

FILED

FEBRUARY 18, 2015

Court of Appeals
Division III
State of Washington

No. 32880-5-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SCOTT WOODWARD, Personal Representative of the ESTATE OF
VIRGINIA MAY WOODWARD; SCOTT WOODWARD and
CHRISTINE WOODWARD,

Plaintiffs-Respondents

v.

EMERITUS CORPORATION; BROOKDALE SENIOR LIVING
COMMUNITIES, INC.; FATIMAH AWAD and JOHN DOE AWAD;
MINDY ROSS and JOHN DOE ROSS,

Defendants-Appellants

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Vic L. VanderSchoor)

BRIEF OF APPELLANTS

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I. INTRODUCTION

Scott Woodward, acting under a durable power of attorney, reviewed and signed a two-page, stand-alone “Agreement to Resolve Disputes By Binding Arbitration” on behalf of his mother Virginia May Woodward prior to her admission as a resident in an assisted living facility operated by Emeritus Corporation. The arbitration agreement was entirely optional, and it specifically gave Woodward an opportunity to “opt-out” within fifteen days. The agreement stated, in plain and simple terms, that the parties agreed to resolve all disputes—including personal injury claims—through binding arbitration and not through a lawsuit.

Yet, after Ms. Woodward passed away, Woodward filed a lawsuit against Emeritus claiming that his mother’s death was caused by a fall she suffered during her residency. Emeritus moved to compel arbitration. Woodward conceded that the claims belonging to his mother’s estate fell within the scope of the agreement, but argued the agreement could not be enforced because it was substantively and procedurally unconscionable. The trial court apparently agreed, and denied Emeritus’s motion without stating the basis of its decision or holding an evidentiary hearing.

That ruling was erroneous and must be reversed. The arbitration agreement is not substantively unconscionable. Its discovery rules and cost-shifting provisions are enforceable under settled Washington and

federal law; and, if Woodward does prevail on the estate's statutory claim, the attorneys' fee term may be severed without invalidating the agreement as a whole. The agreement is not procedurally unconscionable either. It is unambiguous, and Woodward was under no undue pressure to sign it. His misrepresentation claim is equally futile; as a matter of law, one cannot rely on alleged representations that contradict the plain language of the agreement. The estate's claims must be referred to binding arbitration.

II. ASSIGNMENT OF ERROR AND STATEMENT OF ISSUES

The trial court erred when it denied Emeritus's motion to compel arbitration of the Woodward estate's survivorship claims. CP 384-85 (Order Denying Motion to Compel Arbitration and Stay Proceedings). The issues pertaining to this assignment of error are:

1. Does the arbitration agreement cover the claims asserted by Woodward on behalf of the estate of Virginia May Woodward for violation of the Vulnerable Adult Statute and negligence? **Yes.**

2. Did Woodward fail to satisfy his burden of showing that the arbitration agreement was unenforceable on the grounds of substantive unconscionability? **Yes.**

3. Did Woodward fail to satisfy his burden of showing that the arbitration agreement was unenforceable on the grounds of procedural unconscionability? **Yes.**

III. STATEMENT OF THE CASE

A. Factual Background.

Scott Woodward is the son of Virginia May Woodward and personal representative of her estate. CP 283 (Woodward Decl., ¶ 2). In September 2007, Mrs. Woodward executed a durable power of attorney designating Woodward as her attorney-in-fact with authority to, among other things, “make arrangements for support,” “execute ... contracts,” and “refer to arbitration” disputes “whether before or after suit may be actually commenced.” *Id.*; CP 48-52. In late 2012, Woodward arranged to have Mrs. Woodward become a resident of Emeritus at Richland Gardens (“Richland Gardens”), an assisted living community located in Benton County, Washington. CP 285 (Woodward Decl., ¶ 20). Emeritus Corporation (“Emeritus”) operated Richland Gardens at the time of Mrs. Woodward’s residency. CP 240 (Answer, ¶ 3).

On November 28, 2012, Woodward visited Richland Gardens to review and sign various residency-related documents on behalf of Virginia May Woodward. CP 36-38 (Ross Decl., ¶ 24 & Exs. A, C-U). He provided Mindy Ross, Richland Gardens’ Executive Director, a copy of the durable power of attorney. CP 286 (Woodward Decl., ¶ 29). During the meeting, which lasted over an hour, Ms. Ross went over each document with Woodward before he signed it. *Id.* (Woodward Decl.,

¶¶ 22, 23). One of the documents Woodward reviewed and signed that day was a two-page, stand-alone document entitled Agreement to Resolve Disputes By Binding Arbitration (“the Agreement”). CP 45-46. By its terms, the Agreement was entirely optional. *Id.* (“Admission to [Richland Gardens] is not contingent upon signing this Agreement.”).

The Agreement states that, in the event the parties cannot settle a dispute in good faith between themselves, the dispute “**shall be resolved exclusively by binding arbitration**” CP 45 (emphasis in original).

The scope of the Agreement is expansive; it covers:

any action, dispute, claim or controversy of any kind, whether in contract or in tort, statutory or common law, personal injury, property damage, legal or equitable or otherwise, arising out of the provision of assisted living services provided under the terms of any agreement between the Parties, including ... dispute[s] involving acts or omissions that cause damage or injury to either Party ...

Id. The Agreement reiterates “*that claims, including personal injury claims that the Resident may have against the Community cannot be brought in a lawsuit before a judge or jury*” CP 46 (italics in original).

