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IN THE

SUPREME COURT OF THE STATE OF ARIZONA

CONCETTA RIZZIO, an unmarried woman, Plaintiff/Appellee, v. SURPASS SENIOR LIVING, LLC, a foreign limited liability company dba MARIPOSA OF GILBERT; GILBERT AL PARTNERS, LP; GILBERT AL GP, LLC; BRIANNE SCHMITZ and JOHN DOE SCHMITZ, wife and husband; JOHN DOES 1-20; BLACK CORPORATIONS 1-10; WHITE PARTNERSHIPS 1-10; Defendants/Appellants.	No. CV-20-0058-PR Court of Appeals Division One No. 1 CA-CV 19-0221 Maricopa County Superior Court No. CV2018-090357 **PETITION FOR REVIEW**

¶ 1 Pursuant to Rule 23, Ariz. R. Civ. App. Pro., Plaintiff/Appellee Concetta Rizzio (hereinafter "Plaintiff") petitions the Arizona Supreme Court to review the Opinion of the Court of Appeals, Division One, attached hereto as **Exhibit A**, filed on January 30, 2020 ("Opinion"). In partially reversing a denial

of a motion to compel arbitration, the Opinion wrongly invaded the province of the trial court, disregarding the trial court's well-supported factual findings that the arbitration agreement was procedurally and substantively unconscionable. The Court of Appeals also disregarded long-established precedent on unconscionability. This Court can shed light on a murky issue.

ISSUE PRESENTED FOR REVIEW

¶ 2 1. In determining whether a valid agreement existed to arbitrate a dispute brought by an elderly resident against an assisted living facility, did the trial court properly find the agreement was procedurally unconscionable?

2. Did the trial court properly find that the costs to arbitrate were unduly excessive, such that the resident was unable to afford arbitration and the agreement was thus substantively unconscionable?

3. Did the Court of Appeals properly sever the clause requiring the resident to pay all arbitration costs, leaving the rest of the agreement valid?

4. Did the Court of Appeals properly find that an attorney retainer agreement agreeing to advance litigation costs was relevant in determining whether the resident could afford arbitration costs?

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

¶ 3 In April 2017, Deborah Georgianni arranged for her mother, Plaintiff Concetta Rizzio, age 86, to live at Mariposa Point ("Mariposa"), an assisted living facility owned and operated by Defendants/Appellants Surpass

Senior Living, LLC et al. ("Defendants"). Later that year, Ms. Rizzio was moved to a higher level of care at Mariposa; as part of the move, Ms. Georgianni signed an Arbitration Agreement. (*Appendix* pp. 176-78.)

¶ 4 On February 28, 2018, Ms. Rizzio was attacked by another resident, suffering severe facial injuries. She was hospitalized and then moved to a private home; she is currently under 24-hour home health care, suffering dementia, still traumatized by the attack.

II. THE TRIAL COURT'S FINDINGS

¶ 5 Ms. Rizzio filed an abuse of a vulnerable adult action, alleging that Defendants failed to properly supervise the fellow resident who attacked her. Defendants moved to arbitrate her claim based on an alleged agreement included in the Mariposa admission paperwork.

¶ 6 The trial court, the Honorable Sherry K. Stevens of the Maricopa County Superior Court, held an evidentiary hearing to determine the enforceability of the Arbitration Agreement. (Minute Entry dated 1/31/2019, **Exhibit B;** hearing transcripts are in the accompanying Appendix.)

A. Procedural Unconscionability

¶ 7 Ms. Georgianni testified that she met with Rebecca Dice, the Mariposa marketing director, on September 1, 2017 for only about 10 minutes to

sign various documents. (*Appendix,* p. 016:2-7.) She signed the Arbitration Agreement without reading it nor being aware of what it contained. (*Id.,* pp. 022:7 – 024:1; 54:4-7.) She did not read it because she was focused on issues related to her mother's care and selecting her mother's apartment. (*Id.,* pp. 052:11-17, 54:7-14.) The terms of the Agreement were never explained to her, and arbitration was never discussed. (*Id.,* p. 021:21-23.) She did not receive a copy of the Agreement. (*Id.,* p. 055:13-19.)

¶ 8 Ms. Dice testified she typically reviews the terms of the contracts with clients by reading the title of each appendix to the client. (*Appendix,* p. 067:7-12.) She does not read each paragraph to a client. (*Id.,* p. 065:4-6.) Although her current practice is to have the client initial each page of the contract, that practice did not exist when these documents were signed by Ms. Georgianni. (*Id.*, p. 075:15-22.) Ms. Dice does not know what arbitration is, nor the costs involved. (*Id.,* p. 069:6-18.)

¶ 9 The trial court found that the Agreement "(1) was drafted by Defendants; (2) Plaintiff's daughter had little opportunity to review the contract; (3) the arbitration terms were not explained to her; and (4) Plaintiff's daughter had no opportunity to bargain with Defendants." (Minute Entry, **Exhibit B attached hereto,** p. 3.)

B. Substantive Unconscionability – the High Costs of Arbitration

¶ 10 At the hearing, Plaintiff called Winn Sammons as an expert to testify about the arbitration costs in assisted living cases. (*Appendix,* p. 084.) Mr. Sammons testified that a typical local arbitrator with expertise in the medical malpractice field would charge $400 to $500 an hour. (*Id.*, p. 090:5-19.) He calculated that an arbitrator would spend 40 to 56 hours total on the arbitration. (*Id.*, p. 093:13-24.) At $400 an hour, the arbitrator's fee would be from $16,000 to $22,400. (*Id.*, p. 094:3-9.)

¶ 11 Ms. Rizzio currently requires 24-hour nursing care; her living expenses are approximately $11,000 per month. (*Id.,* p. 024:19-22.) She has a small pension and the proceeds from the sale of her home (*Id.*, p. 031:2-13); her assets will be exhausted in two years (*Id.,* p. 025:10-12). Based on this evidence, the trial court concluded that "Plaintiff's resources are inadequate to allow her to participate in arbitration." (Minute Entry, **Exhibit B,** p. 4.)

¶ 12 The trial court found that arbitration of Plaintiff's case would cost on average between $16,000 and $22,000 for the arbitrator's fees, whereas jury fees at trial would be between $1,696 and $2,261. (**Exhibit B,** p. 4.)

