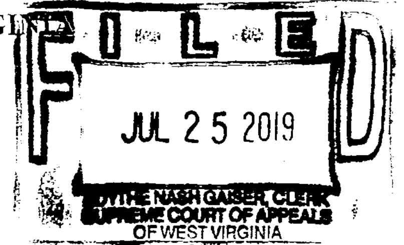
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

RESPONDENT'S BRIEF

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Counter-Statement of the Case

On November 24, 2015, Susan Oates arrived at Piney Valley nursing home where her mother, Donna Wagoner, was admitted just the day before. [JA 174]. Susan was in crisis. [JA 145-46]. Just three weeks prior, Susan's mother was living peacefully and independently in her home of 42 years. [JA 145]. Things changed in an instant when Ms. Wagoner's home was burglarized. [JA 145]. Ms. Wagoner was home alone when she was held up and terrorized. [JA 145]. After the break-in, Susan moved in because she knew that her mother needed someone there in the house with her. [JA 145]. For three weeks, Susan stayed in her mother's house in an upstairs bedroom until one night Ms. Wagoner began displaying signs of confusion. [JA 145]. Susan witnessed her mother repeatedly running into a bookshelf in the middle of the night. [JA 141, 145]. The next morning, Susan took her mother to her doctor and then to Potomac Valley Hospital. [JA 141, 145]. Susan was bewildered and scared for her mother. [JA 145]. She testified, "[i]t was scary because her mind just wasn't like it used to be. She had never been sick a day in her life and now her mind was going." [JA 145]. At this same time, Susan was overwhelmed at work. [JA 146]. She was a manager at the retail store, Peebles, and she was working 45-55 hour weeks preparing for the busiest shopping season of the year. [JA 139, 146]. Even with her work schedule, Susan still managed to visit her mother at the hospital twice per day. [JA 145-46]. After three days in the hospital, Ms. Wagoner's doctor told Susan that her mother was being taken to Piney Valley. [JA 146]. By the time Susan was informed that her mother was being discharged to the nursing home, the ambulance was already on its way. [JA 140-141]. Susan described the "selection process" for her mother's nursing home placement as follows:

> Q: How did you go about choosing Piney Valley as opposed to any other nursing home?
>
> A: It wasn't a choice.

Q: Okay. Could you explain that to me a little more?

A: I went in on the third day and the doctor told me that they were transferring her to Piney Valley for rehabilitation because she was so weak; and that was the end of the conversation.

[JA 140]. Susan was in turmoil. [JA 145]. On one hand, she was relieved because she knew that she could not care for her mother at home. [JA 146]. On the other hand, she was traumatized with guilt because her mother always said she never wanted to be in a nursing home. [JA 146]. Susan arrived at the nursing home on November 24, 2015 and was taken to a separate room to sign paperwork. [JA 141]. She described her mental state in that room as follows:

Q: . . . [W]hat 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.

[JA 146]. Against this backdrop, Susan was given a 97-paged admissions packet and buried within it was an arbitration agreement. [JA 017, 227]. But it was not just an ordinary arbitration agreement. Instead, the arbitration agreement had numerous provisions hand-crafted by the Petitioners to deter claimants from exercising their constitutional right of due process, and to give Petitioners a clear advantage in the arbitral forum. [JA 017]. Namely, the arbitration agreement contained a hidden cost provision threatening to saddle unsuccessful litigants with the nursing home's legal fees and all costs associated with the arbitration, a reduction in the applicable statute of limitations for tort claims, and a confidentiality provision which, as discussed further below, unreasonably favored Petitioners in the arbitral forum. [JA 017-18]. The arbitration agreement further selected an arbitral forum that entered into a consent judgment not to handle consumer

arbitrations in light of allegations that it was engaged in a conspiracy to defraud consumers. [JA 017-18].

