Case No. 81804

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 26 2021 02:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

MAIDE, L.L.C. d/b/a GENTLE SPRING CARE HOME; SOKHENA K. HUCH; MIKI N. TON,

Appellants,

CORINNE R. DILEO, as Special Administrator for the Estate of Thomas DiLeo; THOMAS DILEO, JR., as Statutory Heir to Thomas DiLeo; and CINDY DILEO, as Statutory Heir to Thomas DiLeo,

Respondents.

Appeal

from the Eighth Judicial District Court, Clark County
The Honorable Adriana Escobar, District Court Judge
District Court Case No. A-19-797533-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Respondents Corinne DiLeo, Thomas DiLeo, Jr., and Cindy DiLeo ("Plaintiffs") are each individuals.

Jamie S. Cogburn, Esq. and Hunter S. Davidson, Esq., of Cogburn Law, represented Plaintiffs in the District Court and currently represent them in this Court.

Dated this 26th day of March, 2021.

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By: */s/Hunter S. Davidson*

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JURISDICTIONAL STATEMENT

This Court has jurisdiction as this is an appeal from a final judgment denying a motion to compel arbitration. NRAP 3A(b)(1) ("An appeal may be taken from . . . [a] final judgment entered in an action or proceeding commenced in the court in which the judgment was rendered."); NRS 38.247(1)(a) ("An appeal may be taken from . . . [a]n order denying a motion to compel arbitration.").

The Notice of Entry of Order Denying Maide, L.L.C. d/b/a Gentle Spring Care Home, Sokhena K. Huch, and Miki N. Ton's ("Defendants") Motion to Compel Arbitration was entered on August 14, 2020, and was timely appealed on September 14, 2020.

ROUTING STATEMENT

Contrary to Defendants' Routing Statement, this matter does not fall within any of the categories presumptively assigned to the Nevada Court of Appeals. *See* NRAP 17(b). This an elder abuse/wrongful death action wherein Plaintiffs allege Defendants' negligence resulted in Decedent's leg amputation and subsequent death. Plaintiffs' economic damages and noneconomic damages far exceed the $250,000.00 and $75,000.00 thresholds contemplated in NRAP 17(b)(5) and (6).

The Nevada Supreme Court should retain the appeal to reiterate NRS 597.995(1)'s requirement that an arbitration provision within an agreement include specific authorization demonstrating affirmative agreement with that provision. Pursuant to NRAP 17(a)(12), this is an issue of statewide importance given the increased prevalence of arbitration provisions and their impact on civil litigants' constitutional right to a jury trial. *See* Nev. Const. art. 1, § 3.

ISSUES PRESENTED

1. Whether strict or substantial compliance applies to the interpretation of NRS 597.995(1) when the statute's plain language uses mandatory terms and implicates notice.

2. Whether an estate's claims are subject to binding arbitration when the arbitration provision within a larger agreement was not specifically authorized in accordance with the strict interpretation of NRS 597.995(1).

3. Whether, even if substantial compliance applies to NRS 597.995(1), an estate's claims are subject to binding arbitration when the arbitration provision is one-sided and fails to advise the signatories that they are waiving their constitutional right to a civil jury trial.

4. Whether statutory heirs may be bound to an arbitration provision when they are nonsignatories to the agreement and their claims arise from Nevada's wrongful death statute, NRS 41.085.

STATEMENT OF THE CASE

This case arises from the alleged neglect and wrongful death of Thomas DiLeo ("Decedent"), while he was a resident of Defendants' assisted living facility. After being admitted for dementia, Decedent injured his leg at Defendants' assisted living facility. When treating Decedent's wound, Defendants wrapped his leg too tightly with an elastic band, causing Decedent's leg to become gangrenous. Weeks later, Decedent had his leg amputated and, shortly thereafter, passed away.

After being served with Plaintiffs' Complaint, Defendants filed a Motion to Compel Arbitration arguing Plaintiffs' entire case should be removed into binding arbitration pursuant to an arbitration provision within a larger agreement. Plaintiffs opposed Defendants' Motion to Compel Arbitration, arguing: (1) the binding arbitration provision was not specifically authorized in accordance with NRS 597.995; (2) the Statutory Heir's claims could not be bound to the arbitration provision because they were not signatories to the agreement; and (3) Defendants did not meet their burden of proving the agreement was valid and enforceable.

Defendants' Motion to Compel Arbitration came before Senior Judge Charles Thompson, who held the arbitration provision was enforceable against Decedent's Estate, but not enforceable against the Statutory Heirs. Judge Thompson stayed the Statutory Heir's claims and directed the Estate's claims to proceed in binding arbitration.

Thereafter, Plaintiffs timely filed a Motion to Reconsider wherein they primarily argued Judge Thompson's decision was clearly erroneous because the general signature line at the bottom of the larger agreement did not constitute specific authorization of the arbitration provision.

Plaintiffs' Motion to Reconsider came before the Honorable Adriana Escobar, who held Judge Thompson's decision was clearly erroneous because the arbitration provision lacked a separate signature block, initial line, or other acknowledgement that demonstrated the arbitration provision itself was affirmatively agreed to. Pursuant to NRS 597.995, the arbitration provision was deemed void and unenforceable, and all of Plaintiffs' causes of action were directed to proceed in District Court.

Plaintiffs respectfully request the District Court's Order regarding Plaintiffs' Motion to Reconsider be affirmed, thereby allowing this entire matter to proceed in District Court.

STATEMENT OF FACTS[1]

I. The Subject Abuse / Neglect

In or about January 2015, Decedent was admitted into Defendants' Gentle Spring Care Home[2], which is an assisted living facility / residential facility for groups[3] ("Nursing Home"). App. Vol. I at 00003–00004. Upon admission, Decedent suffered from, among other things, dementia and required 24-hour care and supervision. *Id.* This constant care and supervision included Decedent's most basic needs, such as, providing him with food, water/liquids, shelter, clothing, and services necessary to maintain his physical and mental health. *Id.* at 00004.

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[1] The District Court decided Defendants' Motion to Compel Arbitration, which is the subject of this Appeal, before the opening of discovery. As such, this Statement of Facts is based on the allegations in Plaintiffs' Complaint and the limited documents attached to the briefing previously before the District Court.

[2] At all relevant times, Defendants owned, operated, and controlled Gentle Spring Care Home, which is located at 6418 Spring Meadow Drive, Las Vegas, Nevada 89103 ("Nursing Home"). App. Vol. I at 00003.

[3] *See* NRS 449.017(1) ("Except as otherwise provided in subsection 2, 'residential facility for groups' means an establishment that furnishes food, shelter, assistance and limited supervision to a person with an intellectual disability or with a physical disability or a person who is aged or infirm. The term includes, without limitation, an assisted living facility.").

In or about July 2017, Decedent injured his leg on a wheelchair at Defendants' Nursing Home. *Id*. To treat Decedent's leg injury, one of Defendants' caregivers wrapped Decedent's leg with an elastic bandage wrap and would not let Decedent remove it, despite complaints of discomfort. *Id*. Unfortunately, Defendants' caregiver wrapped the elastic band too tightly around Decedent's leg, causing Decedent's leg to become gangrenous. *Id*. Upon noticing Decedent's leg changing colors, Defendants' Nursing Home attempted to treat Decedent themselves, rather than transporting Decedent to a hospital. *Id*.

On or about July 21, 2017, after realizing Defendants' Nursing Home would not transport Decedent to a hospital, Plaintiff Cindy DiLeo called 911 and had Decedent immediately transported to Spring Valley Hospital. *Id.* at 00005. Upon being admitted to Spring Valley Hospital, hospital physicians determined they needed to amputate Decedent's leg to stop the spread of gangrene. *Id.*

On or about August 3, 2017, Decedent's leg was amputated. *Id.* One week later, on or about August 10, 2017, Decedent passed away from complications stemming from his inadequate care at Defendants' Nursing Home. *Id.*

II. The Subject Arbitration Agreement

Upon Decedent's admission into Defendants' Nursing Home, Plaintiff Corinne DiLeo, as Decedent's power of attorney[4], purportedly executed a number of agreements, including an Admission Agreement and a "Bella Estate Care Home Resident Agreement Addendum" ("Grievance and Arbitration Agreement"). *Id.* at 00082–00093. The presentation of these agreements, and whether Plaintiff Corinne DiLeo comprehended them, is unknown because the District Court's decision on this matter preceded discovery.[5]

On its face, the Admission Agreement is a five (5) page agreement between Defendants' Nursing Home and Decedent, by and through Decedent's power of attorney, Plaintiff Corinne DiLeo. *Id.* at 00082–00086. Decedent's statutory heirs, Plaintiffs Cindy DiLeo[6] and Thomas

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[4] Plaintiff Corinne DiLeo is also the Special Administrator for the Estate of Decedent. *Id.* at 00001.

