IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

SUSAN K. OATES as Executrix for the
Estate of DONNA M. WAGONER, deceased

Plaintiff,

v. Civil Action No. 17-C-76

STONERISE HEALTHCARE, LLC;
KEYSER CENTER, LLC, d/b/a PINEY
VALLEY; ABC BUSINESS ENTITIES 1-10;
JOHN DOE NURSING CARE PROVIDERS;
and JOHN DOE CONTROLLING
OFFICERS, MANAGING MEMBERS, AND
GENERAL PARTNERS 1-10,

Defendants.

FILED
CLERK CIRCUIT COURT
FEB 08 2019
MINERAL COUNTY
KEYSER, WV

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION

THIS CAUSE, having come before the Court for argument on October 11, 2018, upon Defendants' Motion to Dismiss and Compel Arbitration, and having been fully advised in the premises, it is **ORDERED, ADJUDGED,** and **DECREED** that Defendants' Motion is DENIED. In support of this Order, the Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. This action was commenced by way of Complaint filed on August 9, 2017. Plaintiff, Susan K. Oates, alleges that her mother, Donna M. Wagoner, deceased, suffered from numerous injuries and other indignities while she was a resident at the nursing facility known as Piney Valley.

2. On September 12, 2017, Defendants filed their Motion to Dismiss and Compel Arbitration and accompanying Memorandum of Law in Support. Defendants contend that

Plaintiff's claims are subject to mandatory and binding arbitration pursuant to an arbitration agreement.

3. On November 24, 2015, Plaintiff, Susan K. Oates signed a document in her capacity as attorney-in-fact for Ms. Wagoner entitled "Arbitration Agreement." The arbitration agreement is a pre-printed form drafted by the Defendants for presentation to incoming residents or their legal representatives.

4. The arbitration agreement provides for final and binding arbitration of "any legal dispute, controversy, demand or claim that arises out of or relates to the Resident Admission Agreement or any service or health care provided by this center to the Resident ... [.]"

5. The arbitration agreement provides further that "the speed, efficiency, and cost-effectiveness of the Arbitration Agreement process, together with [the parties'] mutual undertaking to engage in that process" constitutes the consideration for acceptance and enforcement of the arbitration agreement.

6. The arbitration agreement states that "the resident's decision of whether to sign this Arbitration Agreement will have no effect on whether he/she is admitted to the facility or on the level of care he/she receives."

7. When asked to describe her mental status at the time the arbitration agreement was signed, Ms. Oates testified as follows:

DIRECT EXAMINATION
BY MR. YOUNG:

Q: And you say you don't remember much about what was said or what was discussed in the room when you were signing this paperwork, but what was your state of mind at that time?
A: The only word I can use is chaos.
Q: Chaos, why do you use the word "chaos"?

A: Because I was having to take time work – time out from work, which I shouldn't have been doing at Christmas, and they were putting my mom in a nursing home, and I felt like I was alone.
Q: I'm sorry to have to dig all this up again –
A: That's okay.
Q: -- but that's all I have.

FURTHER CROSS EXAMINATION
BY MR. JACK:

Q: All right. Just a couple more.
A: Uh-huh.
Q: When you say your state of mind was chaos, were you not in a mental state where you felt you could manage your mother's affairs?

MR. YOUNG: Object to form. You can answer the question. You can answer the question.

A: My mind may have been in chaos but I can still handle business.

8. Ms. Oates had moved her mother in to live with her because someone had broken into Ms. Wagoner's house while Ms. Wagoner was home. Two weeks later, Ms. Wagoner began exhibiting confusion and was found walking into a bookcase in her home at night. Ms. Wagoner's primary care physician could not see her the next day, so Ms. Oates took her to the emergency department at Potomac Valley Hospital where Ms. Wagoner was diagnosed with a urinary tract infection and admitted on November 24, 2015. Ms. Oates visited her mother at least twice per day at the hospital at a time when she was working 45 to 55 hours as a retail manager getting ready for the busiest sales season of the year. Ms. Oates testified that on the third day of Ms. Wagoner's hospitalization, a physician informed her that Ms. Wagoner was to be transferred to Piney Valley for rehabilitation due to weakness and that an ambulance would transport her there. Although Ms. Oates did not object or request other options, the physician did not give her a choice

as to whether her mother would be sent to a nursing home or which nursing home her mother would be taken.

9. There is no evidence of record that any of the foregoing was made known to Piney Valley's staff at any time prior to the filing of this lawsuit.

