NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 12/08/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GLORIA A. DAY, Personal Representative of the Estate of FRANCIS W. DAY, on behalf of the ESTATE OF FRANCIS DAY, deceased, and GLORIA A. DAY, on behalf of FRANCIS DAY'S statutory beneficiaries under A.R.S. § 12-612(A),	No. 1 CA-CV 10-0574
Plaintiffs/Appellants,	DEPARTMENT E
v.	**MEMORANDUM DECISION**
KINDRED HOSPITALS WEST, L.L.C., a Delaware limited liability company, dba KINDRED HOSPITAL ARIZONA-SCOTTSDALE; KINDRED HEALTHCARE OPERATING, INC., a Delaware corporation; KINDRED HEALTHCARE, INC., a Delaware corporation; KAREN SHAMMAS, Administrator; and SCOTT FLODEN, Executive Director,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) **FILED 12/08/2011**
Defendants/Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-033017

The Honorable John A. Buttrick, Judge

REVERSED AND REMANDED

Wilkes & McHugh, P.A. Phoenix
By Melanie L. Bossie
Elizabeth A. Gilbert
And

Law Office of Scott E. Boehm, P.C. Phoenix
By Scott E. Boehm
Attorneys for Plaintiffs/Appellants

Holloway Odegard Forrest & Kelly, P.C. Phoenix
By Vincent J. Montell
Anthony J. Fernandez
Attorneys for Defendants/Appellees

J O H N S E N, Judge

¶1 Gloria A. Day, as personal representative of the estate of her deceased husband and on behalf of his statutory beneficiaries, filed a complaint against Kindred Hospitals West, L.L.C., doing business as Kindred Hospital Arizona-Scottsdale, Kindred Healthcare Operating, Inc., Kindred Healthcare, Inc., Karen Shammas and Scott Floden (collectively "Kindred") arising out of Kindred's treatment of Day's husband. Kindred moved to dismiss the complaint, arguing the dispute should be resolved pursuant to an alternative dispute resolution agreement Day executed on behalf of her husband. The superior court granted Kindred's motion. For the following reasons, we reverse the judgment and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Day's husband, Francis W. Day, was admitted to one of Kindred's hospitals for recovery and rehabilitation after hip surgery. In an affidavit filed with her response to Kindred's motion to dismiss, Day, 80 years old, described that time as "an extremely stressful period" and said the stress affected her ability to think clearly. Day said that the day after her husband's transfer to the Kindred hospital, while she was waiting outside her husband's room, a woman associated with hospital handed her "some papers to sign to admit" her husband to the hospital. Day's affidavit stated, "I recall signing the admission paperwork so that my husband could be admitted to Kindred Hospital Arizona to receive care." Kindred gave Day no explanation regarding the alternative dispute resolution agreement that was included in the 23 pages of paperwork Day was handed. Day quickly signed the documents so she could rejoin her husband in his hospital room. In her affidavit, Day stated she was not aware she had signed an agreement requiring arbitration and did not know "the purpose and meaning of an arbitration agreement[] or the rights waived via such an agreement." Her affidavit concluded, "Had I been fully informed concerning what arbitration is, the differences between an arbitration and a jury trial, what rights my husband had under Arizona law as a vulnerable adult, and if I had not been told

that I had to sign all of the forms presented to me, including the arbitration agreement, I would not have signed the agreement."

¶3 The five-page arbitration agreement bears the capitalized, bold-faced title "**VOLUNTARY ALTERNATIVE DISPUTE RESOLUTION AGREEMENT BETWEEN PATIENT AND HOSPITAL.**" It requires a two-step process for claims against Kindred. The first step is mediation, and if mediation fails, the parties are subject to binding arbitration.

¶4 Directly beneath the title of the document is the following paragraph:

> Under Arizona and Federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. The following is an agreement to forego a jury trial and to instead resolve any dispute that might arise between the Patient and the Hospital through alternative dispute resolution methods, including arbitration.