It further provides that Woodward had “the right to have this Arbitration Agreement reviewed by legal counsel prior to signature” and that it “may be revoked by written notice ... within 15 days of signature.” CP 46. Woodward did not elect to revoke the Agreement within the 15-day opt-out period, or at any time thereafter. CP 38 (Ross Decl., ¶ 27).

Virginia May Woodward moved into Richland Gardens on December 28, 2012, thirty days after the Agreement was signed by Woodward. CP 35 (Ross Decl., ¶ 2). Woodward alleges that Mrs. Woodward fell and broke her hip in March 2013 during an attempted transfer from a chair to a wheelchair. CP 9-10 (AC, ¶¶ 16, 17). Mrs. Woodward was hospitalized and never returned to Richland Gardens. *Id.* (AC, ¶¶ 21-23). She passed away on June 30, 2013. *Id.* (AC, ¶ 23).

B. Procedural Background.

Woodward filed suit in June 2014, and an amended complaint in September 2014. CP 1-15. The amended complaint contains two types of claims: survivorship claims asserted on behalf of Mrs. Woodward's estate for violation of the Vulnerable Adult Statute ("VAS") and negligence; and individual wrongful death claims asserted on behalf of Woodward and his sister, Christine, as statutory beneficiaries. CP 11-14. At bottom, Woodward alleges that the actions of Emeritus and its employees caused Mrs. Woodward to break her hip while at Richland Gardens, and that the injury contributed to her death. CP 4 (AC, ¶¶ 23, 24).

Emeritus moved to compel arbitration on October 16, 2014. CP 16-34. Emeritus sought to compel arbitration of the estate's survivorship claims and, because Woodward signed the Agreement, Woodward's wrongful death claims; Emeritus did not seek to compel Christine

Woodward's individual claims. CP 20. In support of the motion, Ms. Ross filed a declaration stating that, during their meeting, she "asked Mr. Woodward if he had any questions or concerns regarding the Arbitration Agreement, and he stated that he did not." CP 38 (Ross Decl., ¶ 25).

Woodward filed a motion for an evidentiary hearing the next day. CP 232-38. The motion was not supported by any affidavit, but asserted that "Scott [Woodward] contends that a specific discussion about the arbitration agreement occurred and that Ms. Ross misrepresented the agreement." CP 237. Emeritus opposed the motion for an evidentiary hearing—pointing out, among other things, that Woodward failed to articulate what Ms. Ross supposedly said or how he could have been misled given the Agreement's unambiguous terms. CP 355-64.

Woodward filed an opposition to Emeritus's motion to compel arbitration on October 23, 2014. CP 250-81. Woodward asserted a grab-bag of arguments, contending the Agreement was both substantively and procedurally unconscionable. *Id.* Woodward also filed a declaration in which he claimed (for the first time) that, when reviewing the Agreement, he asked Ms. Ross what arbitration meant, and was told: "if 'we had an issue that might have legalities involved, then we would work it out face-to-face.'" CP 286 (Woodward Decl., ¶¶ 26, 27).

On October 24, 2014, the trial court held a non-evidentiary hearing on Emeritus’s motion to compel arbitration. The court did not ask a single question of either party. *See* 10/24/14 Hr. at 3-19. At the conclusion of the hearing, the trial court summarily denied Emeritus’s motion—stating simply, “I am not going to compel arbitration. I don’t think it’s appropriate”—and entered a written order to the same effect. *Id.* at 19; CP 384-85. The court never ruled on Woodward’s motion for an evidentiary hearing. Emeritus filed a timely appeal of the order denying the motion to compel arbitration. CP 387-92; *Weiss v. Lonnquist*, 153 Wn. App. 502, 509-10 224 P.3d 787 (2009) (order denying motion to compel arbitration is appealable as a matter of right under RAP 2.2(a)(3)).

IV. ARGUMENT

A. Standard of Review.

Both parties agree that Emeritus’s motion to compel arbitration is governed by the Federal Arbitration Act (“FAA”).¹ The FAA provides

¹The FAA governs arbitration agreements to the fullest extent permitted by the Commerce Clause. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 267, 273-77 (1995). It is settled that the FAA applies to arbitration agreements covering services provided by long-term care facilities. *See Marmet Health Care Ctr. v. Brown*, --- U.S. ---, 132 S.Ct. 1201 (2012); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 759 S.E.2d 727, 731-33 (S.C. 2014); *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 970-71 (D. Minn. 2012). Moreover, as discussed below, the Agreement itself provides that it “shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.” CP 46.

that arbitration agreements “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. “Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Washington public policy also favors arbitration. *Id.* at 301 n. 2.

The FAA creates a body of substantive law that both federal and state courts must apply to determine arbitrability. *Id.* at 301 (citing *Perry v. Thomas*, 482 U.S. 483, 489 (1987)). This law requires courts to “indulge every presumption ‘in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.’” *Id.* (quoting *Moses H. Cone*, 460 U.S. at 25). Although courts presume arbitrability, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements” under the FAA. *Id.* (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

This Court reviews *de novo* a trial court’s decision to deny a motion to compel arbitration. *Id.* at 302 (citing *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001)). The interpretation of an

arbitration agreement is a question of law. *ACF Property Management, Inc. v. Chaussee*, 69 Wn. App. 913, 919, 850 P.2d 1387 (1993). Similarly, “[t]he existence of an unconscionable bargain is a question of law for the courts.” *Zuver*, 153 Wn.2d at 302 (quoting *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995)). “The party opposing arbitration bears the burden of showing that the agreement is not enforceable.” *Id.* (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)).