10. When asked her feelings about the transfer to a nursing home, Ms. Oates testified "I was actually a little bit relieved because I knew I couldn't handle her at home, but it was traumatic because she always said she didn't want to go to a nursing home."

11. Ms. Wagoner arrived at Piney Valley on November 23, 2015 some time prior to 2:39 p.m. when the first nursing documentation appears in her chart. The admissions process did not occur until the following day.

12. On November 24, 2015, Ms. Oates met with social worker Katrina Robinette to complete the admissions paperwork including the subject arbitration agreement.

13. Ms. Robinette does not remember Susan Oates, and only vaguely recognized a photo of Ms. Oates as someone who she used to see at the nursing home and sometimes at the Peebles where Ms. Oates manages.

14. Neither Ms. Oates nor Ms. Robinette remember the admission process in any detail; however, Ms. Robinette testified as to her usual practice in the admissions process.

15. The arbitration agreement is presented at the end of the admissions process after review of a 97-page admissions packet that contains certain documents to be signed – some optional, some not.

16. During the admissions process with Susan Oates, Ms. Robinette marked an "X" next to the signature line to accept the arbitration agreement. The copy of the arbitration agreement

produced by Piney Valley does not contain a separate signature line to decline the arbitration agreement.

17. The arbitration agreement states that "disputes between the parties will be arbitrated 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."

18. At the time the arbitration agreement was presented, the National Arbitration Forum (NAF) was and remains unavailable due to a consent judgment under which the NAF agreed that it would no longer administer, process, or in any manner participate in new arbitration proceedings involving consumers in light of allegations by the Minnesota Attorney General of anti-consumer bias.

19. The arbitration agreement provides that "[t]he arbitration shall be confidential and all documents related to the arbitration process which are the property of the Facility shall be returned to the Facility upon completion of arbitration."

20. The arbitration agreement provides that "[a] claim is waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or received by the Resident, and is not presented in the arbitration proceeding."

21. The arbitration agreement provides that the arbitrator may "allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys' fees of the prevailing party."

II. CONCLUSIONS OF LAW

22. "Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid,

revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract." Syllabus Point 1, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II).

23. "The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case." Syllabus Point 4, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II).

24. "Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." Syllabus Point 1, Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986).

25. "If a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result." Syllabus Point 8, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II).

26. "An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." Syllabus Point 5, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II); Syllabus Point 3, Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986).

27. "A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and 'the existence of unfair terms in the contract.'" Syllabus Point 4, Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc., 186 W.Va. 613, 413 S.E.2d 670 (1991).

28. "[T]he particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." Syllabus Point 2, Orlando v. Finance One of West Virginia, Inc., 179 W.Va. 447, 369 S.E.2d 882 (1988).

29. "A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Syllabus Point 9, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II).

30. "Procedural 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." Syllabus Point 10, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II).

31. "A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person." Syllabus Point 11, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II).

32. "Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the arbitration agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns." Syllabus Point 12, Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217, 220 (2012) (Brown II).

33. "[T]he process of signing paperwork for medical care – specifically, a contract for admission to a nursing home – is often fraught with urgency, confusion, and stress. People seek medical care in a nursing home for long-term treatment to heal, and do so only a few times in life. Nursing homes daily sign contracts with patients as a routine course of doing business. Most patients do not view the admission process as an interstate commercial transaction with far-reaching legal consequences. Many contracts for admission are signed by a patient or family member in a tense and bewildering setting. It may be disingenuous for a nursing home to later

assert that the patient or family member consciously, knowingly and deliberately accepted an arbitration clause in the contract, and understood the clause was intended to eliminate their access to the courts if the nursing home negligently injured or killed the patient." Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 391, 729 S.E.2d 217, 226 (2012) (Brown II).

34. "Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court." Syllabus Point 4, State ex rel. Dunlap v. Berger, 211 W.Va. 549, 567 S.E.2d 265 (2002).

35. Based upon the findings of fact above, and for reasons stated on the record during oral arguments held before the Court on October 11, 2018, the Court finds that the arbitration agreement signed by Ms. Oates is a contract of adhesion that is both substantively unconscionable on its terms and was executed under circumstances that were procedurally unconscionable.

In light of the above, the Court hereby ORDERS that the Defendants' Motion to Dismiss and Compel Arbitration is DENIED.

Entered this 8 day of FEB, 2019

Honorable Lynn A. Nelson, Circuit Judge

TESTE COPY

Clerk Circuit/Family Court of Mineral County, WV

Proposed *ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION*, Mineral County Civil Action No. 17-C-76

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