The representative from the facility who presented the admissions packet, Katrina Robinette, does not remember Susan Oates or anything about the circumstances surrounding her mother's admission. [JA 152]. She was only able to testify as to her routine practice and experience presenting admissions packets, generally. [JA 157]. Ms. Robinette's routine practice was to present the arbitration agreement at the very end of the 97-paged admissions packet. [JA 157]. In Ms. Robinette's experience, no one had ever read every page of the 97-paged admissions packet. [JA 157]. Instead, they typically just relied upon her explanation. [JA 157]. Ms. Robinette enticed residents and their family members into signing the arbitration agreement by reading them the portion describing arbitration as "cost-effective." She would not, however, mention that residents risk bearing the entire costs of the arbitration if they lose, opting instead to let them "read it themselves." [JA 160, 162]. Belying Petitioner's position that the agreement is "voluntary," Ms. Robinette admitted to marking "X's" next to the signature lines on the arbitration agreement just like she did on all the other mandatory agreements to indicate that Susan's signature was required. [JA 166-167].

Susan K. Oates	11-24-15
Signature of Resident or Durable / General Power of Attorney	Date
Susan K. Oates	11-24-15
Printed Name of Resident or Durable / General Power of Attorney	Date
Katrina Robinette, LSW	11-24-15
Signature of Facility Representative	Date

Further dispelling any doubt that there was an implicit perception that the arbitration agreement was a condition of admission, Ms. Robinette admitted that she could only recall one person ever declining to sign the "optional" arbitration agreement. [JA 158].

Based upon the above facts of record, the Circuit Court soundly rejected Petitioner's Motion to Dismiss and Compel arbitration, finding that the arbitration agreement was "a contract of adhesion that is both substantively unconscionable on its terms and was executed under circumstances that were procedurally unconscionable." [JA 270]. In support of its ruling the Circuit Court made the following findings of fact:

> 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 retain 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.

[JA 264]. The Circuit Court was particularly persuaded by its factual finding that Susan Oates had no choice in whether her mother would be admitted to a nursing home or to which nursing home her mother would be taken, and that the same was arranged completely between the hospital and Piney Valley. [JA 258-59].

Following the Circuit Court's order denying Petitioner's Motion to Dismiss, this appeal followed.

Summary of Argument

The Circuit Court did not err in denying Petitioner's Motion to Dismiss and Compel Arbitration based upon its finding that the proffered arbitration agreement was a contract of adhesion that is both substantively unconscionable on its terms and was executed under circumstances that were procedurally unconscionable. The record contains more than sufficient evidence to support the Circuit Court's finding that the proffered arbitration agreement as substantively and procedurally unconscionable. The Circuit Court correctly applied the well-established common-law unconscionability factors to the unique facts and circumstances of this case.

Further, the Circuit Court's finding of unconscionability does not implicate the Federal Arbitration Act ("FAA") because it is a general, state, common-law, contract-law principle that is not specific to arbitration. *Brown v. Genesis Healthcare Corp.*, (*Brown II*), 229 W.Va. 382, 388, 729 S.E.2d 217, 223 (2012)("The doctrine of unconscionability that we explicated in *Brown I* is a general, state, common-law, contract-law principle that is not specific to arbitration, and does not implicate the FAA.").

In light of the above, Respondents request that this Court affirm the Circuit Court's Order Denying Petitioner's Motion to Dismiss and Compel Arbitration.

Statement Regarding Oral Argument and Decision

Respondent believes that oral argument is necessary pursuant to the criteria in Rule 18(a) and requests oral argument pursuant to West Virginia Rule of Appellate Procedure, Rule 19 because Petitioners' assignment of error involves the application of settled law which is also a narrow issue of the law. *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 657-58, 724 S.E.2d 250, 260-61 (2011), (*"Brown I"*), *vacated and reversed on other grounds*, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), *reaffirmed*, *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012), (*"Brown II"*). Respondent believes further that the case is appropriate for a memorandum decision under Rule 21(a) because there is no substantial question of law other than that of settled law, and there is no prejudicial error in the Circuit Court's ruling.

Counter-Statement of the Scope/Standard of Review

"[W]hen an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo*." Syllabus Point 1, *W.Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W.Va. 465, 796 S.E.2d 574 (2017). However, the "clearly erroneous" standard of review is invoked concerning a circuit court's findings of fact. *See State v. Grimes*, 226 W.Va. 411, 417, 701 S.E.2d 449, 455 (2009)(applying the "clearly erroneous" standard to the circuit court's findings of fact in an evidentiary hearing conducted on a motion to dismiss an indictment); Syllabus Point 1, *Watson v. Sunset Addition Property Owners Ass'n, Inc.*, 222 W.Va. 233, 234, 664 S.E.2d 118, 119 (2008)(applying the "clearly erroneous" standard to the circuit court's findings of fact in a civil contempt order); *CMC Enterprise, Inc. v. Ken Lowe Management Co.*, 206 W.Va. 414, 417, 525 S.E.2d 295, 298 (1999)(applying the "clearly erroneous" standard to the circuit court's findings of fact in a bench trial in a *quantum meruit*

claim); *In Re S.H.*, 237 W.Va. 626, 630, 789 S.E.2d 163, 167 (2016)(applying the "clearly erroneous" standard to the circuit court's findings of fact in a child abuse and neglect case).

