IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 22, 2015 Session

BILLY BOCKELMAN, ET AL. v. GGNSC GALLATIN BRANDYWOOD LLC, ET AL.

Appeal from the Circuit Court for Sumner County
No. 2011-CV-583 Joe Thompson, Judge

No. M2014-02371-COA-R3-CV – Filed September 18, 2015

This appeal concerns the enforceability of an arbitration agreement signed by a patient's health care agent in conjunction with the patient's admission to a nursing home. Within a few months of having been declared to lack capacity, the patient was placed in a nursing home. The agent completed all admission forms and contracts, including an optional, stand-alone arbitration agreement, on the patient's behalf. After the patient's death, the agent sued the nursing home for negligence, violations of the Tennessee Adult Protection Act, breach of contractual duties, and alternatively, medical malpractice. The nursing home moved to compel arbitration, and the trial court granted the motion. On appeal from the order compelling arbitration, the agent claims she lacked authority to sign the arbitration agreement because, at the time of admission, the patient was competent to make her own decisions. Even if the patient lacked capacity, the agent argues that the decision to enter into the arbitration agreement was not a "health care decision." The agent also argues that the arbitration agreement was unconscionable. We affirm the order compelling arbitration.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Deborah Truby Riordan, Little Rock, Arkansas, and Carey L. Acerra, Cameron C. Jehl, and Deena K. Arnold, Memphis, Tennessee, for the appellant, Billy Bockelman.

Thomas O. Helton and Daniel J. White, Chattanooga, Tennessee, and Summer H. McMillan, Knoxville, Tennessee, for the appellees, GGNSC Gallatin Brandywood, LLC d/b/a Golden Living Center–Brandywood; GGNSC Administrative Services, LLC d/b/a

Golden Ventures; GGNSC Clinical Services, LLC; GGNSC Holdings, LLC d/b/a Golden Horizons; Golden Gate National Senior Care, LLC d/b/a Golden Living; GGNSC Equity Holdings, LLC; and Golden Gate Ancillary, LLC d/b/a Golden Innovations.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

In December 2008, Betty Wilson appointed her daughter, Billy Bockelman, as her Health Care Agent. In its entirety, the Health Care Agent form stated:

> I, Betty Jean Wilson, give my agent named below permission to make health care decisions for me if I cannot make decisions for myself, including any health care decision that I could have made for myself if able. If my agent is unavailable or unwilling to serve, the alternate named below will take the agent's place.

No alternate agent was named.

On January 25, 2010, Ms. Wilson's attending physician determined that Ms. Wilson "lack[ed] capacity/competency to make health care decisions or is otherwise mentally or physically incapable of communication in order to give informed consent for health care decisions." The physician documented and signed this determination. Despite the determination, according to the examination notes, Ms. Wilson was oriented to time, place, and person.

Ms. Wilson had several subsequent medical visits with doctors, nurses, and other providers where her mental condition was noted. Those notes present a complicated picture of Ms. Wilson's mental condition. For example, notes from an examination on May 6, 2010, indicate that she did not show any neurological deficits. An assignment of benefits form completed on May 14, 2010, stated that Ms. Wilson was unable to sign because of "physical incapacity," but the "mental incapacity" option was not selected. Notes from Ms. Wilson's physical examination on May 14, 2010, indicate that she was oriented to time, place, and person, but that she suffered from unspecified neurological symptoms. Additionally, several physicians ordered treatment for Ms. Wilson based on her preferences rather than her best interest.[1]

[1] The physician order form stated that the treatment would be ordered on a patient's best interest if she lacked capacity or her preferences were unknown.

In May 2010, Ms. Wilson sought admission to GGNSC Gallatin Brandywood LLC, a nursing home.[2] Although Ms. Bockelman testified that Ms. Wilson had full mental capacity at the time of her admission, Ms. Bockelman presented GGNSC with the health care agent form. As Ms. Wilson's agent, Ms. Bockelman signed all admission documents on Ms. Wilson's behalf. Ms. Bockelman testified that the admission forms were signed outside of Ms. Wilson's presence and that Ms. Wilson had no knowledge that the forms had been signed.

