DIVISION ONE
FILED: 3/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the Matter of the Estate of: LOLA ANN WATTS, An Adult, Deceased. _____ ESTATE OF LOLA ANN WATTS, by and through TABATHA ARNOLD, Personal Representative; TABATHA ARNOLD, on behalf of survivors of LOLA ANN WATTS, Plaintiffs/Appellees, v. AVALON HEATH CARE, INC., a Utah corporation doing business in Arizona as CHANDLER HEALTH CARE CENTER; AVALON HOLDING, INC.; AVALON HEALTH CARE CENTER, LLC; AVALON HEATH CARE OF ARIZONA, LLC; AVALON HEALTH CARE MANAGEMENT OF ARIZONA, LLC; AVALON CARE CENTER – CHANDLER, LLC, Defendants/Appellants.	1 CA-CV 12-0275 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. PB2011-090198

The Honorable Rodrick J. Coffey, Commissioner

AFFIRMED

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N O R R I S, Judge

¶1 Defendants/Appellants Avalon Health Care, Inc., Avalon Holding, Inc., Avalon Health Care Center, LLC, Avalon Health Care of Arizona, LLC, Avalon Health Care Management of Arizona, LLC, and Avalon Care Center -- Chandler, LLC, (collectively "Avalon") appeal the superior court's decision determining that an arbitration agreement executed by Plaintiff/Appellee Tabatha Arnold was unenforceable because it was an adhesion contract and outside her reasonable expectations. As discussed, we agree with the superior court's decision and affirm.

¶2 In April 2010, Arnold, as personal representative of the estate of her grandmother, Lola Ann Watts, sued Avalon[1] and, asserting various state common law and statutory claims, alleged it had failed to care properly for her grandmother in a nursing care facility it operated. In response, Avalon moved to dismiss, asserting Arnold's claims were subject to arbitration

[1]Arnold also sued Casa Grande Community Hospital, Inc., which is not a party to this appeal.

pursuant to a three-page arbitration agreement ("the Agreement") she had signed on behalf of her grandmother shortly after her grandmother had entered the facility.

¶3 The Agreement was titled in bold "RESIDENT AND FACILITY ARBITRATION AGREEMENT." Beneath the title, also in bold, the Agreement stated, "(Voluntary -- Not a Condition of Admission _ Please Read Carefully)." The Agreement required the parties to waive all rights to have any claim decided by a "court of law" or jury and instead "to submit to binding arbitration [] all disputes and claims for damages of any kind for injuries and losses arising from the medical care rendered or which should have been rendered." The Agreement also recited its execution was voluntary and not a condition of admission to the facility.

¶4 Because the parties disputed the circumstances surrounding Arnold's execution of the Agreement, the court held an evidentiary hearing. At the hearing, Arnold testified she remembered meeting and speaking with the facility's Director of Admissions ("the Director") when she signed the Agreement along with other documents. *See infra* ¶¶ 9-10. The Director, however, had no recollection of the meeting; accordingly, she could only describe her habit and practice in presenting the Agreement to residents or their representatives.

¶5 Based on the evidence presented at the hearing, the superior court found Arnold credible and adopted her "version of the facts" because the Director had "no specific recollection of what she [had] discussed with Arnold." The court found Avalon presented the Agreement to Arnold as one she had to sign to ensure Medicare would cover her grandmother's treatment and the Agreement was, therefore, an adhesion contract. *See Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 173 Ariz. 148, 150, 840 P.2d 1013, 1015 (1992) (adhesion contract is typically a standardized form offered to a consumer on a "take it or leave it" basis such that the consumer has no reasonable opportunity for negotiation and cannot obtain goods or services without agreeing to the form contract).

¶6 The court further found the Agreement was outside Arnold's reasonable expectations because Avalon had failed to explain to her either the consequences of signing the Agreement or that signing it was optional, and Arnold would not have signed the Agreement had she known she and the estate were giving up their rights to a jury trial and could have to "pay tens of thousands of dollars in arbitration fees."[2] *See id.* at

[2]The Agreement required a three-person arbitration panel with one "neutral arbitrator" and two arbitrators selected by each party. The Agreement also required the parties to share the fees and expenses of the neutral arbitrator and to pay all of the fees and expenses of the arbitrator they each selected.

151-52, 840 P.2d at 1016-17 (when agreement to arbitrate is adhesion contract, it is unenforceable if it is outside reasonable expectations of the weaker or "adhering" party). The superior court thus denied Avalon's motion to dismiss, and granted a motion filed by Arnold asking it to declare the Agreement unenforceable.

¶7 On appeal, Avalon challenges the superior court's factual findings and legal conclusions that the Agreement was an adhesion contract and was outside Arnold's reasonable expectations.[3] In considering Avalon's challenges, we accept the superior court's factual findings unless they are clearly erroneous. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996). We also view the evidence and reasonable inferences from the evidence in the light most favorable to sustaining the superior court's judgment. *In re Estate of Pouser*, 193 Ariz. 574, 576, ¶ 2, 975 P.2d 704, 706 (1999). We review the superior court's conclusions of law, however, de novo. *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 247, ¶ 16, 119 P.3d 1044, 1050 (App. 2005).

¶8 Avalon first argues the superior court should have found the Director had actually discussed the Agreement with

[3]We have jurisdiction over this appeal pursuant to Arizona Revised Statute section 12-2101.01(A)(6) (Supp. 2012).

Arnold based on the Director's testimony that it was her "habit and practice" to present documents to the signer one by one, and explain the Agreement was not a condition of admission, and by signing this document, the signer was waiving the right to a jury trial. We do not reweigh conflicting evidence, however, and defer to the superior court's determination of credibility; we only examine the record to determine whether substantial evidence supported its factual findings. *See In re Estate of Pouser*, 193 Ariz. at 579, ¶ 13, 975 P.2d at 709 (appellate court does not reweigh conflicting evidence).