The issue of unconscionability necessarily implicates questions of both facts and law. *Brown II*, 729 S.E.2d at 227. ("The 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."). As such, while the Circuit Court's conclusions of law are reviewed *do novo*, the Circuit Court's findings of fact must be afforded deference and set aside only if they are "clearly erroneous."

"A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 231, 470 S.E.2d 177, 185 (1996), *citing*, *Board of Educ. V. Wirt,* 192 W.Va. 568, 579, n. 14, 453 S.E.2d 402, 413, n. 14 (1994). However, "a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.*

Argument

I. The Circuit Court did not err in Finding the Proffered Agreement to be Unconscionable

The West Virginia Supreme Court's first comprehensive assessment of the common-law doctrine of unconscionability came in *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 657-58, 724 S.E.2d 250, 260-61 (2011), (*"Brown I"*), *vacated and reversed on other grounds*, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), *reaffirmed, Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012), (*"Brown II"*). In *Brown I*, the Court considered three cases consolidated for appeal where in each case, the

family member of an incoming nursing home resident signed an admission agreement containing an arbitration provision. *Id.* at 659. *Brown I* set forth a detailed legal roadmap for courts to determine whether an arbitration agreement is unconscionable under state common law applicable to all contracts. *Id.* at 283. While the United States Supreme Court vacated the judgment in *Brown I* on the very limited issue of whether it set forth a categorical prohibition on certain types of arbitration agreements, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 132 S.Ct. 1201, 182 L.E.2d 42 (2012), the remainder of *Brown I* was reaffirmed in *Brown II*, 729 S.E.2d at 226.

> In *Brown I*, we assembled an extensive set of common law factors for courts to weigh in assessing whether a contract, or a particular term or clause within a contract, is unconscionable. Neither the defendants' briefs nor the Supreme Court's opinion assault these well-established common-law guides concerning unconscionability, but rather challenge how this Court applied those guides to the underlying facts. We therefore begin by reaffirming our outline of the common law doctrine of unconscionability that we explicated *Brown I.*

Id. As such, *Brown I* remains the leading authority on the doctrine of unconscionability in West Virginia. *Brown II*, 729 S.E.2d at 226.

According to *Brown I*, "[t]he 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." *Brown I*, 724 S.E.2d at 283-84. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party." *Id.* at 284. The 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." *Id.* at 284. The doctrine of unconscionability is "one of equity and fairness" and "must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case." *Id.* at 283-84. This Court analyzes

unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability. *Id.* at 258. A contract is unenforceable if it is both procedurally and substantively unconscionable. *Id.* at Syllabus Point 20. However, both need not be present to the same degree. *Id.* 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. *Id.*

A. The Evidence of Record is Sufficient to find that the Proffered Arbitration Agreement is Procedurally Unconscionable

"Procedural unconscionability addresses inequities, improprieties, or unfairness in the bargaining process and the formation of the contract." *Brown I*, 724 S.E.2d at 285. Procedural unconscionability is described as "the lack of a meaningful choice, considering all the circumstances surrounding the transaction" including the manner in which the contract was entered, the particular setting existing during the contract formation process, whether each party had a reasonable opportunity to understand the terms of the contract, and "whether the important terms were hidden in a maze of fine print." *Id.*

> Determining procedural unconscionability also requires the court to focus on the real and voluntary meeting of the minds of the parties at the time that the contract was executed and consider factors such as: (1) relative bargaining power; (2) age; (3) education; (4) intelligence; (5) business savvy and experience; (6) the drafter of the contract; and (7) whether the terms were explained to the weaker party.

Id.

Procedural unconscionability usually begins with a contract of adhesion, "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.* "A contract of adhesion must be closely scrutinized to determine if it imposes terms beyond the reasonable expectations of an ordinary

person, or oppressive or unconscionable terms, any of which will prevent enforcement of the agreement." *Id.* at 287.

