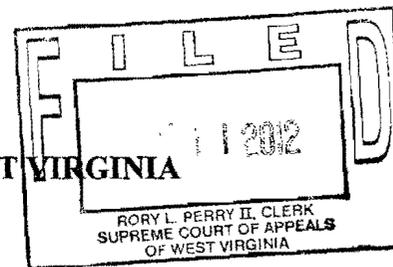


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Clayton Brown, as guardian for and
on behalf of Clarence Brown, Plaintiff Below, Appellant**

vs.) No. 35494

**Genesis Healthcare Corporation, et al,
Defendants below, Appellees**

-AND-

**Jeffrey Taylor, Personal Representative of
the Estate of Leo Taylor, Plaintiff Below, Appellant**

vs.) No. 35546

**MHCC, Inc. f/k/a Marmet Health Care Center, et al.,
Defendants below, Appellees**

-AND-

**Sharon Marchio, Executrix of the Estate
of Pauline Virginia Willet, Plaintiff**

vs.) No. 35635

Clarksburg Nursing & Rehabilitation Center, Inc., et al., Defendants.

**SUPPLEMENTAL BRIEF OF APPELLEES MHCC, INC., F/K/A
MARMET HEALTH CARE CENTER, INC., CANOE HOLLOW PROPERTIES, LLC
AND ROBIN SUTPHIN**

**Shawn P. George, Esquire
WV State Bar #1370
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311**

**COUNSEL FOR APPELLEES
MHCC, INC. F/K/A MARMET
HEALTH CARE CENTER, INC.,
CANOE HOLLOW PROPERTIES, LLC
and ROBIN SUTPHIN**

May 11, 2012

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Center, Inc., et al., Defendants**

**SUPPLEMENTAL BRIEF OF APPELLEES MHCC, INC., F/K/A MARMET HEALTH
CARE CENTER, INC., CANOE HOLLOW PROPERTIES, LLC AND ROBIN SUTPHIN**

Pursuant to the Court's Order of April 3, 2012 and Rule 10(h) of the Rules of Appellate Procedure, Appellees MHCC, Inc. f/k/a Marmet Health Care Center, Inc., Canoe Hollow Properties, LLC and Robin Sutphin file this Supplemental Brief on the following limited question.

QUESTION PRESENTED

Was this Court's determination that the arbitration clauses were unconscionable influenced by its categorical holding that pre-dispute agreements to arbitrate personal injury or wrongful death claims are not governed by the Federal Arbitration Act?

RESPONSE

For two reasons, Appellees respectfully assert the answer to the limited question is "yes". First, Appellants have the burden of proof under West Virginia principles regarding unconscionability to invalidate the arbitration agreements they signed. Appellants have failed to meet that burden. There is insufficient record factual support to sustain Appellants' burden of proof to void and nullify the written agreements on unconscionability grounds. Without it, Appellants cannot prevail. Any attempt to shift the burden of proof to Appellees to demonstrate that their arbitration agreements were *not* unconscionable is preempted by the Federal Arbitration Act ("FAA"). As the United States Supreme Court made clear, state common law principles that are "specific to arbitration" are pre-empted by the FAA. Op. at 4.

Second, the United States Supreme Court already has found that this Court failed to apply, under the FAA, the same legal analysis to the contracts at issue, as this Court applies to contracts in general. Further, the Opinion expressly holds that this Court's unconscionability finding relied, at least "in part" on its threshold determination that "a pre-dispute arbitration agreement that applies to claims of personal injury or wrongful death against nursing homes 'clearly violates public policy.'" Foreshadowing the limited question raised here, the United States Supreme Court went on to state: "It is unclear, however, to what *degree* the state court's alternative holding [on unconscionability] was influenced by the invalid, categorical rule against pre-dispute arbitration." Op. at 4 (emphasis added). As framed, this sentence leads to no other

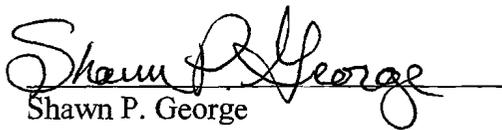
reasonable conclusion. Further support for this conclusion is found in the Opinion's express holding that this Court's unconscionability finding at least relied "in part" on its threshold determination that "a pre-dispute arbitration agreement that applies to claims of personal injury or wrongful death against nursing homes 'clearly violates public policy'". While leaving open *the degree to which* this Court's decision was wrongly influenced, the Opinion makes clear that it was so wrongly influenced. Op. at 4. Accordingly, Appellees respectfully submit that the United States Supreme Court mandate does not leave the limited question open for an answer in the negative and requires affirmance of the Circuit Court orders mandating arbitration.

CONCLUSION

For these reasons and those set forth in Appellees' initial Response in Opposition to Appellants' appeal and those of record in these proceedings, Appellees submit that this Court must deny the appeal and order that these actions be referred to and proceed in arbitration as mandated by the written agreements between the parties.

Respectfully submitted,

MHCC, INC., F/K/A MARMET HEALTH CARE
CENTER, INC. CANOE HOLLOW
PROPERTIES, LLC AND ROBIN SUTPHIN
By Counsel,



Shawn P. George
WV State Bar #1370
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
PH: (304) 343-5555
Fax: (304) 342-2513
sgeorge@gandllaw.com

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CERTIFICATE OF SERVICE

I, Shawn P. George, do hereby certify that I served the foregoing Supplemental Brief of Appellees MHCC, Inc., f/k/a Marmet Health Care Center, Inc., Canoe Hollow Properties, LLC and Robin Sutphin on counsel of record, regular U.S. Mail, this 11th day of May, 2012 as follows:

Michael Fuller, Esquire
McHugh Fuller Law Group
97 Elias Whiddon Road
Hattiesburg, MS 39402

Harry G. Dietzler, Esquire
Hill, Peterson, Carper, Bee & Dietzler, P.L.L.C.
500 Tracy Way
Charleston, WV 25311
Attorneys for Appellant Clayton Brown

Andrew Paternostro, Esquire
Jeffrey D. Stewart, Esquire
The Bell Law Firm PLLC
P.O. Box 1723
Charleston, WV 25326-1723
Attorneys for Appellee Jeffrey Taylor

Frank E. Simmerman, Jr., Esquire
Chad L. Taylor, Esquire
Simmerman Law Office, PLLC
254 E. Main Street
Clarksburg, WV 26301-2170
*Attorneys for Plaintiff/Appellant
Sharon A. Marchio*



Shawn P. George
WV State Bar #1370
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
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Fax: (304) 342-2513
sgeorge@gandllaw.com