B. Woodward Agreed To Arbitrate The Survivorship Claim.

The “first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.” *Kamaya Co., Ltd. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 712, 959 P.2d 1140 (1998) (citation omitted). Because of the FAA’s policy in favor of arbitrability, “although the intentions of the parties as expressed in the agreement control, those intentions are generously construed as to issues of arbitrability.” *Id.* at 714 (quoting *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602 (1993)). Thus, arbitration must be compelled except in those rare cases where it can be said “‘with positive assurance’ that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Id.* (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

This is not one of those cases. Here, the Agreement contains broad language in which the parties expressly manifested their intent to arbitrate the claims at issue here. The Agreement provides in relevant part:

[A]ny action, dispute, claim or controversy of any kind, whether in contract or in tort, statutory or common law, personal injury ... or otherwise, arising out of the provision of assisted living services, healthcare services, or any other goods or services provided under the terms of any agreement between the Parties, ... **shall be resolved exclusively by binding arbitration** ...

CP 45 (emphasis in original). All of Woodward's claims "aris[e] out of" the "assisted living services" Virginia May Woodward received during her stay at Richland Gardens. CP 7-15. Woodward did not argue otherwise. Nor did he dispute that—absent a finding of unconscionability—the Woodward estate's survivorship claims (for violation of the VAS and negligence) are covered by the Agreement and subject to binding arbitration.² The trial court should have granted Emeritus's motion to compel arbitration based on the plain language of the Agreement alone.

² Although Woodward conceded that the survivorship claim is arbitrable if the Agreement is enforced, he argued that his wrongful death claims are non-arbitrable because he signed the Agreement only as Virginia May Woodward's representative, and not in an individual capacity. CP 260-62 (citing *Woodall v. Avalon Care Ctr.-Federal Way*, 155 Wn. App. 919, 231 P.3d 1252 (2010) (decendent's survivorship claims subject to arbitration agreement, but heirs' individual wrongful death claims not subject to agreement)). Emeritus believes Woodward's wrongful death claims are arbitrable—after all, he signed the Agreement—but it has elected not to raise that aspect of the trial court's ruling on appeal.

C. The Agreement Is Not Unenforceable Due To Substantive Or Procedural Unconscionability.

Although the FAA controls the question of arbitrability generally, when a party seeks to avoid an otherwise applicable arbitration agreement on the basis of unconscionability, state law controls. *Doctor's Assocs.*, 517 U.S. at 687. Courts may not refuse to enforce arbitration agreements, however, where the state law applies only to such agreements. *Id.*; *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747 (2011) (“When state law prohibits outright the arbitration of a particular type of claim ... [t]he conflicting rule is displaced by the FAA.”). Washington law recognizes two types of unconscionability—substantive and procedural. *Zuver*, 153 Wn.2d at 303 (citing *Nelson*, 127 Wn.2d at 131). The Agreement is neither substantively or procedurally unconscionable as a matter of law.

1. Substantive Unconscionability: The AAA Consumer Rules And Cost-Splitting Terms Are Enforceable; And The Attorneys’ Fee Term May Be Severed Without Invalidating The Entire Agreement.

A term is substantively unconscionable only where it is “one-sided or overly harsh,” “[s]hocking to the conscience,” “monstrously harsh,” or “exceedingly calloused.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004) (internal marks omitted) (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975) & *Nelson*, 127 Wn.2d at 131). Severance is the usual remedy for substantively

unconscionable terms; only where such terms “pervade” an arbitration agreement, should a court “refuse to sever those provisions and declare the entire agreement void.” *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013). Here, only one aspect of the Agreement is arguably unenforceable in the event Woodward prevails on the merits of his VAS claim—the attorneys’ fee term—and that term easily may be severed without invalidating the Agreement as a whole.

a. Arbitration Conducted In Accordance With The AAA Consumer Rules Is Not Unconscionable.

The Agreement provides that arbitration “shall be administered in accordance with the procedures in effect for consumer arbitration adopted by the American Arbitration Association.” CP 45. The current version of those rules, the Consumer Arbitration Rules, was recently amended and became effective September 1, 2014. Woodward argued below that these consumer arbitration rules—and, in particular, its procedures related to discovery—are inadequate for disputes of this kind and render the Agreement substantively unconscionable. CP 266-71 (“courts have found arbitration provisions to be substantively unconscionable in part because of the procedural limitations contained in the arbitration rules”).

Woodward's substantive challenge to the AAA's consumer arbitration rules must be rejected for a variety of reasons, both legal and factual.³

It is settled that limits on discovery do not render an arbitration agreement substantively unconscionable. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (“by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” (internal marks and citation omitted)). After all, “[l]imited discovery rights are the hallmark of arbitration. ... The fact that an arbitration may limit a party’s discovery rights is not ‘substantive unconscionability.’ If it were, every arbitration clause would be subject to challenge on that ground.” *State ex rel. Ocwen Loan Servicing, L.L.C. v. Webster*, 752 S.E.2d 372, 398 (W.Va. 2013) (quoting *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 689-90, 99 Cal. Rptr. 2d 809 (2000)).

