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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

SCOTT WOODWARD, et al.

v.

EMERITUS CORPORATION, et al.

No. 328805

RESPONDENTS' BRIEF

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I. INTRODUCTION

This appeal arises from the death of Virginia Woodward. While a resident at Richland Gardens by Emeritus (“Emeritus”), an assisted living facility, Virginia¹ was dropped twice by the same staff member executing a one-person assist when Virginia’s personal care plan required two-person assists for all transfers. The first drop was not disclosed to Virginia’s family. The second drop broke Virginia’s hip and resulted in her death. This occurred within four months of Virginia moving into the facility.

In order to induce Scott Woodward, Virginia’s power of attorney, to sign an arbitration agreement as part Virginia’s admission to the facility, the facility director Mindy Ross engaged in fraud in the execution by misrepresenting the contents of the arbitration agreement. The arbitration agreement selected procedures which by their very terms were inappropriate for the type of contract and dispute at hand. The arbitration agreement also contains per se substantively unconscionable attorney-fee and cost shifting terms and creates unreasonable arbitrator compensation rates in order burden the opposing party.

Considering the systematic and egregiously unconscionable terms and conduct of Emeritus, the trial court properly concluded that the

¹ Respondents Scott Woodward and Christine Woodward, and decedent Virginia Woodward are referred to herein by their first names for the sake of clarity and brevity.

arbitration agreement was unconscionable and denied Emeritus' motion to compel arbitration.

II. STATEMENT OF THE CASE

A. Factual History

i. Emeritus Courts Virginia Woodward To Move From Wynwood To Its Facility.

From 2005 to 2012, Virginia May Woodward lived at Wynwood of Columbia Edgewater, an assisted living facility in Richland. *CP 283*. While Virginia suffered from partial paralysis due to a stroke, she retained her cognitive functions, was active at the facility and had remained in stable condition for several years. *Id.* Virginia's son Scott Woodward is a former Richland High School teacher who lives in Richland and would visit his mother several times a week. *Id.* Scott also held a general power of attorney for his mother. *Id.* Virginia's daughter Christine Woodward lives in Bellingham and would drive over to visit her mother once a month. *Id.*

In the years Virginia lived at Wynwood, representatives from Emeritus at Richland Gardens ("Richland Gardens") contacted her several times to encourage her to move to Richland Gardens. *Id.* Virginia and her family discussed moving from Wynwood due to the declining quality of their services and facilities. *Id.* In November 2012, Wynwood raised the rent by an additional \$1,000.00 per month for Virginia's services without

prior notice to her or her family. *CP 284*. In early November, Scott met with the Director for Wynwood who explained that the price increase was due to a change in the rates for two-person assists. *Id.* However, as Wynwood failed to give thirty days' notice on the rate change, the change was rescinded for November until a formal review and notice could be made. *Id.*

Virginia continued to express serious interest in moving from Wynwood. *Id.* With the family now expecting a rate increase, they began visiting other facilities. *CP 285*. Virginia had previously visited Richland Gardens to have lunch with friends. *CP 284*. She was familiar with the facility and liked the food and enjoyed seeing two staff members who had moved from Wynwood to Richland Gardens. *Id.* The facility nurse for Richland Gardens, Fahtima Awad, even made an unsolicited visit to Virginia's room at Wynwood. *Id.* Virginia told Ms. Awad about the pending rate increase and the quality of the facility. *Id.* Ms. Awad assured Virginia she would be much happier at Richland Gardens. *Id.*

In November, Scott had two meetings with Richland Gardens about moving his mother to the facility. *CP 285*. He met with Ms. Awad, facility director Mindy Ross, Christina Heilman, and a traveling corporate executive. *Id.* In the meetings, the Richland Garden employees guaranteed Virginia would always have a two-person assist when being

moved and that the well-trained staff would respond to resident calls in a much more timely fashion than Wynwood. *Id.* At the meeting, Scott was told there was a newly available room which Virginia could move into for December if they made a \$1,000 non-refundable payment. *Id.* Scott was also told to decide quickly because there was another candidate for the apartment. *Id.*

After much deliberation between Virginia, Scott and Christine, they decided to move Virginia to Richland Gardens. *Id.* Scott gave notice to Wynwood that Virginia would be moving out at the end of December. *Id.* On November 27, Scott visited the Richland Gardens facility with his wife and was told that the room was no longer available. *Id.* The room they were showed instead smelled terrible and the windows looked out over a tar roof. *Id.* Scott told Richland Gardens this would not work because Virginia was an outdoor person and needed a good view for when the weather kept her inside. *Id.* Richland Gardens showed Scott a different room which they promised could be fixed up by the end of December. *CP 286.* Richland Gardens promised that it would repaint and re-floor the room before Virginia was ready to move in. *Id.*

Upon entering the facility, Richland Gardens performed a residential baseline examination of Virginia which evaluated no less than 38 separate criteria including disease diagnoses of: hyperthyroidism,

hyperlipidemia, cerebrovascular accidents, hypertension, osteoporosis; evaluation of Virginia's skin, hearing, ability to communicate, cognitive alertness and vision; whether Virginia could be left unsupervised, used assisted/adaptive devices, could dress herself or take care of her own personal hygiene. *CP 298-303*. The evaluation went down all the way to the relatively mundane criteria of whether Virginia had any pets. *CP 301*. Each of these criteria was scored individually (presumably on a 1-100 scale with higher numbers meaning additional care). Virginia was assigned a score of 310.9, was assigned a Care Level of 7 and an additional care charge of \$2,350. *CP 303*. The baseline examination confirmed that Virginia was alert, oriented to person, place and situation, was able to communicate, and could leave the community unsupervised. *CP 298*. Further, upon entering the facility, no less than 13 different daily medication or healthcare monitoring tasks were assigned for Virginia's care. These included providing Tylenol, aspirin, Lipitor, Tums, Toprol, nifedipine, Prilosec, GlycoLax, etc., at scheduled times each day. *CP 304-05*.

ii. The Intake Meeting

On November 28, 2012, the day after he learned the new room had just become available, Scott met with facility director Mindy Ross to go through the intake paperwork for the facility. *CP 286*. The meeting took

place in Ms. Ross' office and lasted for a little over an hour. *Id.* Ms. Ross would hand Scott one paper at a time while holding the next paper in her hand. *Id.* Of the seventeen signatures required, Scott asked for further clarification on the three of them: the pharmacy change, the fee summary, and the arbitration agreement. *Id.* Ms. Ross assured Scott that Ms. Awad would handle the pharmacy change and explained the fee summary. *Id.*

For the arbitration agreement, Scott asked Ms. Ross what "arbitration" meant. *Id.* She replied that arbitration meant that if "we had an issue that might have legalities involved, then we would work it out face-to-face." *Id.* Ms. Ross then used the example of Wynwood raising the rates without notice as an example of when this would apply. *Id.* Based on this explanation, Scott signed the agreement in the space marked "Authorized Representative Signature." *CP 46; CP 286.*

iii. Emeritus Abuses And Kills Virginia

Despite the promise and contract for care, Richland Gardens immediately failed to live up to the care plan prepared for Virginia. Richland Gardens ignored the requirement that Virginia only be transferred using two-person assists, the understaffing of the facility and the lack of training of the facility's staff resulted in Virginia routinely being moved by single staff members. *CP 9.* The lack of staffing and lack of training left the staff overwhelmed and unable to provide for the

residents' most basic needs such as dental hygiene, clean clothing, and removing physical hazards from the area. *CP 10*.