In addition to other admission forms, Ms. Bockelman signed an undated, stand-alone Alternative Dispute Resolution Agreement ("ADR Agreement").[3] At the top of the page, the ADR Agreement included the following statement in bold, capitalized letters:

> **THIS AGREEMENT IS <u>NOT</u> A CONDITION OF ADMISSION TO OR CONTINUED RESIDENCE IN THE FACILITY.**

The ADR Agreement broadly delegated most potential disputes to arbitration:

> This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Facility or the Admissions Agreement between the Parties that would constitute a legally cognizable cause of action in a court of law sitting in the state where Facility is located. Covered disputes include but are not limited to all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; consumer protection; fraud; misrepresentation; negligence; gross negligence; malpractice; and any alleged departure from any applicable federal, state, or local medical, health care, consumer, or safety standards.

However, the ADR Agreement also specified certain matters not subject to arbitration:

> Nothing in this Agreement shall prevent the Resident from filing a grievance or complaint with the Facility or appropriate government agency, from requesting an inspection of the Facility from such agency, or from seeking a review under any applicable federal, state, or local law of any decision to discharge or transfer the Resident. This Agreement also shall

[2] GGNSC Gallatin Brandywood actually admitted Ms. Wilson twice, once on May 12, 2010, and a second time a few days later. After the first admission, she remained a resident until May 14, 2010, when she transferred to a different facility. She returned to GGNSC Gallatin Brandywood on May 19, 2010.

[3] The parties do not know whether Ms. Bockelman signed the ADR Agreement upon the May 12, 2010 admission or the May 19, 2010 admission, but this has no bearing on the appeal.

> not prevent any Party from seeking interim equitable relief from a court of competent jurisdiction to prevent irreparable harm or to preserve the positions of the parties pending arbitration, or to seek appointment of an arbitrator. In addition, the parties are not precluded by this Agreement from seeking remedies in small claims court for disputes or claims within its jurisdiction.

Despite the language at the top of the ADR Agreement, Ms. Bockelman testified that a GGNSC employee told her, "Well, you have to sign it in order for her to stay here." She also stated that the employee did not explain the ADR Agreement. The GGNSC employee could not recall her meeting with Ms. Bockelman. She did testify that her customary practice was to explain that the agreement required patients to resolve claims against the nursing home in arbitration "as opposed to a jury trial."

In May 2011, after Ms. Wilson's death, Ms. Bockelman sued GGNSC, affiliated entities ("GGNSC/Golden"), and other health care providers[4] for negligence, violations of the Tennessee Adult Protection Act, breach of contractual duties, and alternatively, medical malpractice. In the original complaint, Ms. Bockelman alleged that Ms. Wilson was "of unsound mind" throughout her residency at GGNSC. Ms. Bockelman omitted that allegation in a subsequently filed amended complaint.

GGNSC/Golden moved to compel arbitration. After a hearing, the trial court entered an order compelling arbitration on October 18, 2013. The court found that, "more likely than not, the deceased was mentally incompetent and the daughter had proper authority to sign in behalf of her Mother the admissions agreement which contained the arbitration agreement." The court also dismissed the case.

Following a motion to alter or amend filed by Ms. Bockelman, the trial court[5] allowed the parties to conduct further discovery on the issue of unconscionability. After the additional discovery, the court conducted two additional hearings on GGNSC/Golden's motion to compel arbitration.

In a Memorandum Opinion and Order entered November 4, 2014, the trial court again granted GGNSC/Golden's motion to compel arbitration and dismissed the action. The court first noted that the October 18, 2013 order applied an incorrect standard to the issue of Ms. Wilson's competency. In relevant part, the court's order further stated:

[4] The other health care providers named in Ms. Bockelman's complaint and amended complaint are not parties to this appeal.

[5] A new judge heard the motion to alter or amend following the untimely passing of the Honorable C. L. "Buck" Rogers.

> After a thorough review of the record in this case, the Court finds by clear and convincing evidence that Betty Jean Wilson was not competent to sign the Arbitration Agreement on May 12, 2010. [Ms. Bockelman] had actual authority to execute the Arbitration Agreement on behalf of Ms. Wilson pursuant to a validly executed Appointment of Health Care Agent. By appointing [Ms. Bockelman] to make health care decisions on her behalf, Mrs. Wilson was not denied a meaningful choice in health care decision-making. [Ms. Bockelman's] claim that the Arbitration Agreement was procedurally unconscionable must fail.

