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IN THE

SUPREME COURT OF THE STATE OF ARIZONA

CONCETTA RIZZIO, an unmarried woman, Plaintiff/Appellee, vs. 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 **DEFENDANTS'/APPELLANTS' RESPONSE TO PLAINTIFF'S/APPELLEE'S PETITION FOR REVIEW**

Defendants/Appellants Surpass Senior Living, LLC; Gilbert AL Partners, LP; Gilbert AL GP, LLC; and Brianne Schmitz (hereinafter Mariposa Point) request that the Arizona Supreme Court deny the petition

for review. The court of appeals was not required to give deference to the findings of a superior court judgment when analyzing legal conclusions based on a record, interpreting a contract, and deciding a motion to compel arbitration. The Arizona Court of Appeals reached the correct legal conclusions with regard to substantive and procedural unconscionability, and reasonable expectations. The United States Supreme Court charged courts with examining the financial reality of whether a person will have to pay arbitration costs and whether that person can afford those costs. Ms. Rizzio will not pay any litigation costs, including arbitration fees. Therefore, the existence of arbitration costs does not preclude her from moving forward with the case.

Mariposa Point requests that it be awarded its attorney's fees in responding to the petition.

I. THE CORRECT STANDARDS OF REVIEW WERE APPLIED

The courts employ a de novo standard of review to a denial of motion to compel arbitration. Slip op. at 4 ¶ 13; *see also Allstate Prop. And Cas. Ins. Co. v. Watts*, 244 Ariz. 253, 256 ¶ 9 (App. 2018). A de novo standard of review applies to mixed questions of law and fact. *Id*. at 9 ¶ 30; *see also Craven v. Huppenthal*, 236 Ariz. 217, 218 ¶ 5 (App. 2014). When there is no conflict in the evidence and the issue is whether the trial court correctly applied the law to those facts, appellate courts are "not bound by the

conclusions of the trial court, but are at liberty to draw [their] own legal conclusions from the admitted facts." *Sanders v. Brown*, 73 Ariz. 116, 117 (1951); *see also Tovrea Land Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 114 (1967). Further, courts must be mindful of new devices and arguments by litigants and lower courts to declare an arbitration provision against public policy. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). Thus, the Arizona Court of Appeals was required to be extra vigilant in analyzing the totality of the trial court's ruling.

II. THE APPLICATION OF THE FEDERAL ARBITRATION ACT WAS A KEY ISSUE THAT THE TRIAL COURT REFUSED TO CONSIDER

Nothing is more antagonistic to the primacy of federal law than refusing to rule on whether the Federal Arbitration Act (FAA) applied to the case. The trial court's refusal to consider the FAA is an example of an overt act to avoid the proper application of the law. *See Epic Sys.*, 138 S. Ct. at 1623. The Arizona Court of Appeals, however, quickly disposed of the issue and ruled that the FAA applied. Slip op. at 4 ¶ 14. Ms. Rizzio does not challenge this portion of the opinion.

III. PROCEDURAL UNCONSCIONABILITY WAS NOT PRESENT

The court of appeals was bound under the Supremacy Clause to place the arbitration agreement on an equal footing with any other contract and could not apply a contract defense specific to an arbitration provision. *Id*. at

5 ¶ 15 (*quoting AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also Perry v. Thomas*, 482 U.S. 482, 493 n. 9 (1987). Application of a state contract rule is invalid if the application of that rule interferes with the fundamental attributes of arbitration under the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Consequently, the FAA places limitations on state contract defenses. *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 750 (Cal. 2015).

Because she refused to apply the FAA, Judge Stephens' analytical framework for the entire hearing and her substantive ruling were doomed from the outset. The trial court overruled objections during the evidentiary hearing that certain questions were improper because contract-neutral rules had to be applied. (App. 1 at 016:19 – 017:14; 019:1-3) Judge Stephens violated the fundamental premise of the FAA and ruled that individual pages were not initialed and the terms of the document were not explained to Ms. Georgianni. (App. 3 at p. 174) The court of appeals reviewed the record under a neutral lens, however, and correctly concluded that the document was not presented in a procedurally unconscionable manner.

