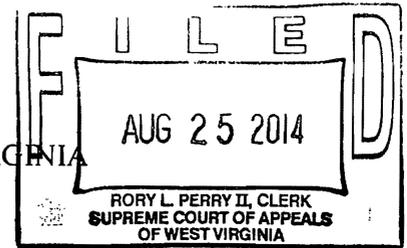


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-0319



(Kanawha County Civil Action No. 13-C-1279)

AMFM, LLC; Commercial Holdings, Inc.  
k/n/a Commercial Holdings, LLC; Integrated  
Commercial Enterprises, Inc.; Manzanita  
Holdings, LLC; Manzanita Management, Inc.;  
Lifetree, LLC; Wisteria, LLC; Mercer Nursing &  
Rehabilitation Center, Inc. d/b/a Mercer Nursing  
& Rehabilitation Center; and Matt Tucker,  
*Petitioners*

v.

Peggy Sue Davis, Individually and on behalf  
of the Estate and Wrongful Death Beneficiaries  
of Lillie Mae Gibson,  
*Respondent*

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PETITIONERS' REPLY BRIEF

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## ARGUMENT

### **I. UNDER WEST VIRGINIA'S WRONGFUL DEATH STATUTE, A PRE-DEATH ARBITRATION AGREEMENT IS BINDING ON WRONGFUL DEATH BENEFICIARIES BECAUSE OF THE DERIVATIVE NATURE OF THEIR CLAIMS.**

As the wrongful death beneficiaries' claims "stand or fall" with the claim of the injured person, no legal or logical reason exists to require the beneficiaries' signature on an arbitration agreement signed by or on behalf of the injured party prior to death. As demonstrated herein, the rule of law proposed by Respondent in this regard is contrary to the wrongful death statute and the precedents of this Court in *Davis v. Foley*.

#### **A. Because wrongful death actions can be wholly barred prior to the death of the injured party by compromise of the underlying personal injury claim without the beneficiaries' consent, the injured party – or her attorney-in-fact – can waive the beneficiaries' right to a jury trial during her lifetime.**

While Respondent argues that because "the right to recover from Petitioners in the event of Lillie Gibson's death never belonged to Lillie Gibson . . . she never had any such right to give away", (Respondent's Br. at p. 6), the reality is that the wrongful death statute itself specifically bars wrongful death actions in the event the injured individual "has compromised for such injury and accepted satisfaction therefor previous to his death." W. Va. Code § 55-7-5. Thus, the wrongful death statute itself permits Lillie Gibson or Charles Gibson as her attorney-in-fact to forever bar the wrongful death beneficiaries from recovery during Lillie Gibson's lifetime by a contract to which the beneficiaries are not parties. Accordingly, no lawful basis exists to conclude that an individual cannot alter the forum in which potential wrongful death claims can be heard when in fact such claims can be settled and extinguished *entirely* prior to death without consent or notice to the beneficiaries.

Although Respondent correctly notes that Lillie Gibson's wrongful death beneficiaries did not sign the subject arbitration agreement, no such requirement exists under West Virginia law. Although the specific question raised by this appeal is a matter of first impression for this Court, the derivative nature of wrongful death claims is not. Rather than treating beneficiaries' claims as independent, this Court has held and reaffirmed "The damages in a wrongful death action arise out of the death of the decedent thereby making a wrongful death action a derivative claim." *Davis v. Foley*, 193 W. Va. 595, 598, 457 S.E.2d 532, 535 (1995). In *Davis*, this Court cited with approval the Supreme Court of Hawaii's opinion in *Hara v. Island Ins. Co., Ltd.* for the proposition that "wrongful death claims 'are derivative and therefore, for purposes of tort liability, stand or fall with the claim of the person actually injured'." *Davis*, 193 W. Va. at 600, 457 S.E.2d 537 (quoting 70 Haw. 42, 759 P.2d 1374, 1376 (1988)), accord *Marlin v. Bill Rich Const, Inc.*, 198 W. Va. 635, 656, 482 S.E.2d 620, 641 (1996).

In the case at bar, Lillie Gibson's wrongful death beneficiaries seek to avoid enforcement of the arbitration agreement on the grounds that they were not signatories; however, the wrongful death statute itself and the derivative nature of the beneficiaries' claims demonstrates that they need not be parties to such an agreement. Accordingly, this Court should answer the Certified Question in the affirmative.

**B. Respondent exclusively relies on non-binding precedent from jurisdictions which treat wrongful death actions in a manner inconsistent with West Virginia law and the Federal Arbitration Act.**

As noted in Petitioners' brief, the recognized split of authority between states which enforce arbitration agreements against wrongful death beneficiaries and those which do not coincides with each state's treatment of the beneficiaries' claims as independent or derivative. Respondent exclusively cites case from jurisdictions which recognize an independent cause of

action in favor of wrongful death beneficiaries without reference to the fact that this Court has already held that such rights are derivative. *See Davis, supra.*

Further, Respondent's characterization of Alabama's wrongful death statute as creating "a new right, not derivative nor the right of succession to the person slain," is not a reference to the derivative/independent distinction at issue here. Rather, this statement a reference to the fact that the Alabama wrongful death act is the source of the "new" right, not the common law.