II. ANALYSIS

On appeal, Ms. Bockelman raises three issues: (1) whether the trial court erred by finding that Ms. Wilson lacked mental capacity in May 2010; (2) whether the trial court erred in holding that Ms. Wilson's health care agent had authority to bind her to an optional, stand-alone ADR Agreement; and (3) whether enforcement of the ADR Agreement is unconscionable under the circumstances.

A. MS. WILSON'S MENTAL CAPACITY

Ms. Bockelman asks us to reverse the trial court's finding that Ms. Wilson lacked capacity at the time the ADR Agreement was executed. At oral argument, Ms. Bockelman's counsel conceded that Ms. Wilson was once incapacitated but claimed that she regained capacity before May 2010. In support of this claim, Ms. Bockelman points to Ms. Wilson's medical records following the determination of incapacity. Whether Ms. Wilson was competent in May 2010 is a question of fact. We review a trial court's finding of fact de novo with a presumption of correctness. Tenn. R. App. P. 13(d). We will not overturn the trial court's factual findings unless the evidence preponderates against them. *See Necessary v. Life Care Ctrs. of Am., Inc.*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636, at *4 (Tenn. Ct. App. Nov. 16, 2007). Evidence preponderates against a factual finding if the evidence "support[s] another finding of fact with greater convincing effect." *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001).

As Ms. Bockelman maintains, individuals in Tennessee are presumed to be mentally competent. *Id.* at 297. To overcome that presumption, a party must provide "clear, cogent, and convincing" proof of an individual's lack of mental capacity. *Ralston v. Hobbs*, 306 S.W.3d 213, 219 (Tenn. Ct. App. 2009). Clear, cogent, and convincing proof permits "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)

We find clear and convincing evidence to support the trial court's finding that Ms. Wilson was incompetent in May 2010. Here, Ms. Wilson's attending physician determined that she "lack[ed] capacity/competency to make health care decisions or is otherwise mentally or physically incapable of communication in order to give informed consent for health care decisions" on January 25, 2010. This followed the procedure contemplated by the Tennessee Health Care Decision Act. *See* Tenn. Code Ann. § 68-11-1803(d) (Supp. 2015). Ms. Bockelman does not challenge the manner in which this determination was made or even that Ms. Wilson lacked capacity as of January 25, 2010. Instead, Ms. Bockelman relies primarily on her own observations and portions of the medical records from the brief period of time between the determination of incapacity and Ms. Wilson's admission to GGNSC to argue that she recovered capacity. Although portions of these records can be argued to suggest recovered capacity, we find them, and Ms. Bockelman's observations, insufficient to overcome the determination of Ms. Wilson's designated physician, who has "primary responsibility for [her] health care." *See id*. § 68-11-1802(a)(4).

In finding clear and convincing evidence of a lack of capacity, we acknowledge that one of the medical records relied upon by Ms. Bockelman was created by the designated physician who found Ms. Wilson lacked capacity. In that record, the designated physician noted that end-of-life orders were based on Ms. Wilson's personal preference. Ms. Bockelman argues that notation "negated" his earlier determination that Ms. Wilson lacked capacity. We disagree. If the designated physician determines an individual has recovered capacity, the physician is required to "promptly record the determination in the patient's current clinical record and communicate the determination to the patient, if possible, and to any person then authorized to make health care decisions for the patient." *Id*. § 68-11-1808(a). No such record or notifications were made.

B. Authority of Health Care Agent

Because Ms. Wilson lacked capacity to make decisions, as her agent, Ms. Bockelman had authority to make health care decisions on her behalf. However, Ms. Bockelman argues that the ADR Agreement is not binding because the decision to enter the ADR Agreement was not a "health care decision" and, therefore, she lacked authority to enter the agreement.

Generally, an agent's power to act on behalf of a principal is limited by the "specific language" of the power of attorney or health care agent instrument. The interpretation of written instruments is a matter of law, which we review de novo. *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 750 (Tenn. 2007); *see also Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 884 (Tenn. 2007) (citing 3 Am. Jur. 2d Agency, § 27 (2007)). We construe powers of attorney and health care agent instruments according to their plain terms. *See Tenn. Farmers Life Reassurance Co.*, 239 S.W.3d at 750.

