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IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

ADRIENNE CURCIO, as Personal Representative of the Estate of Angelina Lanzetta, Deceased, and ADRIENNE CURCIO, personally,

CASE NO: 4D08-1947

Appellant,

vs.

SOVEREIGN HEALTHCARE OF BOYNTON BEACH, L.L.C., d/b/a BOYNTON BEACH NURSING AND REHAB CENTER,

Appellee.
_______________________________________/

On Non-Final Appeal from the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida
Case No. 502007CA002927XXXXMB

INITIAL BRIEF OF APPELLANT

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STATEMENT OF CASE AND FACTS

After she was injured in a fall, Angelina Lanzetta checked into Boynton Beach Nursing and Rehab Center for rehabilitative services and care. (Appendix 2). Due to her injuries, Ms. Lanzetta required constant supervision and assistance. (A 4). She was unable to use the restroom on her own and had to be escorted to the facilities in a wheelchair by an employee of the rehabilitation center. (A 4). After being left alone in the restroom without adequate supervision, Ms. Lanzetta fell off the toilet, fracturing her neck. (A 4). A little more than a year later, Ms. Lanzetta died as a result of the injuries she sustained in this fall. (A 4).

Ms. Lanzetta's daughter, Adrienne Curcio, individually and as personal representative of her mother's estate, sued Sovereign Healthcare of Boynton Beach, L.L.C., doing business as Boynton Beach Nursing and Rehab, for negligence; deprivation or infringement of her mother's rights under Chapter 400 of the Florida Statutes; and wrongful death. (A 5-9). Defendant moved to dismiss Plaintiff's lawsuit and compel arbitration on the ground that the Resident Admission and Financial Agreement signed by Ms. Lanzetta upon her admission to the rehabilitation center mandated the dispute be resolved by arbitration. (A 11-12, 22-23). The agreement provides:

> <u>Arbitration Provisions.</u> Under Federal law two or more parties may agree in writing for the settlement by arbitration of any dispute arising between them. Arbitration is a method for resolving disputes without involving the courts. In these arbitration proceedings, the dispute is

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heard by private individuals, called arbitrators, who are selected by the Resident and/or the Resident's Legal Representative and the Facility. The decision of the arbitrators binds both parties and is final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury.

The Facility and the Resident and/or the Resident's Legal Representative acknowledge that, by their signatures to this Section of the Agreement, they are expressly and voluntarily agreeing to a mutual arbitration, regardless of which party is making a claim; that the Facility agrees to pay the fees of the arbitrators and up to $5,000.00 of reasonable and appropriate attorney's fees and costs for the Resident in any claims against the Facility; that the Resident and/or the Resident's Legal Representative shall have the right to choose the location of any arbitration under this Agreement. Intending to be legally bound the parties expressly agree that this Agreement will be governed by the Federal Arbitration Act. It is the express intent of the parties to have a binding arbitration agreement. For purposes of this Section only (Section VII of this Agreement), the term "Facility" includes Boynton Beach Nursing & Rehab Center (name of Facility), Sovereign Healthcare, LLC, the company that operates the facility, the company that manages the Facility; Southern Healthcare Management, LLC, Sovereign HealthCare LLC, and their employees, agents, parents, affiliates, successors and assigns.

The parties agree that they shall submit to binding arbitration in all disputes against each other and the representatives, affiliates, agents and employees arising out or in any way related or connected to the Agreement and all matters related thereto including matters involving the Resident’s stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care including allegations of medical malpractice; disputes concerning whether any statutory provisions relating to the Resident’s rights under Florida law were violated, including but not limited to claims under chapter 400 of the Florida Statutes; any dispute relating to the payment or non-payment for the Resident’s care and stay at the Facility; and any other dispute under state or Federal law based on contract, tort, statute (including any deceptive trade practices and consumer protection statutes),

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> warranty or any alleged breach, default, negligence, wantonness, fraud, misrepresentation or suppression of fact or inducement.

(A 12-13, 22). Defendant set its motion to compel arbitration for a thirty-minute hearing before the trial court. (A 24).