[5] Defendants' statements that the Admission Agreement "was set aside from the rest of the intake paperwork" is not based in any evidence, nor is it supported by a citation to the record. *See* Appellant's Opening Brief, at p.5; *see also* p.8 ("The [Arbitration] Agreement was set aside from the rest of the Admission Agreement . . . .").

[6] Cindy DiLeo is the daughter of Decedent and Plaintiff Corinne DiLeo.

DiLeo, Jr.[7] (collectively, "Statutory Heirs"), were not signatories to the Admission Agreement. *Id.*

On its face, the Grievance and Arbitration Agreement is a one (1) page agreement between Bella Estate Care Home and Decedent, by and through Decedent's power of attorney, Plaintiff Corinne DiLeo. *Id.* at 00093. Bella Estate Care Home[8] is an entirely separate assisted living facility / residential facility for groups, located at a different address from Defendants' Nursing Home. *Id.* at 00037, 00095. The Grievance and Arbitration Agreement makes no reference to Defendants' Nursing Home or Defendants Maide, L.L.C. ("Defendant Maide"), Sokhena K. Huch ("Defendant Huch"), or Miki N. Ton ("Defendant Ton"). *Id.* at 00093. Similarly, Decedent's Statutory Heirs were not signatories to the Grievance and Arbitration Agreement. *Id.*

Notwithstanding these deficiencies, the Grievance and Arbitration Agreement, which includes two (2) distinct provisions on one (1) page, states:

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[7] Thomas DiLeo, Jr. is the son of Decedent and Plaintiff Corinne DiLeo.

[8] Bella Estate Care Home is located at 3140 Coachlight Circle, Las Vegas, Nevada 89117. *Id.* at 00037.

BELLA ESTATE CARE HOME

Resident Agreement Addendum

Grievance and Arbitration

1. **Grievances:** Resident may voice reasonable grievances about services rendered by staff or other personnel and the Home shall record such grievances upon request to do so. In the event of a written grievances *[sic]*, the Home shall investigate it and make written reply to residents of the Home's findings with *[sic]* a reasonable period thereafter.

2. **Arbitration:** Any controversy, dispute or disagreement, whether sounding in tort or contract to law, arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in (City, State) *[sic]* in accordance with American health *[sic]* Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the Arbitration, shall be binding of all parties to the agreement and judgment on the award rendered by the arbitrator maybe *[sic]* entered in any court having jurisdiction thereof. The parties shall agree upon a sole arbitrator of their choice and if they cannot agree on a single arbitrator there shall be three arbitrators with the neutrals *[sic]* arbitrator chosen by the parties' nominated arbitrators.

Id.

The bottom of the Grievance and Arbitration Agreement has two (2) general signature lines: one purportedly signed by Plaintiff Corinne DiLeo and the other purportedly signed by Defendant Ton. *Id.* at 00093, 00095. The second provision in the Grievance and Arbitration Agreement—which mandates any dispute arising between the parties be subject to binding arbitration ("Any Dispute Provision")—does not have a separate signature line or any other indication that Plaintiff Corinne DiLeo affirmatively agreed to that specific provision. *Id.* at 00093.

III. Relevant Procedural History

On June 27, 2019, Plaintiffs filed their Complaint, asserting the following causes of action against each of the Defendants: (1) Abuse/Neglect of an Older Person; (2) Negligence; (3) Wrongful Death; and (4) Survival Action. *Id.* at 00001–00010. On August 14, 2019, Defendants filed their Answer to Plaintiffs' Complaint. *Id.* at 00011–00018.

On September 13, 2019, Defendants filed a Motion to Compel Arbitration arguing Plaintiffs' entire case should be removed into binding arbitration pursuant to the Any Dispute Provision of the Grievance and Arbitration Agreement. *Id.* at 00019–00026. In addition to the Estate's

claims,[9] Defendants also sought to compel the Statutory Heirs' Wrongful Death claims into binding arbitration, even though the Statutory Heirs were not signatories to any of the agreements or provisions in this matter. *Id.* at 00078–00079, 00097–00104.

On September 14, 2019, Plaintiffs filed their Opposition to Defendants' Motion to Compel Arbitration wherein they argued: (1) that the Any Dispute Provision was void and unenforceable because it lacked NRS 597.995(1)'s specific authorization requirement; (2) that the Statutory Heirs could not be bound to the Any Dispute Provision because they were not signatories to the Grievance and Arbitration Agreement; and (3) that Defendants did not meet their burden of proving that the Grievance and Arbitration Agreement was a valid, enforceable agreement. *Id.* at 00027–00034.

On January 28, 2020, Defendants' Motion to Compel Arbitration came before Senior Judge Charles Thompson, who held that the Any Dispute Provision within the Grievance Arbitration Agreement was enforceable against the Estate of Decedent, but not enforceable against

[9] The Estate's claims include Negligence, Elder Abuse, Wrongful Death, and Survivor Action. *Id.* 00003–00009.

the Statutory Heirs. *Id.* at 00097–00109; 00159–00163. As such, the Estate's claims for Elder Abuse, Negligence, Wrongful Death, and Survival Action would be subject to binding arbitration, while the Statutory Heirs' claims for Wrongful Death would be stayed in District Court during the pendency of the binding arbitration. *Id.* at 00162–00163.

On April 21, 2020, Plaintiffs timely filed a Motion for Rehearing on Defendants' Motion to Compel Arbitration ("Motion to Reconsider"). *Id.* at 00110–00118. In their papers, Plaintiffs argued that Judge Thompson's decision was clearly erroneous because Plaintiff Corinne DiLeo's signature at the end of the Grievance and Arbitration Provision did not constitute specific authorization of the Any Dispute Provision. *Id.* at 00115–00116; App. Vol. II at 00206–00210. In support of their position, Plaintiffs specifically pointed to the various arbitration agreements and provisions in *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 50 (Nev. 2016), wherein the Nevada Supreme Court interpreted NRS 597.995(1)'s specific authorization requirement. App. Vol. II at 00206–00210.

On May 5, 2020, Defendants filed their Opposition to Plaintiffs' Motion to Reconsider wherein they argued: (1) that the Any Dispute

Provision within the Grievance and Arbitration Agreement was specifically authorized as required by NRS 597.995; and (2) that the Any Dispute Provision within the Grievance and Arbitration Agreement is enforceable because it substantially complies—rather than strictly complies—with NRS 597.995. App. Vol. I at 00179–00188.

On May 26, 2020, Plaintiffs' Motion to Reconsider came before the Honorable Adriana Escobar ("Judge Escobar"), who held that Judge Thompson's decision regarding Defendants' Motion to Compel Arbitration was clearly erroneous because the Any Dispute Provision within the Grievance and Arbitration Agreement lacked NRS 597.995(1)'s specific authorization requirement. App. Vol. II at 00254–00273; App. Vol. III at 00277–00283. Specifically, Judge Escobar found that the Any Dispute Provision lacked a separate signature block, initial line, or other acknowledgement that demonstrates Plaintiff Corinne DiLeo affirmatively agreed to the Any Dispute Provision. App. Vol. III at 00281. As such, Judge Escobar ruled that the Any Dispute Provision was void and unenforceable pursuant to NRS 597.995(2) and, therefore, all of Plaintiffs' causes of action shall proceed before the Eighth Judicial District Court. *Id.*

On September 14, 2020, Defendants filed their Notice of Appeal, challenging the District Court's Order regarding Plaintiffs' Motion to Reconsider. *Id.* at 00284–00286.

For the reasons set forth below, Plaintiffs respectfully request the Court affirm the District Court's Order regarding Plaintiffs' Motion to Reconsider, thereby allowing each of Plaintiffs' claims to proceed before the Eighth Judicial District Court.

SUMMARY OF THE ARGUMENT

The plain language of NRS 597.995(1) could not be clearer:

> [A]n agreement which includes **a provision** which requires a person to submit to arbitration **any dispute** arising between the parties to the agreement **must** include **specific authorization for the provision** which indicates that the person has affirmatively agreed to **the provision**.

(emphasis added).