Faced with chronic understaffing, lack of training, and high employee turnover, the inevitable happened. In the process of performing a single-person assist, a staff member dropped Virginia. *CP 9*. The fall resulted in substantial bruising to Virginia. *Id.* However, the incident went unreported to Virginia's family. *Id.* Around a month later, the same staff member dropped Virginia a second time while performing a single-person assist moving Virginia to her wheelchair. *CP 9-10*. This time, the fall fractured Virginia's hip. *CP 10*. Virginia was taken to the hospital where she stayed briefly before transferring to rehabilitative care, then back to the hospital, and ultimately to hospice care. *Id.* Virginia May Woodward died approximately three months after the fall that broke her hip. *CP 11*. The broken hip was listed as a contributing cause of death on her death certificate. *Id.* As noted in Emeritus' own disclosures, "[o]f all fractures from falls, hip fractures cause the greatest number of deaths and lead to the most severe health problems." *CP 125*.

iv. Terms of the Arbitration Agreement

Under the terms of the agreement, arbitration is to be "administered in accordance with the procedures in effect for consumer arbitration adopted by the American Arbitration Association" (AAA). *CP*

45. However, the agreement makes three changes to the AAA procedures. First, the location of the arbitration is changed to the Richland Gardens facility. *CP 46*. Second, the agreement requires the arbitrator fee to be split equally between Emeritus and Woodward. *Id.* Finally, the agreement requires each party to be responsible for its own attorney fees. *Id.*

Under the AAA rules, “[a]rbitrators serving on a case with an in-person or telephonic hearing will receive compensation at a rate of \$1,500 per day.” *CP 327*. Nothing in the agreement alters this rate compensation. *CP 45-46*. However, under the standard procedures, “[t]he business shall pay the arbitrator’s compensation unless the consumer, post dispute, voluntarily elects to pay a portion of the arbitrator’s compensation.” *CP 326*. This provision is altered by the agreement which requires the arbitrator fee to be split equally between the parties. *CP 46*.

Fran Forgette, a local attorney with almost twenty years of experience acting as an arbitrator, submitted a declaration regarding the compensation schedule:

[A] flat arbitrator’s fee of \$1,500 per day, regardless of whether the hearing is a fifteen minute telephonic status conference or a full day arbitration hearing is out of the ordinary, is likely unreasonable and is less likely to result in the selection of a mutually agreeable and qualified arbitrator. This would particularly hold true where the case at issue is neither routine, nor simple. The flat fee

arrangement described appears only suitable for small collection or other such civil disputes. An experienced and qualified arbitrator is unlikely to consent to such a flat fee arrangement if the matter is likely complex, will require extended prep or a long hearing, or will take careful consideration to complete and draft the decision. *CP 381*.

Also contained in the agreement are two separate and conflicting governing law clauses. One clause says the “dispute will be governed by the laws of the state in which the Community is located” while the other says that the “agreement shall be governed by and interpreted under the Federal Arbitration Act.” *CP 45-46*.

v. The Consumer Arbitration Rules

In 2005, the American Arbitration Association (“AAA”) promulgated supplemental procedures for commercial dispute resolution for what they call “consumer-related disputes.” *CP 307*. The very first procedure listed in these consumer rules is C-1, titled “Agreement of the Parties and Applicability.” *CP 310*. According to this procedure, the rules are appropriate only:

[I]n an agreement between the customer and a business where the business has a standardized, systematic application of arbitration clauses with customers and **where the terms and conditions of the purchase if standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices.** *Id.* (emphasis added).

According to this procedure, the “AAA’s most current rules will be used when the arbitration is started.” *Id.*

If the inappropriateness of these procedures was not clear enough when the agreement was executed, the current AAA rules are even more emphatic. *CP 312.* Under the current rules, the first procedure (now “R-1”) continues to address applicability. *CP 320.* R-1 substantially maintains the block quote above, and further gives examples of contracts which “typically meet the criteria for application of these Rules”, including: credit card agreements, cell phone and internet services, fitness club membership agreements, and automobile and manufactured home purchase contracts. *CP 320-21.* R-1 goes on to give examples of inappropriate scenarios for using the consumer rules, including: home construction and remodeling contracts, real estate purchase and sales agreements, and condominium or homeowner association by-laws, etc. *CP 321.*

Finally, procedure R-1 provides that “[w]hen parties have provided for the AAA’s rules... they shall have deemed to have agreed that the application of the AAA’s rules ... shall be an essential term of their consumer agreement.” *CP 320.*

The AAA consumer rules also incorporate by reference the minimum standards of due process for the AAA, called the “Consumer Due Process Protocol.” *CP 321*. Under Principle 11:

Consumers should be given:

- a. clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;
- b. reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitration rosters;
- c. notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and
- d. a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process. *CP 331*.

The agreement drafted by Emeritus and the misrepresentation of the arbitration agreement by Ms. Ross fail to meet these due process standards.

R-22 of the AAA rules governs the exchange of information. *CP 325*. Under this rule “[t]he arbitrator *may* direct (1) specific documentation and other information to be shared between the consumer and business, and (2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.” *CP 325* (emphasis added). Unless the arbitrator finds that fundamental fairness of

the process is affected, “[n]o other exchange of information beyond what is provided for in section (a) above is contemplated under these Rules.” *CP 325*. In other words, there is no mandatory discovery under the AAA rules.

This is particularly concerning as Emeritus’ litigation strategy in wrongful death and elder abuse cases is to impede discovery at all cost. *CP 334-54*. In a recent California case, *Boice v. Emeritus Corporation*, the plaintiffs’ attorneys had to move to compel Emeritus’ response on nearly every discovery request, multiples times. *Id.* This resulted in at least 14 motions to compel being granted by the court and over \$16,000.00 in discovery sanctions being imposed. *CP 341*. Despite these sanctions, Emeritus refused to provide responsive documentation to the plaintiffs as required under the rules of discovery. *CP 334-54*.

B. Procedural History

On June 27, 2014, the Complaint in this matter was filed alleging wrongful death claims on behalf of Chris and Scott as the statutory beneficiaries of Virginia, as well as a survival action through Virginia’s Estate. *CP 1*. On Thursday, October 16, 2014, Emeritus moved the court to compel arbitration, setting the hearing for the following Friday. *CP 16*. The next day, Woodward moved the trial court for an evidentiary hearing “to determine factual disputes that arise between the testimony of the

Mindy Ross and Scott Woodward in the execution of [the] arbitration agreement” noting that Ms. Ross misrepresented the arbitration agreement in discussing its terms with Scott. *CP 232-33; CP 237*. Emeritus filed a memorandum opposing the holding of an evidentiary hearing. *CP 355-64*.

On October 24, 2014, the matters were brought before the court for hearing.² Judge VanderSchoor reminded counsel that he had read all the documents and reviewed the file in preparation for the hearing, asking counsel to limit argument to 10 minutes. *RP 3*. He further counseled the parties that he only needed argument on the motion to compel arbitration, as the argument “probably will resolve” the need for an evidentiary hearing. *RP 3*. During the hearing, counsel for Emeritus did not even attempt to defend Mr. Ross’ declaration as the factually correct version of events. *See RP 4-10; RP 17-18*. Instead, counsel asserted that statement made by Ms. Ross’ “was not a misrepresentation” *RP 7; RP 17*.