Ms. Rizzio was admitted to Mariposa Point in April 2017. (App. 1 at 014:13-17) Ms. Rizzio was being transferred from assisted living to memory care, a higher level of care, in September 2017. Ms. Georgianni signed a ***second set*** of documents. The arbitration document was a separate,

stand-alone form. Ms. Georgianni signed the arbitration document, but chose not to read what she signed. (*Id*. at 023:10-23; 026:9-22)

Arizona law does not require any party to a contract to explain a provision in a document to the other side. Slip op. at 6 ¶ 19. In *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), the Supreme Court invalidated a Montana law on the location of an arbitration provision and the font that had to be used for an arbitration clause. The Arizona Court of Appeals applied *Casarotto* and ruled that the Arizona courts could not impose special notice provisions regarding an arbitration clause. Arizona law has long rejected the contract defense that the person neglected to read a contract and should not be bound by its terms. *Rocz v. Drexel Burnham Lambert, Inc.*, 154 Ariz. 462, 466 (App. 1987). Thus, Ms. Georgianni's claim that she failed to read the document was to no avail and the court of appeals properly applied *Rocz*.

The court of appeals was free under the de novo standard of review to evaluate Ms. Georgianni's testimony regarding what happened. This case involved a mere transfer from one unit to another within the building and no pressure was placed on Ms. Georgianni to sign the documents in September. Instead, Ms. Georgianni wanted the process to go fast because she just wanted to know what she needed to sign. Slip op. at 6 ¶ 19.

In a commercial setting, one side typically drafts the agreement, whether it be insurance documents. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383 (1984) (insurance); *Harrington v. Pulte Homes Corp.*, 211 Ariz. 241 (App. 2005) (house); or obtaining a cell phone, *Baron v. Sprint Corp.*, 2019 U.S. Dist. LEXIS 184435 at *2-3 (D. Md. 2019) (cell phone). This Court recognized over thirty-five years ago that standardized documents may not be the result of bargaining between the parties on all the terms, or a sales person presenting the form may not know of a clause in the form. Nevertheless, the form contract is still enforceable. *Darner Motors*, 140 Ariz. at 393-94. The court of appeals did not err in concluding that a standardized form document here did not meet the criteria for procedural unconscionability. Slip op. at 6 ¶ 18.

IV. THE COURT OF APPEALS CORRECTLY APPLIED SUBSTANTIVE UNCONSCIONABILITY LAW

The Arizona Court of Appeals concluded that it was substantively unconscionable to enforce the provision in the arbitration document that presumptively required Ms. Rizzio to pay all arbitration costs, including Mariposa Point's share. Slip op. at 7 ¶ 22. Mariposa Point is ***not*** submitting a cross-petition for review on that ruling.

A. The Severability Ruling was Correct

Ms. Georgianni signed a separate arbitration document. That document contained many provisions, one of which the court of appeals found enforceable. The arbitration agreement also contained a clause that states that if one provision is found invalid, the remaining provisions shall remain in effect. (App. 6 at pg. 244, ¶ 7) The trial court was specifically advised about this provision, (App. 2 at 157:7-25), but did not apply it. In the briefing below, Ms. Rizzio did not argue the merits of the severability clause.

The court of appeals was obligated to analyze the contract's severability provision under the de novo standard of review. *Andrews v. Blake*, 205 Ariz. 236, 240 ¶ 12 (2003). It was appropriate to apply the severability provision because courts must interpret arbitration contracts "as written." *Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

B. The Mere Existence of Arbitration Fees is not Unconscionable

If there was no provision on how arbitration fees would be paid, then the document would be silent on the topic. Slip op. at 7 ¶ 23. Mere silence on payment of arbitration fees is not a reason to invalidate an arbitration contract. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000); slip op. at 7 ¶ 24.

At oral argument, Ms. Rizzio said that her position was ***not*** that any arbitration costs was per se unconscionable. *See* https://www.youtube.com/watch?v=UJQEep5vqRg (approximately 22:45). In the petition, however, Ms. Rizzio argued yet again that she should never be required to pay any arbitration fee. (Pet. at 14, 15). Nothing in the FAA or the Arizona arbitration laws provides that payment of any arbitration fee is a defense to a motion to compel arbitration. *See* 9 U.S.C. § 2; A.R.S. § 12-3006(A). Federal and state law both contain an inherent assumption that arbitration fees will be paid. Under state law, the Arizona Legislature has expressly acknowledged that arbitration fees do exist because the legislature made the public policy decision that parties would pay arbitration fees and then the prevailing party could seek arbitration costs as part of an award. A.R.S. § 12-3021(D). Arbitration fees work the same way as taxable costs. The Arizona courts cannot second guess that legislative decision and rule that payment of any arbitration fees is substantively unconscionable as a matter of contract law. Reaching such a conclusion would be tantamount to a judicial negation of a policy decision made by the legislature.