In this case, Ms. Wilson granted Ms. Bockelman broad power to make decisions in her stead:

> I . . . give my agent named below permission to make health care decisions for me if I cannot make decisions for myself, including any health care decision that I could have made for myself if able.

To ascertain the scope of Ms. Bockelman's power, we must determine the meaning of "health care decisions." To do so, we again look to the Heath Care Decisions Act and cases interpreting the act.

Under the Health Care Decisions Act, "health care" is defined as "any care, treatment, service or procedure to maintain, diagnose, treat, or otherwise affect an individual's physical or mental condition, and includes medical care as defined in § 32-11-103." Tenn. Code Ann. § 68-11-1802(a)(6). "Health care decision" is defined as "consent, refusal of consent or withdrawal of consent to health care." Tenn. Code Ann. § 68-11-1802(a)(7). In light of these definitions, our Supreme Court has held that the decision to admit a patient to a nursing home "clearly constitutes a 'health care decision.'" *Owens*, 263 S.W.3d at 884. The court reasoned that, because a patient can sign a contract for nursing home care, a health care agent or power of attorney can as well. *Id.*

The *Owens* court also concluded that entering into an arbitration agreement as part of nursing home admission was a health care decision. *Id.* at 884-85. The court warned against distinguishing between health care and legal decisions in contracting for health care:

> [The] purported distinction between making a legal decision and a health care decision fails to appreciate that signing a contract for health care services, even one without an arbitration provision, is itself a "legal decision." . . . . Holding that an attorney-in-fact can make some "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by attorneys-in-fact that likely would have negative effects on their principals.

Id.

We have applied *Owens* to two scenarios involving arbitration agreements and nursing home admissions. In *Necessary v. Life Care Ctrs. of Am., Inc.*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636 (Tenn. Ct. App. Nov. 16, 2007), we considered whether a spouse had authority to sign an optional arbitration agreement as part of her husband's nursing home admission. *Id.* at *1-2, *4. The patient gave his wife oral express authority to sign all documents necessary for his admission to the nursing home.

Id. at *3. He did not give express authority for her to waive his right to a jury trial. *Id.* However, the wife signed an optional arbitration agreement as part of the admissions process. *Id.* at *2-3. Because distinguishing between the agent's authority to make some admissions decisions and not others would create the "untenable" situation described in *Owens*, we concluded the wife had authority to sign the agreement. *Id.* at *5 ("[W]e hold that Plaintiff, who had Decedent's express authority to sign the admission documents at the healthcare facility, also had the authority to sign the arbitration agreement on the Decedent's behalf as one of those admission documents.").

Similarly, in *Mitchell v. Kindred Healthcare Operating Inc.*, 349 S.W.3d 492, (Tenn. Ct. App. 2008), we held that a health care agent has authority to sign an optional, stand-alone arbitration agreement as part of the principal's admission to a nursing home. *Id.* at 498. In that case, the power of attorney stated that the agent had "full power and authority to make health care decisions for me to the same extent that I could make decisions for myself if I had the capacity to do so." *Id.* at 497. The power of attorney also specifically permitted the execution of waivers on the patient's behalf. *Id.* Because the principal could have decided to enter the nursing home and agreed to the arbitration agreement, we concluded that the individual who had power of attorney had authority to execute the arbitration agreement on the patient's behalf. *Id.* at 498.

Admitting Ms. Wilson to a nursing home was a health care decision within the scope of Ms. Bockelman's power as a health care agent. *Owens*, 263 S.W.3d at 884. The health care agent form granting Ms. Bockleman power to act on Ms. Wilson's behalf is similar to the broad delegations of power in both *Owens* and *Mitchell*. *See id.* at 879-80; *Mitchell*, 349 S.W.3d at 496-97. Although agreeing to arbitrate claims was not required for admission, the ADR Agreement was part of the admission process. *See Mitchell*, 349 S.W.3d at 498; *Necessary*, 2007 WL 3446636, at *5. Therefore, following *Owens* and its progeny, we decline to draw distinctions between the "health care" and "legal" decisions involved in nursing home admissions. *Owens*, 263 S.W.3d at 884-85. We accordingly conclude Ms. Bockelman had authority to enter the ADR Agreement as Ms. Wilson's health care agent. By doing so, we avoid the "untenable" result that agents can make some nursing home admission decisions for their principals, but not others. *Id.*