At the conclusion of the hearing, the court ruled as follows:

² Throughout the appellant’s brief, Emeritus seems to imply that the court did not give this hearing its full consideration. *See e.g. Appellant’s Brief, pg. 1* (“trial court apparently agreed, and denied Emeritus’s motion without stating a basis...”); *pg. 7* (“The court did not ask a single question of either party... [a]t 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’”). This implication is completely unsupported by the record. Judge VanderSchoor noted on the record that he went out of his way to find and review all of the pleadings despite Emeritus’ failure to submit bench copies. *RP 3*. The court specifically thanked both attorneys for the briefing and arguments presented. *RP 19*.

I want to [thank] counsel for their briefing and arguments. I am not going to compel arbitration. I don't think it's appropriate. *RP 19*.

Surprisingly, counsel for Emeritus had prepared a proposed order denying the motion to compel arbitration. *RP 19; CP 384-85*. This order, which contained no findings of fact, was the order entered by the court. *CP 384-85*.

III. ARGUMENT

A. Standard of Review.

Generally, arbitrability is a question of law and is thus reviewed *de novo*. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008) (citing *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004)). When the validity of an agreement to arbitrate is challenged, courts apply contract law principles. *Id.* General contract law defenses such as unconscionability may invalidate an arbitration agreement. *Id.* Whether a contract is unconscionable is a question of law. *Id.* However, the court, at its discretion, may take evidence or allow for limited discovery on factual issues surrounding the unconscionability of an arbitration agreement. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 335, 103 P.3d 773 (2004). “[W]here competing documentary evidence [has] to be weighed and conflicts resolved,” the correct standard of review is

whether the trial court decision is supported by substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174, 1180 (2003).

In *Rideout*, Sara Rideout was brought before the court on a motion for contempt. *Id.* at 343-44. The record before the trial court contained numerous declarations filed by both parties. *Id.* at 345. Ms. Rideout had the “right to request the opportunity to present live testimony,” but declined to do so. *Id.* at 353. After reviewing the submitted materials, the trial court concluded that Ms. Rideout had acted in bad faith and held her in contempt. *Id.* at 348. On appeal, the Washington Supreme Court affirmed. *Id.* at 357. In doing so, the Court held that even though the trial judge’s decision rested solely upon written submissions, “trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence.” *Id.* at 352.

We agree with the Court of Appeals that no Washington appellate court reviewing documentary records has weighed credibility. Indeed, the general rule relating to de novo review applies only when the trial court has not *seen* or heard testimony requiring it to assess the credibility of witnesses... We hold that the Court of Appeals correctly concluded that the substantial evidence standard of review should be applied here where competing documentary evidenced had to be weighed and conflicts resolved. *Id.* at 350-51.

Therefore, when conflicting factual evidence is presented by declaration, the appellate court reviews to determine whether the trial

court's decision is supported by substantial evidence. *Id*; see also *Dolan v. King Cnty.*, 172 Wn.2d 299, 310, 258 P.3d 20, 27 (2011) (substantial evidence is the appropriate standard of review “where competing documentary evidence must be weighed and issues of credibility resolved”).

In this matter, Ms. Ross submitted a declaration which addressed her meeting with Scott. *CP 38*. The declaration simply states “[p]rior to signing, I asked Mr. Woodward if he had any questions or concerns regarding the Arbitration Agreement, and he stated he did not.” *CP 38*. Scott on the other hand, submitted a declaration detailing the meeting. *CP 286*. According to Scott, the meeting took place in Ms. Ross’ office and lasted for a little over an hour. *Id*. Of the seventeen signatures required, Scott asked for further clarification on the three of them: the pharmacy change, the fee summary, and the arbitration agreement. *Id*. Ms. Ross assured Scott that Ms. Awad would handle the pharmacy change and explained the fee summary. *Id*.

For the arbitration agreement, Scott asked Ms. Ross what “arbitration” meant. *Id*. She replied that arbitration meant that if “we had an issue that might have legalities involved, then we would work it out face-to-face.” *Id*. Ms. Ross then used the example of Wynwood raising the rates without notice as an example of when this would apply. *Id*.

Because Ms. Ross' and Scott's version of events are mutually exclusive, Woodward moved the trial court for an evidentiary hearing "to determine factual disputes that arise between the testimony of the Mindy Ross and Scott Woodward in the execution of [the] arbitration agreement", noting that Ms. Ross misrepresented the arbitration agreement in discussing its terms with Scott. *CP 232-33, 237*. However, Emeritus opposed the motion for an evidentiary hearing. *See CP 355-379*. At the hearing, Judge VanderSchoor reminded counsel that he "had read all the documents and reviewed the file" and that he only needed "argument on the motion to compel arbitration" as it would resolve the motion for an evidentiary hearing. *RP 3*. Neither party objected to this direction from the court. *RP 3-4*.

The trial court was not required to enter written findings of fact on the motion to compel arbitration. *Weiss v. Lonquist*, 153 Wn. App. 502, 513 n. 8, 224 P.3d 787 (2009). To the extent Emeritus assigns error to the form of the trial court's order it is invited error because it was Emeritus' proposed order. *Humbert/Birch Creek Const. v. Walla Walla County*, 145 Wn. App. 185, 192, 185 P.3d 660 (2008); *see Appellant's Brief, pg. 31; CP 384-85; RP 19*. Moreover, as Emeritus now assigns further error to the trial court's ruling based on the conflicting declarations without an evidentiary hearing, this is also invited error. *Appellant's Brief, pg. 31*;

Humbert, 45 Wn. App. at 192 (2008). If Emeritus did not ask for an evidentiary hearing at the trial court, it cannot raise a claimed need for an evidentiary hearing as an issue on appeal. RAP 2.5(a); *see Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 24, 851 P.2d 689 (1993). The standard of review on substantive unconscionability remains de novo. *Adler*, 153 Wn.2d at 342. However, as to procedural unconscionability, the proper standard of review is whether the trial court’s decision was supported by substantial evidence. *Rideout*, 150 Wn.2d at 352.

B. The Arbitration Agreement Is Procedurally Unconscionable.

In Washington, courts must decline to enforce unconscionable arbitration agreements. Whether a contract is unconscionable is a question of law. *McKee*, 164 Wn.2d at 383. “Unconscionability is a ‘gateway dispute’ that courts must resolve because a party cannot be required to fulfill a bargain that should be voided.” *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013). Washington recognizes two types of unconscionability: substantive unconscionability and procedural unconscionability. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). The law does not require a finding of both procedural and substantive unconscionability before declaring a contract unenforceable. *Adler*, 153 Wn.2d at 347 (holding that substantive unconscionability alone may invalidate an agreement); *Gorden v. Lloyd Ward & Associates, P.C.*,

180 Wn. App. 552, 564, 323 P.3d 1074 (2014) (finding of procedural unconscionability is sufficient and therefore “we need not address substantive unconscionability”).

