IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Stonerise Healthcare, LLC and
Keyser Center, LLC,
Defendants Below, Petitioners

v.

No. 19-0215
(Mineral County Civil Action No: 17-C-76)

Susan K. Oates,
Plaintiff Below, Respondent

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The circuit court erred when it denied Petitioners' *Motion to Dismiss and Compel Arbitration* by finding that the subject Arbitration Agreement is substantively unconscionable and was executed under circumstances that were procedurally unconscionable. This ruling was erroneous and contrary to controlling law because the Arbitration Agreement itself presents commercially reasonable terms, none of which support a finding if substantive unconscionability. Further, the facts developed below during limited contract formation discovery do not present any basis for a finding of procedural unconscionability.

Further, although not analyzed in detail by the lower court, the unavailability of the National Arbitration Forum ("NAF") is an ancillary logistical concern which has no effect on the enforceability of the Arbitration Agreement.

STATEMENT OF THE CASE

Donna Wagoner was admitted to Keyser Center, LLC d/b/a Piney Valley ("Piney Valley") on Monday, November 23, 2015 at some time prior to 2:39 p.m. via ambulance accompanied by her daughter, Susan Oates. [JA 174, 265]. None of the admissions documentation was completed on that day. Rather, Ms. Wagoner remained at Piney Valley under observation overnight, and Ms. Oates returned the following day to complete the admissions process. Ms. Oates is the adult daughter of Ms. Wagoner. She has completed some college courses and served as a court-appointed special advocate for children ("CASA") for approximately ten (10) years until 2013 for which she received weekly three-hour training sessions for 6 months and provided testimony in court in matters where the interests of minor children at issue. [JA 138-140]. For the past 15 years, Ms. Oates has served as manager of the Peebles Department Store in Keyser, WV. In that role, she hires and fires employees; at some

point after Ms. Oates was hired by Peebles, the store began offering optional arbitration agreements to new employees, but Ms. Oates cannot say whether she signed one or not. [JA 139-140]. Ms. Oates further testified that she signs customers up for Peebles store credit cards and although she testified that she does not know whether the credit agreement contain an arbitration clause, [JA 140], the record reflects that it does, [JA 117, n. 1].

Although none of the admissions documents (including the Arbitration Agreement) record the time at which they were signed on November 24, the fact that a nursing note was completed at 2:39 p.m. on November 23, means that Ms. Wagoner would have been at Piney Valley for at least 18 hours before an admissions representative would have been available November 24, 2015. Although Ms. Oates testified that her state of mind was "chaos" due to her work schedule and her mother's health condition, she specifically confirmed that she had full capacity to execute the Arbitration Agreement or other contracts: "My mind may have been in chaos but I can still handle business." [JA 146, 264]

Katrina Robinette, LSW completed the admissions process with Ms. Oates on November 24, 2015. Neither Ms. Robinette nor Ms. Oates were able to offer specific testimony as to the completion of the admissions paperwork beyond or anything that may have been said during the process. [JA 141, 265]. Ms. Robinette testified that the admissions process included a booklet of documents, with some pages being signed and filed while the rest was given to the resident/representative to keep. [JA 154-155]. Many of the documents requiring signature could be declined, and in fact, a review of Ms. Wagoner's admissions packet indicates that Ms. Oates declined multiple agreements including the Beauty Shop agreement, the Resident Trust Fund Account agreement, documents pertaining to laundry, photography, and other matters. [JA 175-

178] In point of fact, when a document lacked a "decline" option, one was written in for Ms. Oates by hand. [JA 175].

The Arbitration Agreement was completely separate from the other admission documents; in fact, it was the only document presented during the admissions process outside of the booklet. [JA 170]. Although the page containing the "decline" signature line was not retained with Ms. Wagoner's Arbitration Agreement, Ms. Robinette testified that no one (including Ms. Oates) ever signed on that page but rather than when a resident declines the agreement, they simply do not sign. [JA 171].

Ms. Robinette testified that her practice was to present the Arbitration Agreement separate from the admissions booklet and to explain that the Arbitration Agreement was optional:

> Q. How were you instructed to present arbitration agreements particularly?
> A. Well, they pretty much were self-explanatory. I mean, it was a form. We would -- it had a highlight -- we had a sample copy that was highlighted with the highlighted points. We reviewed each paragraph -- I reviewed each paragraph, the highlighted parts, and then, you know, explained that it was a voluntary procedure, you know, policy; and, I mean, they didn't have to sign it, if they didn't want to. . . .