¶ 13 The Arbitration Agreement provides:

> Any direct arbitration costs incurred by you will be borne by you. Costs of arbitration, **including our legal costs and attorneys' fees, arbitration fees and similar costs will be the responsibility of the resident.**

(*Appendix,* p. 176 [emphasis added].) The trial court found that this provision would require Ms. Rizzio to pay ***all*** the arbitrator's fees regardless of whether she prevailed or not, rather than the typical arrangement of each party paying half, **even if she prevailed at arbitration**. (Minute Entry, **Exhibit B,** p. 4.) The trial court found this provision "unduly oppressive, unfairly surprising, and not within the range of the reasonable expectations of most people in this circumstance." (**Exhibit A**, p. 4.) Relying on *Clark v. Renaissance West, LLC,* 232 Ariz. 510 (App. 2013), the trial court held that the Agreement was substantively and procedurally unconscionable and denied Defendants' motion to compel arbitration.

III. THE COURT OF APPEALS OPINION

¶ 14 Defendants timely appealed. The Court of Appeals found that the Agreement was not procedurally unconscionable. (Opinion, **Exhibit A,** p. 6, ¶ 20.) It found that the clause requiring Ms. Rizzio to pay all arbitration costs was substantively unconscionable, but held that the clause should be severed, leaving the remainder of the Agreement intact and enforceable. (*Id.*, pp. 7-9.) The Court further held that Ms. Rizzio's attorney retainer agreement allowed her to afford arbitration costs, distinguishing *Clark.* (*Id.*, p. 8, ¶ 27.) The Court of Appeals remanded and ordered the parties to arbitration.

¶ 15 This Court should note that at oral argument on appeal, Defendants' counsel repeatedly stated that Defendants agreed to bear all arbitration costs, thus rendering Plaintiff's arguments about arbitration being cost-prohibitive moot. The Court of Appeals panel pressed the parties on the issue several times; however, there is nothing in the Opinion about Defendants' offer to bear arbitration costs. Plaintiffs have requested a transcript of the oral argument and will supplement this Petition.

ARGUMENT

I. STANDARD OF REVIEW

¶ 16 This Court applies a *de novo* standard of review to a denial of motion to compel arbitration. *Allstate Prop. and Cas. Ins. Co. v. Watts,* 244 Ariz. 253, 256 ¶ 9 (App. 2018). However, the Court of Appeals should have deferred to the trial court's findings of fact findings unless clearly erroneous. *Harrington v. Pulte Home Corp.,* 211 Ariz. 241, 252, ¶ 40, 119 P.3d 1044, 1055 (App. 2005). The Court will affirm the trial court's findings explicitly or implicitly made, even if substantial conflicting evidence exists. *Twin City Fire Ins. Co. v. Burke,* 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003). This deference is given because "the judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the [ruling] which cannot be recreated by a reviewing court from the printed record." *Cal X-tra v. WVSV*

Holdings, LLC, 229 Ariz. 377, 403, ¶ 88, 276 P.3d 11, 37 (App. 2012), *quoting Reeves v. Markle,* 119 Ariz. 159, 164 (1978); *see also Federoff v. Pioneer Title & Trust Co. of Arizona,* 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990).

II. THE COURT OF APPEALS DISREGARDED THE TRIAL COURT'S FINDINGS ON PROCEDURAL UNCONSCIONABILITY

¶ 17 The Court of Appeals disregarded the trial court's findings of fact on procedural unconscionability. The Court stated that "Georgianni herself limited the amount of time she took to review the Agreement." (Opinion, **Exhibit A,** p. 6, ¶ 20.) The record actually states that Ms. Dice told Ms. Georgianni that she needed her to sign the same paperwork that she had signed in April 2017 when Ms. Rizzio moved in. (*Appendix,* pp. 022:18 – 023:19.) At that meeting Ms. Dice never mentioned arbitration nor explained the Agreement. (*Ibid.*) Based on Ms. Dice's assurance that it was the same paperwork, Ms. Georgianni found no reason to have her explain it at length. The trial court noted that Ms. Georgianni "was focused on issues related to her mother's care and selecting her mother's apartment." (Minute Entry, **Exhibit B,** p. 2.) She was "so worried that [her mother] wasn't going to be cared for because it was a brand new facility, and I was worried that it may have been understaffed." (*Appendix,* pp. 052:24 – 053:1.) It turns out her worries were justified; Ms. Rizzio was brutally beaten. The trial court properly concluded that Ms. Georgianni had little opportunity to

review the contract, the arbitration terms were not explained to her, and she had no opportunity to bargain with Defendants. (*Id.*, p. 4.) These factors supported a finding of procedural unconscionability. Regardless, it is the province of the trial court, not the Court of Appeals, to evaluate witness testimony and make findings of fact supported by that testimony. *Reeves,* 119 Ariz. at 164, 579 P.2d at 1387; *Federoff,* 166 Ariz. at 388, 803 P.2d at 109. The Court of Appeals abused its position in discounting those findings.

III. THE TRIAL COURT PROPERLY FOUND THE AGREEMENT VIOLATED PLAINTIFF'S REASONABLE EXPECTATIONS

¶ 18 A contract's terms are enforceable only if they fall within the average person's "reasonable expectations." As *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.,* 140 Ariz. 383 (1984) explained:

> Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, **they are not bound to unknown terms which are beyond the range of reasonable expectation**.... [A plaintiff] who adheres to the [defendant's] standard terms does not assent to a term if the [defendant] has reason to believe that the [plaintiff] would not have accepted the agreement if he had known that the agreement contained the particular term.

Darner, 140 Ariz. at 391-2 [emphasis added].

¶ 19 The Court of Appeals held that the reasonable expectations test was not violated because at most, Ms. Georgianni would not have signed the

Agreement had she known she would be required to pay all arbitration costs, and since the Court severed that clause, everything was fine. In fact, Ms. Georgianni testified that had she known she was giving up her right to sue, or that she would have to pay tens of thousands in arbitration costs, she would never have signed the Agreement. (*Appendix,* pp. 054:15 – 055:6.) So even though the Court of Appeals severed the clause forcing Plaintiff to pay all arbitration costs, she must still pay **her half of the arbitration costs,** which the uncontested evidence shows will be $16,000 -- $22,000. Because Ms. Georgianni testified she would not have signed had she known she would be responsible for tens of thousands in arbitration costs, her reasonable expectations were violated, and the Agreement is void. *Darner,* 140 Ariz. at 391 (customers "are not bound to unknown terms which are beyond the range of reasonable expectation").