Here, the circumstances surrounding the execution of the arbitration agreement were procedurally unconscionable because Ms. Ross affirmatively misrepresented the meaning of “arbitration” to Scott in order to induce him into signing the agreement. The agreement contains contradictory provisions, and can only be enforced in a manner that would result in unconscionable procedural surprise.

i. The Arbitration Agreement Is Procedurally Unconscionable Because Emeritus Engaged In Fraud In The Execution By Misrepresenting The Contents Of The Arbitration Agreement.

The Court should conclude that the substantial evidence supports the trial court’s denial of the motion to compel arbitration because the agreement was executed under circumstances rendering the agreement procedurally unconscionable. Procedural unconscionability examines the circumstances surrounding the execution of the agreement to determine if the parties had a reasonable opportunity to understand the terms of the contract, or whether the important terms were hidden. *Adler*, 153 Wn.2d at 347. The procedural unconscionability inquiry is determined on a case-by-case basis and the factors “should ‘not be applied mechanically without

regard to whether in truth a meaningful choice existed.” *Id.* at 350 (quoting *Nelson*, 127 Wn.2d at 131).

Failure to counsel and advise the other party about the consequences of relinquishing legal protections by entering an arbitration agreement can constitute procedural unconscionability when a special relationship exists between the parties. *Gorden*, 180 Wn. App. at 564 (attorney-client); see also *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 45, 929 P.2d 420 (1997) (care facilities have a “special relationship” and heightened duty of care toward their residents).

A related contract defense which renders a contract void and focuses on the circumstances surrounding the signing of the agreement is fraud in the execution. *Pedersen v. Bibioff*, 64 Wn. App. 710, 722, 828 P.2d 1113 (1992). Fraud in the execution occurs:

If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.

Id. (citing Restatement (Second) of Contracts § 163 (1979)). A misrepresentation is an “an assertion that is not in accord with the facts.” *Yakima Cnty. Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 390, 858 P.2d 245 (1993) (quoting Restatement (Second) of Contracts §

159 (1981)). A misrepresentation is fraudulent when made with the intent to induce the other party “to manifest assent” and where the speaker:

- (a) knows or believes that the assertion is not in accord with the facts, or
- (b) does not have the confidence that he states or implies in the truth of the assertion, or
- (c) knows that he does not have the basis that he states or implies for the assertion.

Restatement (Second) of Contracts § 162 (1981) (*section cited favorably in Marks v. Washington Ins. Guar. Ass'n*, 123 Wn. App. 274, 283, 94 P.3d 352 (2004)). Fraud in the execution, like other contract defenses, can be asserted to prevent enforcement of an arbitration agreement. *See Hotels Nevada v. L.A. Pac. Ctr., Inc.*, 144 Cal. App. 4th 754, 763, 50 Cal. Rptr. 3d 700 (2006).

At the motion hearing, counsel for Emeritus did not even attempt to defend Ms. Ross’ declaration as the factually correct version of events. *See RP 4-10; 17-18*. Instead, counsel asserted that Ms. Ross’ statement “was not a misrepresentation” *RP 17*. This argument appears to have (wisely) been abandoned on appeal as claiming arbitration means “[if] we had an issue that might have legalities involved, then we would work it out face-to-face” is not a misrepresentation stretches the bounds of credulity. Instead, for the first time on appeal, Emeritus asserts the statement wasn’t made by Ms. Ross and that even if it was, Scott had no right to rely on Ms. Ross’ misrepresentation. *Appellant’s Brief, pg. 28*. However, the case

that Emeritus relies on for this proposition, *Skagit State Bank v. Rasmussen*, is grossly inapposite to the case at hand.

First, *Skagit* is an innocent misrepresentation case where the court specifically concluded that there was no claim of “fraud, deceit or coercion” on the part of the person making the representation. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 384, 745 P.2d 37, 38 (1987). In the case, Robert Hayton signed a promissory note with a personal guarantee where his partner explained that the paperwork allowed the partner to encumber the farm without affecting Hayton’s interest. *Id.* at 379-80. Hayton admitted that he did not read the promissory note and did not even look at the front of the document. *Id.* at 180. He signed the paperwork on the back of a truck bed. *Id.* at 382. Amazingly, Hayton testified that *if he had* read the promissory note, he would have understood what it meant. *Id.* The court also noted that Hayton was a sophisticated and experienced high-value real estate purchaser. *Id.* at 380. Based on these facts, it is no surprise that the court concluded that Hayton had no right to rely on his partner’s explanation of the forms considering his own lack of diligence.

In contrast, the substantial evidence overwhelmingly supports the position that Ms. Ross intentionally misrepresented the arbitration agreement to Scott in their meeting. First, the meeting took place over the course of more than an hour. *CP 286*. Scott was deliberative in reviewing the documents and asked questions about multiple forms. *CP 286*. When

Ms. Ross and Scott reviewed the arbitration agreement, he specifically asked her what arbitration meant and she said it was where the parties “work it out face-to-face.” *CP 238*. She followed the explanation up with an innocuous example from Virginia’s previous facility. *CP 238*.

Emeritus argues that the agreement is unambiguous and that no reasonable person could mistake its contents. *Appellant’s Brief, pgs. 29-30*. This argument is nonsensical because Scott in fact stopped and asked Ms. Ross what “arbitration” meant and she provided an incorrect definition. If anyone reading the agreement would know what it meant, then why would Scott bother to ask and why would Ms. Ross bother to provide a dishonest answer? As noted, Scott did not know what arbitration meant. *CP 238*. And there is nothing in the content of the agreement that would correct Ms. Ross’ misrepresentation that arbitration is where the parties “work it out face-to-face.” *CP 45-46*.

As the no right to rely rule is inapplicable to a case where fraud and deceit are present, the question remains whether the substantial evidence supports the conclusion that Ms. Ross engaged in fraud in the execution by misrepresenting the agreement. The answer is a resounding yes. There is no question that “work it out face-to-to” as a definition of arbitration is a statement not in accord with the facts. The fact that Ms. Ross went over all the intake sheets with Scott to obtain his signature on the documents before Virginia could be admitted to the facility shows a

clear intent to induce Scott's "manifestation of assent" to the agreement. *CP 238*. Finally, Ms. Ross' declaration claiming that she asked Scott if he had any questions about the agreement and that Scott replied "no" shows a clear and continued intent to misrepresent terms & the factual circumstances surrounding the execution of the arbitration agreement. *CP 38*.

Whether the Court looks at this as a question of procedural unconscionability or fraud in the execution committed by Emeritus, the result should be the same. By misrepresenting the contents of the agreement, Emeritus prevented Scott Woodward from understanding the nature of the agreement and thus being able to engage in a free choice about whether to sign the arbitration agreement. Therefore, this Court should affirm the denial of the motion to compel arbitration because the substantial evidence shows that the circumstances surrounding the execution of the agreement were procedurally unconscionable and/or amounted to fraud in the execution.

ii. Emeritus' Own Appellants' Brief Shows That The Arbitration Agreement Results In Unconscionable Procedural Surprise.

The Court should conclude that the motion to compel arbitration was properly denied because the agreement results in unconscionable procedural surprise. As noted at the hearing, the agreement contains conflicting terms as to the choice of law. Additionally, Emeritus' own

appellants' brief illustrates further procedural surprise with even better examples.

