IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

UHS OF TUCSON, LLC, A DELAWARE
LIMITED LIABILITY COMPANY DBA PALO VERDE BEHAVIORAL CENTER,
UNIVERSAL HEALTH SERVICES INC., A DELAWARE CORPORATION, UHS OF
DELAWARE INC., A DELAWARE CORPORATION,
Petitioners,

v.

HON. D. DOUGLAS METCALF, JUDGE OF THE
SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

KIMBERLY ADAMS, ELISA ALTAMIRANO, ERIC ALVAREZ,
MAUREEN BATES, JOSHUA BEALL, LARRY CASWELL II, NATHAN COHEN,
KARYN DALRYMPLE, SOMA HELU, TODD HERRES, MICKIE HEWLIN,
BRIDGET RINEHART, ANTONIO SOLIS, TRENT TILLMAN AND
JAMIE VENTURA,
Real Parties in Interest.

Nos. 2 CA-SA 2022-0001 and
2 CA-SA 2022-0008 (Consolidated)
Filed March 18, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).
Ariz. R. P. Spec. Act. 7(g), (i).

Special Action Proceeding
Pima County Cause No. C20203895

JURISDICTION DECLINED IN PART AND ACCEPTED IN PART; RELIEF GRANTED

COUNSEL

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and

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 In this consolidated special-action proceeding, petitioners UHS of Tucson LLC (doing business as Palo Verde Behavioral Health Center), Universal Health Services Inc., and UHS of Delaware Inc. (collectively, the Hospital) seek review of the respondent judge's denial of their motion to compel arbitration in the underlying class-action lawsuit brought by real parties in interest (collectively, the Employees) for unpaid compensation.[1] The Hospital contends the respondent erred in concluding that the Federal Arbitration Act (FAA) did not apply here because the parties had agreed it would apply in arbitration agreements. In their separate petition for special action, the Employees seek to preserve

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[1]The motion to compel arbitration does not pertain to employee Kathy Hovey, who opted out of the arbitration agreement.

"additional reasons" why the respondent's order should be upheld. Because we agree with the Hospital, we accept jurisdiction of its petition for special action and grant relief. However, we decline jurisdiction of the Employees' petition.

Factual and Procedural Background

¶2 In April 2020, in response to the Covid-19 pandemic, Palo Verde adopted a policy under which designated employees would receive additional compensation for each shift they worked in addition to their regular schedule during a staffing shortage. In September 2020, the Employees filed a class action against Palo Verde, alleging it had refused to pay any such compensation. The Employees filed a first amended complaint in March 2021, adding Universal Health Services Inc. and UHS of Delaware Inc. as defendants.

¶3 The Hospital filed a motion to compel arbitration, asserting the Employees had "all signed arbitration agreements requiring that all claims related to or arising out of their employment would be resolved through binding arbitration" and their claims here "all clearly related to" their employment.[2] It pointed out, "The applicable arbitration agreements all state that they are governed by the Federal Arbitration Act and [the Hospital's] operations clearly involve interstate commerce, and therefore the [FAA] applies . . . and the [Employees] should be compelled to arbitrate their claims against [the Hospital]." The Hospital provided an affidavit from an executive, avowing that the Hospital "serves patients throughout the United States, and certainly uses and purchases goods and products that come from across the country and through interstate commerce." In response, the Employees argued the motion should be denied because: (1) the arbitration agreements were not authenticated; (2) the Hospital had failed to establish that the agreements are subject to the FAA; (3) the agreements are substantively and procedurally unconscionable; (4) the agreements "are contrary to [the Employees'] reasonable expectations with respect to the unexplained cost of arbitration, the misrepresented subpoena

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[2]Palo Verde initially filed a motion to compel arbitration in February 2021. But after the Employees filed their first amended complaint naming the additional defendants, the Hospital filed a first amended motion to compel arbitration, also including those defendants. Because the motions were substantively similar, the parties agreed that resolution of one motion would also resolve the other.

authority, and the unlawful confidentiality provision;" and (5) the Hospital had waived its right to compel arbitration.

¶4 The respondent judge heard argument on the motion to compel arbitration in July 2021. When discussing the applicability of the FAA, the respondent questioned whether the Hospital had "submitted any facts in support of these employees being involved in interstate commerce." The Hospital responded that it had submitted an affidavit from an executive showing its "operations are involved in interstate commerce," which the Hospital maintained was sufficient because the arbitration agreements themselves do not "need to relate to interstate commerce." The Employees, however, argued that the Hospital needed "to show that the employee/employer context was within interstate commerce, not just that the [H]ospital itself is engaged in interstate commerce."