IV. THE TRIAL COURT PROPERLY FOUND THE AGREEMENT TO BE SUBSTANTIVELY UNCONSCIONABLE

A. The High Costs of Arbitration Render the Agreement Substantively Unconscionable.

¶ 20 "Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed." *Maxwell v. Fidelity Financial Services,* 184 Ariz. 82, 89, 907 P.2d 51 (1995). Factors

showing substantive unconscionability include "**significant cost-price disparity.**" *Id.; see also Harrington*, 211 Ariz. at 252.

¶ 21 *Clark v. Renaissance West, LLC,* 232 Ariz. 510, involving a nursing home arbitration agreement, is squarely on point. The trial court found that the plaintiff – a man with limited income and no savings – would incur about $22,800 in arbitrators' fees. *Clark,* 232 Ariz. at 514, ¶ 15, 18. The Court of Appeals affirmed the trial court's finding of substantive unconscionability: "we conclude there is reasonable evidence supporting the trial court's determination that Plaintiff would be unable to afford to arbitrate his claims. As a result, the Agreement effectively precludes Plaintiff from obtaining redress for any of his claims." *Id.* at 515, ¶ 21. The Court relied on *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 81 (2000), which held that an arbitration agreement is substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights." *Green Tree,* 531 U.S. at 81.

B. A Retainer Agreement is Immaterial.

¶ 22 In *Clark,* the Court of Appeals held three factors are in play when evaluating whether high costs would bar arbitration:

(1) evidence of specific costs to arbitrate that the plaintiff would incur;

(2) evidence of the plaintiffs' financial status and inability to pay those costs; and

(3) whether the agreement permits the plaintiff to waive or reduce costs based on financial hardship.

Clark, 232 Ariz. at 513. **These factors focus on the *plaintiff's* – *not* her attorney's – ability to pay.** In *Clark,* the evidence was exclusively about the plaintiff's financial status: he was an elderly man on a fixed income. *Id.* at 514. **Even though the plaintiff in *Clark* had counsel who might have been able to advance costs** (undersigned counsel here), **that was completely irrelevant to the Court's analysis.** The inquiry is solely on how high the costs are and whether the ***plaintiff*** can afford to pay them. *Clark,* 232 Ariz. at 514.

¶ 23 In *Rizzio v. Surpass Senior,* the Court of Appeals distinguished *Clark,* noting that "neither *Clark* nor *Harrington* contemplated a retainer agreement that provided for counsel to advance arbitration costs." In the first place, the Court was wrong; in both cases, there were retainer agreements that would have advanced arbitration costs. But more importantly, a retainer agreement is irrelevant and should not be considered in the Court's analysis of a plaintiff's ability to pay arbitration costs.

¶ 24 First, nearly all of the cases, from *Green Tree* on down, focus on the individual plaintiff's ability to pay, rather than her attorney's. *E.g., Cole v. Burns Intern. Sec. Services,* 105 F.3d 1465, 1468 (D.C. Cir. 1997) (costs are borne by employee, not his attorney); *Murray v. United Food and Commercial Workers Intern. Union,* 289 F.3d 297, 303 (4th Cir. 2002) (focusing on individual

employee); *Castillo v. CleanNet USA, Inc.,* 358 F.Supp.3d 912, 943 (N.D. Cal. 2018) (plaintiff's $35,000 annual income prevented him from arbitrating). The fact that an attorney may advance arbitration costs is almost never part of a court's analysis.

¶ 25 *Harrington*, which noted the presence of a retainer agreement, involved an arbitration clause in a purchase contract for a home. The homeowners subsequently discovered that the home was near a jet engine test facility, and claimed the excessive noise caused their home value to decline. 211 Ariz. at 244, ¶ 2. "The factors of potential physical injury" and "an emotionally charged setting for the signing of the contract" were not present in *Harrington,* but they are in Ms. Rizzio's case. 211 Ariz. at 251, ¶ 37. Moreover, an arbitration for noise damage to a home would last a day at most, would require perhaps one expert per side to discuss the effect of noise pollution on property values, and would cost a few thousand dollars at most. Compare this to a nursing home failure-to-supervise case, where the parties would each need multiple experts (nursing, nursing home administration, treating physician, etc.). The evidence in this case is that the arbitration would take 40 to 56 hours to complete. (*Appendix,* p. 093.) An arbitrator would charge about $400 an hour, which would mean total arbitration costs would be between $16,000 and $22,400 per arbitrator. (*Id.*, p. 094.).

¶ 26 In upholding the Mariposa Arbitration Agreement, the Court of Appeals did not take into account situations where a plaintiff's attorney cannot afford to advance tens of thousands in arbitration costs, or where the attorney works on an hourly basis and does not advance any costs at all. In each of these cases, the plaintiff would be unable to afford arbitration. It also makes no sense that an otherwise unconscionable Agreement is saved when, years afterward, the resident retains an attorney who agrees to advance costs.

¶ 27 Moreover, there is no reason why a plaintiff should have to incur thousands of dollars in arbitration costs, **over and above** those in a typical civil lawsuit. As the trial court here recognized: "Case preparation costs (expert witness fees, deposition costs, obtaining records) should be about the same whether the parties proceed by arbitration or trial." (**Exhibit A,** p. 4.) The difference, of course, is the extra $16,000 - $22,000 in arbitrator fees. Plaintiff would not have to pay $16,000 to a judge for her time. Why should she be forced to pay so much to a private arbitrator when she already supports the court system through her tax dollars? This simple fact makes arbitration in nursing home cases **always** more expensive than civil court.

¶ 28 Finally, both *Harrington* and *Clark* examined whether the agreement permits the plaintiff to waive or reduce costs based on financial hardship. *Harrington,* 211 Ariz. at 254; *Clark,* 232 Ariz. at 513. The agreement in *Harrington* permitted waiver or reduction, which weighed towards enforcing the

agreement. 211 Ariz. at 254. The agreement in *Clark* did not, which weighed against enforcement. 232 Ariz. at 515. The Agreement in Ms. Rizzio's case does not permit waiver or reduction based on financial hardship.