In *Brown v. MHN Government Services, Inc.*, the Washington Supreme Court reviewed whether an arbitration agreement was unconscionable under California law. *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 263, 306 P.3d 948 (2013). In addressing procedural unconscionability, the court noted that the arbitration agreement did not contain "procedural oppression" in that the arbitration agreement was clearly marked as a mandatory arbitration agreement. *Id.* at 267. However, the lack of procedural oppression was not a bar to a determination that the agreement was procedurally unconscionable. *Id.* Instead, the court recognized that an arbitration agreement could be procedurally unconscionable if it presents a "procedural surprise in the form of an ambiguity." *Id.* In that matter, it was not clear which subset of arbitration rules applied to the case. *Id.* The court, in looking at the agreement from the eyes of the parties (who were "sophisticated bargaining parties" but not attorneys), held that this lack of clarity resulted in procedural surprise to the party seeking to avoid arbitration and was thus procedurally unconscionable. *Id.* at 268; accord *Gorden*, 180 Wn. App. at 563-64 (citing favorably to *Brown* and holding the inconsistent

venue and jurisdiction clauses rendered the agreement procedurally unenforceable).

In addition to the inconsistent choice-of-law provisions, the appellants' brief illustrates two additional examples of procedural surprise. First, Emeritus claims that the AAA arbitrator compensation schedule does not apply. *Appellant's Brief*, pg. 19 n. 5. Yet in the very next footnote, Emeritus agrees to pay the arbitrator's compensation if the term is unconscionable, citing the very AAA procedure setting arbitrator compensation at \$1,500.00 a day. *Appellant's Brief*, pg. 20 n. 6.

Were this not enough, the brief goes on to claim that the agreement which states: "[a]rbitrations shall be administered in accordance with the procedures in effect for consumer arbitration adopted by the [AAA]" does not actually mean that the consumer arbitration rules apply. *Appellant's Brief*, pg. 13 n. 3. Emeritus claims that the arbitrator gets to choose what rules apply. *Id.* Under Emeritus' interpretation, Woodward could not have relied on the clause designating "the procedures in effect for consumer arbitration adopted by the [AAA]" to mean that AAA consumer arbitration rules will be used. Instead, unknown and unspecified procedures might apply. The Court could not ask for a better example of procedural surprise. *See Brown*, 178 Wn.2d at 268 (counsel's changing position on which arbitration rules apply shows procedural surprise). Therefore, the

Court should conclude that the agreement contains unconscionable procedural surprise.

C. The Arbitration Agreement Is Substantively Unconscionable

Substantive unconscionability involves cases where a clause or a term of the contract is one-sided, overly harsh, or requires that a party give up a substantive right that they are entitled to under statute. *See Adler*, 153 Wn.2d at 344. Procedural unconscionability looks to “circumstances surrounding” the transaction to determine if the party had a reasonable opportunity to understand the terms of the contract. *Zuver*, 153 Wn.2d at 304 (*quoting Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). Isolated substantively unconscionable terms can be severed from the arbitration agreement. *Hill*, 179 Wn.2d at 58. However, when the severance “significantly alters[s] both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause,” the court must invalidate the entire agreement. *Id.* (*quoting Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 607, 293 P.3d 1197, 1201 (2013)).

Here, the agreement was substantively unconscionable because it seeks to bind the plaintiffs to arbitration procedures which by their very terms are inappropriate for this type of dispute, the compensation for an arbitrator selected under the AAA consumer rules is unlikely to result in

the selection of a qualified arbitrator, and the arbitration agreement is substantively unconscionable because the agreement requires each side to pay one-half of the costs and for each side to bear its own attorney fees.

i. The Arbitration Agreement Is Substantively Unconscionable Because It Mandates The Use Of Procedures Which By Their Own Terms Should Not Be Used For This Type Of Contract Or Dispute.

The trial court properly denied the motion to compel arbitration because the designated procedures, by their very terms, are inappropriate for this type of dispute. The AAA consumer rules are designed for agreements where “the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms...” *CP 320*. Notably, this clause is not just part of an introduction or explanation, it is a direct quote from the very first rule under the procedures designated by the arbitration agreement. *Id.*

Substantive unconscionability is presented where a contract, clause or term of the contract is one-sided, overly harsh, or exceedingly calloused. *Nelson*, 127 Wn.2d at 131. Where the arbitration procedures do not allow a party to adequately vindicate their rights, the arbitration agreement is unenforceable. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939-40 (4th Cir. 1999); *see generally Jackson v. Payday Fin., LLC*,

764 F.3d 765, 779 (7th Cir. 2014) (payday loan agreement designating Cheyenne River Sioux Tribal Nation as arbitrator was void not just because of possibility of bias, but because the forum was completely inappropriate procedurally). There is no better example of an exceedingly calloused agreement than one that designates arbitration procedures where the first rule of the procedures in effect states “these procedures are inappropriate for your type of contract.”

In its brief, Emeritus attempts to change the argument by claiming that because the AAA consumer rules have been determined not to be substantively unconscionable in some cases, they can never be deemed unconscionable. *Appellant’s Brief*, pg. 14. Emeritus cites *Riensch v. Cingular Wireless, LLC*, 2006 WL 3827477 (W.D. Wash. Dec. 27, 2006), a cell phone contract case. It shouldn’t be surprising that the AAA consumer arbitration rules were conscionable for a cell phone contract case when procedure R-1 states: “contracts that typically meet the criteria for application of these Rules” include “Telecommunications (cell phone, ISP, cable TV) agreements.” *CP 320*. The proper inquiry is whether the procedures are conscionable for the contract and dispute at hand. It is clear that they are not because the procedures themselves explicitly inform the parties that they are not.

Next, Emeritus asserts that in *AT&T Mobility LCC v. Concepcion*, the Supreme Court held that discovery limitations and class arbitration waivers could never be considered unconscionable terms. *Appellant's Brief*, pg. 14. This is an incorrect statement of law. In *Concepcion*, the Court was confronted with California's *Discover Bank* rule, which effectively made class arbitration waivers per se unconscionable in small disputes. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). The plaintiff sought to sue AT&T because it advertised free phones where the customer was still charged with sales tax, resulting in a \$30.22 dispute, and AT&T moved to compel arbitration. *Id.* at 1744. In the arbitration agreement before the Court, when a consumer filed a notice of dispute, AT&T was solely responsible to pay all arbitration costs for non-frivolous claims. *Id.* at 1744. The consumer could seek injunctive relief and punitive damages. *Id.* Finally, if the arbitrator awarded more than AT&T's offer of settlement, the customer received a \$7,500.00 minimum recovery plus double attorney fees. *Id.* The Court was understandably skeptical that a class arbitration waiver was unconscionable where the arbitration rules put the customer in a better position than it would be in a class action. *Id.* at 1753.

In discussing why the *Discover Bank* rule was preempted by the FAA, the Court discussed situations where unconscionability frameworks

would have a disparate impact on arbitration agreement enforceability. The *Discover Bank* rule, which invalidates class arbitrations waivers, while nominally applicable to any type of contract, effectively only applies to arbitration agreements. *Id.* at 1747. The Court hypothesized that a similar rule which holds that all discovery limitations are unconscionable would also disparately impact arbitration agreements. *Id.* Therefore, *Concepcion* did not hold that all class arbitration waivers and all discovery limitations are per se conscionable. Rather, a court must review the designated procedures in a case-by-case basis to determine whether they are one-sided or overly harsh for the dispute at hand.