¶9 Here, Arnold presented substantial evidence supporting the superior court's finding that Avalon presented the Agreement to her as one she had to sign to ensure Medicare coverage for her grandmother's care at the facility. Arnold testified the Director telephoned her and told her that she had to fill out Medicare paperwork to ensure her grandmother could stay at the facility. Arnold understood she had to sign the documents, or Medicare would not pay for the care and her grandmother would have to leave the facility. Arnold also testified that when she arrived at the facility, the Director presented her with a stack of papers, which consisted of 20 documents, including the Agreement. Arnold explained she completed the paperwork in about 15 to 20 minutes, and although she recalled the Director actually discussed two of the documents with her, *see infra*

¶ 10, she testified she did not "remember it happening" -- the "it" being whether the Director had discussed the Agreement with her. Arnold also explained the Director did not tell her that by signing the Agreement, she was agreeing to arbitrate any claims her grandmother might have and was waiving the right to a trial. On this record, we cannot say the superior court improperly adopted Arnold's "version of the facts."

¶10 Arnold also argues that even if the Director did not orally explain the Agreement to Arnold, the Agreement itself stated it was voluntary and Arnold admitted she would have understood this if she had read it. Avalon, however, failed to present any evidence showing it took any steps to put Arnold on notice that the stack of papers she was given to sign -- papers that she believed only pertained to Medicare or her grandmother's care and stay at the facility –- contained a document that concerned legal claims and waiver of jury trial rights. Indeed, based on the initial telephone call from the Director, Arnold understood she would be filling out Medicare paperwork to ensure her grandmother could stay at the facility; and among the stack of documents, the Director brought only two documents –- an advance directive form and a resident trust agreement -- to her attention, but said nothing to her about legal claims, arbitration, and jury rights.

¶11 Avalon next argues Arnold should have understood she did not have to sign all the documents to ensure her grandmother could stay at the facility because she declined to sign the resident trust agreement. But, as Arnold testified, the Director actually discussed the trust document with her. Further, the two documents the Director discussed with Arnold concerned her grandmother's stay and care at the facility –- topics that would not have given Arnold notice the stack also contained a document concerning legal claims, arbitration, and jury rights. In sum, we agree with the superior court the Agreement was an adhesion contract.

¶12 An adhesion contract is nevertheless enforceable unless it is outside the reasonable expectations of the adhering party.[4] *See Broemmer*, 173 Ariz. at 151, 840 P.2d at 1016. The party seeking to invalidate an adhesion contract because its term is beyond his or her reasonable expectations must demonstrate the drafting party had reason to believe the signer would not have accepted the agreement had he or she known it contained that particular term. *Harrington*, 211 Ariz. at 247,

[4]An adhesion contract is also not enforceable if it is unconscionable. *See Broemmer*, 173 Ariz. at 151, 840 P.2d at 1016. The superior court additionally found the Agreement was unconscionable –- a finding Avalon also challenges on appeal. We do not need to address this argument because, as discussed, the superior court found the Agreement unenforceable because it was outside Arnold's reasonable expectations.

¶ 19, 119 P.3d at 1050 (citation omitted). As discussed in *Harrington*, whether an adhesion contract violates a party's reasonable expectations may be shown by: (1) prior negotiations, (2) the circumstances, (3) whether the term is bizarre or oppressive, (4) whether the term eviscerates the non-standard terms explicitly agreed to, (5) whether the term eliminates the dominant purpose of the transaction, (6) whether the adhering party can understand the term if he or she attempts to check, or (7) any other factor relevant to what the adhering party expected in the contract. *Id.* at 247-48, ¶ 19, 119 P.3d at 1050-51 (citing *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 391-94, 682 P.2d 388, 396-99 (1984)).

¶13 Here, relying on *Harrington* factors 2 and 7, the superior court concluded the Agreement was not within Arnold's reasonable expectations. On the record presented, we agree. As discussed, the Director called Arnold and told her she needed to sign Medicare paperwork so her grandmother could stay at the facility. Avalon therefore had reason to believe Arnold was signing the stack of documents under the impression they were necessary for her grandmother's stay in the facility. Also, as discussed, the Director did not point out the Agreement to Arnold or otherwise alert her that the Agreement was not a document she needed to sign for Medicare. While the Director

did point out and explain two other documents, those documents nevertheless concerned Arnold's grandmother's residency and treatment at the facility and gave Arnold no reason to expect the stack also included a document concerning legal claims, arbitration, and jury rights. Therefore, we agree with the superior court Arnold did not expect such a document in the stack and, had she known about the Agreement and the consequences of signing it, she would not have signed it.

¶14 Under the circumstances presented here, we thus agree with the superior court the Agreement was an adhesion contract and was outside Arnold's reasonable expectations.[5] Accordingly, the superior court correctly concluded the Agreement was unenforceable.

[5]Avalon contends that because the Agreement was not a clause in a lengthy contract containing numerous provisions, but was instead a stand-alone document, the reasonable expectations analysis does not apply. We disagree. The three-page Agreement was presented to Arnold as part of a stack of documents, not as a stand-alone contract.

CONCLUSION

¶15 We affirm the superior court's judgment denying Avalon's motion to dismiss and declaring the Agreement unenforceable. As the successful party on appeal, we award Arnold her costs on appeal contingent upon her compliance with Rule 21 of Arizona Rules of Civil Appellate Procedure.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
ANDREW W. GOULD, Judge

/s/
RANDALL M. HOWE, Judge