On page four of the document is a paragraph stating,

> Patient acknowledges that he/she understands the following: (1) He/She has the right to seek legal counsel from an attorney of his/her choice concerning this Agreement; (2) The signing of this Agreement is voluntary and not a pre-condition of admission to or the furnishing of services to the Patient by Hospital, and the decision of whether to sign the Agreement is solely the Patient's decision without influence from the Hospital . . . **(4) THE ADR PROCESS ADOPTED BY THIS AGREEMENT CONTAINS PROVISIONS FOR BOTH MEDIATION AND BINDING**

> **ARBITRATION, AND IF THE PARTIES ARE UNABLE TO REACH SETTLEMENT INFORMALLY OR THROUGH MEDIATION, THE DISPUTE SHALL PROCEED TO BINDING ARBITRATION; (5) AGREEING TO THE ADR PROCESS IN THIS AGREEMENT MEANS THAT THE PARTIES ARE WAIVING ANY RIGHT TO TRIAL IN COURT, INCLUDING ANY RIGHT TO A JURY TRIAL, ANY RIGHT TO A TRIAL BY A JUDGE, AND THEIR RIGHT TO APPEAL THE DECISION OF THE ARBITRATOR(S) IN A COURT OF LAW;** and (6) He/She acknowledges that the terms and effect of this Agreement have been explained to and understood by the Patient and that he/she has had the opportunity to ask questions about this Agreement.

(Emphasis in original.)

¶5 The complaint Day filed alleged that throughout his stay at the Kindred hospital, her husband was compromised both mentally and physically. He remained at Kindred until his death on August 14, 2008.

¶6 Day's complaint alleged negligence, violation of the Adult Protective Services Act under Arizona Revised Statutes ("A.R.S.") sections 46-451, -454 and -455 (2008) and wrongful death. Citing the signed alternative dispute resolution agreement, Kindred moved to dismiss and compel arbitration. Over Day's objection and after oral argument, the court compelled arbitration and dismissed Day's complaint with prejudice. It stated,

> In this case, [Day] has not defined material issues of fact regarding the Agreement. She does not assert lack of capacity or competence. Nor does she argue that she had no opportunity to read and review the document before signing it. In the circumstances, there is no need for an evidentiary hearing.
>
> As to [Day]'s remaining legal arguments, they are rejected for the reasons set forth in the briefing.

¶7 Day filed a timely appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2011).[1]

DISCUSSION

A. Standard of Review.

¶8 We review a ruling on a motion to compel arbitration in the same manner as a ruling granting summary judgment. *See Ruesga v. Kindred Nursing Ctrs. West, L.L.C.*, 215 Ariz. 589, 596, ¶ 23, 161 P.3d 1253, 1260 (App. 2007) ("courts have repeatedly analogized a trial court's duty in ruling on a motion to compel arbitration to its duty in ruling on a motion for a summary judgment," implying analogous standard for appellate review (quotation omitted)). Thus, our role "is to determine whether there is any genuine issue of material fact underlying the adjudication, and, if not, whether the substantive law was correctly applied." *Long v. Buckley*, 129 Ariz. 141, 142, 629

[1] Absent material revisions after the relevant date, we cite a statute's current version.

P.2d 557, 558 (App. 1981) (standard of review for grant of summary judgment). We review the superior court's interpretation of a contract *de novo*. *Samaritan Health Sys. v. Superior Court*, 194 Ariz. 284, 288, ¶ 14, 981 P.2d 584, 588 (App. 1998). We view the facts and all reasonable inferences in the light most favorable to the party opposing the motion. *See Hill-Shafer P'ship v. Chilson Family Trust*, 165 Ariz. 469, 472, 799 P.2d 810, 813 (1990) (review of summary judgment).

B. The Arbitration Agreement.

¶9 Arbitration contracts are "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." A.R.S. § 12-1501 (2011). Thus, the enforceability of an arbitration agreement is governed by general principles of contract law. *Broemmer v. Abortion Servs. of Phx., Ltd.*, 173 Ariz. 148, 150, 840 P.2d 1013, 1015 (1992).