³ Woodward also argued that the AAA's consumer rules could not apply by their own term because assisted living services do not fall within the AAA's definition of a “consumer agreement.” CP 257, 268-69. But the rules clearly state that the rules will apply when the parties “have specified that these Consumer Arbitration Rules shall apply” *or* “the arbitration agreement is contained within a consumer agreement, as defined ..., that does not specify a particular set of rules.” CP 320 (Rule R-1(a)). In other words, even if the arbitration agreement is not part of a “consumer agreement,” the parties may specifically agree to have the consumer arbitration rules apply to their dispute. As noted below, the arbitrator ultimately has discretion over which rules to apply.

More importantly, in *Concepcion*, the Supreme Court held that the FAA preempted any claim that an arbitration agreement is substantively unconscionable based on discovery limitations. *Concepcion*, 131 S.Ct. at 1747 (“An obvious illustration ... would be a case finding unconscionable ... consumer arbitration agreements that fail to provide for judicially monitored discovery.”); *Wallace v. Red Bull Distrib. Co.*, 958 F. Supp. 2d 811, 824 (N.D. Ohio 2013) (“*Concepcion* explicitly rejected the argument that discovery restrictions in arbitration agreements are unconscionable.”); *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 1008 (N.D. Cal. 2012) (in light of *Concepcion*, “limitations on arbitral discovery no longer support a finding of substantive unconscionability”). This Court can and should reject Woodward’s challenge to AAA procedures on this basis alone.

Beyond that, Woodward did not cite any pre- or post-*Concepcion* authority finding AAA’s consumer rules substantively unconscionable. There is no such authority. *Riensch v. Cingular Wireless, LLC*, 2006 WL 3827477, *9 (W.D. Wash. Dec. 27, 2006) (finding AAA consumer rules not substantively unconscionable). Nor could Woodward explain how the rules are one-sided or unfair. They are neither. The rules allow the arbitrator to order the parties to produce documents, identify witnesses, and exchange any other information (*i.e.*, depositions) the “arbitrator determines ... is necessary to provide for a fundamentally fair process.”

CP 325 (Rule R-22). The arbitrator may issue protective orders, orders to compel, sanctions and “any other enforcement orders that the arbitrator is empowered to issue under applicable law.” *Id.* (Rule R-23).⁴

Nothing more is required. Courts have uniformly rejected claims of substantive unconscionability where, as here, the “rules leave the decision about which discovery tools to use, and in what manner, to the discretion of the arbitrator.” *Booker v. Robert Half Intern., Inc.*, 413 F.3d 77, 83 (D.C.Cir. 2005); *see also Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 984, 104 Cal. Rptr. 3d 341 (2010); *Clerk v. First Bank of Del.*, 735 F. Supp. 2d 170, 184-85 (E.D.Pa. 2010); *Cockerham v. Sound Ford, Inc.*, 2006 WL 2841881, *3 (W.D. Wash. Sept. 29, 2006). Not only do the consumer rules give the arbitrator discretion to allow the full panoply of discovery, it gives him or her authority to jettison those rules altogether. CP 322 (Rule R-1(e): “If an objection is filed, the arbitrator shall have the authority to make the final decision on which AAA rules will apply.”).

At bottom, Woodward’s challenge to the AAA consumer rules do not show substantive unconscionability because they are premised entirely

⁴ In connection with his opposition to Emeritus’s motion, Woodward submitted only excerpts of the AAA Consumer Arbitration Rules. Because Benton County local rules forbid reply briefs, Emeritus had no opportunity to file a complete version of the rules. This Court can take notice of the rules, however, which are available from the AAA at: <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased>.

on “speculation about what *might* happen in the arbitral forum,” rather than some right the Agreement (or AAA rules) forbids. *Booker*, 413 F.3d at 77 (italics in original). Importantly, Woodward is not left without a remedy in the event his (unfounded) fears materialize; a court may vacate an arbitration award when a party was denied a “full and fair” hearing because the procedures used by the arbitrator were a “sham, substantially inadequate or substantially unavailable.” *Fed. Deposit Ins. Corp. v. Air Florida System, Inc.*, 822 F.2d 833, 842 (9th Cir. 1987); 9 U.S.C. § 10(a)(3) (award may be vacated if arbitrator refuses to hear pertinent evidence or engages in misbehavior that prejudices a party). Woodward’s substantive unconscionability argument fails for this reason as well.

b. Woodward Did Not Satisfy His Burden Of Showing That The Cost-Splitting Term Is Unconscionable.

The Agreement provides that “[t]he arbitrator’s fee shall be shared equally by the Parties.” CP 46. Woodward claimed that the Agreement is substantively unconscionable because this cost-splitting term would create an “unreasonable financial burden” that will prevent the estate of Virginia May Woodward from vindicating its legal rights. CP 265-66. This argument fails as a matter of law for the simple reason that Woodward did not present any evidence whatsoever to show that the estate could not afford to pay half the costs of arbitration. Moreover, even had Woodward

satisfied his burden of proof on the issue, the non-material fee-splitting term easily may be severed, and the remainder of the Agreement enforced.