[JA 155]. Ms. Robinette testified that there have been times when she felt a resident or attorney-in-fact was not "in a state of mind where they could complete the admission process" and that on those occasions "we would do it on a different day when they felt when they were able to do it." [JA 170]. In this case, the Ms. Wagoner had been in the facility for at least 18 hours, and Ms. Oates completed the admission process without objection.

On August 9, 2017, Plaintiff filed this action alleging personal injury and wrongful death against Defendants below/Petitioners. [JA 2-14]. On September 14, 2017, Defendants

below/Petitioners moved to dismiss this action and compel arbitration, [JA 15-47], to which Plaintiff below/Respondent responded on October 10, 2017, [JA 48-111]. The lower court heard the motion on October 16, 2017 and entered an Order denying the motion on December 18, 2017 while finding "that the record needs additional factual development regarding the issues surrounding the contract and the parties thereto." [JA 112]. The parties agreed to conduct limited discovery to develop the factual record on the issue identified by the lower court after which the lower court entered an Agreed Briefing Order on September 25, 2018 directing the parties to file any supplemental briefing deemed necessary. [JA 113-114]. On October 11, 2018, the lower court heard the motion and issued an oral decision to deny the motion with directions that an order be prepared. [JA 251-261]. On February 8, 2019, the lower court entered its "Order Denying Defendants' Motion to Dismiss and Compel Arbitration". [JA 262-271].

This appeal followed. Defendants below/Petitioners seek reversal of the lower court's February 8, 2019 *Order Denying Defendants' Motion to Dismiss and Compel Arbitration* and remand with instructions to grant the Motion.

SUMMARY OF ARGUMENT

Arbitration agreements are binding contracts that must be enforced pursuant to the Federal Arbitration Act ("FAA"). 9 U.S.C. § 1, *et seq*. As binding contracts, courts are not permitted to disregard their terms or rewrite the provisions to change their meaning. Instead, courts are permitted to only determine the threshold issues of whether the agreement is valid and whether the dispute falls within its scope. Here, the lower court erred in denying the *Motion to Dismiss and Compel Arbitration* on the ground that the Arbitration Agreement is substantively unconscionable and was executed under circumstances constituting procedural unconscionability. In doing so, the lower court disregarded the commercially reasonable terms of the Arbitration Agreement itself and imputed to Petitioners both

knowledge of and responsibility for actions of third-parties which occurred both (1) prior to Ms. Wagoner's admission to Piney Valley and (2) entirely unknown to Petitioners.

The circuit court failed to follow basic contract principles and as a result, violated Section 2 of the FAA, which mandates that binding Arbitration Agreements and contracts "evidencing a transaction involving interstate commerce. . . 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. Moreover, the lower court relied, at least in part, on the unavailability of the National Arbitration Forum despite the absence of any evidence that the NAF's unavailability rendered the Arbitration Agreement impossible to perform.

Petitioners request that this Court reverse the lower court's order denying the Motion to Dismiss and Compel Arbitration, and remand the matter with instructions to refer this action to arbitration pursuant to the Arbitration Agreement signed by the parties.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request oral argument pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure. Rule 18 of the West Virginia Rules of Appellate Procedure states that oral argument is unnecessary if all of the parties have waived oral argument, the appeal is frivolous, the dispositive issues have been authoritatively decided, or all of the facts and legal arguments are adequately presented in the briefs. None of these criteria are present in this case, and therefore oral argument is necessary and appropriate.

STANDARD OF REVIEW

The appellate standard of review of a circuit court's denial of a motion to dismiss is *de novo*. *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013) (*citing* Syl. Pt. 4, *Ewing v. Board of Educ. of Cnty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998)).

