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

PETITIONERS' REPLY BRIEF

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This Court has repeatedly recognized "strong federal and state public policy favoring arbitration". *See e.g. Cabot Oil & Gas Corp. v. Beaver Coal Co.*, Nos. 16-0904, 16-0905 (Nov. 9, 2017) (memorandum decision); § 55-10-2(2) ("The United States has a well-established federal policy in favor of arbitral dispute resolution, . . ."). This Court adopted this policy within ten years of the passage of the Federal Arbitration Act when it held in a Syllabus Point, "[t]he law favors arbitrations and every reasonable intendment will be indulged in support of them . . ." Syl. Pt 1, in part, *Mutual Improvement Co. v. Merchants' & Business Men's Mut. Fire Ins. Co.*, 112 W. Va. 291, 164 S.E. 256 (1932).

Respondent's arguments are contrary to both fact and law; as such, the lower court's order must be reversed with instructions to grant Petitioners' *Motion to Dismiss and Compel Arbitration.*

ARGUMENT

I. Even Respondent's characterization of the facts cannot support a finding of procedural unconscionability under the clear precedents of this Court.

Analysis of procedural unconscionability is not concerned with unrelated events that occurred weeks or even months before a contract is formed – such as the purported burglary of Ms. Wagoner's home a month before her admission to Piney Valley. [JA 145]. Rather, this Court has made clear time and again, that the relevant inquiry concerns "the bargaining process and formation of the contract" and whether the facts demonstrate the "lack of a real and voluntary meeting of the minds". Syl. Pt. 10, *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 386, 729 S.E.2d 217, 222 (2012) ("Brown II") (citations omitted).

Unable to pound the law or the facts, the Respondent pounds the facts by pointing out such unfortunate circumstances as Ms. Wagoner's decline in overall health, Ms. Wagoner's

desire to remain in her own home, and a burglary that took place a month beforehand, and the fact that it was the Christmas shopping season, and the retail store she managed was very busy. However, none of the foregoing can overcome Ms. Oates' own, candid admission that "My mind may have been in chaos but I can still handle business." [JA 146, 264]. She further admits that even though she had two adult siblings, she never made an effort to consult with them or request assistance. [JA 197]. The lower court's decision to disregard Respondent's own admission that she was competent to manage her mother's affairs and instead rely on a third party's decision to discharge Ms. Wagoner to Piney Valley from Potomac Valley Hospital, [JA 259], as a basis for a finding of procedural unconscionability is contrary to law and must be reversed.

In a series of opinions post-*Brown II*, this Court' opinions regarding lower courts' rulings on procedural unconscionability. *See e.g. Nationstar Mortg., LLC v. West*, 237 W. Va. 84, 91, 785 S.E.2d 634, 641 (2016) (no showing of procedural unconscionability when arbitration clause included within mortgage documents that were signed during a "hurried" real estate closing); *New v. GameStop, Inc.*, 232 W. Va. 564, 577-79, 753 S.E.2d 62, 75-77 (2013) (no showing of procedural unconscionability when signatory to arbitration agreement "failed to offer any evidence that she was incapable due to age, literacy or lack of sophistication to understand the clear terms of the arbitration agreement . . . that the arbitration agreement's terms were hidden from her or were couched in unduly complex terms.") *Emple. Res. Grp.. LLC v. Harless*, No. 16-0493 (Apr. 13, 2017) (memorandum opinion) (no showing of procedural unconscionability when employee signed acknowledgement of "Company's Dispute Resolution Program Booklet" which had no opt-out clause or meaningful alternatives to signature).

These cases make clear that Respondent's burden is to show that "the manner or setting" in which Respondent received and signed the subject Arbitration Agreement "prevented her from

having a reasonable opportunity to understand the terms of the agreement." *Emple, supra.* Indeed, this Court entertains a presumption that "a party to a contract has read and assented to its terms, and absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted." *GameStop, Inc.*, 232 W. Va. at 578, 753 S.E.2d at 76 (2013) (*quoting Adkins v. Labor Ready, Inc.*, 185 F.Supp.2d 628, 638 (S.D.W. Va. 2001)).

On the record in this case, Respondent simply cannot make the required showing – particularly in light of the fact that the subject Arbitration Agreement states (and repeats) that it is a voluntary agreement which the resident has the right to "refuse to execute" with "no effect on whether he/she is admitted to the facility or on the level of care he/she receives." [JA 17-19]. Respondent's tenuous notion of duress falls flat in light of the 30-day revocation period which is unliterally extended to the resident and not reserved to the facility. *Compare Respondent's Brief* 1-3 *with* [JA 18-19].

II. Respondent has failed to demonstrate any valid basis for a finding of substantive unconscionability.

E. Discretionary Awards of Fees and Costs

1. The authority of an arbitrator to award fees or costs on a discretionary basis does not render an arbitration agreement unconscionable.