Importantly, NRS 597.995(1)'s plain language includes the mandatory "must" term and implicates notice (i.e. directs signatories' attention to that provision). Failure to strictly comply with NRS 597.995(1) voids the arbitration provision and renders it unenforceable. *See* NRS 597.995(2); *Washoe County v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) (a statute's use of the word "must" generally imposes a mandatory requirement that demands strict compliance); *Pawlik v. Shyang-Fenn Deng*, 134 Nev. 83, 89, 412 P.3d 68, 73 (2018) (strict compliance applies to statutes that implicate notice); *Fat Hat, LLC v. DiTerlizzi*, 385 P.3d 580 (Nev. 2016) (implicitly applying strict compliance to NRS 597.995(1)).

Here, the Estate's claims are not subject to binding arbitration because the Any Dispute Provision within the Grievance and Arbitration

Agreement is not specifically authorized in accordance with NRS 597.995(1). Notably, the Grievance and Arbitration Agreement has two (2) independent provisions: one that addresses the handling of resident grievances; and another that compels any dispute into binding arbitration (i.e. the Any Dispute Provision). The Any Dispute Provision lacks a signature block, initial line, or other acknowledgement indicating Plaintiff Corinne DiLeo, as Decedent's power of attorney, affirmatively agreed to submit any dispute to binding arbitration. As such, Any Dispute Provision is void and unenforceable pursuant to NRS 597.995.

Similarly, the Statutory Heirs' claims for wrongful death are not subject to binding arbitration because, in addition to the Any Dispute Provision being void, the Statutory Heirs were not signatories to the Grievance and Arbitration Agreement. Nevada recognizes only a few theories under which a nonsignatory may be bound to an arbitration provision/agreement: (1) incorporation by reference; (2) estoppel; (3) assumption; (4) agency; and (5) veil-piercing/alter ego. *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 634–35, 189 P.3d 656, 659 (2008). In this matter, the only two plausible theories—incorporation by reference and estoppel—do not apply because the Any Dispute Provision does not

incorporate any outside parties and the Statutory Heirs' wrongful death claims arise from Nevada's wrongful death statute, not the Grievance and Arbitration Agreement.

As such, the Any Dispute Provision is not enforceable against either the Estate or the Statutory Heirs. Therefore, the District Court's Order regarding Plaintiffs' Motion to Reconsider should be affirmed, thereby allowing each of Plaintiffs' claims to proceed before the Eighth Judicial District Court.

STANDARD OF REVIEW

Orders denying arbitration typically involve mixed questions of law and fact, which the appellate court reviews under different standards. *Gonski v. Second Judicial District Court*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010). Specifically, the District Court's factual findings are given deference and should be upheld, unless they are clearly erroneous and not based on substantial evidence. *International Fidelity Insurance Company v. State of Nevada*, 122 Nev. 39, 42, 126 P.3d 1133, 1134–35 (2006); *see also Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008) ("Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion"). Similarly, the

District Court's application of the standards to the facts is given deference. *Loice v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). On the other hand, questions purely of law are reviewed *de novo*. *Gonski*, 126 Nev. at 557, 245 P.3d at 1168.

In addition, "questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Nevada law has long held that courts should not look beyond a statute's plain language when the language is clear on its face. *Beazer Homes Nevada v. Eighth Judicial District Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004); *see also MGM Mirage v. Nevada Insurance Guaranty Ass'n*, 125 Nev. 223, 228–29, 209 P.3d 766, 769 (2009) (if the language of the statute is plain and unambiguous, the court should not construe that statute otherwise).

ARGUMENT

I. Strict compliance applies to NRS 597.995(1)[10] because the provision's plain language uses mandatory terms and implicates notice.

When determining whether a statute's provision requires strict or substantial compliance, the Nevada Supreme Court looks to the provision's plain language, as well as policy and equity principles. *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 663, 310 P.3d 569, 571 (2013) (citing *Leyva v. National Default Servicing Corp.*, 127 Nev. 470, 475–76, 255 P.3d 1275, 1278 (2011)). As outlined below, strict compliance applies to NRS 597.995(1) because: (A) NRS 597.995(1)'s plain language includes the mandatory "must" term; (B) NRS 597.995(1) is a time and manner provision that implicates notice; and (C) Plaintiff Corinne DiLeo would be severely prejudiced by enforcement of the Any Dispute Provision.

[10] This statute was enacted in 2013 and amended in June 2019. Given the subject events occurred in 2017, the 2013 version of this statute applies.

A. Strict compliance applies to NRS 597.995(1) because the provision's plain language includes the mandatory "must" term.

A provision's use of the word "must" generally imposes a mandatory requirement that demands strict compliance. *Otto*, 128 Nev. at 431, 282 P.3d at 725 (citing *Pasillas v. HSBC Bank, USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011)); *see also S.N.E.A. v. Daines*, 108 Nev. 15, 19, 824 P.3d 276, 278 (1992) ("This court has stated that in statutes, 'may' is permissive and 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature."); *Holiday v. Horst (In re Estate of Horst Revocable Trust)*, 136 Nev. Adv. Op. 90. at *11–12 (Nev. Dec. 31, 2020) (holding strict compliance applies to NRS 164.021(2)(c) because the plain language of the statute use the mandatory term "must" and implicates notice).

To illustrate, in *Pasillas*, the plaintiffs sought sanctions against defendant bank for its failure to participate in the Foreclosure Mediation Program in accordance with NRS 107.086. 127 Nev. at 467, 255 P.3d at 1285. Specifically, NRS 107.086 states that deed of trust beneficiaries, such as defendant bank, "shall" bring certain documentation to the foreclosure mediation and have present a representative with authority

to modify the loan; if any of these violations occur, the mediator "shall" recommend sanctions. *Id.* at 467. Even though it failed to bring the proper documents and a representative with authority to modify the subject loan, defendant bank maintained that sanctions were improper because it still mediated the foreclosure in good faith. *Id.* Ultimately, the Nevada Supreme Court rejected defendant bank's argument and found sanctions were required under NRS 107.086. *Id.* at 467–68. In reaching this conclusion, the Court held that the plain language of NRS 107.086—i.e. that a beneficiary "shall" bring certain documents and proper representative—is a mandatory requirement that demands strict compliance. *Id.* As such, whether defendant bank mediated in good faith is immaterial; it still failed to comply with the mandatory requirements of the statute. *Id.*

While not stated explicitly, the Court's general rule—that the word "must" imposes a mandatory requirement demanding strict compliance—is implicit in *Fat Hat*. There, the Nevada Supreme Court reviewed NRS 597.995(1)'s requirement that:

> [A]n agreement which includes a **provision** which requires a person to submit to arbitration any dispute arising between the parties to the agreement **must** include specific

> authorization for the **provision** which indicates that the person has affirmatively agreed to the **provision**.

(emphasis added). *Id.* at *1. Upon review of NRS 597.995(1)'s mandatory language, the Court held that the arbitration provisions in four (4) of the *Fat Hat* employment agreements were void and unenforceable because they lacked NRS 597.995(1)'s specific authorization. *Id.* at *2. In reaching its conclusion, the Court acknowledged that there was a general signature line immediately below the arbitration provision, but that said signature line was not specific to the enforceability of the binding arbitration provision. *Id.* In other words, the Court implicitly applied strict compliance to NRS 597.995(1)'s interpretation and held that the exact provision that requires "any dispute" be subject to binding arbitration be specifically authorized; general signature lines are insufficient. *Id.*

Here, strict compliance applies to NRS 597.995(1) because the provision's plain language includes the mandatory "must" term. Like *Pasillas*, where strict compliance applied to Nevada's Foreclosure mediation statute based on its plain language use of "shall," here, strict compliance applies to NRS 597.995(1) based on its plain language use of "must." In fact, *Fat Hat* already implicitly ruled that strict compliance

applied to NRS 597.995(1) by applying this exacting standard to the disputed agreements. As such, both NRS 597.995(1)'s plain language, and *Fat Hat's* analysis of the same, mandate that NRS 597.995(1) be strictly complied with.

B. Strict compliance applies to NRS 597.995(1) because it is a "time and manner" provision that implicates notice.

Generally, a statutory provision is mandatory and requires strict compliance when it states a specific "time and manner" for performance. *Markowitz*, 129 Nev. at 664–65, 310 P.3d at 572. "Time and manner" provisions concern when performance must take place and the way in which the deadline must be met. *Id.* Alternatively, a statutory provision is directory and only requires substantial compliance when it concerns "form and content." *Id.* "Form and content" provisions concern who must take action and what information that party is required to provide. *Id.* Importantly, strict compliance applies to statutes that implicate notice. *McCulloch v. Bianchini*, 53 Nev. 101, 101, 292 P. 617 (1930) ("[T]he provisions of the statute prescribing the procedure to be followed, including the time and manner of giving notice, are mandatory and must be strictly followed."); *Pawlik*, 134 Nev. at 89, 412 P.3d at 73 ("directory

provisions are those governing form and content . . . and do not implicate notice.") (internal quotations omitted); *see also In re Estate of Horst*, 136 Nev. Adv. Op. 90. at *11–12 (holding strict compliance applies to NRS 164.021(2)(c) because the plain language of the statute uses the mandatory term "must" and implicates notice).