¶10 Day contends the arbitration agreement she signed is not enforceable because it is a contract of adhesion that contains terms beyond her reasonable expectations. *See id.* at 151, 840 P.2d at 1016.

¶11 An adhesion contract is one offered on a take-it-or-leave-it basis to a consumer who has no realistic bargaining strength. *See Burkons v. Ticor Title Ins. Co. of Cal.*, 165 Ariz. 299, 311, 798 P.2d 1308, 1320 (App. 1989), *rev'd on other*

grounds, 168 Ariz. 345, 813 P.2d 710 (1991). "[U]nder such conditions . . . the consumer cannot obtain the desired product or services except by acquiescing in the form contract." *Broemmer*, 173 Ariz. at 150, 840 P.2d at 1015 (quotation omitted). In *Broemmer*, the Arizona Supreme Court held an arbitration agreement between an abortion clinic and a young woman was a contract of adhesion because it was a standardized contract offered to the young woman on a "take it or leave it" basis. *Id.* at 151, 840 P.2d at 1016.

¶12 We infer that the superior court rejected Day's contention that the arbitration agreement was a contract of adhesion because the agreement itself specifically states it is a voluntary agreement that a patient need not sign to receive treatment. As recounted above, the agreement is titled "**VOLUNTARY**" and recites that signing it "is voluntary and not a pre-condition of admission to or the furnishing of services."

¶13 In her affidavit, however, Day presented evidence to support the proposition that she may have reasonably believed that she was required to sign the agreement in order for Kindred to treat her husband. She stated that she received the arbitration agreement when "[a] person handed me some papers to sign to admit my husband" to the Kindred hospital. Her affidavit continued, "I recall signing the admission paperwork

so that my husband could be admitted to Kindred Hospital Arizona to receive care."

¶14 Day argues that because Kindred offered no evidence to the contrary, we must take as true her argument that the arbitration agreement was offered to her to sign on a take-it-or-leave-it basis. Given the language in the arbitration agreement itself, we decline to adopt Day's contention that her affidavit, by itself, required the superior court to deny Kindred's motion to dismiss. Moreover, although Day's affidavit may imply that the woman who handed Day the packet of documents told her that her husband would not be treated if she did not sign all the documents, Day's affidavit does not say so expressly. Thus, we conclude that on the record presented, a material issue of fact exists as to whether the arbitration agreement on which Kindred relies was a contract of adhesion.[2]

¶15 We likewise conclude that material issues of fact remain concerning Day's contention that the arbitration agreement cannot be enforced because it is beyond her reasonable expectations. *See Broemmer*, 173 Ariz. at 151, 840 P.2d at 1016 (contract of adhesion will not be enforced if it "does not fall

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[2] Unlike the dissent, we do not understand *Broemmer* to require the conclusion that the arbitration agreement Day signed is unenforceable as a matter of law. As we have said, while the *Broemmer* court concluded the contract there was a contract of adhesion because it was offered to the patient on a take-it-or-leave-it basis, the agreement in this case recited that signing it was *not* a condition of treatment.

within the reasonable expectations of the weaker or 'adhering' party" (quotation omitted)).

¶16 Day's affidavit asserted that she signed each document in the packet quickly and "was not even aware that [she] had signed an arbitration agreement, the purpose and meaning of an arbitration agreement, or the rights waived via such an agreement." Contrary to one of the recitations in the agreement, Day said no one from Kindred explained the document to her.[3] Furthermore, she said she lacks training, experience or work history that otherwise might have informed her about arbitration.