Respondent mischaracterizes the discretion of an arbitrator to award fees and costs as a "loser pays" provision. The plain language of the agreement provides that the default rule is for each party to "bear [its] own costs and attorney's fees . . ." [JA 18]. This is entirely consistent with the American Rule. The Agreement further provides that "arbitrator *may*, in the award 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." This authority is entirely consistent with

certain statutory fee-shifting claims which could be brought by the parties or indeed the inherent power in equity for a court "to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986). To the extent the Respondent attempts to read more into this clause, her concerns are entirely speculative.

2. Respondent has failed to make the required showing of "unreasonably burdensome costs" before the lower court or even on appeal.

Respondent's brief quotes *State ex rel. Richmond Am Homes of W. Va.* for the following proposition:

> [P]rovisions 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.

Respondent's Brief at 14 (*quoting State ex rel. Richmond American Homes of W. Va. v. Sanders*, 228 W. Va. 125, 137-38, 717 S.E.2d 909, 921-22 (2011) (further citations omitted). However, where the above quotation left off, this Court continued as follows:

> 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.

State ex rel. Dunlap v. Berger, 211 W. Va. 549, 551, 567 S.E.2d 265, 267 (2002). Accordingly, because Respondent, as the party challenging the so-called "loser pays" provision, did not present the costs likely to be imposed to the lower court and the lower court therefore did not

make the required finding, this issue is not properly before the Court and cannot serve as a basis for a substantive unconscionability ruling.

F. Confidentiality within the arbitration process is consistent with the precedents of this Court and cannot form the basis of a substantive unconscionability challenge.

This Court has addressed the concept of confidentiality in court-annexed arbitration in the context of the business court division in *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.* In that case, the parties agreed to submit certain aspects of their dispute to confidential arbitration before a three-judge panel. It was later argued that the agreement to a confidential arbitration was contrary to the public's right of access to the courts. Ultimately, this Court held, that it views "the parties' agreement to keep matters confidential to the extent allowable by law as little more than an agreed protective order, ultimately rendered moot when this Court unsealed the record. For those reasons, we do not find that the proceedings violated the constitutional right to access the courts." *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.*, ___ W. Va. ___, 820 S.E.2d 416, 426 (2018). Accordingly, Plaintiff's assertion that confidentiality in arbitration *private* arbitration is substantively unconscionable is contrary to this Court's reasoning that confidentiality can be appropriate to some degree even in cases which are filed in public courts and when arbitration is conducted by elected circuit judges.

Confidentiality serves a legitimate purpose which benefits all parties, but particularly the Respondent, as this Court has, also recognized the legitimate privacy interest of litigants in the "highly personal and confidential nature of medical records," requiring that such records, "be subject to special consideration to assure that, . . . , there will be no unnecessary disclosure of medical information. . ." *Keplinger v. Va. Elec. & Power Co.*, 208 W. Va. 11, 23-24, 537 S.E.2d 632, 644-45 (2000). The facts likely to be subject to discovery in this matter will include very

personal medical information that should not extend beyond the parties to the dispute; accordingly, a confidentiality provision cannot for the basis of a substantively unconscionability challenge.

Finally, although the arbitration proceeding itself is confidential, the subject Arbitration Agreement *expressly preserves* the right to file complaints with the Long-Term Care Ombudsman, the Office of Health Facility Licensure and Certification and its federal equivalent which could include inspection of the facility and written public findings of any deviations from the Medicare Conditions of Participation. This belies any suggestion that maintaining the parties' confidentiality somehow deprives the public any information which legitimately should be in the public domain.

G. This Court has previously declined an invitation to find the inclusion of the NAF in an arbitration agreement is substantively unconscionable, and this case presents no reason to do otherwise.

In *Credit Acceptance Corporation v. Front*, this Court reversed a lower court's ruling that "the unavailability of [the NAF] rendered the contracts substantively unconscionable". *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 521, 745 S.E.2d 556, 559 (2013). In this case, the facts are even farther removed from those in *Front* because the subject Arbitration Agreement identifies the arbitrator as either the NAF *or* an alternative to be agreed upon by the parties. For the exact reasons cited by this Court in *Front*, Respondent's argument is without merit.

H. The parties' agreement that all claims arising from the same incident be presented in the same proceeding as expressed in the subject Arbitration Agreement is entirely consistent with West Virginia law.

At the outset, Respondent's claim of substantive unconscionability is entirely hypothetical in that all claims which could have accrued based on Ms. Wagoner's care and

treatment had accrued at the time the Complaint in this action was filed, and she identifies no claim which she has lost by operation of this provision. Accordingly, any ruling on this issue would constitute an advisory opinion only. "Generally and consistently, this Court has held that we are not a body that gives advisory legal opinions. 'Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes.' " *State ex rel. W. Va. Deputy Sheriffs' Ass'n v. Sims*, 204 W. Va. 442, 445, 513 S.E.2d 669, 672 (1998) (*quoting* Syl. Pt. 2, in part, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991).)

The subject Arbitration Agreement simply requires that any claims which had arisen at the time an arbitration is commenced must be presented during that arbitration proceeding. This is entirely consistent with this Court's often repeated policy "to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts." *See e.g. Howell v. Luckey*, 205 W. Va. 445, 449, 518 S.E.2d 873, 877 (1999).

CONCLUSION

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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