¶5 In its August 2021 under-advisement ruling, the respondent judge denied the motion to compel arbitration. Relying on *Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.W.3d 884 (Ark. 2007), and *Shield Security & Patrol LLC v. Lionheart Security & Consulting LLC*, No. 1 CA-CV 16-0678 (Ariz. App. Oct. 31, 2017) (mem. decision),[3] the respondent explained, "By its plain terms, the [FAA] does not apply because a party to the contract is engaged in interstate commerce, but rather because the contract in dispute evidences a transaction involving commerce." The respondent further reasoned that the Hospital had failed to establish that the "employment contracts . . . evidence a transaction involving commerce." To "avoid piecemeal litigation," the respondent also addressed the other issues raised by the parties, rejecting the Employees' additional defenses against enforcement of the arbitration agreements.

¶6 The Hospital filed a timely notice of appeal. However, this court dismissed the appeal for lack of jurisdiction—"without prejudice to [the Hospital] to file a petition for special action"—because it involved an interlocutory order. *Adams v. UHS of Tucson*, No. 2 CA-CV 2021-0120 (Ariz. App. Dec. 2, 2021) (order). The Hospital then filed this petition for special action. After briefing on the Hospital's petition was complete, the Employees filed their own petition for special action, seeking to preserve "additional reasons" that the respondent judge's denial of the motion to

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[3]Memorandum decisions issued after January 1, 2015, may be cited for persuasive value if "no opinion adequately addresses the issue before the court." Ariz. R. Sup. Ct. 111(c)(1)(C).

compel arbitration should be upheld. We decline jurisdiction of the Employees' petition.

Special-Action Jurisdiction

¶7 Special-action jurisdiction is appropriate when a party has no "equally plain, speedy, and adequate remedy by appeal," Ariz. R. P. Spec. Act. 1(a), and when the issue raised is a pure question of law and matter of first impression, *State ex rel. Miller v. Superior Court*, 189 Ariz. 228, 230 (App. 1997). As we explained in the prior attempted appeal, the Hospital has no adequate remedy by appeal from the denial of its motion to compel arbitration. *See Sec. Alarm Fin. Enters., L.P. v. Fuller*, 242 Ariz. 512, ¶ 7 (App. 2017). In addition, the primary issue presented here is a question of law—whether the FAA applies—that "requir[es] neither factual review nor interpretation." *Orme Sch. v. Reeves*, 166 Ariz. 301, 303 (1990); *see also Sec. Alarm Fin. Enters., L.P.*, 242 Ariz. 512, ¶ 7. And there appears to be no published Arizona case directly on point. We therefore exercise our discretion and accept special-action jurisdiction.

Discussion

¶8 The issue in this special action is whether the arbitration agreements are enforceable under the FAA. In part, the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA preempts state law and governs all agreements involving interstate commerce, including arbitration agreements in employment contracts. *Hamblen v. Hatch*, 242 Ariz. 483, ¶ 20 (2017).

¶9 The United States Supreme Court has explained that the purpose of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Equal Emp. Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). The FAA, therefore, "simply requires courts to enforce privately negotiated agreements to

arbitrate, like other contracts, in accordance with their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Arbitration under the FAA is "a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit." *Id.* The FAA reflects a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also S. California Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 11 (1999).

¶10 "[C]ourts '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.'" *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, ¶ 23 (App. 2007) (quoting *Ex parte Greenstreet, Inc.*, 806 So. 2d 1203, 1207 (Ala. 2001)). Generally, "the party moving for arbitration has the burden of proving the existence of a contract containing an arbitration clause, in a transaction that substantially affects interstate commerce." *Greenstreet*, 806 So. 2d at 1207. This court reviews de novo the denial of a motion to compel arbitration. *Rizzio v. Surpass Senior Living LLC*, 251 Ariz. 413, ¶ 8 (2021).

¶11 The Hospital points out that the arbitration agreements in this case state, "This agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce."[4] It therefore reasons that "the parties have already agreed the FAA applies and the agreement involves commerce" and this "alone" is sufficient to support application of the FAA here.

¶12 The respondent judge seemingly rejected this argument in the under-advisement ruling, explaining, "The parties have not raised the issue of whether the Arbitration Agreement's reference to the [FAA] as applying to any enforcement of the agreement is an enforceable choice of law provision, so the Court will not address it." In their response to the petition for review, the Employees similarly assert that the Hospital's failure to raise below the issue of whether "the arbitration agreements' incorporation of the FAA is enough" renders it waived before this court.