C. UNCONSCIONABILITY

Finally, Ms. Bockelman argues that, even if she had the requisite authority, the ADR Agreement is not enforceable because it is unconscionable. *See Taylor v. Butler*, 142 S.W.3d 277, 285 (Tenn. 2004) (holding that a court may refuse to enforce an unconscionable contract or unconscionable term within a valid contract). She argues that the Agreement is unconscionable for three reasons: (1) Ms. Wilson was denied a meaningful choice because she was never presented with the ADR Agreement; (2) GGNSC misrepresented the ADR Agreement's terms; and (3) the ADR Agreement lacks mutuality of obligation. Whether an arbitration clause is unconscionable is a

question of law, which we review de novo. *Berent v. CMH Homes, Inc.*, __ S.W.3d __, No. E2013-01214-SC-R11-CV, 2015 WL 3526984, at *4 (Tenn. Jun. 5, 2015).

Although unconscionability may be categorized as either procedural (a party's lack of meaningful choice) or substantive (unreasonably harsh contract terms), Tennessee courts tend to "lump the two [concepts] together." *Trinity Indus., Inc. v. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 170-71 (Tenn. Ct. App. 2001). We determine whether a contract or term is unconscionable "in the light of its setting, purpose and effect." *Taylor*, 142 S.W.3d at 285. An unconscionable contract is one where,

> the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other."

Id. (quoting *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984)). We have also defined an unconscionable contract as one where "the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for a meaningful choice." *Id.*

In determining whether a contract is unconscionable, we consider several factors, including: the parties' relative bargaining power, *Trinity Indus.*, 77 S.W.3d at 171; whether the contract terms are common in the industry, *id.*; weaknesses in the contracting process like fraud or lack of capacity, *Berent*, 2015 WL 3526984, at *5 (citing Restatement (Second) of Contracts § 208, cmt. a (1981)); and the mutuality of obligation, *Taylor*, 142 S.W.3d at 286 (Tenn. 2004); *Berent*, 2015 WL 3526984, at *11. In the context of an arbitration agreement between a health care provider and patient, we have also considered whether the agreement to arbitrate was hidden within an admission contract; the consequences of arbitration were explained to the patient; was revocable; changed the drafter's duty of care or liability; and was required for the provision of health care services. *See Buraczynski v. Eyring*, 919 S.W.2d 314, 321 (Tenn. 1996).

We conclude the ADR Agreement is not unconscionable on the basis that Ms. Wilson lacked a meaningful choice. Although she was never personally presented with the ADR Agreement, Ms. Wilson lacked mental capacity and her health care agent was appropriately presented with the agreement on her behalf. Additionally, as noted on the face of the document, the agreement was optional and not required for Ms. Wilson's admission to the nursing home. Ms. Bockelman could have decided not to enter into the arbitration agreement, and Ms. Wilson could have still received services.

We also decline to find the ADR Agreement unconscionable on the ground that GGNSC misrepresented its terms. Ms. Bockelman testified that the nursing home employee did not explain the arbitration agreement but told her that it was required for

admission. Although she could not recall her meeting with Ms. Bockelman, the employee claims she would not have made such a representation. Even if the employee erroneously told Ms. Bockelman that the ADR Agreement was required for admission, Ms. Bockelman is assumed to have read the contract she signed. *See Beasley v. Metro. Life Ins. Co.*, 229 S.W.2d 146, 148 (Tenn. 1950) ("[O]ne is under a duty to learn the contents of a written contract before he signs it."). The ADR Agreement was separate from the admission contract and indicated on its face that the agreement was optional and not required for Ms. Wilson's admission. Moreover, the Agreement explained that the patient was giving up her right to a jury trial and allowed Ms. Bockelman to revoke her acceptance within thirty days of execution. To reinforce the importance of the ADR Agreement, at the top of the signature page, the document stated in bold, capitalized letters: "**THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ IT CAREFULLY AND IN ITS ENTIRETY BEFORE SIGNING."**

