

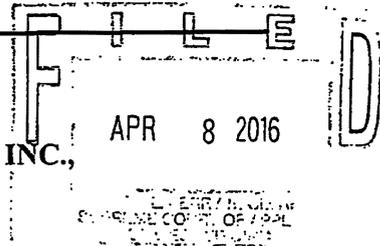
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0441

SCHUMACHER HOMES OF CIRCLEVILLE, INC.,
a foreign corporation
Defendant Below, Petitioner



v.

**JOHN SPENCER
and CAROLYN SPENCER**
Plaintiffs below/Respondents.

**BRIEF OF THE WEST VIRGINIA HEALTH CARE ASSOCIATION, INC. AS
*AMICUS CURIAE***

IN SUPPORT OF PETITIONER, URGING REVERSAL

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INTRODUCTION

The West Virginia Health Care Association, Inc.¹ [WVHCA], is a trade association for long term health care providers in West Virginia. It is a state affiliate of the American Health Care Association and the National Center for Assisted Living. The WVHCA has more than 130 member facilities that include nursing homes, assisted living communities, and hospital based skilled nursing facilities. The WVHCA also has associate members² who supply goods and services to its members. In 1976, WVHCA was incorporated as a not-for-profit organization for its members to gain information, representation, education, and services with the common goal of providing quality care in safe surroundings for fair payment. The member facilities consist of proprietary and nonproprietary long term care facilities with a total of more than 10,500 beds.

STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

Through its government affairs division, WVHCA represents the interests of members and associate members before the executive, legislative, and judicial branches of both federal and state government. WVHCA has filed amicus briefs in this Court in the previous cases of Boggs v. Camden-Clark Memorial Hospital Corporation, 216 W. Va. 656, 609 S.E.2d 917 (2004), Verba v. Ghaphery, 210 W. Va. 30, 552 S.E.2d 406 (2001), and Brown v. Marmet Healthcare Center, Inc., 228 W. Va. 646, 724 S.E.2d 250 (2011), where the interests of West Virginia assisted living communities were at stake. Likewise,

¹ Pursuant to Rule 30(e)(5), the WVHCA states that this brief was not drafted, in whole or in part, by counsel for a party; that neither a party to this appeal nor his counsel have made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the WVHCA, its members, or its counsel have made such a monetary contribution.

² In the interest of full disclosure, WVHCA notes that the law firm of Flaherty Sensabaugh Bonasso, PLLC is an associate member of the WVHCA.

in this case, where the issue concerns alternative dispute resolution, the interests of West Virginia nursing homes and assisted living communities are at stake. Counsel for the WVHCA has timely given notice to the parties and sought the parties' consent to file this brief pursuant to Rule 30; however, all parties did not grant consent as required by Rule 30(a), and therefore, the WVHCA submits this brief pursuant to Rule 30(c) and at this Court's invitation through its March 2, 2016 Order.

ARGUMENT

The WVHCA believes that the DIRECTV v. Imburgia decision will be well-summarized by the parties. Accordingly, this brief will serve to highlight issues with this Court's April 24, 2015 opinion which merit the Court's attention as it reconsiders in light of DIRECTV.

THIS COURT'S OPINION FAILED TO FOLLOW CLEAR SUPREME COURT PRECEDENT IN FAILING TO APPLY THE RULE OF RENT-A-CENTER v. JACKSON.

In the opening paragraphs of Schumacher I, this Court enunciated the bedrock principle of every delegation provision challenge FAA jurisprudence: the party opposing the delegation provision **must challenge it specifically**. Compare Schumacher Homes of Circleville, Inc. v. Spencer, 235 W. Va. 335, 344, 774 S.E.2d 1, 10 (2015) ("Schumacher I"); with Rent-A-Ctr., W.. Inc. v. Jackson, 561 U.S. 63, 72, 130 S. Ct. 2772, 2779 (2010) ("Accordingly, unless [plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."). The Supreme Court's authoritative interpretation of § 2 of the FAA in Rent-A-Center applies a presumption of enforceability to delegation provisions unless a party specifically

challenges it.

A. This Court should have enforced both Rent-A-Center and Rule 10(d).

The Spencers declined to challenge the delegation provision twice: first, at the hearing on the motion to dismiss before the circuit court, and second, in response to petitioner's brief when they were *obligated to do so* by Rule of Appellate Procedure 10(d)³. In the face of such a clear record, this Court could have and should have resolved the issue without further discussion.

B. Schumacher I improperly shifts the burden of challenging a delegation provision to the party seeking arbitration.

The point of law enunciated in Syllabus Point 8 read together with the Court's holding that "... when a party seeks to enforce a delegation provision in an arbitration agreement against an opposing party, under the FAA there are two prerequisites for the delegation provision to be effective. . . ." when read together appear to shift the burden of enforcing a delegation provision on the party seeking arbitration. *See Schumacher I*, 235 W. Va. at 346, 774 S.E.2d at 12. This apparent rule is problematic for at least two reasons.

First: it directly contradicts the Supreme Court's holding that under the FAA :

... as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). By holding – in essence – that a proponent of a delegation provision must positively show

³ "Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible."

that the delegation provision language reflects “a clear and unmistakable intent by the parties to delegate state law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator”, this Court creates an arbitration-specific rule which contradicts the “liberal federal policy favoring arbitration agreements” identified in Moses H. Cone. Id., 460 U.S. at 24. However, this arbitration-specific rule – which goes further than Rent-A-Center – impermissibly places arbitration agreements on unequal footing with other contracts. As the Supreme Court has made clear, “[c]ourts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.” Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996). This Court’s interpretation of Rent-A-Center places delegation provisions on unequal footing with other contracts generally and thus violates the rule enunciated in Casarotto.

CONCLUSION

For the reasons stated herein the West Virginia Health Care Association, Inc. respectfully requests that the judgment in the Circuit Court of Mason County and of this Court in its April 24, 2015 opinion be reversed.

**WEST VIRGINIA HEALTH CARE
ASSOCIATION, INC.**

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CERTIFICATE OF SERVICE

I, the undersigned counsel for amicus curiae the West Virginia Health Care Association, Inc. do hereby certify that on April 8, 2016, I served the foregoing BRIEF OF THE WEST VIRGINIA HEALTH CARE ASSOCIATION, INC. AS AMICUS CURIAE by depositing a true copy thereof in the United States mail, first class postage prepaid, addressed as follows:

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