Indeed, the proper interpretation of *Concepcion* comes from our own Washington Supreme Court:

[Appellant] argues that the above analysis is preempted by the United States Supreme Court's opinion in *Concepcion*. In *Concepcion*, the United States Supreme Court examined the *Discover Bank* rule, a California decisional rule that invalidated most class-action waivers in adhesion contracts where there were predictably small amounts of damages. Importantly, the arbitration clause at issue in that case contained several provisions arguably favorable to the consumer. For example, under the contract, AT&T agreed to pay all costs for nonfrivolous claims, arbitration was to take place in the county of the consumer's billing address, and AT&T could never recover its attorney fees. The United States Supreme Court recognized that both the trial and appellate courts had described the arbitration clause favorably before invalidating it under the broad *Discover Bank* rule, under which few arbitration clauses could be valid. The Court discussed what it considered to be the

many benefits of arbitration to consumers and approved of the lower court's finding that the “*Concepcions* were better off under their arbitration agreement” than as members of a class. In the end, the majority held that, under the *Discover Bank* rule, even those arbitration clauses that were fairly and evenly drafted were not put on “equal footing with other contracts” and “[stood] as an obstacle to the accomplishment of the FAA's objectives.”. Accordingly, the Court held the rule to be preempted. **Read in context, the holding in *Concepcion* is less than surprising. When *Discover Bank* was applied in *Concepcion*, the rule became, in essence, an overbroad rule invalidating an arbitration clause that might be otherwise conscionable under California law. As our above analysis shows, the arbitration clause at issue here contained numerous unconscionable provisions based on the specific facts at issue in the current case. *Concepcion* provides no basis for preempting our relevant case law nor does it require the enforcement of [Appellant’s] arbitration clause.**

Gandee, 176 Wn.2d at 609-10 (internal citations omitted, emphasis added).

In this case, the trial court properly denied the motion to compel because the arbitration procedures, including discovery, were unconscionable for the specific case at hand. This is well supported by the evidence. The very first rule of procedure prohibits the use of these arbitration procedures in this type of dispute. Second, Emeritus did not dispute and presented no evidence to rebut the fact that it is an extraordinarily bad actor when it comes to wrongful death litigation. In *Boice v. Emeritus Corporation*, the plaintiffs in that case had to move to compel responses to discover requests no less than 14 times. *CP 341*.

Emeritus was sanctioned for more than \$16,000.00 as discovery sanctions. *CP 341*. Emeritus never learned its lesson, which required court orders compelling discovery responses right up to a few months before trial. *CP 349*.

Even with the full array of civil procedure at hand, Emeritus does not comply with its discovery obligations. If Emeritus cannot be trusted to fulfill its duties as required by court orders, it cannot possibly be expected to do so under procedures where discovery is wholly discretionary. Arbitration agreements are only valid “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.” *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Therefore, the trial court properly concluded that the arbitration agreement was substantively unconscionable because it designated unconscionable arbitration procedures.

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ii. The Arbitration Agreement Is Substantively Unconscionable Because It Sets Forth Unreasonable Arbitrator Compensation Rates Inhibiting Access To A Forum That Allows The Claimants To Adequately Vindicate Their Rights.

Further, the procedures for arbitrator compensation are substantively unconscionable in this case because the compensation terms are unlikely to be accepted by a mutually agreeable or competent arbitrator. The rules designated by Emeritus in the arbitration agreement set arbitrator compensation at \$1,500.00 per day regardless of whether the hearing is a 15 minute status-conference or a full hearing. This results in arbitrator compensation that is far too high for simple hearings and far too low for trial days and award drafting.

When the arbitration agreement creates a prohibitively burdensome forum that inhibits the party's ability to bring the claim, the provision is substantively unconscionable. *Zuver*, 153 Wn.2d at 309. Here, Emeritus has actually gone one-step further and created an artificial roadblock to a conscionable forum by modifying arbitrator compensation to contain non-standard and unreasonable terms. Although the arbitration agreement specifies the manner in which an arbitrator is selected, the arbitrator's compensation is determined "in accordance with the procedures in effect for consumer arbitration adopted by the [AAA]." *CP 45*. The AAA rules

provide that arbitrators “will receive compensation at a rate of \$1,500 per day.” *CP 327*. Under the default AAA rules, “[t]he business shall pay the arbitrator’s compensation unless the consumer, post dispute, voluntarily elects to pay a portion of the arbitrator’s compensation.” *CP 326*. However, the Emeritus arbitration agreement specifies that the arbitrator’s fee must be split.

The problem this presents is that a daily fee of \$1,500 is insufficient for this type of case. Fran Forgette, a Kennewick attorney with nearly forty years of experience and almost twenty years of experience as an arbitrator, submitted a declaration stating that “[a]n experienced and qualified arbitrator is unlikely to consent to such a flat fee arrangement if the matter is likely complex, will require extended prep or a long hearing, or will take careful consideration to complete and draft the decision.” *CP 381*.

Because the AAA consumer rules are designed for non-customizable consumer transactions, it is not surprising that an experienced arbitrator qualified to arbitrate a wrongful death case would likely be unwilling to enter into a compensation structure under the consumer rules because the rules are designed for lesser disputes where far less discovery and shorter hearings are conducted. Non-customizable transactions involve fewer factual disputes and where they involve

contract claims the damages are more easily determined than in a wrongful death case. Because these rules are not designed for this type of dispute, the end result would be to force appellants to litigate before an ill equipped forum for the task at hand. Because Emeritus designate these rules, as opposed to others that may have been appropriate, Emeritus has only itself to blame. Therefore, the Court should conclude that the motion to compel was properly denied because the arbitration agreement creates artificial barriers to finding an agreeable and competent arbitrator due to incongruous arbitrator compensation terms.

iii. The Attorney Fees And Cost-Splitting Provisions Are Substantively Unconscionable.

This Court should conclude that the attorney fees and cost-splitting provisions of the arbitration agreement are substantively unconscionable because they require the plaintiffs to forfeit substantive statutory rights. “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute...” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). A provision requiring each side to pay its legal fees in arbitration is substantively unconscionable when a statute provides for attorney fees to be awarded to a prevailing plaintiff. *Adler*, 153 Wn. 2d at 355.

In *Adler*, the plaintiff was an employee of Fred Lind Manor, a senior living home. *Id.* at 338. As a condition of continued employment, Adler was required to sign an arbitration agreement. *Id.* Adler was injured on the job and filed a claim with the Department of Labor and Industries. *Id.* at 339. Shortly thereafter, Adler was fired and replaced by a younger employee. *Id.* As a result, Adler filed a lawsuit against Fred Lind Manor alleging disability discrimination, age discrimination, and national origin discrimination. *Id.* at 340. The arbitration agreement required “arbitrator's fee and other expenses of the arbitration process” to be shared equally and that the “parties shall bear their own respective costs and attorney fees.” *Id.* at 338.