C. The Agreement's Substantive Unconscionability Renders the Entire Agreement Void.

¶ 29 The Court of Appeals erred in simply severing the Agreement's clause forcing Plaintiff to bear all costs of the arbitration, leaving the Agreement otherwise intact. But this would leave the Agreement without any instructions as to the awarding of costs and fees. How is the court to know what the parties intended – whether to split the arbitration costs equally, or have the loser pay all, or some other arrangement? Of course, here the parties did not "intend" anything at all; Plaintiff was not even aware of the Agreement.

¶ 30 So long as Plaintiff is responsible for any portion of the arbitration costs, her ability to pay them is a concern. Ms. Georgianni testified that Plaintiff could probably afford a $600 expense, but it would be difficult beyond that, especially if it were several thousand dollars. (*Appendix,* pp. 041:18 – 042:20.) Severing this clause does not solve the problem of Plaintiff's inability to pay high arbitration costs. The trial court properly found that the entire Agreement was unconscionable and declared it void in its entirety.

VI. REQUEST FOR ATTORNEYS' FEES

¶ 31 Plaintiff requests that if she prevails on appeal, she be awarded her reasonable attorneys' fees pursuant to A.R.S. §12-341.01.

CONCLUSION

¶ 32 The Court of Appeals has told Plaintiff, in essence, "without realizing it, you have given up your right to sue for being severely injured. Luckily, you can pay at least $15,000 to bring a claim in arbitration." Would anyone in their right mind ever sign such a document? The trial court's well-supported findings should be affirmed.

DATED this 4th day of March, 2020.

UDALL SHUMWAY PLC

By /s/ H. Micheal Wright
H. Micheal Wright
Lincoln M. Wright
Attorneys for Plaintiff/Appellee

CERTIFICATE OF COMPLIANCE

I certify that Plaintiffs' accompanying Petition for Review complies with Rule 23 of the Arizona Rules of Civil Appellate Procedure, and contains fewer than 3,500 words.

CERTIFICATE OF SERVICE

I certify that on March 4, 2020, Plaintiffs' accompanying Petition for Review was electronically filed through AZTurboCourt and copies were electronically served to the following:

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DATED this 4th day of March, 2020.

UDALL SHUMWAY PLC

By /s/ H. Micheal Wright
H. Micheal Wright
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Attorneys for Plaintiff/Appellee

Exhibit A

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

CONCETTA RIZZIO, *Plaintiff/Appellee,*

v.

SURPASS SENIOR LIVING LLC, et al., *Defendants/Appellants.*

No. 1-CA CV 19-0221
FILED 1-30-2020

Appeal from the Superior Court in Maricopa County
No. CV2018-090357
The Honorable Sherry K. Stephens, Judge

AFFIRMED IN PART, REVERSED IN PART, REMANDED

COUNSEL

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By Kevin C. Nicholas, Bruce C. Smith, Rae Richardson
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OPINION

Judge Jennifer M. Perkins delivered the opinion of the Court, in which Presiding Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

PERKINS, Judge:

¶1 This appeal addresses whether an agreement to arbitrate a claim is substantively unconscionable based on arbitration costs when counsel for the party seeking to avoid arbitration has agreed to advance all costs.

¶2 Surpass Senior Living ("Surpass") appeals from a superior court ruling denying its motion to compel arbitration. The court found the arbitration agreement both substantively and procedurally unconscionable, and that the agreement violated plaintiff's reasonable expectations. For the following reasons, we reverse the court's finding that the costs of arbitration rendered the agreement as a whole unconscionable, but affirm as to the agreement's cost-shifting provision and sever it from the agreement.

FACTUAL AND PROCEDURAL HISTORY

¶3 In April 2017, Deborah Georgianni arranged for her mother, Concetta Rizzio, to live at Mariposa Point ("Mariposa"), a nursing care facility managed by Surpass. Georgianni, as Rizzio's power of attorney, entered a contract on Rizzio's behalf with Mariposa. Later that year, Georgianni signed a similar contract when moving Rizzio to a higher care level at Mariposa.

¶4 Both contracts included identical agreements to arbitrate all claims arising from the contract ("Agreement"). The Agreement contained a cost-shifting provision stating that Rizzio would be responsible for all "[c]osts of arbitration, including [defense]'s legal costs and attorney's fees, arbitration fees and similar costs," should she make a claim against Surpass. The Agreement also contained the following portions in boldface type:

> **Because this arbitration agreement addresses important legal rights, The Community encourages and recommends that you obtain the advice of legal counsel to review this agreement prior to signing this arbitration agreement.**

* * *

Admission to the Community is not contingent upon signing this Agreement.

¶5 In February 2018, another resident allegedly attacked Rizzio, causing her to be hospitalized. Georgianni then filed a lawsuit on Rizzio's behalf alleging various claims against Surpass, the other resident, and others. Surpass moved to compel arbitration based on the Agreement. Georgianni countered that the arbitration requirement was both procedurally and substantively unconscionable.

¶6 The superior court held an evidentiary hearing, and three witnesses testified: Georgianni, Mariposa representative Rebecca Dice, and arbitrator Winn Sammons.

¶7 Georgianni testified that her initial meeting with Mariposa, resulting in the first contract, was with Mariposa representative Leslie Davis. The two discussed the first contract, which included the Agreement, for only "10, 15 minutes," before Georgianni signed. Georgianni testified that the conversation focused on Rizzio's care and her "apartment, because that was what [Georgianni] was hyper-focused on." She further testified that she told Davis to: "[t]ell me what I need to sign" and that Davis immediately complied, Georgianni signed, and they discussed other things.

¶8 Georgianni testified that a similar process occurred with Dice when Rizzio moved to the higher care level of the property. Dice explained to her that the paperwork differences were only as to the level of care and apartment number. Georgianni testified that on neither occasion was she aware the Agreement was in the packet, neither Davis nor Dice mentioned the Agreement, and she did not receive the documents in advance.

¶9 Dice testified that her standard practice was to send documents to individuals before meeting them in person, to read the appendix titles aloud at the signing, and to block out an hour-and-a-half to go over the documents. She stated that her practice was to point out the Agreement. But, concerning the later contract signing, she stated if a resident was merely moving from one apartment to another, she would only discuss relevant changes unless the resident had any questions. Further, she could not state affirmatively that she had discussed the Agreement at that signing.