Here, strict compliance applies to NRS 597.995(1) because the provision constitutes a time and manner requirement that implicates notice. While Defendants are partially accurate in stating "NRS 597.995's plain objective is to ensure that a signatory is aware of an arbitration agreement,"[11] the plain language of NRS 597.995 and *Fat Hat* show the objective runs deeper. Specifically, it is not enough that a separate arbitration agreement is signed. Rather, NRS 597.995(1) requires the *provision* within an agreement that compels arbitration for "any dispute" be specifically signed or authorized. *See* NRS 597.995(1); *Fat Hat*, 385 P.3d 580, at *2 ("In addition to a signature line at the end of the [arbitration] contracts, both [Plaintiffs] were required to fill in their names and addresses in the blank spaces of the provision, explicitly stating that the agreement to arbitrate was effective."). NRS 597.995(1)'s

[11] *See* Appellants' Opening Brief, at p.15.

notice implications were clearly articulated in the statute's legislative history:

> **Assemblyman Paul Aizley**
>
> I appear before the Committee in support of Assembly Bill 326, which revises provisions relating to arbitration. This bill addresses the mandatory arbitration clauses that are standard in many agreements we consumers must agree to on a day-to-day basis. These standardized agreements are pervasive and are hardly ever disclosed to the consumer when purchasing a product or service, aside from the small print that might appear in the middle of a multipage contract. Some of the contracts you may have signed recently that bind you to mandatory arbitration with a service provider or retailer may include your cell phone service plan, checking account, acceptance of a job, computer software upgrades, and other contracts.
>
> . . .
>
> Assembly Bill 326 specifies that contracts, which require a consumer to submit to arbitration in the event of a dispute over the product or service, must include an affirmative agreement to that provision by the consumer. If the consumer does not specifically authorize that provision in the agreement, then the mandatory arbitration provision would be void. The bill would only apply to agreements entered into after October 1, 2013.
>
> . . .
>
> **Mark Wenzel, Nevada Justice Association:**
>
> I am here to testify in support of A.B. 326. This bill is a Nevada consumer protection bill. It affects nearly all Nevada citizens. This bill will allow consumers in the state of Nevada

> to make a more fully informed, meaningful decision as to whether to enter into contracts that contain mandatory arbitration clauses. As Assemblyman Aizley mentioned to you moments ago, these types of mandatory arbitration clauses are contained in a host of different consumer-related contracts, including cell phone providers, landlord / tenant agreements, car leases, et cetera. They are not often prominently displayed and are sometimes buried within the fine print of an agreement, or what we call the "boilerplate provisions" of a contract.

Minutes of the Meeting of the Assembly Committee on Commerce and Labor, 77th Session (March 27, 2013).

Thus, NRS 597.995(1) clearly implicates notice and, therefore, demands strictly compliance.

C. Strict compliance applies to NRS 597.995(1) because Plaintiff Corinne DiLeo did not have actual notice of the Any Dispute Provision and will be severely prejudiced by its enforcement.

In the limited context of mechanic's liens and bail bond forfeitures, the Nevada Supreme Court has recognized substantial compliance with a notice statute may be sufficient only if both of the following elements are satisfied: (1) the party received actual notice; and (2) the party will not be prejudiced. *See Las Vegas Plywood v. D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982); *State v. Eclectic Services*, No. 76713 (Nev. Nov. 1, 2019). Black's Law Dictionary notes that "actual notice" and

"express notice" may be used interchangeably. *Actual Notice*, BLACK'S LAW DICTIONARY (9th ed. 2009); *Express Notice*, BLACK'S LAW DICTIONARY (9th ed. 2009). Their respective definitions are as follows:

> **Actual Notice**. Notice given directly to, or received personally by, a party.—also termed *express notice*.
>
> **Express Notice.** Actual knowledge or notice given to a party directly, not arising from any inference, duty, or inquiry. See *actual notice*.

Id.

Here, even if the Court expanded this limited exception to NRS 597.995, substantial compliance does not apply because Plaintiff Corinne DiLeo did not have actual notice of the Any Dispute Provision and will be severely prejudiced by its enforcement. First, there is no evidence in the record that Plaintiff Corinne DiLeo had actual knowledge of the Any Dispute Provision. While Plaintiff Corinne DiLeo may have signed the bottom of Grievance and Arbitration Agreement, her expected testimony is that she did not have specific knowledge of the Any Dispute Provision and that she blankly signed the entire Grievance and Arbitration Agreement among the papers it was bundled with. Second, even if the Court finds Plaintiff Corinne DiLeo had actual knowledge, there is no dispute that she will be severely prejudiced by its

enforcement. Specifically, enforcing the Any Dispute Provision will eliminate Plaintiff Corinne DiLeo's constitutional right to a jury trial, *see* Nev. Const. art. 1, § 3, and compel arbitration pursuant to a provision that Defendants failed to even proofread.[12] As such, the Court's limited exception—which has historically only been applied to mechanic's liens and bail bond forfeitures—does not apply to the instant case.

II. The Estate's claims should not be compelled into binding arbitration because the Any Dispute Provision within the Grievance and Arbitration Agreement is not specifically authorized as required under NRS 597.995(1)'s strict interpretation.

The plain language of NRS 597.995(1) is clear: any agreement with a provision requiring a person submit to arbitration "any dispute" must include specific authorization of *that provision*. The District Court applied NRS 597.995(1)'s plain language to the four (4) corners of the Grievance and Arbitration Agreement and correctly held that the second

[12] The Grievance and Arbitration Agreement is riddled with grammatical errors and omissions. App. Vol. I at 00093. Specifically, the Grievance and Arbitration Agreement states, in bold, that it is an agreement with Bella Estate Care Home, which is a completely different nursing home than that Decedent was contracting to reside at. *Id.* In addition, the Any Dispute Provision omits the city and state in which binding arbitration was to be conducted and, instead, inserted the placeholder: "(City, State)". *Id.*

provision—i.e. the Any Dispute Provision—was void and unenforceable because it lacked this specific authorization. As outlined below, the District Court's decision is consistent with the Nevada Supreme Court's interpretation of NRS 597.995 and, therefore, should not be disturbed.

A. The Any Dispute Provision within the Grievance and Arbitration Agreement is not specifically authorized and, therefore, is void and unenforceable.

NRS 597.995, in relevant part, states:

> 1. [A]n agreement which includes **a provision** which requires a person to submit to arbitration **any dispute arising between the parties to the agreement** must include specific authorization for **the provision** which indicates that the person has affirmatively agreed to **the provision**.
>
> 2. If an agreement includes **a provision** which requires a person to submit to arbitration **any dispute arising between the parties to the agreement** and the agreement fails to include the specific authorization required pursuant to subsection 1, **the provision** is void and unenforceable.

(Emphasis added).

In *Fat Hat, LLC v. DiTerlizzi*, the Nevada Supreme Court reviewed NRS 597.995(1)'s specific authorization requirement and upheld its strict interpretation. 385 P.3d 580. In *Fat Hat*, six (6) plaintiffs challenged the validity of binding arbitration provisions in their employment contracts,

arguing that the provisions did not satisfy NRS 597.995(1)'s specific authorization requirement. *Id.* at *1. For four (4) of the six (6) plaintiffs, the employment contracts were largely the same—they each included twenty-one (21), individually numbered provisions. App. Vol. II at 00231–00247. The last provision (i.e. the twenty-first) mandated "any dispute . . . be submitted to binding arbitration" and was immediately followed by a signature line. *Id.* As to these four (4) employment agreements, the Nevada Supreme Court found that the signature line following that "any dispute" arbitration provision was a general signature line for entire employment contract. 385 P.3d 580, at *2. As such, the "any dispute" arbitration provision lacked NRS 597.995(1)'s specific authorization and, therefore, was void and unenforceable:

> [T]he contracts for respondents DiTerlizzi, Klus, Monica, and Kirtz did not contain the "specific authorization" for the arbitration provision in their respective contracts that NRS 597.995 demands. **Though the arbitration provision immediately preceded the signature line on the last page for all the contracts, that was a general signature line indicating consent to all the terms of the contract. Thus, those signatures do not qualify as specific authorizations for the arbitration provision.** Although Kirtz initialed at the bottom of the page with the arbitration provision, she initialed at the bottom of every page; thus, her initials fail to demonstrate that she affirmatively agreed to the arbitration provision. Because Fat Hat's contracts with respondents DiTerlizzi, Klus, Monica, and Kirtz failed to

> include the specific authorization NRS 597.995 requires, the arbitration provision in those four contracts are void and unenforceable, and we affirm the district court's order denying arbitration as to them.