On appeal, Adler argued that the costs and attorney fees provisions were substantively unconscionable. *Id.* at 352-355. The court remanded the arbitration cost inquiry to the trial court, but agreed that the attorney fees provision was unconscionable. *Id.* at 355. In doing so, the court relied on RCW § 49.60.030(2), which provides for recovery of “the cost of suit including reasonable attorneys' fees” for parties who successfully vindicate their rights under the Washington Law Against Discrimination. *Id.* Because the arbitration agreement required both sides to bear their own attorney fees instead of awarding costs and fees to the prevailing plaintiff, the provision was substantively unconscionable. *Id.*

Here, one of the survival actions brought by Virginia Woodward is a claim that Emeritus engaged in abuse of a vulnerable adult. RCW § 74.34.200 grants a cause of action for a vulnerable adult “who has been subjected to abandonment, abuse, financial exploitation, or neglect [...] while residing in a facility.” RCW § 74.34.200. Upon death, the cause of action transfers to the executor or administrator of the deceased. RCW § 74.34.210. Under RCW § 74.34.200(3):

In an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorneys' fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.

Here, the award of attorney fees is even clearer than that allowed for under *Adler* and RCW § 49.60.030. While RCW § 49.60.030 merely allows a plaintiff who has been discriminated against to have a cause of action for attorney fees, RCW § 74.34.200(3) makes the award of attorney fees mandatory to a prevailing plaintiff along with the costs of suit which include expert witness fees. Based on this, the provision in the Emeritus arbitration agreement requiring that arbitrator fees “be shared equally” and that “[e]ach party shall be responsible for its own legal fees” is substantively unconscionable.

Emeritus asks to waive the offending attorney fee provision, but the Court is not required and should not accept that waiver. *RP 9; Appellant's Brief, pg. 20; Gandee, 176 Wn.2d at 608-09.*

Strong reasons exist for encouraging contracts to be conscionable at the time they are written and allowing after-the-fact waiver to moot unconscionability challenges is the exception, not the rule. Parties should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver. This would encourage rather than discourage one-sided agreements and would lead to increased litigation. Any other approach is inconsistent with the principle that contracts – especially the adhesion contracts common today – should be conscionable and fairly drafted. *Id.*

Whether to accept Emeritus' waiver depends on Emeritus' anticipated use of the arbitration agreement. Emeritus uses these arbitration agreements for cases just like this. They are not primarily for rent disputes. Emeritus could have written the agreement to provide that the attorney fees provision does not apply where a statute provides a resident with attorney fees as the prevailing party. Emeritus could have left out the attorney fees and cost-splitting provisions, or could have drafted the provisions in any number of other ways. Ultimately, Emeritus chose to place this burden on its residents knowing that the primary purpose of the arbitration agreement is to redirect elder abuse cases to arbitration where a resident and their family are left with the impression that if they arbitrate they must pay their own fees even if a statute provides

otherwise. This is not only highly foreseeable, it is part of Emeritus' design. As such, this Court should reject Emeritus' waiver which it proffers only as a late-stage attempt to save the arbitration agreement.

D. Denying The Motion To Compel Is The Only Available Remedy.

The Court should affirm the trial court because no other remedy can cure the unconscionable provisions and the unconscionable circumstances under which the agreement was signed. When an agreement contains substantively unconscionable terms, the unconscionable terms can be severed from the agreement. *Gandee*, 176 Wn.2d at 603 (*citing Adler*, 153 Wn.2d at 358). But, "where such terms 'pervade' an arbitration agreement, we 'refuse to sever those provisions and declare the entire agreement void.'" *Id.* When a contract suffers from procedural unconscionability, the contract is void and cannot be saved by severance because "this does not cure the procedural deficiencies." *Gorden*, 180 Wn. App. at 565.

In this case, the arbitration agreement is procedurally unconscionable (and thus cannot be saved by severability) and the AAA consumer rules cannot be severed from the arbitration agreement because they are an essential term of the agreement. The arbitration agreement states that "[a]rbitrations shall be administered in accordance with" the AAA consumer rules. *CP 45*. In addition, the AAA rules explicitly state

that “as part of [the parties’] consumer agreement, they shall be deemed to have agreed that the application of the AAA’s rules and AAA administration of the consumer arbitration shall be an essential term of their consumer agreement.” *CP 320* (emphasis added). If an essential term is severed, there is no agreement. *McKee*, 164 Wn.2d at 403 (“[w]e find that having excised the dispute resolution provision as unconscionable, that the balance of the [consumer service] agreement stands on its own”). If an essential term is severed, the agreement cannot stand on its own and must be wholly stricken. *Id.*; see also *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 649, 757 P.2d 499 (1988) (entire contract voided when essential term cannot be severed).

In addition, the substantively unconscionable terms pervade the entire agreement and new terms cannot merely be substituted. “Despite a liberal federal policy favoring arbitration agreements, a court cannot rewrite the arbitration agreement for the parties.” *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1084 (9th Cir. 2007) *overruled on other grounds as recognized in Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 933 (9th Cir. 2013) (internal quotations and citations omitted).

Little would be left of the arbitration “agreed” to by the parties. On these facts, the unconscionable terms pervade the entire clause and severing three out of four provisions would require essentially a rewriting of the arbitration

agreement. Thus, the arbitration clause cannot be severed from the overall contract. *Gandee*, 176 Wn.2d at 607.

Nonetheless, Emeritus has argued that other procedures chosen by the arbitrator can gap-fill this void because the true, material term is the agreement to arbitrate.

At bottom, their remedy, if anything, in terms of substantive provision is separate. Adler and Zuver are clear. Unconscionable provisions can be suffered because of true, material term is the agreement to arbitrate. There is no dispute about that. The defendants don't feel that Triple A (sic) is a material term. There is no evidence that plaintiffs rely on Triple A as a material term. There is no evidence that fee splitting is a material term. Adler is clear even three terms can be stricken and severed from the agreement and still enforce arbitration. *RP 9* (emphasis added).

The Washington Uniform Arbitration Act and the FAA provide a procedure when the named arbitrator cannot perform the duties. *See* RCW § 7.04A.110; 9 U.S.C. § 5. However, the power of the new arbitrator is limited to “the powers of an arbitrator designated in the agreement to arbitrate.” RCW § 7.04A.110. The statute does not give an arbitrator the ability make up new procedures when the old procedures are found unconscionable. Once again, Emeritus provided for these rules and the rules state they are an essential term. Emeritus has no one to blame but itself when the rules turn out to be substantively unconscionable.

The arbitration agreement is procedurally unconscionable, and as such, the agreement is void without further inquiry. Further, even if the Court were to conclude that the agreement is only substantively unconscionable, the substantively unconscionable terms are essential terms and pervade the entire agreement. Therefore, the only result provided under the law is to strike the agreement in its entirety.

E. Ordering Arbitration In This Matter Would Be Futile Because The Designated Procedures Would Result In The Matter Being Returned To Superior Court.

The Court should affirm the trial court's denial of the motion to compel arbitration because compelling arbitration under the terms of the agreement would result in the matter returning to the Superior Court. According to the terms of the agreement: "Arbitrations shall be administered in accordance with the procedures in effect for consumer arbitration adopted by the American Arbitration Association." *CP 45*. The specified rules of procedure put forth by the AAA are the binding rules of procedure for the arbitration agreement. *Nail v. Consol. Res. Health Care Fund I*, 155 Wn. App. 227, 234, 229 P.3d 885 (2010).