¶10 Sammons testified that he had spent most of his litigation career in medical negligence cases, and been serving as an arbitrator since

2013. He testified that, under the Agreement, "every scenario contemplated involves the plaintiff bearing the defense fees and costs, but no scenario contemplate[d] the defense bearing the plaintiff's" fees and costs. He noted that Rizzio's contractual obligation to bear the defense costs and fees in arbitration regardless of who won was not common practice in eldercare.

¶11 The superior court found that: "(1) [the contract] was drafted by Defendants; (2) Plaintiff's daughter had little opportunity to review the contract; (3) the arbitration terms were not verbally explained to her; and (4) Plaintiff's daughter had no opportunity to bargain with Defendants." The court also found that not only would Rizzio be unable to effectively vindicate her claim given the costs of arbitration, but that the contract unfairly allocated all the costs of arbitration to Rizzio, even if she prevailed at arbitration. Accordingly, the court found that, under the totality of the circumstances, the Agreement was procedurally and substantively unconscionable and that it violated Rizzio's reasonable expectations.

¶12 Defendants timely appealed.

DISCUSSION

¶13 We review the denial of a motion to compel arbitration *de novo*. *Sec. Alarm Fin. Enters., L.P. v. Fuller*, 242 Ariz. 512, 515, ¶ 9 (App. 2017). "[W]e defer, absent clear error, to the factual findings upon which the trial court's conclusions are based." *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 246–47, ¶ 16 (App. 2005).

I. The FAA Applies to the Agreement.

¶14 The Federal Arbitration Act ("FAA") states that arbitration provisions in a "contract evidencing a transaction involving 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 (emphasis added). The words "involving commerce" in Section 2 of the FAA indicate Congress's intent to exercise its Commerce Clause powers to their fullest extent in the FAA. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–74 (1995). Here, the contract is between an Arizona resident (Rizzio) and an assisted living facility owned and operated by a Texas LLC (Surpass). The construction, hiring, and operation of the facility by a foreign LLC is interstate commerce for the purposes of the FAA. *See United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (defining the three categories of activity that Congress may regulate under the Commerce Clause). The FAA applies.

¶15 When the FAA applies to an arbitration agreement, a court "must place [the] agreement[] on an equal footing with other contracts . . . ." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). That said, "generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

II. The Agreement Is Not Procedurally Unconscionable.

¶16 Surpass argues the arbitration agreement is not procedurally unconscionable. State law, not federal law, provides the standard for unconscionability. *See Sec. Alarm*, 242 Ariz. at 516, ¶ 11 ("Whether an arbitration agreement [under the FAA] is valid, irrevocable, and enforceable is governed by state law."); *see also Maxwell v. Fid. Fin. Servs., Inc.*, 184 Ariz. 82, 90 (1995); *Casarotto*, 517 U.S. at 686–87. Either procedural or substantive unconscionability may be an independent defense against enforcement of an agreement. *Duenas v. Life Care Ctrs. of Am., Inc.*, 236 Ariz. 130, 135, ¶ 7 (App. 2014) (rejecting argument that individual challenging the agreement must prove both procedural and substantive unconscionability because "[e]ither doctrine can provide an independent defense to enforceability"); 9 U.S.C. § 2. Under Arizona law, a contract is procedurally unconscionable when "unfair surprise, fine print clauses, mistakes or ignorance of important facts or other things [meant that] bargaining did not proceed as it should." *Duenas*, 236 Ariz. at 135, ¶ 8 (App. 2014) (quoting *Clark v. Renaissance W., L.L.C.*, 232 Ariz. 510, 512, ¶ 8 (App. 2013)).

¶17 Arizona courts consider numerous factors when determining whether a contract is procedurally unconscionable, including:

> [A]ge, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.

Maxwell, 184 Ariz. at 89 (quoting *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 268 (E.D. Mich. 1976)). Further, courts may also consider "whether the contract was separate from other paperwork, whether the contract used conspicuous typeface . . . and whether the contract was signed hurriedly and without explanation in emergency circumstances[.]" *Duenas*, 236 Ariz. at 135, ¶ 8 (internal citations omitted). The *Duenas* court rejected a

procedural unconscionability claim where the plaintiff had "an opportunity to review [the] agreement and exercise independent judgment," there was no "inconspicuous bundl[ing] with other contractual terms," and the agreement did not serve "as a precondition to care." 236 Ariz. at 136, ¶ 11.

¶18 The superior court's factual findings here do not establish procedural unconscionability. Instead, at most they demonstrate that the Agreement was akin to a standardized adhesion contract. An adhesion contract is offered "on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired . . . services except by acquiescing in the form contract." *Id.* at 137–38, ¶ 20 (quoting *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 173 Ariz. 148, 150 (1992)). Such contracts are not *per se* unconscionable and, instead, are typically enforceable. *Id.* at 137, ¶ 20 n.2.

¶19 Nothing in applicable Arizona law requires a drafter to explain the provisions of standardized contracts, nor does the post-hoc regret of a party to such a contract suffice to demonstrate unconscionability. *See id.* at 135–36, ¶¶ 10–11; *see also Casarotto*, 517 U.S. at 687–88 (holding that special notice provisions applying only to arbitration agreements were preempted by the FAA). Nor can Rizzio find refuge in Georgianni's claim that she "neglected to read" the Agreement. *Rocz v. Drexel Burnham Lambert, Inc.*, 154 Ariz. 462, 466 (App. 1987). This is particularly true given Georgianni's acknowledgement that she pressed Davis to just "[t]ell [her] what [she] need[ed] to sign."

¶20 The record establishes that Georgianni herself limited the amount of time she took to review the Agreement. It also demonstrates that Surpass included in the Agreement express language, in bold typeface, recommending consultation with legal counsel and that Rizzio's admission to Mariposa was not contingent on signing the Agreement. Nothing in the record suggests the presence of "emergency circumstances" or Surpass-imposed time pressure. *See Duenas*, 236 Ariz. at 135, ¶ 8. This record does not support a finding of procedural unconscionability and we therefore reverse that finding.

III. The Superior Court Correctly Found the Cost-Shifting Provision of the Agreement Substantively Unconscionable.

¶21 Surpass also contests the superior court's finding of substantive unconscionability. Substantive unconscionability occurs where a contract has "terms so one-sided as to oppress or unfairly surprise an

innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." *Maxwell*, 184 Ariz. at 89; *see also Clark*, 232 Ariz. at 512, ¶ 8. Substantive unconscionability examines the relative fairness of the obligations undertaken. *Gullett ex rel. Estate of Gullett v. Kindred Nursing Ctrs. W., L.L.C.*, 241 Ariz. 539, ¶ 25 (App. 2017). Arbitration agreements may be substantively unconscionable "if the fees and costs to arbitrate are so excessive as to 'deny a potential litigant the opportunity to vindicate his or her rights.'" *Clark*, 232 Ariz. at 512, ¶ 8 (quoting *Harrington*, 211 Ariz. at 252, ¶ 39).