¶17 We conclude Day's averments were sufficient to create an issue of fact concerning her contention that the arbitration provisions were beyond her reasonable expectations. We do not agree, however, with our dissenting colleague that the superior court should have ruled in Day's favor on this issue as a matter of law. The invalid arbitration agreement in *Broemmer* contained "no conspicuous or explicit waiver of the fundamental right to a jury trial." *Id.* at 152, 840 P.2d at 1017. We cannot conclude that as a matter of law, the jury-trial waiver in the arbitration agreement at issue in this case was not conspicuous

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[3] The agreement Day signed recites (apparently falsely, according to Day's affidavit) that "the terms and effect of this Agreement have been explained to and understood by the Patient and that he/she has had the opportunity to ask questions about this Agreement."

or explicit. Nor does this case present any question as to the impartiality of the arbitrator, such as was presented in *Broemmer*. *See id.* at 151-52, 840 P.2d at 1016-17.[4]

¶18 Day cites no authority, and we are aware of none, for the proposition that a patient or his representative is not bound by an arbitration provision simply because he was unfamiliar with alternative dispute resolution and did not pause to read the arbitration agreement before signing. We take at face value Day's assertion that she was feeling stress at the time and that she signed the agreement quickly so that she could return to her husband. But the superior court, acting as the finder of fact, may conclude that key provisions of the agreement were so conspicuous and plainly worded that Day could not have reasonably been surprised to hear of them later. We note that although Day states she was unfamiliar with the concept of arbitration, the first sentence of the agreement explained that "two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them," and further explained that "[t]he following is an agreement to

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[4] Citing information outside the record, the dissent argues there are questions concerning the objectivity of the National Arbitration Forum, the arbitration company specified in the agreement. In arguing the agreement cannot be enforced, Day does not challenge the objectivity of the neutrals who might sit as arbitrators pursuant to the agreement, perhaps because, as the dissent acknowledges, National Arbitration Forum apparently is no longer in existence. *See* footnote 6, *infra.*

forego a jury trial . . . between the Patient and the Hospital through alternative dispute resolution methods, including arbitration." On the other hand, the court may conclude that given all the relevant circumstances, including Day's experience and relative ability to read and comprehend the document, she would not have reasonably understood the arbitration provision without assistance.

CONCLUSION

¶19 For the reasons stated, we conclude genuine issues of material fact exist concerning whether the agreement was a contract of adhesion and, if it was, whether the arbitration provisions were within Day's reasonable expectations. *See Phx. Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 293, 877 P.2d 1345, 1349 (App. 1994) (remanding enforceability of contract of adhesion signed by patient's husband, who offered evidence that he would not have assented to the contract if he had understood it). Accordingly, we vacate the judgment dismissing the complaint and remand for further proceedings by the superior court. *See Ruesga*, 215 Ariz. at 596, ¶¶ 23-24, 161 P.3d at 1260 (describing nature of summary proceedings superior court may conduct when material issues of fact are presented on a motion to compel arbitration). Because Day timely requested discovery, the court shall allow her a reasonable opportunity to

develop the facts, then set an evidentiary hearing after which it shall decide the matter. *See id.*

¶20 Because we have decided to remand for further proceedings, we need not address Day's contention that Kindred owed her a fiduciary duty, which it breached by the manner in which it obtained her consent to the arbitration agreement, and her argument that even if the agreement is enforceable, it does not apply to claims raised by her deceased husband's statutory wrongful-death beneficiaries.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

K E S S L E R, Judge, concurring in part and dissenting in part,

¶21 I concur with the majority's conclusion that Day is entitled to a period of discovery and an evidentiary hearing *if* a disputed issue of material fact exists on the enforceability of the arbitration agreement. I respectfully disagree with the majority that a genuine dispute of material fact exists. Rather, we are presented with a scenario of whether an arbitration agreement waiving all rights to a jury trial is enforceable when it was presented to an eighty-year-old woman

unskilled in legal matters among twenty-three pages of documents shortly after her husband was admitted to a hospital and she was told she had to sign all of the documents. I conclude that, like the arbitration agreement in *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (1992), the arbitration agreement in this case is both a contract of adhesion and is unenforceable because it contains provisions beyond Day's reasonable expectations. Accordingly, I would reverse and remand this matter to have the civil litigation proceed without arbitration.