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[4]For some of the employees, the record contains the entire arbitration agreement showing this language. However, for others, the record only contains the signature page and not the initial page on which this language presumably appears. But the parties do not dispute that the agreements were identical for all employees.

¶13 Admittedly, much of the discussion below on the applicability of the FAA turned on how the Hospital needed to establish interstate commerce—by the conduct of the Hospital itself or in the context of the employment relationship—not the language of the arbitration agreements. However, at the start of the motion to compel arbitration, the Hospital pointed out that the arbitration agreements state they are governed by the FAA. The Hospital also relied on general contract principles, arguing that the plain language of the arbitration agreement controlled and, as such, the FAA applied. Thus, this argument was raised below. Moreover, the doctrine of waiver is discretionary, *Noriega v. Town of Miami*, 243 Ariz. 320, ¶ 27 (App. 2017), and we decline to apply it here given the plain language of the arbitration agreements, *cf. Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993) ("If application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law, it is appropriate for us to consider the issue.").

¶14 "It is a fundamental rule in the interpretation of contracts that the court must ascertain and give effect to the intention of the parties at the time the contract was made if at all possible." *Polk v. Koerner*, 111 Ariz. 493, 495 (1975). "To determine the parties' intent, we 'look to the plain meaning of the words as viewed in the context of the contract as a whole.'" *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, ¶ 15 (App. 2010) (quoting *United Cal. Bank v. Prudential Ins. Co.*, 140 Ariz. 238, 259 (App. 1983)). When the terms of a contract are plain and unambiguous, the interpretation is a question of law for the court. *Id.*

¶15 The plain language of the arbitration agreements in this case unambiguously provides that they are governed by the FAA and involve interstate commerce. We must therefore give effect to this clear intention of the parties. *See Mining Inv. Grp., LLC v. Roberts*, 217 Ariz. 635, ¶ 16 (App. 2008) (when intent of parties is expressed in clear and unambiguous language, no room for court construction or interpretation); *cf. Waffle House, Inc. v. Pavesi*, 806 S.E.2d 204, 208 (Ga. App. 2017) ("[I]t strains credulity to believe that the parties' express reference to the FAA in the choice-of-law provision evinced something other than their intention that the FAA govern any arbitration proceedings between them."). And because the parties agreed the FAA would apply, we need not engage in a fact-intensive interstate-commerce analysis. *See Hamblen*, 242 Ariz. 483, ¶ 20; *see also Rizzio*, 251 Ariz. 413, ¶ 9 (noting agreement at issue "specifically provides it 'shall be governed by and interpreted under'" FAA and suggesting FAA therefore applied regardless of interstate-commerce connections); *cf. Arkansas Diagnostic Ctr., P.A.*, 257 S.W.3d at 890 (discussing plaintiff's interstate-commerce connections where arbitration agreement did not

provide that FAA applied). Accordingly, the FAA applies here, and the respondent judge erred as a matter of law in concluding otherwise. *See Rizzio*, 251 Ariz. 413, ¶ 8.

¶16 The respondent judge also concluded the Employees' claims in the class action are covered by the arbitration agreements and rejected the Employees' other defenses against enforcement of the arbitration agreements. Consequently, as the Hospital maintains, the respondent was required to grant the motion to compel arbitration.[5] *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (under FAA, trial court limited to determining whether valid arbitration agreement exists and, assuming it does, whether agreement encompasses dispute; if yes to both, FAA "requires" enforcement of arbitration agreement); *United Behav. Health v. Maricopa Integrated Health Sys.*, 240 Ariz. 118, ¶ 28 (2016) (same). We therefore reverse the August 2021 under-advisement ruling and remand the case for proceedings consistent with this decision.

Attorney Fees

¶17 The Hospital and the Employees have requested their attorney fees and costs incurred in this special-action proceeding. The Hospital relies on A.R.S. §§ 12-341, 12-341.01, while the Employees cite A.R.S. §§ 12-341, 12-341.01, 12-349, 12-2106. We deny the Employees' request because they are not the prevailing party. In our discretion, we also deny the Hospital's request for attorney fees. *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). However, the Hospital is entitled to its costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See also* Ariz. R. P. Spec. Act. 4(g).

Disposition

¶18 For the foregoing reasons, we accept special-action jurisdiction of the Hospital's petition and grant relief. We decline jurisdiction of the Employees' petition for special action.

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[5]Because we conclude the FAA applies based on the plain language of the arbitration agreements, we need not address the Hospital's remaining arguments.