¶22 Here, the superior court correctly found that the cost-shifting provision in the Agreement was substantively unconscionable. The agreements in *Clark* and *Harrington* left the allocation of arbitration costs and expenses unstated. In contrast, the Agreement specifically allocated the payment of *all* costs, fees, and expenses to plaintiff, *even if she prevails*. This is unusual, one-sided, and operates as a prospective penalty for any resident seeking to bring a meritorious claim. We agree with the superior court that this provision is oppressive and may not be enforced.

¶23 That finding, however, is not dispositive. The Agreement contains an express severability clause under which the cost-shifting provision may be severed while the remainder of the Agreement remains in effect. Rizzio contends that we cannot sever the cost-shifting provision because that would leave the Agreement with no direction on allocation of costs and, even absent the provision here, Rizzio cannot afford to pay arbitration costs.

¶24 Mere silence as to the allocation of arbitration costs does not support invalidating an agreement. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 ("[T]he arbitration agreement's silence on [the allocation of costs] is plainly insufficient to render it unenforceable."). Moreover, our legislature provided for arbitration agreements without cost allocation provisions. A.R.S. § 12-3021(D) (providing that, absent a provision directing otherwise, the arbitrator may direct the payment of costs in the arbitration award); *see also* 9 U.S.C. § 9 (generally presuming discretionary authority of arbitrator to enter award under FAA). Thus, a lack of guidance as to cost allocation in the Agreement resulting from severance is not a concern. Rizzio's argument that she cannot afford arbitration goes to whether the Agreement is substantively unconscionable even without the cost-shifting provision. Thus, we turn to whether the the Agreement, without the cost-shifting provision, is substantively unconscionable.

IV. The Agreement Without the Cost-Shifting Provision is not Substantively Unconscionable.

¶25 An arbitration agreement is not substantively unconscionable if "'the prospective litigant effectively may vindicate' his or her rights in the arbitral forum." *Harrington*, 211 Ariz. at 252, ¶ 42 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Effective vindication may be thwarted by "filing and administrative fees attached to arbitration that are so high as to make access to the forum impractical." *Amer. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). The doctrine does not permit courts to invalidate arbitration agreements on the grounds that they merely make "it [] not worth the expense involved in *proving* a statutory remedy . . . ." *Id.* The issue presents a case-by-case inquiry, relying on "individualized evidence to establish that the costs of arbitration are prohibitive." *Harrington*, 211 Ariz. at 252, ¶¶ 43–44 (citing *Green Tree*, 531 U.S. at 91–92). Our invalidation of the cost-shifting provision leaves the Agreement silent as to who bears the costs of arbitration here; this silence on its own cannot warrant a finding of substantive unconscionability where the FAA applies. *Green Tree*, 531 U.S. at 90–91.

¶26 In *Harrington*, evidence showing approximately $12,000 in arbitration costs plus additional arbitrators' fees accompanied by the mere assertion that the costs were prohibitive was insufficient to establish substantive unconscionability. *See* 211 Ariz. at 253, ¶¶ 45–49. By contrast, in *Clark*, the court held that an arbitration agreement was substantively unconscionable due to an estimated $22,800 in arbitrators' fees plus costs, established on the record, and the lack of opportunity for cost reduction or deferral for hardship. 232 Ariz. at 514–15, ¶¶ 18–21; *see also* A.R.S. § 12-302(C)–(D).

¶27 Neither *Clark* nor *Harrington* contemplated a retainer agreement that provided for counsel to advance arbitration costs. But Georgianni signed just such a retainer agreement with her attorney here, under which her counsel assumed responsibility for advancing all costs. And her counsel represented to this court and the superior court that the repayment of such costs only occurs out of the proceeds of a recovery. In other words, Rizzio will only incur costs if (1) she prevails and thus receives a recovery award, and (2) despite her position as prevailing party the arbitrator declines to allocate all costs to Surpass. The presence of such an arrangement here negates any argument of substantive unconscionability based on arbitration costs: Rizzio is not responsible for up-front costs and such costs cannot, therefore, be held an impediment to arbitration.

¶28 One potential outcome of the arbitration is that Surpass prevails and receives an award of fees and costs against Rizzio. But that is not enough to render the Agreement unconscionable under the FAA—litigants in any forum must weigh the costs of losing. *See Italian Colors*, 570 U.S. at 236. To hold that mere potential costs can invalidate an arbitration agreement, when this would not be true of any other contract, would violate federal law. *See Casarotto*, 517 U.S. at 687–89. Unconscionability due to costs is a question of whether the costs effectively close the forum to the prospective litigant—whether costs "preclude" the litigant from effective vindication of her rights in the arbitral forum. *Green Tree*, 531 U.S. at 90; *see also Italian Colors*, 570 U.S. at 236 (holding that arbitration agreement may be invalid if "filing and administrative fees attached to arbitration [] are so high as to make access to the forum impracticable").

¶29 Accordingly, the finding that the Agreement is unconscionable based on arbitration costs cannot stand. Having stricken the unconscionable cost-shifting provision, given the severance provision, we discern no basis for finding the remainder of the Agreement unconscionable, either procedurally or substantively.

V. The Superior Court Erred by Finding the Agreement Violated Rizzio's Reasonable Expectations.

¶30 The superior court held, and Rizzio argues here, that the Agreement violated her reasonable expectations. "[R]easonable expectations claims may present questions of both fact and law," which we review *de novo*. *Harrington*, 211 Ariz. at 246, ¶ 16. Invalidation of a contract for violating the reasonable expectations of a party is a ground distinct from unconscionability. *Id.* at 252, ¶ 39. The rule precludes the enforcement of a contract provision if one party has reason to believe that the other party would not have entered the contract had he known that it contained the provision. *Darner Motor Sales, Inc. v. Univ. Underwriters Ins. Co.*, 140 Ariz. 383, 391 (1984) (adopting Restatement (Second) of Contracts § 211, which sets forth the reasonable expectations rule).