Plaintiff argued in her response to Defendant's motion to compel arbitration that the arbitration clause is unenforceable because it is procedurally and substantively unconscionable and in violation of public policy. (A 27-30). Specifically, Plaintiff claimed that the agreement is unconscionable because the decedent had no choice but to sign the arbitration agreement in order to obtain the medical treatment and care she needed, and that she did not understand the agreement or the rights she was waiving by signing the agreement. (A 27-28). She also claimed the arbitration agreement violates public policy because decedent was stripped of her constitutional rights to due process and access to courts when she was required to sign the confusing agreement prior to receiving necessary care. (A 30).

At a hearing before the Honorable Diana Lewis, Defendant argued that the arbitration agreement should be enforced because, *inter alia*, there was "no evidence that [the decedent] had been declared incompetent" before signing the agreement. (A 42). Defense counsel also represented to the court that, although no depositions had been taken on the issue, the admissions director of the rehabilitation center would testify that Defendant's general practice is to explain

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the terms of the admission agreement to the residents and their powers of attorney; to specifically explain the import of the arbitration clause; and to explain that admission to the facility is not contingent on the signing of the arbitration agreement. (A 45).

Plaintiff argued that the decedent signed the arbitration agreement under distress because she was being admitted to the rehabilitation center as an "at-risk patient," had no bargaining power, and believed she would not be admitted and receive care unless she signed the agreement. (A 51-52). Plaintiff pointed out that regardless of the representations of defense counsel, there was no evidence that the decedent would have been admitted to the rehabilitation center without signing the arbitration agreement. (A 53). Defendant countered that it was afraid to engage in discovery prior to the hearing on its motion to dismiss for fear that it would waive it rights to arbitration. (A 55-56).

Rather than order the parties to engage in discovery and come back for an evidentiary hearing on the issue of whether the arbitration clause is unconscionable, Judge Lewis granted Defendant's motion to dismiss "without prejudice for [Plaintiff] to bring it back if during the course of the discovery [she] determine[d] there will be good grounds to strike that clause . . . ." (A 61). When Plaintiff asked how the parties would engage in discovery if her case was

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dismissed, the trial court instructed, "You are going to go through the arbitration proceedings." (A 62).

The trial court entered a written order granting Defendant's motion to compel arbitration and dismissing Plaintiff's case, which states:

> 1. Defendant's Motion to Dismiss and to Compel Arbitration is GRANTED. This case is hereby dismissed.
>
> 2. The Court finds that the subject Arbitration Agreement is enforceable, thus, the parties shall proceed to arbitrate the dispute. The Court further finds that the Plaintiff failed to meet its burden of proof that the deceased did not have the mental capacity to enter into the Arbitration Agreement.
>
> 3. The Court shall retain jurisdiction to reconsider the dismissal of this case pending the development of sufficient grounds during the arbitration process.

(A 72). Plaintiff timely appealed the trial court's order to this Court. (A 73-75). Although Plaintiff's notice of appeal specified that she is appealing a final order, (A 73), the Court ruled *sua sponte* that her appeal seeks review of a non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv).

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SUMMARY OF ARGUMENT

In opposition to Defendant's motion to compel arbitration, Plaintiff argued the arbitration provision contained in the rehabilitation center admission agreement is unconscionable because the decedent had no choice but to sign the arbitration agreement in order to obtain the medical treatment and care she needed, and that she did not understand the agreement or the rights she was waiving by signing the agreement. Rather than holding an expedited evidentiary hearing under section 682.03(1), Florida Statutes, to resolve the dispute as to the validity of the arbitration agreement, the trial court granted Defendant's motion to compel arbitration and dismissed Plaintiff's case. The trial court's enforcement of the arbitration agreement without first determining that the agreement is valid and enforceable amounts to reversible error.

Furthermore, even if the trial court was correct in granting Defendant's motion to compel arbitration, it was error for the trial court to dismiss Plaintiff's action rather than entering a stay of the proceedings.

The Court should reverse the trial court's order granting Defendant's motion to dismiss and compel arbitration and remand for an expedited evidentiary hearing.

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ARGUMENT

I. When a party disputes the validity of an arbitration agreement, section 682.03(1), Florida Statutes, requires the trial court to hold an expedited evidentiary hearing prior to granting a motion to compel arbitration. Plaintiff asserted that the arbitration agreement in this case is unconscionable and, therefore, invalid. The trial court, however, erroneously granted Defendant's motion to compel arbitration without first holding an evidentiary hearing.