AAA is not an arbitrator, but is merely an administrator of the arbitration process. *CP 317*; *see also CP 362* (arbitrator compensation and AAA administrative fees are separate matters). As a result, designating the AAA consumer arbitration procedures creates a two-step system. To

initiate arbitration under the procedures, a party sends a copy of the arbitration demand to AAA. *CP 322*. Under procedure R-1(d), the AAA then reviews the arbitration agreement to determine if the arbitration agreement “substantially and materially complies with the due process standards of these Rules and the Consumer Due Process Protocol.” *CP 321*. If the arbitration agreement fails to meet this standard, “either party may choose to submit its dispute to the appropriate court for resolution.” *CP 321*. If the arbitration agreement meets this standard, then R-16(a) sends the matter to the arbitrator agreed to by the parties. *CP 324*.

Here, there is no dispute that the arbitration agreement fails to meet the due process requirements set forth by the AAA procedures or the Due Process Protocols. As discussed *supra*, the AAA procedures make it clear that the rules should only be used in contracts for “standardized, consumable goods or services.” *CP 320*. Based on these failures, AAA procedure R-1(d), as designated by Emeritus as the controlling procedures of the arbitration agreement, will return this matter to the appropriate court for resolution, in this case, Benton County Superior Court.

Aside from the AAA procedure itself, this Court’s decision in *Nail v. Consol. Res. Health Care Fund I* compels this result. In *Nail*, a nursing home resident fell out of bed after surgery and died. *Nail*, 155 Wn. App. at 231. Upon admission to the facility in 2005, the resident signed an

arbitration agreement designating “the applicable rules of procedure of the AAA.” *Id.* at 230. Prior to entering the agreement, AAA issued a “healthcare policy statement” stating that it would no longer accept healthcare injury cases unless there was a post-dispute arbitration agreement. *Id.* at 231. The question before the court was whether the healthcare policy statement was a policy or a rule of procedure. *Id.*

In deciding whether the healthcare policy statement was a rule of procedure, the term was given its ordinary dictionary meaning of a particular way of doing or of going about the accomplishment of something” *Id.* at 232. “[A] procedure is actually how something is accomplished while a policy is the organization of the internal order of a subject according to management wisdom.” *Id.* Ultimately, the court concluded that the healthcare policy statement was not a rule of procedure. *Id.* at 234. “Notably, AAA did not legislate its policy statement into a specified rule of procedure.” *Id.*

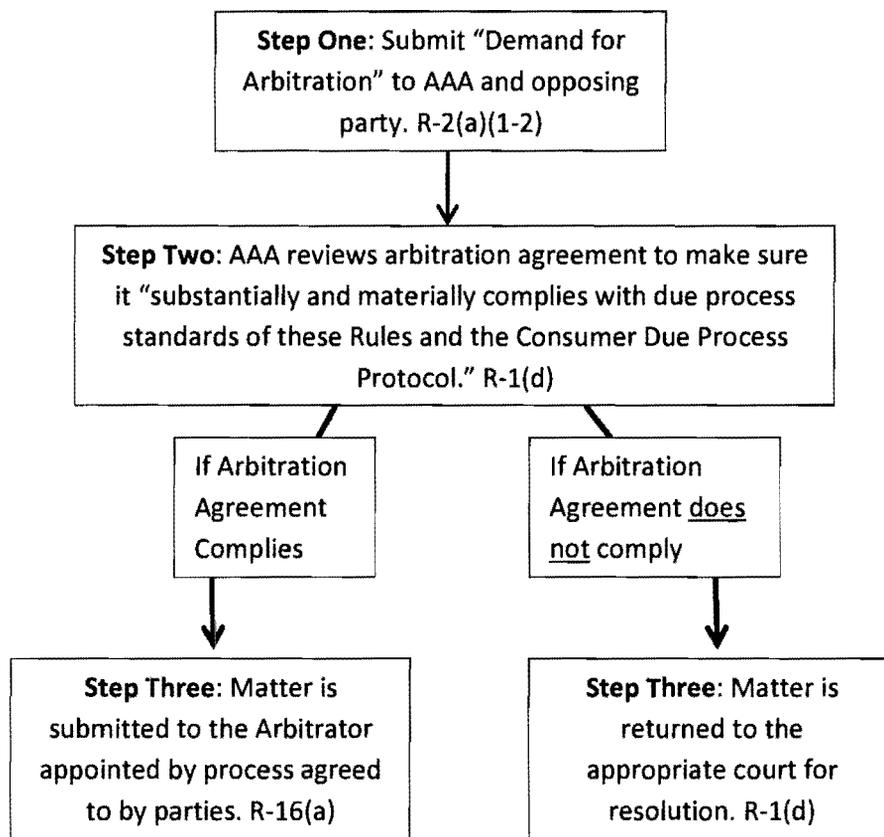
In the present case, AAA has since done exactly as this Court directed in *Nail* and has incorporated the policy into the rules of procedure.

When parties have provided for the AAA's rules or AAA administration as part of their consumer agreement, they shall be deemed to have agreed that the application of the AAA's rules and AAA administration of the

consumer arbitration shall be an essential term of their consumer agreement.

...
When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, **they thereby authorize the AAA to administer the arbitration.**

CP 320-321 (emphasis added). The procedure is set forth as such:



Additionally, unlike the arbitration agreement in *Nail*, which says “the arbitrators shall apply the applicable rules of procedure of the AAA,” in this case the Emeritus agreement says “[a]rbitrations shall be administered

in accordance with the procedures in effect for consumer arbitrations...”
CP 45. AAA procedure R-1 requires that the agreement be scrutinized for compliance before moving onto the next step: submission to the arbitrator, and there is nothing in the Emeritus arbitration agreement that alters these binding rules of procedure.

Emeritus intentionally mandated procedures which by their very terms were inappropriate for this type of dispute. However, to their credit, they designated procedures which create a fail-safe to prevent businesses from engaging in this precise conduct and circumventing due process. Therefore, even if the Court were to conclude that the trial court erred in finding the agreement was unconscionable, the Court should affirm the denial of the motion to compel because ordering this matter to arbitration would still result in the case returning to the Superior Court. As one court has put it: “courts should not be in the business of issuing futile relief.” *Burton v. City of Belle Glade*, 966 F. Supp. 1178, 1188 (S.D. Fla. 1997) *aff'd in part, rev'd in part*, 178 F.3d 1175 (11th Cir. 1999).

F. The Court Should Authorize The Trial Court To Award Costs And Attorney Fees Incurred On Appeal When Woodward Prevails On The Merits Of The Vulnerable Adult Abuse Claim.

Pursuant to RAP 18.1, plaintiffs request that the Court authorize the trial court to award appellate attorney fees related to this appeal when

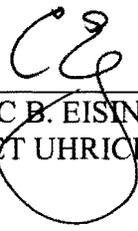
plaintiffs ultimately prevail on the merits. *Thompson v. Lennox*, 151 Wn. App. 479, 212 P.3d 597 (2009); RCW § 74.34.200(3).

IV. CONCLUSION

This Court should affirm the trial court's denial of Emeritus' motion to compel arbitration because the arbitration agreement was procured by fraud in the execution and is procedurally unconscionable and includes pervasive substantively unconscionable terms that cannot be severed. Moreover, the trial court's ruling is reviewable for substantial evidence. Based on the conflicting declarations of Mindy Ross and Scott Woodward, and Emeritus' opposition to respondents' motion for an evidentiary hearing, this Court should affirm the trial court's finding of unconscionability and strike the entire arbitration agreement.

DATED this 20th day of March, 2015

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