An arbitration agreement may be substantively unconscionable if it requires a party to pay costs that effectively deprive that party a forum for vindicating claims. *Zuver*, 153 Wn.2d at 307-10. But, critically, “where ... a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” *Id.* at 308 (quoting *Green Tree*, 531 U.S. at 92). Thus, a party opposing arbitration must submit admissible evidence “showing that *she* cannot afford the fees in *this* arbitration.” *Id.* at 310, n. 6 (emphasis in original); *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 327, 211 P.3d 454 (2009) (plaintiff has “burden of showing that the cost of arbitration is prohibitive by documenting his financial resources, the extra costs of arbitration, and any offer by the other party to defray the cost of arbitration”).

Woodward failed to satisfy that burden here. Emeritus moved to compel arbitration of Mrs. Woodward’s survivorship claim and Scott Woodward’s wrongful death claims only. It did not seek to compel arbitration of Christine Woodward’s individual claims. CP 19-20. Yet, only Christine Woodward filed a declaration on the issue, which stated that “[b]ecause of my low disposable income, being required to pay \$750

for every hearing or motion ... could become prohibitively expensive to me to pursue this case in arbitration.” CP 288-89.⁵ That assertion, even if true, is irrelevant because Christine Woodward has no obligation to pay arbitration costs; her individual claims are non-arbitrable, and nothing in her declaration or the record suggests that she is personally responsible for paying any portion of the estate’s expenses. *Id.* (“I am a beneficiary of my mother’s estate and am personally a plaintiff in this case.”).

For purposes of establishing “prohibitive” costs, the only issue that matters is whether the estate can afford to pay its share of the arbitrator’s fee—and, on that issue, the record is conspicuously silent. Woodward is the representative of Virginia May Woodward’s estate, and his declaration says nothing regarding the estate’s (or his own) financial resources, much

⁵ Woodward assumed the AAA’s fee schedule of \$1,500 per day would apply. CP 265. The AAA’s fee schedule will not apply, however, because there will be no AAA-appointed arbitrator. The Agreement says that arbitration shall be conducted “in accordance” with the AAA’s rules, not that the AAA shall administer the arbitration. *Gandee*, 176 Wn.2d at 605 (agreement “does not require arbitration with the AAA but only that the rules of the AAA be followed”). And, as this Court recognized, the AAA “no longer accept[s] the administration of cases involving individual patients without a post-dispute agreement to arbitrate.” *Nail v. Consol. Res. Health Care Fund I*, 155 Wn. App. 227, 230, 229 P.3d 885 (2010) (quoting AAA Healthcare Policy Statement). While the AAA’s inability to administer the arbitration prevents appointment of a AAA-arbitrator, it does not affect the validity of the Agreement. *Id.* at 234-35; *Dean*, 759 S.E.2d at 733-35; *Blue Cross Blue Shield of Ala. v. Rigas*, 923 So.2d 1077, 1092 (Ala. 2005). More to the point, as explained, Woodward presented no evidence that the estate would be unable to afford splitting the cost of the arbitrator’s fee—regardless of what rate the arbitrator charged.

less that those resources would be insufficient to pay half the arbitrator's fees in this matter. CP 282-87. Washington cases uniformly hold that the absence of any such evidence is fatal to an unconscionability claim. *Zuver*, 153 Wn.2d at 309-10; *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009); *Eckstein v. Life Care Ctrs. of Amer.*, 623 F. Supp. 2d 1235, 1237-38 (E.D. Wash. 2009). The same is true here.

Finally, even if Christine Woodward's declaration were somehow sufficient to satisfy Woodward's burden of proving the estate's inability to pay, the Agreement would not be rendered unenforceable. Rather, for the reasons described below, in that event, as the Supreme Court did in *Adler*, this Court must simply sever both the attorneys' fee and the cost-splitting terms and enforce the remainder of the Agreement—as neither term “pervades” the parties' fundamental agreement to arbitrate as a whole. *See Adler*, 153 Wn.2d at 360, n. 15 (“in the event the trial court finds the fee-splitting provision to be substantively unconscionable, it may likewise sever that provision and still compel arbitration”).⁶

⁶ Moreover, an offer by the defendant to pay the cost of arbitration moots a challenge to an arbitration agreement's cost-splitting term. *Zuver*, 153 Wn.2d at 310 & n. 7; *Adler*, 153 Wn.2d at 354; *Walters*, 151 Wn. App. at 327. If the cost-splitting term is unconscionable and cannot be severed from the Agreement, Emeritus will agree to pay the arbitrators' fees in accordance with AAA's default rule. CP 326 (“The business shall pay the arbitrator's compensation”). The Court can reject Woodward's substantive unconscionability argument on this basis as well.

- c. In The Event Woodward Prevails On His VAS Claim At Arbitration, The Attorneys' Fee Term May Be Severed And The Remainder Of The Agreement Enforced.

The Agreement provides that “[e]ach Party shall be responsible for its own legal fees.” CP 46. The VAS provides, on the other hand, that “a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorneys’ fee.” RCW 74.34.200(3). Woodward argued below that the attorneys’ fee term was substantively unconscionable because it would nullify the estate’s right to recover attorneys’ fees if it prevailed on its VAS claim. CP 263-65. Because the estate has not prevailed on its VAS claim, and may never do so, this argument is entirely speculative. But even if the estate were to prevail, and thus the attorneys’ fee term is inconsistent with Washington law, *see Adler*, 153 Wn.2d at 354-55, the proper remedy would be to sever the term—not to invalidate the Agreement as a whole.