In opposition to Defendant's motion to compel arbitration, Plaintiff argued the arbitration provision contained in the rehabilitation center admission agreement is unconscionable because the decedent had no choice but to sign the arbitration agreement in order to obtain the medical treatment and care she needed and that she did not understand the agreement or the rights she was waiving by signing the agreement. Rather than holding an expedited evidentiary hearing under section 682.03(1), Florida Statutes, to resolve the dispute as to the validity of the arbitration agreement, the trial court granted Defendant's motion to compel arbitration and dismissed Plaintiff's case. The trial court's enforcement of the arbitration agreement without first determining that the agreement is valid and enforceable amounts to reversible error.

"[T]here are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla.

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1999) (citation omitted). Section 682.03(1), Florida Statutes, speaks to the first of these elements:

> A party to an agreement or provision for arbitration subject to this law claiming the neglect or refusal of another party thereto to comply therewith may make application to the court for an order directing the parties to proceed with arbitration in accordance with the terms thereof. If the court is satisfied that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application.

(Emphasis added). Thus, "when the party opposing arbitration disputes the existence or validity of an agreement to arbitrate, the trial court is to resolve that question as part of the ruling on the motion to compel arbitration." *Jalis Constr., Inc. v. Mintz*, 724 So. 2d 1254, 1254-55 (Fla. 4th DCA 1999). The trial court can resolve this question only after holding an expedited evidentiary hearing. *See* *Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed*, 425 So. 2d 127, 129 (Fla. 4th DCA 1982) (holding party's "indicat[ion] that a dispute existed about the making of the agreement . . . required the trial court to afford the parties a full evidentiary hearing on the disputed issue").

A trial court's failure to follow the requirements of 682.03(1) before granting a motion to compel arbitration should be reviewed *de novo*. *See* *Sumner Group, Inc. v. M.C. Distributec, Inc.*, 949 So. 2d 1205, 1206 (Fla. 4th DCA 2007) (noting pure questions of law are reviewed *de novo*); *United HealthCare of*

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Florida, Inc. v. Brown, 984 So. 2d 583, 585 (Fla. 4th DCA 2008) ("A trial court's conclusions regarding the construction and validity of an arbitration agreement are reviewed *de novo*.").

There are four ways "that parties might demonstrate to a court that a disputed issue exists 'as to the making of the agreement' within the meaning of section 682.03(1): (1) arguments of counsel at a hearing; (2) the filing of a written response in opposition to arbitration; (3) the filing of affidavits; and (4) review of documents furnished by counsel." *Linden v. Auto Trend, Inc.*, 923 So. 2d 1281, 1283 (Fla. 4th DCA 2006) (internal citations omitted). Here, Plaintiff filed a response in opposition to Defendant's motion to dismiss and compel arbitration in which she argued at length that the arbitration agreement is unconscionable and, therefore, invalid and unenforceable. (A 27-30). She also raised these arguments at the hearing on Defendant's motion to compel arbitration. (A 51-53). Thus, Plaintiff clearly demonstrated to the trial court that she disputed the "making of" the arbitration agreement, which triggered the duty of the court to hold an evidentiary hearing on the matter under 682.03(1).

Instead, the trial court held a *non-evidentiary* hearing at which it granted Defendant's motion to compel arbitration and dismissed Plaintiff's case, but "retain[ed] jurisdiction to reconsider the dismissal of th[e] case pending the development of sufficient grounds during the arbitration process." (A 72). The

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trial court, therefore, sent the case to arbitration before determining whether the parties entered into a valid arbitration agreement giving Defendant the right to compel arbitration. This amounts to reversible error. *See* *Merrill Lynch Pierce Fenner & Smith, Inc. v. Melamed*, 425 So. 2d 127, 128-29 (Fla. 4th DCA 1982) (quashing order denying motion to compel arbitration where "trial court conducted a non-evidentiary hearing at which it became evident that there was a dispute between the parties concerning the making of the agreement to arbitrate" but failed to hold evidentiary hearing in order to resolve the dispute); *Jalis Constr., Inc. v. Mintz*, 724 So. 2d 1254, 1254-55 (Fla. 4th DCA 1999) (reversing order denying motion to compel arbitration and remanding for an "expedited evidentiary hearing to determine the existence of an agreement to arbitrate"); *Travelers Ins. Co. v. Irby Const. Co., Inc.*, 816 So. 2d 829, 830 (Fla. 3d DCA 2002) (reversing order granting arbitration and remanding "for an expedited evidentiary hearing to make a determination as to the nature and extent of the right to compel arbitration").