Finally, we conclude that the ADR Agreement is not unconscionable on the basis that it lacks mutuality of obligation. Our Supreme Court has addressed unconscionability and mutuality of obligation in two recent cases. In *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004), the court held that an arbitration provision reserving judicial remedies for "practically all [of the drafter's] claims," but requiring the other party to arbitrate all its claims was unconscionable. *Id.* at 286. In that case, the arbitration provision was contained in an adhesion contract between a car dealer and a buyer. *Id*. Particularly in light of the fact that the buyer had no ability to negotiate the contract, the court held that the arbitration agreement was "unreasonably favorable to [the dealer] and oppressive to [the buyer.]" *Id.*

However, our Supreme Court later clarified in *Berent* that *Taylor* did not adopt a per se rule that arbitration agreements with non-mutual remedies were unconscionable. *Berent*, 2015 WL 3526984, at *1, 13. Instead, the court held that one party's retention of a judicial forum for limited purposes does not necessarily render the arbitration agreement unconscionable. *Id.* at *13. The arbitration agreement in *Berent* was included in an adhesion contract for the sale of a manufactured home. *Id.* The arbitration provision required both the buyer and seller to arbitrate all major disputes, but both parties were permitted to seek judicial resolution of "small claims." *Id.* Both parties were also permitted to seek injunctive relief in court, so long as the relief was "in support of arbitration." *Id.* However, the sellers could seek relief in a judicial forum to "enforce their security interest" in the manufactured home or "to seek preliminary relief." *Id.* The sellers argued their exception for foreclosure was necessary to protect their security interest because they could not do so in arbitration proceedings. *Id.*

Although the arbitration provision had "some degree of non-mutuality in the parties' choice of forum," the court concluded that the arbitration agreement was not unconscionable. *Id.* at *14. The court upheld the foreclosure exception, noting that there was a "reasonable business justification for the carve-out for foreclosure proceedings" on

the manufactured home." *Id.* Therefore, the court concluded that the agreement was not favorable to the sellers "beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable." *Id.*

In this case, the ADR Agreement delegates most of the parties' claims to arbitration. The parties share identical rights and obligations in the arbitration process. Ms. Wilson may bring the same claims against the nursing home in arbitration as she could in court. "[T]he agreement 'did not change the defendant's duty to use reasonable care in treating [the patient], nor limit liability for breach of that duty, but merely shifted disputes to a different forum.'" *Mitchell*, 349 S.W.3d at 500 (citing *Reagan*, 2007 WL 4523092, at *15). Further, the agreement does not place a monetary cap on Ms. Wilson's potential recovery nor does it limit the type of damages she can seek in arbitration. Additionally, the ADR Agreement does not place an undue financial burden on Ms. Wilson if she chooses to pursue arbitration; GGNSC/Golden is responsible for the majority of the arbitration fees.

Although the ADR Agreement may have some degree of non-mutuality in practical effect, our Supreme Court has held that non-mutual remedies do not render an arbitration agreement per se unconscionable. *Berent*, 2015 WL 3526984, at *1. As in *Berent*, both parties here are permitted to seek judicial relief in small claims court. Although Ms. Wilson's most likely claim against the nursing home—negligence—could exceed the jurisdictional cap for small claims court, the nursing home's most likely claim—breach of contract for unpaid fees—could also exceed the small claims court cap. We enforced a similar agreement in *Berent*.

In sum, while the ADR Agreement may favor the nursing home more than Ms. Wilson, it is not "unreasonably favorable" to the nursing home. *See Berent*, 2015 WL 3526984, at *14; *see also LeMaire v. Beverly Enter. MN, LLC*, No. CIV. 12-1768 JRT/TNL, 2013 WL 104919, at *4-5 (D. Minn. Jan. 9, 2013) (holding that a very similar ADR Agreement was not unconscionable). Therefore, in light of the facts and circumstances presented in the record, we conclude the ADR Agreement is not unconscionable and is enforceable.

III. CONCLUSION

We find clear and convincing evidence to support the trial court's finding that the patient lacked capacity, and we conclude that the health care agent had authority to sign the arbitration agreement. We further conclude that the arbitration agreement is not unconscionable. The judgment of the trial court is affirmed.

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W. NEAL McBRAYER, JUDGE