*Breed v. Atlanta Birmingham & Coast R.R.*, 241 Ala. 640, 642 (1941).

The sum of all the case law cited by the parties to this appeal points to the conclusion that states which treat wrongful death beneficiaries' claims as derivative – such as West Virginia – will enforce an arbitration agreement signed prior to death by the injured party or her legal representative. For this reason and those set forth in the previously-filed *Petitioners' Brief*, this Court should answer the Certified Question in the affirmative.

## **II. RESPONDENT HAS FAILED TO DEMONSTRATE EITHER THAT THE PURPORTED CHOICE OF THE NATIONAL ARBITRATION FORUM IS "AN INTEGRAL PART OF THE AGREEMENT TO ARBITRATE".**

Although this Court has not yet ruled on whether a specific forum in a specific arbitration agreement is "integral" or "ancillary" within the meaning of Section 5 of the FAA or *Credit Acceptance Corp. v. Front*, the Third Circuit case upon which this Court based its holding in *Front* provides significant guidance.

In *Khan v. Dell, Inc.*, the United States Court of Appeals for the Third Circuit was presented with an appeal from a district court's denial of a motion to compel arbitration in light of the unavailability of the chosen arbitrator, the National Arbitration Forum. 669 F.3d 350 (3rd Cir. 2012). In *Khan*, the subject arbitration agreement provided that "ANY CLAIM, . . . SHALL

BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect.” 669 F.3d at 351 (emphasis in original). Mr. Khan relied on Rule 1 of the NAF Code of Procedure which requires that the NAF Code “ shall be administered only by the National Arbitration Forum. . .” *Id.* at 352. The *Khan* court framed the question presented as “whether the provision in the Terms and Conditions that the NAF be the arbitrator is exclusive to the NAF and is an integral part of the agreement between Dell and Khan, thus preventing the appointment of a substitute arbitrator.” *Id.* at 353-354.

The *Khan* court further noted that the incorporation of the FAA into the arbitration agreement suggest that “in the event of the NAF's unavailability, the FAA's procedures for addressing such a problem should apply.” The *Khan* court reasoned that the NAF's unavailability is simply a “mechanical breakdown in the arbitrator selection process.” Further, “a narrower construction of Section 5 would be inconsistent with the ‘liberal federal policy in favor of arbitration’ articulated in the FAA.” *Id.* at 356. Ultimately, the Khan Court held:

The contract's language does not indicate the parties' unambiguous intent not to arbitrate their disputes if NAF is unavailable. Section 5 of the FAA requires a court to address such unavailability by appointing a substitute arbitrator. The District Court's contrary conclusion is at odds with the fundamental presumption in favor of arbitration.

669 F.3d at 357.

In the case at bar, Respondent relies heavily on cases from other jurisdictions which cite different arbitration language and reach different results. Respondent's Br. at pp. 14-17.

However, when this Court sought to formulate the test for courts in this jurisdiction to apply Section 5 of the FAA, it looked to the Third Circuit in a case which held that the NAF's unavailability – even when it was specifically named the NAF as the arbitrator – would not bar

appointment of a substitute arbitrator. Petitioner suggests that although *Khan* is not binding precedent in West Virginia, the well-reasoned analysis upon which this Court relied in *Front* should be persuasive.

Thus, Petitioner requests that this Court affirm the circuit court's finding that the designation of the NAF's Code of Procedures is merely "an ancillary logistical concern" and does not bar enforcement of the agreement.

### CONCLUSION AND REQUEST FOR RELIEF

Petitioners respectfully request that this Court answer the Certified Question as presented in the affirmative. The derivative nature of wrongful death beneficiaries' claims is a well-settled matter of West Virginia law, and based on that authority, an such beneficiaries have no basis on which to challenge the enforceability of an arbitration agreement as set forth by Respondent.

Petitioners further request that the Court affirm the lower court's finding that any purported designation of the National Arbitration Forum constitutes a mere "ancillary logistical concern" subject to substitution pursuant to Section 5 of the Federal Arbitration Act.

**Petitioners AMFM, LLC; Commercial Holdings, Inc. k/n/a Commercial Holdings, LLC; Integrated Commercial Enterprises, Inc.; Manzanita Holdings, LLC; Manzanita Management, Inc.; Lifetree, LLC; Wisteria, LLC; Mercer Nursing & Rehabilitation Center, Inc. d/b/a Mercer Nursing & Rehabilitation Center; and Matt Tucker,**

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 25<sup>th</sup> day of August 2014, the foregoing *Petitioner's Reply Brief* was deposited in the U.S. Mail, first class postage prepaid, addressed to all other parties to this appeal as follows:

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