This Court has recognized that the circumstances surrounding the nursing home admission process are particularly troubling. *Id.* at 268.

> The 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; they rarely view the admission process as an interstate commercial transaction with far-reaching legal consequences
>
> ***
>
> Unlike the situation that exists when a consumer signs a contract for a product or service, people entering a nursing home have to sign admissions contracts in the midst of a crisis, without time to comparison shop or to negotiate the best service and price combination. Put simply, there is usually little time to investigate options or to wait for an opening at a nursing home of choice. Time pressure during the hospital discharge process significantly impairs people's ability to seek and carefully consider alternatives. Potential residents and their family members often experience panic when they feel there is insufficient time to consider different facilities, and they may choose a facility they would not have chosen if they had more time to weigh their options.
>
> ***
>
> In the typical nursing home admission process, residents and their family members do not have time to read and deliberate on the terms of the agreement. Facilities often present the contract *after* the person decides to apply for admission, rather than beforehand, when the individual or his or her representative can carefully examine the admission contract, and contemplate the meaning and ramifications of its provisions, particularly those that have nothing to do with care and related services and costs. Furthermore, there is often no time for the person to sit down with a facility representative who can answer questions and explain the contract's terms . . . [A]dmissions agreements typically are pre-printed contracts of adhesion offered on a take-it-or-leave-it basis, giving residents no meaningful opportunity to chance or negotiate the terms.

Id. These circumstances create an "implicit perception that the forms must be signed as a condition of admission." *Id.* at 269. Further, "[i]t 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 II*, at 729 S.E.2d at 226.

The admissions process in this case had all of the hallmarks of procedural unconscionability. Susan Oates was in a markedly compromised bargaining position compared to Petitioners. Susan Oates was presented with a pre-printed form arbitration agreement on a take-it-or-leave-it basis. Susan Oates had no meaningful alternatives in choosing whether her mother would be admitted to a nursing home or which nursing home her mother would be admitted. Susan Oates was afforded no opportunity to review the admissions paperwork in advance of her mother's admission, she was provided no explanation or disclosure whatsoever of the one-sided terms that were hidden within the fine print of the agreement, and she had no ability to negotiate its terms. Finally, just as recognized by this Court in *Brown I*, Susan Oates was in the midst of a crisis when she admitted her mother to the Petitioner's nursing home and had only one concern: ensuring that her mother obtained the care and treatment she needed to get better.

Petitioners do not dispute the facts giving rise to Susan Oates's chaotic mental state, but instead argue that these facts should be disregarded because '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." Petitioners' Brief, at p. 9. Petitioners' argument is a red herring, completely devoid of substance and merit. Petitioners fail to cite to a single case, precedential or otherwise, that imposes a scienter requirement in the unconscionability analysis. It matters not whether Petitioners *knew* that Susan Oates's mental state was chaos, it matters only that those circumstances *existed* at the time and *affected* Susan Oates's bargaining position and opportunity to make a meaningful choice. *Brown I*, 724 S.E.2d at 285. Indeed, this Court has recognized unconscionability factors such as the

weaker party's age, intelligence, and education without the need for evidence that the stronger party investigated or even *knew of* such factors. *Brown I*, 724 S.E.2d at 285.

Petitioners also rely upon the purported existence of a page containing a "decline" signature line. But the record is devoid of any evidence that the agreement presented to Susan Oates contained such a declination page. Petitioners were not only unable to locate an original declination page, but were also unable to produce an exemplar declination page for the form arbitration agreement that was in circulation at the time. [JA 235-36]. Instead, Petitioners produced only a three-paged arbitration agreement that provided no alternative signature line to decline and had "x" marks indicating that Susan Oates's signature was required. [JA 019]. These facts strongly suggest that the agreement was presented as a condition of admission.

Petitioners also hang their hat on a soundbite from Susan Oates that she could still "handle business." Petitioners Brief, at p. 9. Despite putting on a strong face in response to an improper question where a sound objection was preserved, [JA 146], the record is clear that Susan Oates was on the verge of breakdown from her mother being burglarized, hospitalized, and institutionalized all within a matter of three weeks. At the time she signed the proffered arbitration agreement, Susan was vulnerable, and Susan was alone. She was traumatized, stressed, and scared. Susan could not "handle business," despite her valiant efforts to do so. And Susan Oates unwittingly entered into a one-sided agreement as a product of her vulnerability.