C. Arbitration Fees do not Prohibit Ms. Rizzio's Case from Proceeding

In *Green Tree*, the Supreme Court stated that it might be possible that arbitration costs could not be imposed on a party if those costs would

"***preclude***" Ms. Rizzio from presenting her case. *Green Tree*, 531 U.S. at 90. The evidence must show that the costs are an outright bar because the Court has used the synonyms like prevent, forbid, and eliminate. *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

The ability to prosecute a civil claim does not mean a litigant is entitled to most efficient or cost-effective manner of litigation. This notion was rejected in *Italian Colors* regarding whether individual claims would be cost-effective given likely expert fees to present a claim versus the likely recovery, or whether splitting arbitrable and non-arbitrable claims was more expensive, inefficient, and potentially redundant. *KPMG, LLP v. Cocchi*, 565 U.S. 18 (2011) (*per curiam*); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1984).

The premise of *Green Tree* and *Italian Colors* was economic reality. Here, the reality is that Ms. Rizzio is not going to pay ***any litigation costs***. She is not going to pay experts, filing fees, or the charges for deposition transcripts. Ms. Georgianni testified that she expected that all litigation costs would be paid by her attorney as they were incurred, including any fees charged by an arbitrator. (App. 1 at 045:21-24; 046:24 – 47:7) Winn Sammons, Ms. Rizzio's own expert, also admitted that the retainer agreement did not exclude arbitration costs as litigation costs that would be paid/advanced by an attorney and Mr. Sammons testified that arbitration

costs would paid by counsel. (App. 2 at 124:3-14) The economic reality is that Ms. Rizzio's claim is not eliminated or precluded based on the existence of arbitration expenses.

During the oral argument, Judge McMurdie asked an important question of counsel for Ms. Rizzio on whether it would be pertinent if Ms. Rizzio had a rich aunt/relative who agreed to pay all litigation costs. *See* https://www.youtube.com/watch?v=UJQEep5vqRg (starting at 24:30). Ms. Rizzio admitted that "absolutely" that would be a relevant question regarding arbitration costs. There is no legal or analytical distinction between a relative agreeing to pay litigation costs and an attorney who agrees to pay those costs.

The Arizona Court of Appeals followed the mandates by the United States Supreme Court in concluding that Ms. Rizzio's claim will not be eliminated by the existence of arbitration costs. Ms. Rizzio will not be forced to make an actual financial choice between paying for her medical care, or paying the bills from an arbitrator, an expert or any other litigation vendor.

The appellate court here also properly distinguished *Clark v. Renaissance West, LLC,* 232 Ariz. 510 (App. 2013). That case was not decided under the FAA. *Clark* did not include evidence of the contingency fee agreement, nor did the record explore whether the litigant would pay the

any litigation charges as they were incurred. The parties assumed that Clark would have to pay any arbitration fees. The record here proves that Ms. Rizzio does not have to pay arbitration fees.

D. Plaintiffs' Other Cases are Distinguishable

Castillo v. CleanNet USA, Inc., 358 F. Supp. 3d 912 (N.D. Cal. 2018), is distinguishable from the case here on several grounds. First, a key portion of that case was what portions of *Armendariz v. Foundation Health Psychare Servs., Inc.*, 6 P.3d 669 (Cal. 2000), remained valid after the *Green Tree* decision in 2000. The case also involved the application of a California law pertaining to specific legal claims, which are not present in Arizona. Finally, while there was evidence regarding Castillo's limited income, the record implies that Castillo would pay costs.

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997), is similarly distinguishable. This case predated *Green Tree* as well as other decisions on litigation costs such as *Italian Colors* (rejecting argument regarding inefficiency of individualized claims). The case did not involve examination of a contingency fee agreement in which all litigation costs were advanced. Nor did the record contain sworn testimony that Cole would not be obligated to pay arbitration costs, which is the case here. Finally, *Cole* did not involve consideration of a state statute, which is evidence of public policy, in which a legislative body already accepted the premise that

litigants in arbitration would be paying arbitration fees. A.R.S. § 12-3021(D).

Nesbitt v. FCNH, Inc., 811 F.3d 371 (10th Cir. 2016), is also distinguishable from the instant case. While there was mention of Nesbitt's inability to afford arbitration, the circuit court did not have testimony that Nesbitt would not have to pay arbitration costs for his case to proceed. In fact, the case was limited in holding that the written enrollment arbitration agreement was internally inconsistent and thus ambiguous regarding the availability of a fee award to Nesbitt. *Nesbitt* also involved the application of Colorado wage and hour laws, which is not the case here.

E. Reasonable Expectations

The court of appeals properly reversed the trial court's ruling on reasonable expectations. In *Darner Motor*, this Court held that boilerplate agreements are enforceable, and also recognized that these documents may have unknown terms and "even unknowable" provisions. 140 Ariz. at 393-94. People are still "assenting to terms" in such documents. *Id*. at 391, 394.