FACTUAL AND PROCEDURAL HISTORY

¶22 This appeal comes to us in the setting that the defendants chose not to dispute Day's affidavit or the documents she submitted to the trial court. Accordingly, we are obliged to take as true the factual events recited by Day. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) ("If the opposing party fails to present, either by affidavit or other competent evidence, facts which controvert the moving party's affidavits, the facts alleged by the moving party may be considered as true."). We are also obliged to make all reasonable inferences from those facts in favor of Day. *Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 90, 163 P.3d 1034, 1061 (App. 2007) (citation omitted).

¶23 Day's husband ("Husband") was an elderly man who had hip surgery prior to his admission to one of Kindred's hospitals ("Kindred" or "Hospital") for recovery and rehabilitation. Day, who was eighty years old, described that time as "an extremely stressful period" affecting her ability to think clearly. The day after Husband's transfer to Kindred, while Day was waiting in the Hospital to join her husband, a woman associated with the Hospital gave Day Husband's admissions paperwork. Day's affidavit implies that the woman instructed her "to sign all of the forms presented to [her]" for Husband to continue receiving treatment. Despite language in the paperwork to the contrary, Kindred gave Day no explanation regarding the arbitration agreement that was included in the twenty-three pages of paperwork. Day quickly signed the documents so she could ensure Husband's admission and subsequent care and rejoin him in his hospital room. In her affidavit, Day states "[she] was not even aware that [she] had signed an arbitration agreement, the purpose and meaning of an arbitration agreement, or the rights waived via such an agreement."

¶24 The arbitration agreement, entitled "Voluntary Alternative Dispute Resolution Agreement Between Patient and Hospital," requires a two-step process for claims against Kindred. The first step is mediation, and if mediation fails,

the parties are subject to binding arbitration. The document also includes the following passage in bold type:

> AGREEING TO THE ADR PROCESS IN THIS AGREEMENT MEANS THAT THE PARTIES ARE WAIVING ANY RIGHT TO TRIAL IN COURT, INCLUDING ANY RIGHT TO A JURY TRIAL, ANY RIGHT TO A TRIAL BY A JUDGE, AND THEIR RIGHT TO APPEAL THE DECISION OF THE ARBITRATOR(S) IN A COURT OF LAW.

That paragraph also contains additional provisions in regular typeface stating that the "Agreement is voluntary and not a pre-condition of admission to or the furnishing of services" and that the "terms and effect of this Agreement have been explained to and understood by the Patient."

¶25 As alleged in the complaint, throughout his stay at Kindred, Husband was both mentally and physically compromised. He was dependent on Kindred for all his daily needs including feeding, hygiene, infection control, toileting, physical rehabilitation, and exercise. Over the course of two months, Husband developed pressure sores that became highly infected. The infection ultimately spread and was aggravated by malnutrition, dehydration, and weight loss. Husband remained a resident of Kindred until his death in August 2008.

¶26 Day filed a complaint alleging negligence, wrongful death, and a violation of the Adult Protective Services Act under Arizona Revised Statutes ("A.R.S.") sections 46-451 to -459 (Supp. 2011). Relying on the signed agreement, Kindred

immediately filed a motion to dismiss and to compel arbitration. Day responded, asserting the agreement was unenforceable and requesting an evidentiary hearing on its enforceability. Following oral argument, the trial court compelled arbitration and dismissed Day's complaint with prejudice:

> In this case, [Day] has not defined material issues of fact regarding the Agreement. She does not assert lack of capacity or competence. Nor does she argue that she had no opportunity to read and review the document before signing it. In the circumstances, there is no need for an evidentiary hearing. As to [Day]'s remaining legal arguments, they are rejected for the reasons set forth in the briefing.

DISCUSSION

¶27 Day asserts in part that the Arbitration Agreement is unenforceable as an adhesion contract whose terms she did not reasonably expect. I agree.