The trial court recognized that it needed to review evidence in order to determine whether the arbitration agreement is valid. (A 60-62). But it chose to rule on the motion to compel arbitration before holding a hearing at which the necessary evidence could be presented. (A 60-62). And it did so: 1) with the knowledge that no discovery had yet taken place because Defendant did not want to engage in discovery prior to having its motion to compel arbitration heard, (A

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55-56); and 2) under the assumption (without record evidence) that Plaintiff would be entitled to the same discovery in arbitration that she would be entitled to in circuit court. (A 62). These are important considerations because the question of whether an arbitration provision is unconscionable is an extremely fact-laden one. Ever since the U.S. Supreme Court decided the case of *Green Tree Financial Corp. - Alabama v. Randolph*, 531 U.S. 79 (2000), plaintiffs challenging the unconscionability of mandatory arbitration clauses have been required to pull together extensive factual records.

As an illustration of the kind of fact and proof-intensive cases that plaintiffs must set forth, the U.S. District Court in *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd with respect to unconscionability*, 319 F.3d 1126, 1149-50 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003), traces through a great many of the factual issues that must be litigated when plaintiffs argue that a particular arbitration clause is unconscionable. To prove here, as did the plaintiffs in *Ting*, for example, that Defendant's arbitration provision was promulgated in a manner that was procedurally unconscionable, Plaintiff would be wise to put in evidence that (a) Defendant's arbitration provision is an adhesive one that was imposed by the stronger party on a take-it-or-leave it basis; (b) Defendant's arbitration provision was promulgated in a manner designed to ensure that its patients would never notice, read, or understand it; and (c) all or nearly all of Defendant's

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competitors impose similar arbitration provisions upon their patients, so that decedent had no meaningful choice, as that phrase is used in the law of unconscionability. To prove each of these points, Plaintiff would need to present testimony and other evidence.

Also, rather than focusing on the unconscionability challenge raised by Plaintiff in her responsive papers (A 27-30) and at the hearing (A 51-53), the trial court indicated that its sole focus was whether the decedent was incompetent at the time she signed the arbitration agreement. (A 60-61, 72). This was error as a finding of competence is not a bar to an unconscionability challenge. *See* *VoiceStream Wireless Corp. v. U.S. Communications, Inc.*, 912 So. 2d 34, 39 (Fla. 4th DCA 2005) (noting that procedural prong of unconscionability analysis "involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms") (quoting *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999)).

As Plaintiff specifically raised an unconscionability challenge to the enforceability of the arbitration provision and she has not yet had the opportunity to present evidence to demonstrate the procedural and substantive unconscionability of the provision, the trial court erred in granting Defendant's motion to compel arbitration. The Court should, therefore, reverse the trial court's

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order granting Defendant's motion to dismiss and compel arbitration and remand for an expedited evidentiary hearing.

II. When an order granting arbitration is entered, the case should be stayed. The trial court erred in dismissing Plaintiff's case outright upon granting Defendant's motion to compel arbitration.

"When an order for arbitration is entered, the cause should be stayed." *Liberty Commc'ns, Inc. v. MCI Telecomm. Corp.*, 733 So. 2d 571, 573 (Fla. 5th DCA 1999); *see also* §682.03(3), Fla. Stat. ("Any action or proceeding involving an issue subject to arbitration under this law shall be stayed if an order for arbitration . . . has been made under this section."). It is error for a trial court to dismiss a case in consideration of a motion to compel arbitration. *Id.* Therefore, in the event the Court affirms the trial court's order granting Defendant's motion to compel arbitration, it should still reverse the order dismissing Plaintiff's case.

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CONCLUSION

The Court should reverse the trial court's order granting Defendant's motion to dismiss and compel arbitration and remand for an expedited evidentiary hearing at which Plaintiff has the opportunity to prove the arbitration agreement is unconscionable and, therefore, unenforceable.

Respectfully submitted this 1st day of October, 2008.

s/Diana L. Martin

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing Initial Brief were served by US Mail, postage prepaid, this 1st day of October, 2008, upon:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Initial Brief being submitted is in Times New Roman 14-point font.

s/Diana L. Martin
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