ARGUMENT

I. UNDER THE FEDERAL ARBITRATION ACT THE SUBJECT ARBITRATION AGREEMENT IS VALID AND MUST BE ENFORCED.

The law of arbitration has been extensively litigated in West Virginia. In recent years, this Court has issued over two dozen decisions considering the issue in various contexts. Thus, this Court is well aware of the principles governing the application of the FAA and the recognition that it applies broadly to any transaction directly or indirectly affecting interstate commerce. *See e.g. Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). Indeed, this Court has recognized that "the federal policy favoring arbitration of disputes requires that a court construe liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration." *State ex rel. City Holding Co., v. Kaufman*, 216 W.Va. 594, 598, 609 S.E.2d 855, 859 (2004).

Nonetheless, Petitioners recognize this Court's recent trepidation regarding federal case law enforcing arbitration provisions pursuant to the FAA. As stated by the Court:

> In recent years, the United States Supreme Court has doled out several complicated decisions construing the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Read together, these decisions create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses that is politely described as 'a tad oversubtle for a sensible application.' The Supreme Court sees its arbitration decisions as a series of 'clear instruction[s],' . . . But experience suggests that the rules derived from these decisions are difficult for lawyers and judges - and nearly impossible for people of ordinary knowledge - to comprehend. ***Still, no matter how confounding the Supreme Court's arbitration decisions may seem, we are constitutionally bound to apply them to arbitration clauses that involve interstate transactions.***

Schumacher Homes of Circleville, Inc. v. Spencer, 235 W. Va. 335, 339, 774 S.E.2d 1, 5 (2015) (emphasis supplied, internal citations omitted). It is within this framework that the subject Arbitration Agreement must be evaluated and applied. *See Buckeye Check Cashing, Inc., v.*

Cardegna, 546 U.S. 440 (2006) (recognizing that the FAA places arbitration agreements on equal footing with all other contracts). The lower court's failure to follow clear legal precedent must be reversed.

A. The lower court's finding of substantive unconscionability is in error and must be reversed because the subject Arbitration Agreement is commercially reasonable and free of unconscionable terms.

At the outset, Petitioners note that contrary to the majority of arbitration agreements considered by this Court, the subject Arbitration Agreement is entirely voluntary and can be unilaterally rejected by the patient's representative or rescinded within thirty days. [JA 18-19]. The lower court acknowledges but does not discuss this fact in any detail. However, even if the subject Arbitration Agreement were mandatory, its terms – including all of the terms cited by the lower court – are bilateral in nature. Specifically, the lower court cites the fact that the subject Arbitration Agreement is pre-printed, recites as part of the consideration the "speed, efficiency, and cost-effectiveness" of arbitration, designates the NAF[1] as the arbitrator (or an alternative arbitrator if the NAF is unavailable), imposes confidentiality and the return of documents upon conclusion of the arbitration, requires consolidation of claims into a single proceeding, and permits the arbitrator allocate all or part of the costs of arbitration and the reasonable attorneys' fees of the prevailing party.

Mutuality of obligation is the essence of substantive unconscionability. *See e.g. Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 289, 737 S.E.2d 550, 558 (2012) (". . . the lack of mutuality in a contractual obligation — particularly in the context of arbitration — is an element a court may consider in assessing the substantive unconscionability of a contract term."); *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 393, 729 S.E.2d 217, 228 (2012). This Court has

[1] The unavailability of the NAF is treated in *Section II, infra.*

instructed that "[i]n assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation. If a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable." Syl. Pt. 10, *Dan Ryan Builders, Inc., supra.* In this case, every term cited by the lower court is facially neutral and imposes equal obligations on both parties to the agreement. Accordingly, the lower court erred in finding the agreement substantively unconscionable and should be reversed.

B. The lower court's finding of procedural unconscionability is in error and must be reversed because the Respondent has made no showing of procedural unconscionability sufficient to invalidate the Arbitration Agreement.

The notion of procedural unconscionability may lend itself to serving as an escape hatch for the enforcement of any contract which a party – in hindsight – wishes to renegotiate. This case presents the Court with a proper vehicle by which to clarify and reiterate the relatively limited circumstances in which procedural unconscionability may relieve a party of his obligations. In the case at bar, the subject Arbitration Agreement was signed by an educated, literate, intelligent adult who suffers from no disability and has enjoyed a lengthy career as both a Court-Appointed Special Advocate for Children and the manager of a large department store. When she completed the admissions process at Piney Valley, her mother had been in the facility for at least 18 hours – if not longer – and had been attended to by the nursing staff during that entire time. By definition, Ms. Wagoner was not in any acute distress or emergency condition – otherwise, she could not have been admitted in the first place. In Ms. Oates' own words, when it came to handling her mother's affairs at the time, "[m]y mind may have been in chaos but I can still handle business." And so she did.