Id. (emphasis added).

The remaining two (2) plaintiffs in *Fat Hat* executed separate arbitration agreements. App. Vol. II at 00249–00253. As to these plaintiffs, *Fat Hat* held that the arbitration agreements were enforceable because, in addition to a signature line at the end of each arbitration agreement, both plaintiffs were required to write their name and address explicitly stating the arbitration agreement was effective:

> Respondents Hebert and Mihaylova, on the other hand, signed identical "Arbitration Agreement[s] with Fat Hat and complied with NRS 597.995. **In addition to a signature line at the end of the contracts, both Hebert and Mihaylova were required to fill in in their names and addresses in the blank spaces of the provision, explicitly stating that the agreement to arbitrate was effective.** Thus, the arbitration provision in Hebert and Mihaylova's arbitration agreements are valid and enforceable.

Id. (emphasis added).

Here, the Estate's claims should not be compelled into binding arbitration because the Any Dispute Provision within the Grievance and Arbitration Agreement is not specifically authorized in accordance with

NRS 597.995(1). As outlined above, the Grievance and Arbitration Agreement has two (2) independent provisions: one that addresses the handling of resident grievances; and another that addresses binding arbitration. The latter provision—i.e. the Any Dispute Provision—states:

> Any controversy, dispute or disagreement, whether sounding in tort or contract to law, arising out of or relating to this Agreement . . . shall be settled exclusively by binding arbitration . . . .

However, absent from this Any Dispute Provision is a signature block, initial line, or other acknowledgement that indicates Plaintiff Corinne DiLeo, as Decedent's power of attorney, affirmatively agreed to submit "any controversy, dispute, or disagreement" to binding arbitration. The Grievance and Arbitration Agreement faces the same fundamental flaw as the four (4) employment contracts with the "any dispute" arbitration provisions that were voided in *Fat Hat*—it merely includes a general signature line below the arbitration provision rather than specific authorization that the arbitration provision is effective.

Fat Hat's analysis in upholding the two (2) separate arbitration agreements further demonstrates why the Any Dispute Provision within the Grievance and Arbitration Agreement is unenforceable. Specifically, the arbitration agreements upheld by *Fat Hat* included both a general

signature line at the end *and* specific authorization in that "[the plaintiffs] were required to fill in their names and addresses in the blank spaces of the **provision**, explicitly stating that the agreement to arbitrate was effective." *Id.* (emphasis added). Here, that specific authorization is absent from the Any Dispute Provision and, therefore, the Any Dispute Provision is void and unenforceable.

B. Whether the Grievance and Arbitration Agreement is a separate agreement or continuation of the Admission Agreement is immaterial because the Any Dispute Provision lacks NRS 597.995's specific authorization.

In their Opening Brief, Defendants concede that the Grievance and Arbitration Agreement is a wholly separate contract from the Admission Agreement.[13] This is consistent with Plaintiffs' position. Nevertheless, as outlined below, the Any Dispute Provision is void and unenforceable,

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[13] *See* Appellants' Opening Brief, at p.11 ("In this case, Mrs. DiLeo initially signed a Resident Agreement that contained five-pages *[sic]* with a single signature block on page "five" that applied to the whole agreement. She then signed a **separate** "Resident Agreement Addendum" (the "Addendum") that contained the subject arbitration clause.") (emphasis added) (internal citations omitted); *see also id.*, at pp.11–12 ("These two clauses [i.e. the Grievance Provision and the Any Dispute Provision] comprise a **single** arbitration agreement.") (emphasis added).

regardless of whether the Court finds the Grievance and Arbitration is a separate, independent agreement.

1. The Grievance and Arbitration Agreement is a separate, independent agreement that lacks NRS 597.995(1)'s specific authorization.

When evaluating any contract or agreement, courts should limit their inquiry to the four (4) corners of the contract. *See State Dep't of Transportation v. Eighth Judicial District Court*, 113 Nev. 549, 554, 402 P.3d 677, 682–83 (2017). If a contract or agreement is ambiguous—i.e. subject to more than one reasonable interpretation—then the ambiguity should be construed against the drafter. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215–16, 163 P.3d 405, 407 (2007).

Here, the four (4) corners of the Grievance and Arbitration Agreement demonstrate it is an agreement that is wholly independent of the Admission Agreement. In addition to listing an entirely different nursing home from that listed in the Admission Agreement, the Grievance and Arbitration Agreement also references itself as a separate agreement. Specifically, the Any Dispute Provision within the Grievance and Arbitration Agreement states:

> Any controversy, dispute or disagreement, whether sounding in tort or contract to law, arising out of or relating to **this**

> **Agreement**, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration . . . .

Thus, the Grievance and Arbitration Agreement is a separate contract pertaining to the rights and responsibilities associated with Resident "Grievances" (as outlined in the first provision). Because the Grievance and Arbitration Agreement is a separate contract, the second provision—i.e. the Any Dispute Provision—must be specifically authorized. Here, the Grievance and Arbitration Agreement is merely signed in its entirety and, therefore, lacks the specific authorization required under NRS 597.995.

2. Even if the Court finds the Grievance and Arbitration Agreement is a continuation of the Admission Agreement, the Any Dispute provision is void and unenforceable because it lacks NRS 597.995(1)'s specific authorization.

NRS 597.995(1) mandates that any contract provision requiring an individual to submit "any dispute arising between the parties," must include specific authorization indicating the individual affirmatively agrees to *that* provision. This strict interpretation of NRS 597.995 was crystalized through *Fat Hat*'s analysis of the two (2) arbitration provisions, which were ultimately deemed valid because they had a general signature line for the agreement *and* a separate section where

the plaintiffs had to fill their names and addresses explicitly stating the arbitration agreement was effective. 385 P.3d 580, at *2.

Here, even if the Court finds that the Grievance and Arbitration Agreement is a continuation of the Admission Agreement, the Any Dispute Provision is still void and unenforceable because it lacks NRS 597.995(1)'s specific authorization. Unlike *Fat Hat*, where the two (2) upheld arbitration agreements had general signature lines for the entire agreement and specific authorization (completing name and address) acknowledging the enforcement of the binding arbitration provision, here, the Grievance and Arbitration Agreement merely has a general signature line at the bottom. As such, the second provision—i.e. the Any Dispute Provision—lacks specific authorization and, therefore, is void an unenforceable.

C. The District Court's Order should not be disturbed because its application of the facts to NRS 597.995 was not an abuse of discretion.

In their Opening Brief, Defendants argue that the facts surrounding the Grievance and Arbitration Agreement—e.g. the length, the word count, and the font—support a finding that the Any Dispute

Provision was specifically authorized.[14] These factual arguments were already addressed and rejected by the District Court, whose decision should not be disturbed absent an abuse of discretion.

Orders denying arbitration typically involve mixed questions of law and fact, which the appellate court reviews under different standards. *Gonski*, 126 Nev. at 557, 245 P.3d at 1168. Specifically, the District Court's factual findings are given deference, and should be upheld, unless they are clearly erroneous and not based on substantial evidence. *International Fidelity*, 122 Nev. at 42, 126 P.3d at 1134–35. Similarly, the District Court's application of the standards to the facts is given deference. *Loice*, 124 Nev. at 20, 174 P.3d at 982.

Here, the District Court's application of NRS 597.995 to the facts surrounding the Grievance and Arbitration Agreement deserves deference and should not be disturbed absent an abuse of discretion. In the underlying proceedings, the District Court carefully reviewed the Grievance and Arbitration Agreement—including its length, word count, and font—and determined that the Any Dispute Provision was void and unenforceable because it lacked a separate signature block, initial

[14] *See* Appellants' Opening Brief, at pp.11–12.

section, or other acknowledgement. This determination concerns an application of standards to facts and, therefore, should not be overturned absent abuse of discretion. While Defendants may disagree with the District Court, the District Court's ruling is not clearly erroneous.