Darner Motor did not hold that unknown terms had to be explained to the other side. *See Crawford Prof. Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d. 249, 265 (5th Cir. 2014) (applying Arizona law). Ms. Rizzio's argument that arbitration costs had to be explained to her is not a contract-neutral position. *See Casarotto*, 517 U.S. at 687; *Sanchez*, 353 P.3d at 751.

It is simply another scheme to thwart the application of the FAA. *Cf. Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (Kentucky ruling that power of attorney document had to have specific language to waive a jury trial violated the FAA).

The trial court committed legal error in applying *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 173 Ariz. 148 (1992). *Broemmer* should have been argued and decided under the FAA because traveling from Iowa to Arizona for medical care is interstate commerce. *Broemmer* used arbitration-specific language, applied the facts to just one legal context, but not all Arizona contracts, and was antagonistic to the enforcement of the FAA under an existing precedent. *Perry v. Thomas*, 482 U.S. 482 (1987). *Broemmer* is an example of an appellate decision from an era in which courts were thwarting the policy goals of enforcing arbitration provisions. Slip op. at 10 ¶ 32.

Courts have preached for years that citizens cannot claim ignorance of the law. *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971); *Jennings v. Woods*, 194 Ariz. 314, 326 ¶ 60 (1999). Arbitration laws have existed for almost 100 years. 9 U.S.C. § 14; 43 Stat. 883 (1925); A.R.S. § 12-1501, *et seq*; H.B. 127, 25th Leg., 2d Reg. Sess. (Ariz. 1962); A.R.S. § 12-3001 *et seq*. Since the early 1960's, Arizona's Legislature has presumed that arbitration costs would be handled like any other litigation

expense and awarded to a prevailing party. A.R.S. § 12-1510. Arbitration clauses exist in satellite TV agreements, employment contracts, car purchases, home sales, cell phone contracts, and long-term care documents. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Gilmer v. Interstate/Johnson Corp*., 500 U.S. 20 (1991)*; Baron*, 2019 U.S. Dist. LEXIS 184435 at *2-*3; *Jones v. GMC*, 640 F. Supp.2d 1124 (D. Ariz. 2009); *Mathews v. Life Care Centers of Am. Inc.*, 217 Ariz. 606, 177 P.3d 867 (Ct. App. 2008); *Harrington, supra.* Ninety-five years after the passage of the FAA, the presence of an arbitration provision cannot be considered a surprise or bizarre term. *Harrington*, 211 Ariz. at 252 ¶ 39.

The one exception Ms. Rizzio argued in the petition was that she would not have signed if she had known about arbitration costs. The presence of a subjective belief is not sufficient to establish an exception under *Darner Motor*. There has to be evidence that Ms. Georgianni ***led Mariposa Point to believe*** that she would not sign this form agreement if she had to pay any arbitrator's fees. *Darner Motor*, 143 Ariz. at 391; slip op. at 9 ¶ 31. There was no such evidence here.

The court of appeals correctly found that there was no violation of the reasonable expectations doctrine.

F. There was no Agreement to Pay Costs

Ms. Rizzio incorrectly claimed that Mariposa Point agreed to pay costs during the oral argument. Counsel conceded that if Mariposa Point proceeded to arbitration and lost, and there was an order to pay the arbitration costs of its opponent, then it would have to pay those costs. *See* https://www.youtube.com/watch?v=UJQEep5vqRg (approximately at 38:20). The statement of counsel is consistent with both the language of the document, as well as the public policy in Arizona that the costs incurred by a prevailing party in arbitration can be recovered as part of the arbitration award. A.R.S. § 12-3021(D).

V. ADDITIONAL ISSUES PRESENTED BELOW THAT MAY BE CONSIDERED IF THE PETITION IS GRANTED

Pursuant to ARCAP 23(f)(2), Mariposa Point lists the following issues presented below for consideration if the petition for review is granted.

A. Whether under current Supreme Court decisions the "effective vindication" dictum, which was the underpinning for *Green Tree* remains a valid doctrine. (Op. Br. at 37-38)

B. Whether *Green Tree* should still be applied. (Op. Br. at 38-39)

C. Whether arbitration costs should be a valid defense and/or consideration of arbitration costs constitutes an impermissible revision to the defenses enumerated in the arbitration statutes. (Op. Br. at 39-45)

VI. REQUEST FOR ATTORNEYS' FEES

Pursuant to A.R.S. § 12-341.01, Mariposa Point requests an award of its attorney's fees in responding to this petition.

CONCLUSION

For the foregoing reasons, Defendants/Appellants request that the Arizona Supreme Court deny the petition for review.

Dated this 10th day of April, 2020.

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