B. The Agreement Contains Terms that Unreasonable Favor the Petitioner and are Substantively Unconscionable

"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 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 II*, 729 S.E.2d at 221. "Substantive unconscionability refers to whether the terms of a contract are unreasonably favorable to the more powerful party." *Brown I*, 724 S.E.2d at 288. Despite Petitioners' contention, it is not enough that the terms of an arbitration agreement are "facially neutral." Indeed, facially neutral terms may have an "overly harsh effect" on the weaker party. *Id.* at 287. Further, facially neutral terms may still be "unreasonably favorable to the more powerful party." *Id.* at 288.

In this case, the arbitration agreement was a contract of adhesion that contained numerous terms that were beyond the reasonable expectations of an ordinary person, and were oppressive and unconscionable.

"Loser Pays" Provision

While the proffered arbitration agreement initially sets forth that "[t]he Facility agrees to pay for the fees associated with arbitration," buried within the fine print the agreement provides that "the 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." [JA 018]. The offensive provision lurks within a larger paragraph:

> **Who pays for the arbitration?**
>
> The Facility agrees to pay for the fees associated with arbitration which may include but is not limited case management fees and professional fees for the arbitrator's services. The Parties shall bear their own costs and attorney's fees except that the 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.

A reasonable person with average intellect and experience would not understand this paragraph to impose the risk of unreasonably burdensome costs including all of the arbitration costs and the nursing home's legal fees. Further, Petitioners had reason to know that incoming residents typically relied upon their representation that arbitration was "cost-effective" rather than reading

the admissions paperwork word-for-word on their own. [JA 157, 160, 162]. As such, this term was never explained or even *disclosed* to Susan Oates. [JA 160, 162].

As recognized by this Court on numerous occasions, "loser pays" provisions such as this are unconscionable:

> 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.

State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders, 228 W. Va. 125, 137–38, 717 S.E.2d 909, 921–22 (2011), *quoting*, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 559-60, 567 S.E.2d 265, 275-76 (2002). "[I]t is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." *Brown II*, 729 S.E.2d at 229.

In this case, pursuing a potential claim against Petitioners means taking on the risk that Respondent will have to saddle tens of thousands of dollars of costs, including the entire cost of the arbitration and the Petitioners' legal fees. Pursuant to West Virginia precedent, this term is unconscionable "unless the court determines that exceptional circumstances exist that make the provision conscionable." *Sanders*, 717 S.E.2d at 921–22. Petitioners have set forth no such "exceptional circumstances" that would render this provision conscionable. On the contrary, the record suggests that the provision is particularly offensive considering that Petitioners' representative Katrina Robinette told Susan Oates that arbitration was "cost-effective" while failing to disclose the possibility that Susan Oates may have to foot the entire bill if she lost. [JA 160, 162]. Petitioners' only defense to the inclusion of this unconscionable term is that it is facially

neutral. However, while both parties may face the risk of paying for the entire arbitration and the victor's attorney's fees, the risk of losing that much money is far more daunting to a nursing home resident than it is to a corporate nursing home chain. Nursing home residents are far more likely than Petitioners to be intimidated by excessive costs and compelled into forfeiting bona fide claims.

The "loser pays" provision also contravenes West Virginia's clear public policy concerns embodied in the "American Rule." *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 52, 365 S.E.2d 246, 250 (1986). The American Rule provides that "each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syllabus Point 2, *Yokum*, 365 S.E.2d at 246.

> [A]n eventual loser's refusal to recognize the validity of the eventual winner's position, and his insistence on taking the winner to court, do not necessarily imply wrongful conduct on the part of the loser. After all, the loser calculated his chances of winning as sufficiently promising to put up his own attorneys' fees. And even where lawyers take a case on a contingency fee, the lawyer has usually calculated the chance of winning as sufficiently strong to warrant his time and effort.