When an arbitration agreement contains an unenforceable term, a court may sever the term and enforce the remainder of the agreement so as to fulfill “the primary intent of the parties to arbitrate their disputes.” *Id.* at 358-60. Severance “is particularly likely when the agreement includes a severability clause.” *Walters*, 151 Wn. App. at 330; *Zuver*, 153 Wn.2d at 320 (“when parties have agreed to a severability clause in an arbitration

agreement, courts often strike the offending unconscionable provisions to preserve the contract's essential term of arbitration"). A court should not invalidate the entire arbitration agreement unless the unconscionable terms are so numerous and pervasive that severing them would essentially require the court to rewrite the agreement. *See McKee v. AT & T Corp.*, 164 Wn.2d 372, 403, 191 P.3d 845 (2008); *Gandee*, 176 Wn.2d at 603.

The Supreme Court in *Adler*, and many other courts, have held that an unenforceable attorneys' fee term does not pervade the "primary thrust" of an arbitration agreement, and may be severed without invalidating the entire agreement. *Adler*, 153 Wn.2d at 359-60; *Walters*, 151 Wn. App. at 329-30; *see also Ambler v. BT Americas Inc.*, 964 F. Supp. 2d 1169, 1177 (N.D.Cal. 2013). The same is true here. Not only does the Agreement contain an express severability clause, striking the attorneys' fee term will not affect any material aspect of the Agreement, *i.e.*, what disputes are covered, who conducts the arbitration, what procedures apply, where the arbitration is held, etc. If anything, striking the term comports with the Agreement's requirement that the dispute be decided under Washington law (*i.e.*, the VAS). CP 46. For this reason as well, the Agreement cannot be invalidated on the grounds of substantive unconscionability.

2. Procedural Unconscionability: There Was No Lack Of Meaningful Choice Or Ambiguity; Nor Can Woodward Claim To Have Relied On Alleged Misrepresentations Contrary To The Express Terms Of The Agreement.

Procedural unconscionability is “the lack of meaningful choice, considering all the circumstances surrounding the transaction including ‘[t]he manner in which the contract was entered,’ 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.’” *Zuver*, 153 Wn.2d at 303 (quoting *Schroeder*, 86 Wn.2d at 260). The Washington Supreme Court has emphasized that “these three factors [should] not be applied mechanically,” and that the “key inquiry” is whether the party lacked a meaningful choice. *Id.* at 305. Because Woodward had the opportunity to read and understand the clear terms of the Agreement, and was given the option to reject or revoke it, his claim of procedural unconscionability fails as a matter of law.

a. Woodward Was Given A Meaningful Opportunity To Review And Understand The Agreement.

The Agreement was not ambiguous, nor were its key terms “hidden in a maze of fine print.” The Agreement is a stand-alone, two-page document entitled “Agreement to Resolve Disputes By Binding Arbitration,” and its plain language provided that “any” dispute, including tort claims for “personal injury,” would be subject to “binding arbitration

and not by lawsuit[.]” CP 45. Although Woodward later claimed he didn’t know what “arbitration” meant, the Agreement was clear on this point too. Immediately above the signature line, it stated:

The Resident understands that the result of this Arbitration Agreement is that claims, including personal injury claims that the Resident may have against the Community cannot be brought in a lawsuit before a judge or jury, and agrees that all such claims will be resolved as described in this Arbitration Agreement. Admission to the Community is not contingent upon signing this Agreement.

Id. (italics in original). As discussed below, regardless of what Woodward now claims he was told, “an average person” would read the Agreement as precluding a lawsuit of these very claims. *See Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 896-98, 28 P.3d 823 (2001) (no unconscionability where arbitration clause “was obvious in the fairly short contract” and “[a]n average person would read” it to cover the claims at issue).

Moreover, Woodward was not subject to “undue pressure,” *Zuver*, 153 Wn.2d at 306-07, nor denied an opportunity to read and ask questions about the Agreement before he signed it; indeed, he admits to doing both. CP 286 (Woodward Decl., ¶¶ 22-24). Just as important, Woodward never claimed he was told (or believed) he had to sign the Agreement to get his mother into Richland Gardens. Nor could he; the Agreement says just the opposite. CP 46. Courts routinely uphold similar arbitration agreements against claims of procedural unconscionability. *See Miller v. Cotter*, 863

N.E.2d 537 (Mass. 2007) (optional arbitration agreement signed upon admission to nursing home); *GGNSC Vanceburg LLC v. Hanley*, 2014 WL 1333204 (E.D. Ky. Mar. 28, 2014) (same); *Glover v. Darway Elder Care Rehab. Ctr.*, 2014 WL 931459 (M.D. Pa. Feb. 4, 2014) (same).

But there's more. The Agreement contains an opt-out clause that gave Woodward 15 days to revoke—again, without affecting his mother's residency at Richland Gardens. CP 46. This window gave Woodward even more time to review the Agreement, ask questions or consult with an attorney. *See Zuver*, 153 Wn.2d at 306 (no procedural unconscionability where plaintiff had 15 days to “to contact counsel or even [defendants] with any concerns or questions she might have” about agreement); *Luna v. Household Fin. Corp.*, 236 F. Supp. 2d 1166, 1176 (W.D. Wash. 2002) (agreement with 3-day rescission period not procedurally unconscionable). Of course, Woodward did none of these things, and never revoked the Agreement. CP 38 (Ross Decl., ¶¶ 26-27). Woodward's claim of procedural unconscionability fails for this reason too.

b. The Agreement's Choice-Of-Law Terms Do Not Result In Ambiguity Or “Procedural Surprise.”