Further, in their Opening Brief, Defendants make several factual arguments that are not supported by the evidence[15] and, therefore, should be ignored by the Court. Specifically, Defendants argue: (1) that the Grievance Provision is not a separate provision from the Any Dispute Provision in the Grievance and Arbitration Agreement; (2) that the Grievance and Arbitration Agreement "was set aside from the rest of the intake paperwork"; and (3) that Plaintiff Corinne DiLeo was aware of the Any Dispute Provision and was not confused by the same.[16] There is no evidence to support these assertions. First, the face of the Grievance and Arbitration Agreement clearly shows that the Grievance Provision and Any Dispute Provision are separate and individually numbered; arguing otherwise runs contrary to the evidence. Moreover, there is absolutely no evidence that suggests the Grievance and Arbitration Agreement was

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[15] *See* Appellants' Opening Brief, at pp. 5, 11–12.

[16] *Id.*

separately set aside or that Plaintiff Corinne DiLeo was aware, and not confused by, the Any Dispute Provision. In reality, the fact that the Grievance and Arbitration Agreement has the wrong nursing home listed, is incomplete (e.g. fails to specify the city and state of arbitration), and includes multiple grammatical errors and typos strongly suggests the Grievance and Arbitration Agreement was not carefully reviewed. As such, Plaintiffs request Defendants' factual arguments be ignored.

In sum, the Any Dispute Provision within the Grievance and Arbitration Agreement lacks specific authorization and, therefore, does not comply with NRS 597.995(1)'s strict interpretation. As such, the Any Dispute Provision is void and unenforceable.

III. Even if the Court applies substantial compliance to NRS 597.995(1), the Any Dispute Provision is still void and unenforceable because it is procedurally and substantively unconscionable.

An arbitration provision may be deemed void and unenforceable when it is both procedurally and substantively unconscionable. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553–54, 96 P.3d 1159, 1162 (2004), *overruled on other grounds by U.S. Home Corp. v. Michael Ballesteros Trust*, 134 Nev. 180, 192, 415 P.3d 32, 41–42 (2018). An arbitration provision is *procedurally* unconscionable "when a party lacks a

meaningful opportunity to agree to the clause terms either because of unequal bargaining powers, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract." *Id.* An arbitration provision is *substantively* unconscionable when its "terms and surrounding circumstances at the time of execution are so one-sided as to oppress or unfairly surprise an innocent party." *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.* 89 Nev. 414, 418, 514 P.2d 654, 657 (1973); *see id.* Procedural and substantive unconscionability operate on a sliding scale: when procedural unconscionability is great, less evidence of substantive unconscionability is required, and vice versa. *FQ Men's Club, Inc. v. Doe*, No. 79265 (Nev. Sep. 17, 2020); *Burch v. Second Judicial District Court*, 118 Nev. 438 , 444, 49 P.3d 647, 650 (2002). As outlined below, the Any Dispute Provision is both procedurally and substantively unconscionable.

A. The Any Dispute Provision is procedurally unconscionable because it is a carelessly drafted adhesion contract that failed to advise Plaintiff Corinne DiLeo that she was waiving her constitutional right to a civil jury trial.

An arbitration provision is procedurally unconscionable when a party has unequal bargaining power or when the provision itself is not

readily ascertainable. *D.R. Horton*, 120 Nev. at 553–54, 96 P.3d at 1162. When determining whether a provision is procedurally unconscionable, courts look to whether the provision uses "complicated, incomplete, or misleading language that fails to inform a reasonable person of the contractual language's consequences." *Id.* Here, the Any Dispute Provision is procedurally unconscionable because: (1) it did not advise Plaintiff Corinne DiLeo that she was waiving her constitutional right to a jury trial; (2) it is an adhesion contract wherein Plaintiff Corinne DiLeo had unequal bargaining power; (3) its careless drafting renders the provision confusing; and (4) Defendants failed to provide Plaintiff Corinne DiLeo with a copy of the governing arbitration rules.

1. The Any Dispute Provision is procedurally unconscionable because it did not advise Plaintiff Corinne DiLeo that she was waiving her constitutional right to a jury trial.

To be enforceable, an arbitration provision must put the signatories on notice that they are waiving important rights under Nevada law—including the constitutional right to a civil jury trial. *Id.* at 557. In *D.R.*

Horton, the Court evaluated and voided the following arbitration provision:[17]

> **11. THIS CONTRACT IS SUBJECT TO THE NEVADA ARBITRATION RULES GOVERNED UNDER NEVADA REVISED STATUTE CHAPTER 38 AND THE FEDERAL ARBITRATION ACT.**
>
> Buyer and Seller agree that any disputes or claims between the parties, whether arising from a tort, this Contract, any breach of this Contract or in any way related to this transaction, including but not limited to claims or disputes arising under the terms of the express limited warranty referenced in Paragraph 10 of this Contract, shall be settled by binding arbitration under the direction and procedures established by the American Arbitration Association "Construction Industry Arbitration Rules" except as specifically modified herein or dictated by applicable statutes including the Nevada Revised Statute Chapter 38 and/or the Federal Arbitration Act. If Buyer does not seek arbitration prior to initiating any legal action, Buyer agrees that Seller shall be entitled to liquidated damages in the amount of ten thousand dollars ($10,000.00). Any dispute arising from this Contract shall be submitted for determination to a board of three (3) arbitrators to be selected for each such controversy. The decision of the arbitrators shall be in writing and signed by such arbitrators, or a majority of them, and shall be final and binding upon the parties. Each party shall bear the fees and expenses of counsel, witnesses and employees of such party, and any other costs and expenses incurred for the benefit of such party. All other fees and expenses shall be divided equally between Buyer and Seller.

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[17] This arbitration provision was located on the back side of a one-page, two-sided agreement. *Id.* at 551.

Id. at 555–56 (emphasis in original).

In voiding this provision, *D.R. Horton* noted that, even if the signatories read the inconspicuous provision, it was still unenforceable because it "failed to adequately advise an average person that important rights were being waived by agreeing to arbitrate any disputes under the contract." *Id.* at 557. In reaching this conclusion, the Court specifically cited the fact that the arbitration provision did not notify the signatories that they were waiving their right to a civil jury trial. *Id.* at 556.

Here, the Any Dispute Provision is procedurally unconscionable because it does not notify the parties that they are waiving their constitutional right to a civil jury trial. The *D.R. Horton* provision and Any Dispute Provision are strikingly similar: they both state that "any dispute" will be subject to binding arbitration[18]; they both identify the governing arbitration rules and procedures; and they both identify the arbitrator(s) selection process. Similarly, both provisions share the same flaw—neither the *D.R. Horton* provision nor the Any Dispute Provision include any language notifying the signatories that they are waiving

[18] *D.R. Horton* predates NRS 597.995 and, therefore, the Court did not analyze whether the arbitration provision was compliant with the statute's specific authorization requirement.

their right to a civil jury trial.[19] Thus, in accordance with *D.R. Horton*, the Any Dispute Provision must be struck as void and unenforceable.

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[19] Failure to include this language also runs afoul of the American Health Law Association, Dispute Resolution Service's Rules for Procedure for Consumer Arbitration (effective September 1, 2020) which, pursuant to the Any Dispute Provision, would be the governing rules of the binding arbitration. Specifically, Section 2.1 states:

> If the agreement to arbitrate was signed before the events giving rise to the claim occurred, the agreement must:
>
> (1) be a separate document conspicuously identified as an agreement to arbitrate;
>
> (2) include the following notice, or substantially similar language, in a conspicuous location:
>
> **Voluntary Agreement to Arbitrate**
>
> **THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ IT CAREFULLY BEFORE SIGNING.**
>
> **This is a voluntary agreement to resolve any dispute that may arise in the future between the parties under the American Health Law Association's Rules of Procedure for Arbitration. In arbitration, a neutral third party chosen by the parties issues a final, binding decision. When parties agree to arbitrate, they waive their right to a trial by jury and the possibility of an appeal.**
>
> (3) state conspicuously that the health care entity will provide the same care or treatment, without delay, if the agreement is not signed; and
>
> (4) explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it (unless a state law applicable to

2. The Any Dispute Provision is procedurally unconscionable because it is an adhesion contract wherein Plaintiff Corinne DiLeo had unequal bargaining power.