¶31 Rizzio advanced no argument, and the record contains no evidence, that Surpass had reason to believe Georgianni would have declined to sign the contract if she had known more about relevant portions of the Agreement. At best, the record could be said to support an argument that Georgianni would not have signed the Agreement had she known about the cost-shifting provision. We have already severed that provision as unconscionable.

¶32 Rizzio relies on *Broemmer v. Abortion Services of Phoenix Ltd.* in arguing that the Agreement violates her reasonable expectations. 173 Ariz. 148 (1992). The *Broemmer* court held that, in the medical context, it violates a patient's reasonable expectations to require her to sign an arbitration agreement without a "conspicuous or explicit waiver of the fundamental right to a jury trial." *Id.* at 152. The United States Supreme Court has since expressed clear disapproval for such an arbitration-specific holding. *See, e.g., Casarotto*, 517 U.S. at 688–89 (invalidating a facially arbitration-specific Montana notice requirement); *Concepcion*, 563 U.S. at 346–52 (invalidating California rule based in unconscionability that undermined policy goals surrounding arbitration); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426–27 (2017) (invalidating Kentucky rule that "oh so coincidentally" applied only to arbitration agreements without naming them specifically).

¶33 *Broemmer* also is distinguishable. Melinda Broemmer, at the time a 21-year old high school graduate in Iowa earning less than $100 per week, entered an arbitration agreement when she sought abortion services in Arizona. She was "not experienced in commercial matters," and, after some litigation, "[was] still not sure 'what arbitration is.'" 173 Ariz. at 152. And the agreement in *Broemmer* was an adhesion contract, offered on a take it or leave it basis, such that staff "presented [it] to [Broemmer] as a condition of treatment." *Id.* at 151. The court invalidated the arbitration agreement but explicitly declined to "write a sweeping, legislative rule concerning all agreements to arbitrate," opting instead to "decide *this* case." *Id.* at 153.

¶34 Georgianni's signature on the Agreement was explicitly not a condition of treatment for Rizzio. Further, Georgianni has handled matters relating to Rizzio's health care since 2010 and testified that in her capacity as Rizzio's power of attorney she had previously executed other agreements. This is enough to place us outside *Broemmer*'s narrow scope. We, therefore, reverse the superior court's determination that the Agreement violated Georgianni's reasonable expectations.

VI. Attorney's Fees

¶35 Both parties request attorney's fees under A.R.S. § 12-341.01. In our discretion, we decline to award attorney's fees. Surpass, as the prevailing party, is entitled to its costs on appeal.

CONCLUSION

¶36 We affirm the court's finding of unconscionability (and by extension unenforceability) as to the cost-shifting provision of the

Agreement alone. Having severed that unenforceable provision, on all other grounds and concerning all other provisions of the Agreement, we reverse and remand for further proceedings consistent with this opinion.

AMY M. WOOD • Clerk of the Court
FILED: AA

Exhibit B

Clerk of the Superior Court
*** Electronically Filed ***
02/05/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-090357 01/31/2019

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

CONCETTA RIZZIO H MICHEAL WRIGHT

v.

SURPASS SENIOR LIVING L L C, et al. BRUCE C SMITH

MINUTE ENTRY

East Court Building - Courtroom 712

10:13 a.m. This is the time set for the continuation of an Evidentiary Hearing regarding Defendants Surpass Senior Living, LLC, Gilbert AL Partners, LP, Gilbert AL GP, LLC, and Brianne Schmitz's *Motion to Compel Arbitration*, filed on August 9, 2018. Appearing on behalf of Plaintiff, Concetta Rizzio, is counsel, H. Michael Wright. Appearing on behalf of all Defendants is counsel, Bruce C. Smith.

A record of the proceedings is made digitally in lieu of a court reporter.

Winn Sammons is sworn and testifies.

The witness is excused.

Closing arguments are presented.

IT IS ORDERED taking this matter under advisement.

IT IS ORDERED that the clerk permanently release all exhibits not offered in evidence to the counsel or party causing them to be marked, or to their written designee. Counsel/party shall have the right to refile relevant exhibits as needed in support of any appeal. Refiled exhibits

must be accompanied by a Notice of Refiling Exhibits and presented to the Exhibits Room of the Clerk's Office. The court's exhibit tag must remain intact on all refiled exhibits.

IT IS FURTHER ORDERED that counsel/party or written designee take immediate possession of all exhibits referenced above.

ISSUED: Exhibit Release Forms (2)

12:38 p.m. Matter concludes.

LATER:

The Court has considered the Motion to Compel Arbitration (with exhibits) filed August 9, 2018, the Response to Motion to Compel Arbitration and Motion to Declare Arbitration Agreement Unenforceable filed August 28, 2018, Plaintiff's Supplement to Response to Motion to Compel Arbitration filed August 29, 2018, the Reply in Support of Motion to Compel Arbitration (with exhibits) filed September 24, 2018, the Reply Re Motion to Declare Arbitration Agreement Unenforceable filed September 26, 2018, the Notice of Supplemental Authority in Support of Motion to Compel Arbitration and Reply in Support of Motion to Compel filed January 9, 2019, Defendants' Sur-Reply To Motion to Compel Arbitration Regarding Interstate Commerce (with exhibits) filed January 25, 2019, Plaintiff's Sur-Response to Motion to Compel Arbitration Re: Interstate Commerce filed January 29, 2019, and the evidence, exhibits and oral argument from the evidentiary hearing conducted on January 24, 2019 and January 31, 2019.

Plaintiff was admitted to Defendants' facility, Mariposa of Gilbert, in April 2017. Mariposa is an assisted living facility. Plaintiff's daughter, using a power of attorney, met with a representative from Defendants' facility to complete paperwork for Plaintiff's admission to Mariposa. That representative was the marketing director and had no training or experience in reviewing documents with clients. She met with Plaintiff's daughter because the facility director was unavailable. The contract document presented to Plaintiff's daughter was 38 pages long including attachments. One attachment was an agreement to resolve disputes by binding arbitration. In September 2017, Plaintiff was moved from assisted living to memory care and new documents were signed by Plaintiff's daughter. In September 2017, Plaintiff's daughter met with the director but there was no discussion about the arbitration agreement. Plaintiff's daughter testified she did not read the documents before signing them because she was focused on issues related to her mother's care and selecting her mother's apartment.