Woodward argued below that the Agreement was procedurally unconscionable because it contains “contradictory” choice-of-law terms. The Agreement provides that the “*dispute* will be governed by the laws of

the state in which the Community is located” (*i.e.*, Washington) and, also, that the “*Arbitration Agreement* shall be governed by and interpreted under” the FAA. CP 46 (emphasis added). Woodward claimed these two terms conflict and would result in a “procedural surprise” because it is unclear whether the FAA or the Washington Uniform Arbitration Act (“WUAA”) controlled. CP 274-75 (citing *Brown v. MHN Gov’t Servs., Inc.*, 178 Wn.2d 258, 306 P.3d 948 (2013)).⁷ Woodward’s effort to find ambiguity in the Agreement is baseless. There is no conflict and no surprise. The two terms simply address different issues.

Under the FAA, parties may agree on whether the FAA or state law will supply the “rules for arbitration” and, separately, which law will supply the “substantive, decisional law.” *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002). Thus, the Supreme Court has held specifically that there is no conflict where an agreement contains choice-of-law terms that address arbitrability, on one hand, and substantive law, on the other. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52,

⁷ Woodward’s reliance on *Brown, supra*, for this proposition was heavily misplaced. In *Brown*, the parties’ arbitration agreement provided that arbitration would be conducted in “accordance with the provisions of the American Arbitration Association.” The Washington Supreme Court concluded that, under California case law, the agreement was procedurally unconscionable because it did not specify which AAA rules applied and the defendant had taken inconsistent positions on the issue. 178 Wn.2d at 267-68. There is no similar authority in Washington and, as discussed above, unlike *Brown*, the Agreement specifies which AAA rules apply.

64 (1995) (“the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.”). That is precisely what the Agreement does here. The two terms reflect the parties’ clear intent that the FAA will govern arbitrability, and that Washington law will govern the merits. The Agreement is a model of clarity, not ambiguity.⁸

In any event, Woodward did not claim to have been confused or misled by these provisions. Nor was he able to identify what “procedural surprise” would result, or difference it would make, if the WUAA rather than the FAA governed the issue of arbitrability. Although there are slight differences between the two acts, none of those differences are relevant here.⁹ Both provide that arbitration agreements are “valid, enforceable, and irrevocable” except upon such grounds as exist “at law or in equity”

⁸ Woodward’s claim of “procedural surprise” was particularly disingenuous in light of his exclusive reliance on the FAA when opposing Emeritus’s motion to compel arbitration and moving for an evidentiary hearing. CP 235; 258-59. Plainly, his attorneys were not confused as to which of the Agreement’s choice-of-law terms governed arbitrability.

⁹ As an example of the purported differences between the two acts, Woodward pointed out that the FAA allows a jury to decide whether the parties entered into an arbitration agreement, while the WUAA does not. CP 275 (citing 9 U.S.C. § 4 & RCW 7.04A.070(1)). Here, however, there is no dispute that the parties entered into the Agreement; the only dispute is whether the Agreement is unconscionable. Even under the FAA, that is a question of Washington law to be determined by the court. *Simpson v. Inter-Con Sec. Systems, Inc.*, 2013 WL 1966145, *2 (W.D. Wash. May 10, 2013). Indeed, when Woodward invoked the FAA to move for an evidentiary hearing, he did not ask for a jury. CP 232-38.

for revocation. RCW 7.04A.060(1); 9 U.S.C. § 2. And both recognize that a court can consider state law defenses to invalidate such an agreement. *Weidert v. Hanson*, 178 Wn.2d 462, 465, 309 P.3d 435 (2013). In short, Washington law governs Woodward’s unconscionability defense under either the FAA or WUAA and, for the reasons described herein, Woodward failed to establish that defense as a matter of law.

c. Woodward Cannot Rely On Alleged Fraud In The Execution To Claim Procedural Unconscionability.

Richland Gardens’ executive director, Mindy Ross, testified she specifically asked Woodward if he had any questions or concerns about the Agreement, and Woodward said he did not. CP 38 (Ross Decl., ¶ 25). Woodward disputed that account, filing a declaration in which he claimed he asked Ross what arbitration meant and was told if “we had an issue that might have legalities involved, then we would work it out face-to-face.” CP 286 (Woodward Decl., ¶¶ 26-27). Woodward argued that this alleged “misrepresentation” constituted “fraud in the execution” and rendered the Agreement procedurally unconscionable. CP 271-74. Not so. Woodward could not justifiably rely on any such statement as a matter of law and, even if he could, the trial court could not properly resolve the parties’ dispute without holding an evidentiary hearing, which it did not do.

Parties have a duty to read any contract they sign, and a party who voluntarily signs a contract may not later attempt to avoid that contract on the grounds that he was ignorant of its contents. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (citing *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973)). This rule does not apply if one party misrepresents a contract's contents to induce the other to enter into it, and the party justifiably relied on the representation. *Id.* at 384-85; *Yakima Cty. (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 389-90, 858 P.2d 245 (1993). Critically, however, reliance must be reasonable under the circumstances; “a party may not be heard to say that he relied upon a representation when he had no right to do so.” *Skagit State Bank*, 109 Wn.2d at 384.