An arbitration provision is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the provision's terms because of unequal bargaining power, as in an adhesion contract. *Id.* at 554. An adhesion contract is "a standardized contract form offered to consumers of goods and services essentially on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Obstetrics and Gynecologists v. Pepper*, 101 Nev. 105, 107, 693 P.2d 1259, 1260 (1985). In *Pepper*, the Court found that the contested arbitration agreement was an adhesion contract because: (i) the agreement was

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contracts generally grants a longer period for revocation).

https://www.americanhealthlaw.org/getmedia/fd876c19-8c1c-406e-8263-aa916c9a39f3/20_DRS-Consumer.pdf (emphasis in original); *see also* American Health Law Association, Dispute Resolution Service's Rules for Procedure for Arbitration (effective April 7, 2014) at https://www.americanhealthlaw.org/getmedia/77e85825-ef41-4578-b3d6-b83a0bfabf6b/April-7-2014.pdf (effective rules when the Grievance and Arbitration Agreement was signed).

prepared by the defendant medical clinic and presented to plaintiff as a condition of treatment; (ii) the plaintiff had no opportunity to modify any of the arbitration agreement's terms; and (iii) the plaintiff had to choose between signing the arbitration agreement as is or forego treatment at the medical clinic. *Id.*

Here, the Any Dispute Provision is procedurally unconscionable because it is an adhesion contract wherein Plaintiff Corinne DiLeo had unequal bargaining power. Like *Pepper*, the Grievance and Arbitration Agreement, which contains the Any Dispute Provision, was: (i) prepared by Defendants and presented as a condition of Decedent's residency; (ii) did not provide Corinne DiLeo the opportunity to modify any of the terms; and (iii) made Plaintiff Corinne DiLeo choose between signing or foregoing Decedent's residency at the Nursing Home. Moreover, the Grievance and Arbitration Agreement is clearly a "standardized contract form" as evidenced by the fact it lists a completely different nursing home than the one Decedent contracted to reside at. Thus, the Any Dispute Provision is even more procedurally unconscionable because it constitutes an adhesion contract.

3. The Any Dispute Provision is procedurally unconscionable because its careless drafting renders the provision confusing.

An arbitration provision is procedurally unconscionable when careless drafting—including misspelled or omitted words and phrases—render the provision confusing. *FQ Men's Club*, Case No. 79265, at *5–6, *8–9 (citing *D.R. Horton*, 120 Nev. at 554, 96 P.3d at 1162). Here, the Grievance and Arbitration Agreement is riddled with multiple typos and omissions that render the agreement confusing. Specifically, the Grievance and Arbitration Agreement states, in bold, that it is an agreement with Bella Estate Care Home, which is a completely different nursing home than that Decedent was contracting to reside at. In addition, the Any Dispute Provision omits the city and state in which binding arbitration was to be conducted and, instead, inserted the placeholder: "(City, State)". Moreover, the Grievance and Arbitration Agreement contains multiple grammatical errors which, considered in their entirety, cast doubt on the legitimacy of the agreement. Accordingly, the Any Dispute Provision is even more procedurally unconscionable because its careless drafting renders it confusing.

4. The Any Dispute Provision is procedurally unconscionable because Defendants failed to provide Plaintiff Corinne DiLeo with a copy of the governing arbitration rules.

An arbitration provision is procedurally unconscionable if the drafting party fails to provide the other party with a copy of the governing arbitration rules. *Henderson v. Watson*, No. 64545, at *4 (Nev. Apr. 29, 2015); *see also Trivedi v. Curexo Tech. Corp.*, 116 Cal. Rptr. 3d 804, 808 (Ct. App. 2010) (providing that "the failure to provide a copy of the arbitration rules to which the employee would be bound, supported a finding of procedural unconscionability"). In *Watson*, the Nevada Supreme Court evaluated an employment contract that demanded any dispute be subject to binding arbitration, to be governed by the American Arbitration Association's rules. *Id.* Ultimately, the Court found the arbitration provision was procedurally unconscionable because the defendant failed to provide the plaintiff with a copy of the American Arbitration Association's rules when the agreement was executed. *Id.* at *4–5.

Here, the Any Dispute Provision is procedurally unconscionable because Defendants failed to provide Plaintiff Corinne DiLeo with a copy of the American Health Law Association, Dispute Resolution Service's

rules which, pursuant to the Any Dispute Provision, were to govern any arbitration.

In sum, the procedural unconscionability of the Any Dispute Provision is great. Its failure to notify Plaintiff Corinne DiLeo that she was waiving her constitutional right to a jury trial, alone, renders it unenforceable. Moreover, a finding of procedural unconscionability is further bolstered by Defendants' superior bargaining power, careless drafting and omissions, and failure to provide Plaintiff Corinne DiLeo with a copy of the governing arbitration rules cited in the Any Dispute Provision.

B. The Any Dispute Provision is substantively unconscionable because it mandates arbitration be governed by one-sided arbitration rules that were unilaterally chosen by Defendants.

An arbitration provision is substantively unconscionable when its actual terms are overly harsh, oppressive, one-sided, or cause an unfair surprise. *Bill Stremmel Motors,* 89 Nev. at 418, 514 P.2d at 657; *Watson*, No. 64545, at *5. As noted, less evidence of substantive unconscionability is necessary where procedural unconscionability is great. *Burch*, 118 Nev. at 444, 49 P.3d at 650; *see also D.R. Horton*, 120 Nev. at 558, 96 P.3d at 1164 ("Although the one-sidedness of the provision is not

overwhelming, it does establish substantive unconscionability, especially when considered in light of the great procedural unconscionability present . . . ."). Here, the Any Dispute Provision is substantively unconscionable because: (1) Defendants had the unilateral and exclusive right to select the rules governing arbitration; (2) the governing rules require the parties split the arbitration fees; and (3) the governing rules mandate the arbitration proceedings and award remain confidential.

1. The Any Dispute Provision is substantively unconscionable because Defendants had the unilateral and exclusive right to select the rules that govern the arbitration.

An arbitration provision is substantively unconscionable when one party had the unilateral and exclusive right to decide the rules that govern the arbitration. *Burch*, 118 Nev. at 444, 49 P.3d at 650. In *Burch*, the Nevada Supreme Court evaluated an arbitration provision, which mandated that any dispute be subject to binding arbitration in accordance with the Construction Arbitration Services (CAS) or other National Home Insurance Company / Home Buyers Warranty approved rules. *Id.* at 440. Ultimately, the Court concluded the arbitration was substantively unconscionable because the defendant had the unilateral

and exclusive right to decide the rules that govern the arbitration and selection of arbitrators. *Id.* at 144.

Here, the Any Dispute Provision is substantively unconscionable because Defendants had the unilateral and exclusive right to select the rules that govern arbitration. Like *Burch*, where the defendants unilaterally decided the Construction Arbitration Services' rules would govern the arbitration, here, Defendants unilaterally decided that the American Health Law Association, Dispute Resolution Service's rules would govern the arbitration. As such, the terms of the Any Dispute Provision are one-sided and, therefore, substantively unconscionable.

2. The Any Dispute Provision is substantively unconscionable because the governing rules require the parties split the arbitration fees.

An arbitration provision is substantively unconscionable if it requires the parties to split the costs associated with the arbitration. *D.R. Horton*, 120 Nev. at 558, 96 P.3d at 1165 (citing *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (finding the disputed arbitration agreement was substantively unconscionable because it required the plaintiffs split the arbitrator's fees with the defendant); *see also Armendariz v. Foundation Health Psychcare Services*, 24 Cal. Rptr. 2d 745, 6 P.3d 669 at 687 (2000).

("[T]he arbitration process cannot generally require the employee to bear any *type* of expenses that the employee would not be required to bear if he or she were free to bring the action in court."); *Shankle v. B-G Maintenance, Inc.*, 163 F.3d 1230, 1350 (10th Cir. 1999) (holding unenforceable a fee-splitting provision that would cost an employee between $1,875.00 and $5,000.00 to resolve a particular claim); *Cole v. Burns International Security Services*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (upholding a fee-splitting agreement, but only after the court construed the agreement to require the employer to pay all the arbitrator's fees).

Here, the Any Dispute Provision is substantively unconscionable because the governing rules—the American Health Law Association, Dispute Resolution Service's Rules for Procedure for Consumer Arbitration (effective September 1, 2020)[20]—burden Plaintiffs with a portion of the arbitration fees. Notably, Section 7.6(a)(3) states that the Plaintiffs may be required to split fees if the arbitration hearing lasts

[20] Available at https://www.americanhealthlaw.org/getmedia/fd876c19-8c1c-406e-8263-aa916c9a39f3/20_DRS-Consumer.pdf

more than three (3) days.[21] Per the parties' Joint Case Conference Report, the estimated time of trial is 5–7 days; as such, it is reasonable to expect that any arbitration of this matter would extend beyond three (3) days and, therefore, subject Plaintiffs to arbitration fees.

3. The Any Dispute Provision is substantively unconscionable because the governing rules mandate the arbitration proceedings and award remain confidential.