¶28 "This court recognizes the strong public policy favoring arbitration as the preferred means of dispute resolution." *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Mgmt., Inc.*, 165 Ariz. 25, 29, 795 P.2d 1308, 1312 (App. 1990). However, "that same public policy presupposes the existence of a valid agreement to arbitrate. Only when the arbitration provision is enforceable will the court compel arbitration." *Id.* at 30, 795 P.2d at 1313. Arbitration contracts are "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." A.R.S. §

12-1501 (2003). Thus, the enforceability of an arbitration agreement is governed by general principles of contract law. *Broemmer*, 173 Ariz. at 150, 840 P.2d at 1015; *see also Maxwell v. Fid. Fin. Servs., Inc.*, 184 Ariz. 82, 88, 907 P.2d 51, 57 (1995) ("This court previously has noted the rule that 'reasonable expectations' and unconscionability are two distinct grounds for invalidating or limiting the enforcement of a contract . . . .").

¶29 The ADR Agreement was an unenforceable contract of adhesion. An adhesion contract is one that is offered on a take-it or leave-it basis to a consumer who has no realistic bargaining strength. *Broemmer*, 173 Ariz. at 150, 840 P.2d at 1015. "[U]nder such conditions . . . the consumer cannot obtain the desired product or services except by acquiescing in the form contract." *Id.* But a "conclusion that the contract was one of adhesion is not, of itself, determinative of its enforceability." *Id.* at 151, 840 P.2d at 1016. Such a contract "is fully enforceable according to its terms . . . unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise." *Id.* (citation omitted). In determining enforceability, we look to "the reasonable expectations of the adhering party and whether the contract is unconscionable." *Id.* "Although customers typically adhere to standardized agreements and are

bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation." *Broemmer*, 173 Ariz. at 152, 840 P.2d at 1017 (quoting *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 391, 682 P.2d 388, 396 (1984)).

¶30 In *Broemmer*, the Arizona Supreme Court held that a one-page arbitration agreement between an abortion clinic and a young woman was unenforceable as a contract of adhesion as it was beyond the reasonable expectations of the plaintiff. *Id.* Accordingly, the supreme court reversed the summary judgment that had required arbitration without remanding it for an evidentiary hearing. *Id.* This case requires the same result because the facts in *Broemmer* are, for all relevant purposes, indistinguishable.

¶31 In both cases, each plaintiff was under a great deal of emotional stress, was not experienced in commercial matters, and did not know anything about arbitration. *Id.* When filling out paperwork, neither plaintiff realized she was signing an arbitration agreement, and neither medical facility made any attempt to explain its nature or consequences. *Id.*

¶32 The majority concludes that this case is distinguishable from *Broemmer* on whether it was a contract of adhesion because the agreement did not require a signature as a

prerequisite for Husband receiving services at Hospital and Day did not expressly say she was told she had to sign the agreement to obtain such services. *Supra*, ¶ 14 and n.1. I cannot agree. Unlike the one-page agreement handed to the patient in *Broemmer* that stated the patient was free to go to other clinics, the agreement here was part of a twenty-three page packet of documents. Additionally, Day expressly stated in the affidavit that she was told she had to sign all the documents handed to her.[5]

¶33 Moreover, the fact that Day's affidavit did not expressly state she was told she had to sign the documents to obtain services is of no moment. We are obliged to make all reasonable inferences from the undisputed facts in favor of and not against the non-movant. *Dawson*, 216 Ariz. at 111, ¶ 90, 163 P.3d at 1061. We can reasonably infer from Day's undisputed affidavit that a member of Hospital staff told her she had to sign all of the admissions forms to obtain services. Thus, this case is even stronger than *Broemmer* to hold the arbitration agreement is a contract of adhesion. It is undisputed Day was

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[5] "*I recall signing the admission paperwork so that my husband could be admitted to [Kindred] to receive care*. . . . Had I been fully informed concerning what arbitration is, the differences between an arbitration and a jury trial, what rights my husband had under Arizona law as a vulnerable adult, *and if I had not been told that I had to sign all of the forms presented to me*, including the arbitration agreement, I would not have signed the agreement." (Emphasis added.)

told Kindred was the only hospital she could get services for her husband whereas in *Broemmer* the arbitration agreement expressly stated the patient knew there were other clinics for her to obtain the requested services. While the form itself may have been labeled as voluntary, the conditions under which the form was presented indicate that the contract was one of adhesion.