Ross did not make the statement Woodward attributes to her. But even if she did, Woodward had no right to rely on any such statement:

It requires little in the way of diligence to ascertain the truth of a representation made as to the legal effect of plain and unambiguous documents which a party has the opportunity to read. A party generally cannot escape the duty of reading the documents (the duty to “investigate” by simply reading the documents in order to know their contents) in the absence of a showing that he or she was unable to read or understand the language used, that there was a special relation of trust and confidence in the representing party, that some artifice was employed to obtain his or her signature, or that something was done to prevent his or her reading the document.

Id. at 385 (citation omitted). In short, a party cannot justifiably rely on a statement that contradicts the plain language of the contract. *See also Williams v. Joslin*, 65 Wn.2d 696, 698, 399 P.2d 308 (1965) (“Since the evidence of the actual receipts was before the respondent, he had no right to rely on any oral representation that contradicted it.”); *Wash. Fed. Sav. & Loan Ass’n v. Alsager*, 165 Wn. App. 10, 18, 266 P.3d 905 (2011) (plaintiff “could not justifiably relied on any oral statements given the loan documents which they signed” because the alleged statements “directly conflicted with the terms of the promissory note and deed of trust”).

This rule forecloses Woodward’s fraud in the execution argument. Woodward cannot rely on an alleged statement that “arbitration” required only that the parties try to work out issues “face-to-face” because any such statement would be contrary to the unambiguous terms of the Agreement itself. While Section 1 requires the parties to attempt to settle disputes “in good faith between themselves,” Section 2 clearly specifies what happens “in the event that such disputes cannot be resolved” that way: all claims “including personal injury claims ... cannot be brought in a lawsuit” but, instead, “shall be resolved exclusively by binding arbitration,” “conducted by a single arbitrator,” that will result in a decision that “may be entered as a judgment in any court having jurisdiction.” CP 45-46. No one who bothered to read the Agreement would be confused about its meaning.

Nor can Woodward avail himself of the various exceptions to the no-right-to-rely rule. As discussed above, there certainly was no special relationship of trust and confidence between Woodward and Emeritus, who dealt with each other at arm's-length; Woodward was under no undue pressure to sign the Agreement because it was entirely optional and his mother would not become a resident of Richland Gardens for another 30 days; and, not only was he given an opportunity to read the Agreement and have it "reviewed by legal counsel prior to signature," he had another 15 days to revoke after he signed it. *Id.* Woodward should have read the entire Agreement, and his failure to do so renders his purported reliance on Ross's alleged statements unjustified as a matter of law.

While this Court can reverse on this basis, the opposite is not true. Even if Woodward were entitled to rely on statements that contradict the Agreement, the most this Court could do is remand for an evidentiary hearing. In *Adler*, an employee said he was forced to sign an arbitration agreement under the threat of termination and that he could not understand the agreement due to his limited English skills. 153 Wn.2d at 349. The employer disputed that account. *Id.* After noting that the parties "offer remarkably different versions of the facts," the Washington Supreme Court held that it could not "make a determination of procedural

unconscionability without further factual findings,” and it remanded the case to the trial court for further proceedings. *Id.* at 350-51.

The situation here is the same. Ross testified that she made no statements about the Agreement. CP 38 (§ 25). Woodward said she did, and that he relied on them. CP 286 (§§ 26-29). The trial court could not accept Woodward’s version of events without assessing credibility and other facts—especially since he has the burden of proof. *Yakima Cty.*, 122 Wn.2d at 391. Woodward conceded this point when he moved for an evidentiary hearing to prove up his procedural unconscionability claim. CP 237 (“[b]ased on the factual dispute ... regarding the circumstances surrounding the execution of the arbitration agreement ..., the Court should hear the testimony of Ms. Ross and Scott Woodward”). The trial court—who did not rule on Woodward’s motion—either did not reach the issue or erroneously resolved the dispute in Woodward’s favor. Either way, this Court cannot affirm on this ground without findings of fact.

VI. CONCLUSION

Woodward’s various substantive and procedural unconscionability arguments are without merit. The Agreement is enforceable. This Court

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should reverse, and direct the trial court to grant Emeritus's motion to compel arbitration of the Woodward estate's survivorship claims.

RESPECTFULLY SUBMITTED this 18th day of February, 2015.

LANE POWELL PC

By *s/Ryan P. McBride*

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Mindy Ross

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington and United States that on February 18, 2015, I caused a copy of the foregoing document to be served on the following person(s) in the manner indicated below at the following address(es):

| | | |
|--|-------------------------------------|------------------------------|
| Eric B. Eisinger, WSBA No. 34293 | <input type="checkbox"/> | by CM/ECF |
| Bret Uhrich, WSBA No. 45595 | <input checked="" type="checkbox"/> | by Electronic Mail |
| Walker Heye Meehan & Eisinger, PLLC | <input type="checkbox"/> | by Facsimile Transmission |
| 1333 Columbia Park Trail, Ste. 220 | <input checked="" type="checkbox"/> | by First Class Mail |
| Richland, WA 99352 | <input type="checkbox"/> | by Hand Delivery |
| Tel: 509.735.4444 | <input type="checkbox"/> | by Overnight Delivery |
| Fax: 509.735.7140 | | |
| E-mail: eeisinger@walkerhey.com | | |
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DATED this 18th day of February, 2015, at Seattle, Washington.

s/Ryan P. McBride

Ryan P. McBride