An arbitration provision is substantively unconscionable if it precludes "the use or release of evidence outside of the arbitration proceeding." *Watson*, No. 64545, at *5 (citing *Ting*, 319 F.3d at 1151–52). In *Ting*, the Ninth Circuit evaluated the following arbitration confidentiality provision for substantive unconscionability:

> Any arbitration shall remain confidential. Neither you nor [defendant] may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award.

Ting, 319 F.3d at 1152 n.16. Ultimately, the Ninth Circuit found this provision substantively unconscionable because "[a]lthough facially

[21] *Id.* at 18; *see also id.* at 5 (Section 2.3 mandating the plaintiffs pay a fee if they choose to expand the list of arbitration candidates); *id.* at 20 (Section 8.2 mandating the plaintiffs pay a fee for copies of any documents in the arbitration case file).

neutral, confidentiality provisions usually favor companies over individuals" and that gag orders prevent plaintiffs from accessing a body of knowledge regarding those companies. *Id.* at 1152.

Here, the Any Dispute Provision is substantively unconscionable because the governing rules—the American Health Law Association, Dispute Resolution Service's Rules for Procedure for Consumer Arbitration (effective September 1, 2020)—mandate the arbitration proceeding and award remain confidential. Like *Ting*, Section 7.10 mandates:

> The Administrator and the arbitrator shall maintain the confidential nature of the arbitration proceeding and any award, except as necessary in connection with a judicial challenge to or enforcement of an award, or unless as otherwise required by law.[22]

This provision is strikingly similar to the confidentiality provision analyzed in *Ting* and, therefore, should be found substantively unconscionable.

Thus, in addition to great procedural unconscionability, the Any Dispute Provision also faces multiple instances of substantive unconscionability, including, one-sided governing rules that were

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[22] *Id.* at 19.

unilaterally chosen by Defendants. As such, even if the Court applies substantial compliance to NRS 597.995(1), the Any Dispute Provision is still void and unenforceable because it is procedurally and substantively unconscionable.

IV. Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. are not bound to the Any Dispute Provision because they are not signatories to the Grievance and Arbitration Agreement.

"Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Truck Ins. Exch.*, 124 Nev. at 634, 189 P.3d at 659 (internal quotations omitted). Only under the following limited theories may a nonsignatory be bound to an arbitration agreement/provision: (A) incorporation by reference; (B) estoppel; (C) assumption; (D) agency; and (E) veil-piercing/alter ego. *Id.* at 634–635. Here, the latter three theories—assumption, agency, and veil-piercing/alter ego—do not apply to Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. As outlined below, the remaining theories—incorporation by reference and estoppel—fail to bind Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. to the Any Dispute Provision and, therefore, they cannot be compelled into binding arbitration.

A. Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. are not bound by the Any Dispute Provision because the Grievance and Arbitration Agreement does not incorporate them (i.e. the heirs) by reference.

A nonsignatory may be bound to an arbitration agreement if the agreement incorporates the nonsignatory by reference. *Id.* at 634. For instance, in *Goliger v. AMS Properties, Inc.*, the daughter of a nursing home resident signed an arbitration agreement in her capacity as the resident's responsible party, but not in her own personal capacity. 123 Cal. App. 4th 374, 378, 19 Cal. Rptr. 3d 819, 821 (2004). Later, the daughter brought a wrongful death suit against the nursing home in both her personal capacity and on behalf of her resident mother. *Id.* Ultimately, the Court held the daughter's personal wrongful death claim was not bound to the arbitration agreement because she did not sign the arbitration agreement in her personal capacity, nor was she personally incorporated into agreement. *Id.*

Here, Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. cannot be bound to the Any Dispute Provision because they did not sign the Grievance and Arbitration Agreement, nor are they incorporated by reference in the Grievance and Arbitration Agreement. If Defendants wanted to bind Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. to the Any

Dispute Provision, then they should have included a provision in that Grievance and Arbitration Agreement stating the agreement applies to Decedent's successors, children, assigns, agents, heirs, etc.

B. Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. are not bound by the Any Dispute Provision under the theory of estoppel because their wrongful death claim is statutory and not based in contract.

Under the theory of estoppel, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a 'direct benefit' from a contract containing an arbitration clause." *Truck Ins. Exch.*, 124 Nev. at 636, 189 P.3d 671 (quoting *International Paper v. Schwabedissen Maschinen Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000)). A nonsignatory receives a direct benefit when its claims arise from the contract. *City of Henderson v. Guarantee Company of North America*, No. 73299 (Nev. App. June 22, 2018) (citing *R.J. Griffin & Co. v. Beach Club II Homeowner's Association*, 384 F.3d 157, 160–61 (4th Cir. 2004) ("In the context of arbitration, the doctrine [of equitable estoppel] applies when one party attempts 'to hold [another party] to the terms of [an] agreement' while simultaneously trying to avoid the agreement's arbitration clause."); *International Paper*, 206 F.3d at 417–17; (holding that a nonsignatory customer was equitably estopped from refusing to

comply with an arbitration provision in a contract between the distributor and manufacturer in its suit based on that contract because the contract provided "part of the factual foundation for every claim asserted by" the non-signatory and therefore "it cannot seek to enforce those contractual rights and avoid the contract's requirement that "any dispute arising out of the contract be arbitrated"); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739–41 (Tex. 2005) (discussing that "if a non-signatory's breach-of-warranty and breach-of-contract claims are based on certain terms of a written contract, then the non-signatory cannot avoid an arbitration provision within that contract . . . . If, however, a non-signatory's claims can stand independently of the underlying contract, then arbitration generally should not be compelled under this theory.")).

While not explicitly addressed by this Court, other jurisdictions have followed this principle and held a statutory heir's wrongful death claim is not subject to binding arbitration because the claim is based in statute, not the arbitration or resident agreement. *See e.g. Goliger*, 123 Cal. App. 4th at 378, 19 Cal. Rptr. 3d at 821; *Finney v. National Healthcare Corp.*, 193 S.W.3d 393 (Mo. Ct. App. 2006). In *Finney*, the

granddaughter of a nursing home resident executed an arbitration agreement on behalf of the resident. 193 S.W.3d at 394. Subsequently, the daughter of the resident brought an action, in her personal capacity, against the nursing home for the wrongful death of her resident mother. *Id.* Ultimately, the Court held the daughter was not bound by the arbitration agreement because she was not a signatory to the arbitration agreement and her wrongful death action arose from the state's wrongful death statute. *Id.* at 395. In support of its position, the Court explained:

> The wrongful death claim does not belong to the deceased or even to a decedent's estate. The wrongful death act creates a new cause of action where none existed at common law and did not revive a cause of action belonging to the deceased. A wrongful death action is not a transmitted right nor a survival right but is created and vested in the statutorily designated survivors at the moment of death. The damages under [RSMo] section 537.080 are different than the damages Decedent would have been entitled to in a personal injury action against Appellants. Under Missouri's wrongful death statute, the party or parties may receive pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death.

Id. (internal citations and quotations omitted).

Here, the theory of estoppel does not bind Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. to the Any Dispute Provision because their

wrongful death claims arise out of NRS 41.085, not the Grievance and Arbitration Agreement or Admission Agreement. Like *Finney*, where the statutory heir's wrongful death claim arose from Missouri's wrongful death statute, here, Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr.'s wrongful death claims arise from the Nevada's wrongful death statute (NRS 41.085). That is, Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr.'s wrongful death claims stand independent of the Grievance and Arbitration Agreement and Admission Agreement; the claims do not arise from either agreement. As such, the theory of estoppel does not bind Plaintiffs Cindy DiLeo and Thomas DiLeo, Jr. to the Any Dispute Provision and, as nonsignatories, they cannot be compelled into binding arbitration.

CONCLUSION

As set forth herein, the Estate's claims are not subject to binding arbitration because the Any Dispute Provision within the Grievance and Arbitration Agreement is not specifically authorized in accordance with the strict interpretation of NRS 597.995(1) and, therefore, is void and unenforceable. Similarly, the Statutory Heir's claims for wrongful death are not subject to binding arbitration because, in addition to the Any

Dispute Provision being void, the Statutory Heirs were not signatories to the Grievance and Arbitration Agreement. Ultimately, the District Court did not abuse its discretion in applying the standards of NRS 597.995(1) to the facts surrounding the Any Dispute Provision and Grievance and Arbitration Agreement. Therefore, Plaintiffs respectfully request the Court affirm the District Court's Order regarding Plaintiffs' Motion to Reconsider and allow each of Plaintiffs' claims to proceed before the Eighth Judicial District Court.

Dated this 26th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the

matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS' ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 26th day of March, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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S. Vogel

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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/s/*Noel Raleigh*
An employee of Cogburn Law