¶34 These same undisputed facts also are indistinguishable from *Broemmer* on whether the arbitration agreement was beyond Day's reasonable expectations. In *Broemmer*, the court held that an adhesion contract consisting of a *one-page* document requiring arbitration and *telling the patient she could obtain services at other clinics* if she refused to sign, was unenforceable as a matter of law as beyond the reasonable expectations of the patient. *Broemmer*, 173 Ariz. at 152, 157, 840 P.2d at 1017, 1023. This case is even more compelling than *Broemmer* because the arbitration agreement was included among *twenty-three pages of paperwork* Kindred presented to Day and told her to sign and Day had been told that Hospital was the only location Husband could obtain the services needed. While the agreement provided in regular typeface that signing the agreement was not a pre-condition to the furnishing of services to Husband, such language has little bearing when it was simply one statement among twenty-three pages of documents, no one bothered to

explain the purpose of the agreement to Day, and Day's affidavit concerning the manner in which the documents were presented to her refutes the boilerplate language hidden in the twenty-three pages she was handed and told to sign. Moreover, the arbitration agreement specifically states that "[b]y signing this Agreement, . . . [the Patient] acknowledges that the terms and effect of this Agreement have been explained to and understood by the Patient and that he/she has had the opportunity to ask questions." The inclusion of this language indicates that Kindred understood that patients might consider the agreement confusing and require additional explanation.

¶35 Finally, the majority states that unlike *Broemmer,* here the objectivity of the proposed arbitration panel is not suspect. *Supra*, ¶ 17. Even if that were accurate, which it is not, that distinction is unavailing as simply one factor considered in *Broemmer*.[6] When we consider Day's emotional

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[6] The arbitration panel in *Broemmer* was to consist of OBGYN specialists. 173 Ariz. at 151, 840 P.2d at 1016. Here, the arbitrators were to be the National Arbitration Forum ("NAF"). Independent research shows NAF's lack of objectivity in favoring industry. Thus, lawsuits have been filed by both the San Francisco City Attorney and the Minnesota Attorney General against NAF based on its lack of objectivity. *See California v. Nat'l Arbitration Forum, Inc.*, No. 473-569 (San Francisco Cnty. Super. Ct. filed Mar. 24, 2008), http://www.sfcityattorney.org/index.aspx?page=178; *Minnesota v. Nat'l Arbitration Forum, Inc.*, No. 09-18550 (Hennepin Cnty. Dist. Ct. 4th Jud. Dist. filed July 14, 2009); State of Minnesota Office of the Attorney General, *National Arbitration Forum Barred from Credit Card and Consumer Arbitrations under*

stress, her lack of experience in commercial matters, her lack of knowledge regarding arbitration, and the circumstances in which the agreement was presented and signed, I conclude that the arbitration agreement was a contract of adhesion beyond Day's reasonable expectations, and is therefore unenforceable.

CONCLUSION

¶36 For the reasons stated above, I would reverse the order compelling arbitration and dismissing the complaint and not remand for further evidentiary hearings on the enforceability of the arbitration agreement.

/s/
DONN KESSLER, Judge

Agreement with Attorney General Swanson (July 2009), http://legal pad.typepad.com/files/minn-release-agreement.pdf ("To consumers, the company said it was impartial, but behind the scenes, it worked alongside credit card companies to get them to put unfair arbitration clauses in the fine print of their contracts and to appoint the Forum as the arbitrator. Now the company is out of this business."). Reports have also been published documenting NAF trends. *See* Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), http://www.citizen.org/documents/ArbitrationTrap.pdf ("In the nearly 20,000 cases where NAF reached a decision, [the industry] prevailed in an astonishing 99.6 percent of cases."). Thus, just as in *Broemmer*, the arbitration panel was beyond Day's reasonable expectations because of its purported lack of objectivity.

At oral argument, Kindred argued that NAF is no longer in existence and new arbitrators would have to be found. However, that is not the issue. The issue is whether Day would have had any reasonable expectation that she was agreeing to arbitrators whose objectivity was highly suspect.