In February 2018, Plaintiff was attacked by another resident and was hospitalized for her injuries. Plaintiff sustained head, face and neck injuries and is severely traumatized by the incident. Plaintiff alleges Defendants failed to supervise the attacker and covered up the

incident. The Complaint alleges a claim of abuse of a vulnerable adult under A.R.S. § 46-455 and a claim for negligence. Plaintiff seeks compensatory and punitive damages.

Defendants' motion seeks an order compelling arbitration. Appendix K, an Agreement to Resolve Disputes by Binding Arbitration (pages 36, 37 and 38 to the contract), states in part:

> Binding arbitration is the process of resolving a dispute or a grievance outside a court system by presenting it for decision to an impartial third party. Both sides in the dispute agree in advance to the choice of arbitrator and certify that they will abide by the arbitrator's decision. The procedures differ from those used in the courts, especially regarding burden of proof and presentation of evidence. *Arbitration avoids costly litigation* and offers a relatively speedy resolution as well as privacy for the disputants. (emphasis added)
>
> . . . .
>
> *Any direct arbitration costs incurred by you will be borne by you. Costs of arbitration, including our legal costs and attorney's fees, arbitration fees and similar costs will be the responsibility of the resident.* (emphasis added)

Plaintiff contends the arbitration agreement is unconscionable (both substantively and procedurally) and unenforceable, citing to *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.,* 140 Ariz.383 (1984), (although customers typically adhere to standardized agreements and are bound by them, they are not bound to terms which are beyond the range of reasonable expectation), *Maxwell v. Fidelity Financial Services, Inc.,* 184 Ariz. 82 (1995) (there was no bargaining press and the terms are unduly oppressive and unfairly surprising to Plaintiff), *Clark v. Renaissance West, LLC*, 232 Ariz. 510 (App. 2013) (the agreement was substantively unconscionable because the fees and cost to arbitrate were so excessive as to deny a potential litigant the opportunity to vindicate his or her rights), and *Broemmer v. Abortion Services of Phoenix*, 173 Ariz. 148 (1992) (there are two judicial limits on adhesion contracts/provisions: (1) a provision that does not fall within the reasonable expectations of the weaker party will not be enforced against him; and (2) a provision even if consistent with the reasonable expectations of the parties will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable).

Defendants argue: (1) adhesion contracts are enforceable (citing to *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co*., 140 Ariz. 383 (1984); (2) adhesion contracts are enforceable regardless of whether Plaintiff read it or appreciated its full effect (citing to *Rocz v. Drexel Burnham Lambert, Inc*., 154 Ariz. 462 (App. 1987); (3) there is no requirement to draw a person's attention to every provision in a contract; (4) a reasonable person would understand the

arbitration agreement and thus there was no substantive unconscionability (citing to *Harrington v. Pulte Homes*, 211 Ariz. 241 (App. 2005); (5) the arbitration agreement is not unconscionable because of the costs allocation since Plaintiff will not be precluded from vindicating her rights; and (6) there was no disparity in bargaining power because Plaintiff's daughter could seek another facility of her choosing. Also, Defendants contend the Federal Arbitration Act preempts state rules that discriminate against arbitration or ban it on a particular class of cases, citing to *Marmet Health Care Ctr., Inc. v. Brown,* 132 S. Ct. 1201 (2012) and *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015). Arbitration contracts must be interpreted as any other contract, citing to *Kindred Nursing Ctrs., Ltd. Ptrsp. v. Clark*, 137 S.Ct. 1421 (2017).

The Court finds the contract here (1) was drafted by Defendants; (2) Plaintiff's daughter had little opportunity to review the contract; (3) the arbitration terms were not verbally explained to her; and (4) Plaintiff's daughter had no opportunity to bargain with Defendants. The director of the Mariposa facility testified she typically reviews the terms of the contract with clients by reading the title of each appendix to the client. She does not read each paragraph to a client. Although her current practice is to have the client initial each page of the contract when it is signed, that practice did not exist when these documents were signed by Plaintiff's daughter. In addition, Mariposa now provides clients with a copy of the contract in advance of the meeting to sign documents. The director also testified she does not know what arbitration is like and does not know the costs involved.

The Court also finds Plaintiff's resources are inadequate to allow her to participate in arbitration. After the incident at Mariposa which is the subject of this litigation, Plaintiff was moved to a different facility that is more expensive than Mariposa. Plaintiff's current living expenses are approximately $11,000 per month. Plaintiff has a small pension and the proceeds from the sale of her home which are being used to pay her current living expenses. Plaintiff's assets will be exhausted in two years. Plaintiff's attorneys have agreed in writing to advance expenses and costs to bring her case. There are no exclusions. Plaintiff incurs interest on any advances made by her attorneys to bring her case.

Plaintiff's expert witness testified at the evidentiary hearing that arbitration of a case like this will costs on average between $16,000 and $22,000 for the arbitrator's fees. Jury fees for this case would cost between $1,696 and $2,261. Case preparation costs (expert witness fees, deposition costs, obtaining records) should be about the same whether the parties proceed by arbitration or trial however some costs could arguably be streamlined for an arbitration hearing. The expert also opined that it is uncommon to require a plaintiff to pay a defendant's costs even if the plaintiff prevails at arbitration.

Considering the facts and circumstances here, the Court finds the arbitration agreement falsely stated that arbitration avoids costly litigation. The Court also finds the provision in the arbitration agreement that requires a plaintiff to pay all costs of arbitration even if plaintiff

prevails is unduly oppressive, unfairly surprising, and not within the range of the reasonable expectation of most people in this circumstance. Further, the fees and costs to arbitrate required by this arbitration agreement are excessive and would deny many potential litigants the opportunity to vindicate their rights.

Considering the totality of the circumstances, the Court finds the arbitration agreement, Appendix K to the contract, is unduly oppressive, unenforceable, and unconscionable. This is not a situation where the parties freely and fairly entered into an agreement to arbitrate disputes and contract law provides this agreement should not be enforced by the courts. See *Broemmer v. Abortion Services of Phoenix*, 173 Ariz. 148 (1992).

For the reasons stated:

IT IS ORDERED denying the Motion to Compel Arbitration filed August 9, 2018.

IT IS FURTHER ORDERED granting Plaintiff's Motion to Declare Arbitration Agreement Unenforceable filed August 28, 2018.