Nelson v. West Virginia Public Employees Insurance Board, 171 W.Va. 445, 453, 300 S.E.2d 86, 94 (1982). "[T]he American rule promotes equal access to the courts for the resolution of bona fide disputes." *Yokum*, 365 S.E.2d at 250. "[O]ne should not be penalized for merely prosecuting or defending a lawsuit, as litigation is at best uncertain." *Id.* The arbitration agreement contravenes the long-standing American Rule in West Virginia and violates the sound and thoughtful public policy behind its adoption. *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 39, 614 S.E.2d 680, 686 (W.Va. 2005) (courts empowered to void contracts based on violations of sound public policy); Syllabus Point 12, *Brown II*, 729 S.E.2d at 221 (courts are empowered to consider "public policy concerns" when determining substantive unconscionability).

Confidentiality Provision

The agreement further 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." [JA 017]. While this issue has yet to come under appellate review in West Virginia, there exists a substantial breadth of persuasive authority finding that provisions in an arbitration agreement that require the arbitration proceedings and award to be kept confidential to be substantively unconscionable. *See e.g.Schnuerle v. Insight Commc'ns Co., L.P.*, 376 S.W.3d 561, 579 (Ky. 2012); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash. 2d 293, 314, 103 P.3d 753, 765 (2004); *Ting v. AT&T,* 319 F.3d 1126, 1151-52 (9th Cir. 2003).

The unreasonable advantage granted to the drafter of such a provision is aptly characterized by the Ninth Circuit Court of Appeals:

> Although facially neutral, confidentiality provisions usually favor companies over individuals . . . because companies continually arbitrate the same claims, the arbitration process tends to favor the company . . . if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player . . . AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract.

Ting, 319 F.3d at 1151-52.

As the drafters of the instant agreement, Petitioners are "repeat players" in the forum they have selected. Petitioners' "mutual obligation" to keep the proceedings confidential is meaningless considering that Petitioners have access to a wealth of knowledge and precedent from previous arbitration proceedings against them in similar cases. Further, the West Virginia public – particularly those individuals in Mineral County – have an interest in Petitioners' negligent, intentional, reckless, and outrageous conduct coming to light rather than the same being

shrouded in secrecy behind the closed doors of a private process. *Zuver*, 103 P.3d at 765 ("a lack of public disclosure may systematically favor companies over individuals."). For these reasons, the confidentiality provision in the agreement is substantively unconscionable because it is unreasonably favorable to Petitioners, is beyond the scope of expectations for a reasonable person executing this type of agreement, and is contrary to public policy.

Selection of the National Arbitration Forum ("NAF")

The arbitration agreement provides that 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 0017-18]. The NAF is a biased and unfair forum such that the provision in the arbitration agreement selecting the NAF has an unreasonably harsh effect on Respondent and unreasonably favors Petitioners.

As recognized by this Court in *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 521, 745 S.E.2d 556, 559 (2013), the NAF entered into a consent order precluding them from handling consumer arbitration proceedings in light of allegations of anti-consumer bias. *Id.* The National Arbitration Forum's conspiracy to defraud consumers was discovered over six years before the proffered arbitration agreement was presented to Susan Oates. At the time the agreement was signed, Petitioners knew or had reason to know that the NAF was an unfair forum that favored companies over consumers. If arbitration was to proceed before the NAF as Petitioners preferred, Respondent would be unable to receive a fair hearing. The arbitration agreement's incorporation of a one-sided forum "violates notions of neutrality and fundamental fairness" and is unconscionable. *Toppings v. Meritech Mortg. Servs., Inc.*, 212 W. Va. 73, 74, 569 S.E.2d 149, 150 (2002) (concurrence) (Maynard, J.) (finding an arbitration agreement to be unenforceable for its selection of an arbitral forum that had the appearance of impropriety because it was

compensated "through a case-volume fee system whereby the decision maker's income as an arbitrator is dependent on continued referrals from the creditor.").

Petitioners do not even defend their selection of an unfair forum – nor could they. Instead, Petitioner's only defense is that the arbitration agreement provides for alternatives. [JA 0017-18] Petitioners cite to and rely upon *Credit Acceptance Corp. v. Front* for the principal that an arbitration agreement's selection of an unavailable forum is not fatal to the enforceability if "the choice of forum is an ancillary logistical concern." 745 S.E.2d at 568. Respondent recognizes that only where the choice of forum is "an integral part of the agreement to arbitrate" will the failure of the chosen forum render the arbitration agreement unenforceable. *Id.* To be clear, Respondent's argument is not based upon Petitioners' selection of an *unavailable* forum. Respondent's argument is based upon Petitioners' selection of *a biased and unfair* forum. As such, this Court's opinion in *Credit Acceptance Corp. v. Front* is not implicated. Regardless of whether the NAF is available or unavailable, the arbitration agreement selected an arbitral forum that "impinges on neutrality and fundamental fairness" and is unconscionable under West Virginia law. *Toppings v. Meritech Mortgage Services, Inc.*, 569. S.E.2d at 149.

