



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



Rizzio v. Surpass Senior Living LLC, CV-20-0058-PR

PARTIES:

Petitioner: Concetta Rizzio (“**Rizzio**”)

Respondent: Surpass Senior Living LLC (“**Surpass**”)

FACTS:

In 2017, Deborah Georgianni (“**Georgianni**”), arranged for her elderly mother, Rizzio, to move into a nursing care facility managed by Surpass. As Rizzio’s power of attorney, Georgianni executed a form contract supplied by Surpass. A few months later Rizzio was moved to a higher level of care and Georgianni executed another similar contract with Surpass.

Both contracts included identical arbitration agreements (collectively, the “**Agreement**”) that were appended to the main contract. The front page of the Agreement included a paragraph stating: “**Because this arbitration agreement addresses important legal rights, The Community encourages and recommends that you obtain the advice of legal counsel to review this agreement prior to signing this arbitration agreement.**” Toward the end of the agreement was another bolded provision stating: “**Admission to the Community is not contingent upon signing this agreement.**” The Agreement also included an unusual cost-shifting provision that required the resident to pay costs and attorneys’ fees, regardless of the outcome of any arbitration. It also had a severability provision that stated: “If any provision of this Arbitration Agreement is held to be invalid or unenforceable, the remainder of the agreement shall remain in full force and effect.”

In February 2018, another resident of the facility attacked Rizzio, causing her severe injuries. She was hospitalized and then moved to a private home.

Georgianni filed suit against Surpass and others. Surpass moved to compel arbitration under the Agreement. Georgianni argued that the Agreement was unconscionable. The trial court agreed and denied Surpass’s request to send the matter to arbitration. Surpass appealed.

The court of appeals noted that the Federal Arbitration Act requires that an arbitration agreement be placed ““on an equal footing with other contracts,”” including in applying the state-law doctrine of unconscionability. *Rizzio v. Surpass Senior Living LLC*, 248 Ariz. 266, 270 ¶ 15 (App. 2020) (quoting *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). The court outlined Arizona law on unconscionability, noting that it contains a procedural and a substantive element. The court of appeals concluded that the record indicated the Agreement was not procedurally unconscionable and the court “reverse[d] that finding” by the trial court. *Id.* ¶ 18.

The court of appeals then stated that substantive unconscionability “occurs where a

contract has terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.” *Id.* ¶ 21 (citation omitted). The court of appeals agreed with the trial court that “the cost-shifting provision in the Agreement was substantively unconscionable,” because it “specifically allocated the payment of *all* costs, fees, and expenses to plaintiff, *even if she prevails.*” *Id.* ¶ 22. However, because the Agreement contained a severability clause, the court of appeals severed the cost-shifting provision and left the remainder of the Agreement intact.

In the court of appeals, Rizzio argued that the cost-shifting provision could not be severed because “that would leave the Agreement with no direction on allocation of costs and, even absent the provision here, Rizzio cannot afford to pay arbitration costs.” *Id.* ¶ 23. The court of appeals stated that “[m]ere silence as to the allocation of arbitration costs does not support invalidating an agreement” because in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000), the U.S. Supreme Court indicated that silence as to costs “is plainly insufficient to render [an arbitration agreement] unenforceable.” *Id.* ¶ 24.

And, the court of appeals noted that Rizzio had signed a retainer agreement with her attorneys “under which her counsel assumed responsibility for advancing all costs” of arbitration. *Id.* ¶ 27. Under that retainer agreement, Rizzio would be required to repay her attorneys “only . . . out of the proceeds of a recovery.” *Id.* Thus, “Rizzio will only incur costs if (1) she prevails and thus receives a recovery award, and (2) despite her position as prevailing party the arbitrator declines to allocate all costs to Surpass.” *Id.* According to the court of appeals, the “presence of such an arrangement here negates any argument of substantive unconscionability based on arbitration costs: Rizzio is not responsible for up-front costs and such costs cannot, therefore, be held an impediment to arbitration.” *Id.* Consequently, the court of appeals found “no basis” for finding the “Agreement unconscionable, either procedurally or substantively.” *Id.* ¶ 29. The court then remanded to the trial court for further proceedings. Rizzio then filed a petition for review in this Court.

ISSUE:

The Court granted review as to this issue, as rephrased by the Court:

Whether a plaintiff’s retainer agreement under which her attorney will advance all costs of arbitration can be considered as part of the plaintiff’s individualized showing of her ability to financially bear the costs of arbitration.

DEFINITION:

Black’s Law Dictionary defines “Unconscionability” as: 1. Extreme unfairness. • Unconscionability is normally assessed by an objective standard: (1) one party’s lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party. 2. The principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp. terms that are unreasonably favorable to one party while precluding meaningful choice for the other party.

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