The Court put significant emphasis on the unfortunate series of events which preceded Ms. Wagoner's admission to Piney Valley; however, the Court further notes that the record is devoid of any evidence that these facts were known to Piney Valley at any time prior to the filing of this lawsuit.

As this Court has stated on numerous occasions

> [p]rocedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

Syl. Pt. 10, *Brown, supra* (citations omitted). In the case at bar, no witness has offered any facts which would support a finding of unconscionability. Ms. Oates herself acknowledged that despite whatever "chaos" may have been going on in her life, she was able to "handle business" when it came exercising her duties as her mother's attorney-in-fact. The sole factual findings which could even partially support a finding of procedural unconscionability is the fact that Ms. Robinette drew an "x" where Ms. Oates was to sign the subject Arbitration Agreement, and somehow the "decline" page of the agreement – which we know Ms. Oates did not sign – was misplaced. Every of the fact pertaining to Ms. Oates' state of mind or the conduct of third-parties was entirely unknown to Piney Valley and cannot support a finding of procedural unconscionability. Accordingly, the lower court's decision must be reversed.

II. THE UNAVAILABILITY OF THE NATIONAL ARBITRATION FORUM IS AN "ANCILLARY LOGISTICAL CONCERN" WHICH DOES NOT RENDER THE ARBITRATION AGREEMENT UNENFORCEABLE.

The subject Arbitration Agreement contains an agreement that binding arbitration shall be conducted "by National Arbitration Forum, or if National Arbitration Forum is unavailable for any reason, the parties to this Arbitration Agreement agree to appoint an alternative arbitrator." [JA 17]. As this Court recognized in *Credit Acceptance Corp. v. Front*, "the NAF entered into a consent decree forbidding it from conducting consumer arbitration." 745 S.E.2d 556, 559 (W. Va. 2013). Although the lower court cited the selection of the NAF as a basis for invalidating the subject Arbitration Agreement, the record is devoid of any argument or evidence that the NAF has any peculiar expertise such that the appointment of a substitute arbitrator pursuant to the Arbitration Agreement and *Section 5* of the FAA would materially alter the proceedings.

In *Front*, this Court first interpreted *Section 5* of the FAA when it adopted the majority rule as formulated in Syllabus Point 3:

> Where an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to *section 5* of the Federal Arbitration Act, *9 U.S.C. § 5 (1947)* (2006 ed.), only if the choice of forum is an ancillary logistical concern. Where the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable.

Front, supra. In adopting this majority rule, this Court noted the following underlying rationale for distinguishing between forum selections which are "integral" and those which are merely an "ancillary logistical concern": ". . ., when the choice of arbitration forum was integral to the agreement, such that the parties would not have agreed upon arbitration absent the selected forum, application of Section 5 to appoint a substitute arbitrator is more problematical." 745

S.E.2d at 568 (*quoting Jones v. GGNSC Pierre, LLC*, 684 F. Supp. 2d 1161, 1166 (D.S.D. 2010)).

In the present case, no argument has been made nor does the record suggests that the parties would not have agreed to arbitrate future disputes and the absence of the NAF. In point of fact, when the signatory to the Arbitration Agreement was asked whether she had even heard of the NAF, she testified that she had not even heard of it. [JA 143]. Thus, to the extent the lower court relied on the selection of the NAF as a basis for a finding of unconscionability, that finding is in error and contrary to the FAA and this Court's precedents. As such, this Court should reverse the ruling below.

CONCLUSION AND REQUEST FOR RELIEF

The Arbitration Agreement at issue is a binding contract that must be enforced. Under the FAA, this Court must interpret the agreement within the framework of traditional contract rules. Petitioners request that this Court reverse the circuit court's order denying their *Motion to Dismiss and Compel Arbitration*, and remand the matter with instructions to refer this action to arbitration.

Petitioners Stonerise Healthcare, LLC and Keyser Center, LLC d/b/a Piney Valley,

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