Reduction of the Statute of Limitations

The agreement states, "[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." [JA 018]. This provision functionally shortens the applicable statute of limitations for tort claimants while leaving all of Petitioners' prospective claims unaffected. Specifically, nursing home residents could see the statute of limitations under the arbitration agreement shortened to a matter of days if multiple injuries occur months or years apart. The arbitration agreement does not even make an accommodation for tolling based upon

reasonably delayed discovery of an injury, an accommodation which is based upon sound public policy concerns in West Virginia. Syllabus Point 3, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009). This provision is unreasonably favorable to Petitioners because their typical legal action (*i.e.* collection actions for an unpaid bill) are not in danger of being waived. Petitioners do not have to contend with factors delaying the discovery of an injury, and they do not have to worry about the passage of time between one injury and another. Thus, there is virtually no occasion where Petitioners would prospectively waive a viable claim. The provision at issue is demonstrably hostile to tort claimants, and is therefore substantively unconscionable.

II. The Circuit Court's Order Finding the Proffered Agreement Unconscionable Does Not Implicate the Federal Arbitration Act

Section 2 of the Federal Arbitration Act ("FAA") provides that written provisions providing for the arbitration of disputes "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.A. § 2.

> The purpose of the Federal Arbitration Act, 9 U.S.C. § 2, is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitration are enforced according to their terms.

Syllabus Point 7, ("*Brown I*"), 724 S.E.2d at 260-61. Indeed, the purpose of the FAA was to make arbitration agreements "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). By its very language, the FAA contains a "savings clause" providing that an agreement to arbitrate (just like any other contract) can be set aside "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. Pursuant to this "savings clause," "[n]othing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or unconscionability – may be applied

to invalidate an arbitration agreement." Syllabus Point 9, *Brown I*, 724 S.E.2d at 261. "The doctrine of unconscionability that we explicated in *Brown I* is a general, state, common-law, contract-law principle that is not specific to arbitration, and does not implicate the FAA." *Brown II*, 729 S.E.2d at 223.

In light of the above, Petitioners' argument that the Circuit Court's order "violated Section 2 of the FAA" is meritless. The determination of the Circuit Court centered upon unconscionability which is a general, state, common-law, contract-law defense to any contract in West Virginia. Syllabus Point 9, *Brown I*, 724 S.E.2d at 261. This Court in *Brown I* "assembled an extensive set of common law factors for courts to weigh" when determining unconscionability, *Brown II*, 729 S.E.2d at 224-25, and the sole issue in this case is whether the Circuit Court applied those factors appropriately (which Respondent maintains it did). As such, the FAA is not implicated at all. Indeed, this Court has had no reservation in finding arbitration agreements to be unconscionable without implicating the FAA. *See e.g. State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011); *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914 (2005); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002); *Toppings v. Meritech Mortgage Services, Inc.*, 212 W.Va. 73, 569 S.E.2d 149 (2002); *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), *overruled on other grounds*, *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012).

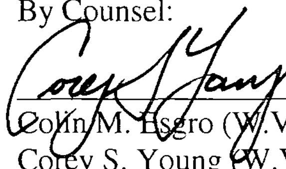
Conclusion and Request for Relief

The Circuit Court did not err in denying Petitioners' Motion to Dismiss and Compel Arbitration based upon its finding that the proffered arbitration agreement was a substantively and procedurally unconscionable contract of adhesion. The Circuit Court correctly applied the well-

established common-law unconscionability factors to the unique facts and circumstances of this case. The record contains sufficient evidence to establish that Susan Oates lacked a meaningful choice in the execution of the arbitration agreement, and that the arbitration agreement contained terms that were unreasonably favorable to the Petitioners. Respondent respectfully requests that this Court affirm the Circuit Court's order denying Petitioner's Motion to Dismiss and Compel Arbitration.

Respectfully Submitted,
Respondent, Susan K. Oates,

By Counsel:



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