IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 091901

Clayton Brown, as guardian for and On behalf of Clarence Brown,

Petitioner,

vs.

Genesis Healthcare Corporation; Genesis Healthcare Holding Company II; Genesis Health Ventures, Inc. of West Virginia; Genesis Eldercare Corporation; Genesis Eldercare Network Services, Inc.; Genesis Eldercare Management Services, Inc.; Genesis Eldercare Rehabilitation Services, Inc.; Genesis Eldercare Staffing Services, Inc.; Genesis Eldercare Hospitality Services, Inc.; Marmet SNF Operations, LLC; 1 Sutphin Drive Associates, LLC; 1 Sutphin Drive Operations, LLC; Genesis WV Holdiongs, LLC; Glenmark Associates, Inc.; Marmet Health Care Center, Inc. n/k/a MHCC, Inc., Canoe Hollow Properties, LLC; Robin Sutphin and Shawn Eddy,

Respondents.

AMICUS CURIAE BRIEF
ON BEHALF OF THE WEST VIRGINIA ASSOCIATION FOR JUSTICE

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INTRODUCTION AND INTEREST OF AMICUS CURIAE, WEST VIRGINIA ASSOCIATION FOR JUSTICE

This amicus brief is submitted on behalf of the West Virginia Association for Justice ("WVAJ") in support of the Appellant, Clayton Brown.

The WVAJ is a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia injured and/or harmed by the wrongful conduct of others. The Membership of WVAJ is particularly interested in the protections to be afforded ordinary West Virginians and in securing for them the benefits and protections enshrined in the State Constitution, the West Virginia Code and the decisions of this Court. It has filed amicus briefs on more occasions than could conveniently been counted and its briefs have been acknowledged as helpful to this Court on multiple occasions.[1]

I. SUMMARY OF THE ARGUMENT

A person may not contract away the fundamental rights of another. See Woodruff v. Bd. of Tru. of Cabell Huntington, 173 W.Va. 604, 611 (1984). Moreover, a contract which is unconscionable or void as against public policy shall not be enforced. See Board of Educ. of Berkeley County v. W. Harley Miller, Inc., 160 W.Va. 473, 486 (1977). Finally, constitutional rights can only be waived under specific circumstances, only by the rights-holder and not by implication or proxy. See e.g. State v. Neuman, 179 W.Va. 580 (1988). These important principles of West Virginia law have been transgressed by the Circuit Court's ruling compelling arbitration in this case, and it should accordingly be reversed.

[1] See e.g. Taylor v. Nationwide Mut. Ins. Co., 214 W.Va. 324 (2003); State ex rel. Charles Town General Hosp. v. Sanders, 210 W.Va. 118 (2001). The WVAJ was previously named the "West Virginia Trial Lawyers Association."

Amicus curiae, the West Virginia Association for Justice, asks that this Court overturn the Circuit Court's decision and reaffirm that arbitration provisions cannot be secreted in form contracts, nor used to unconscionably strip vulnerable persons of their basic rights as West Virginians. Amicus curiae also requests the opportunity to participate in oral argument in view of the importance of these issues to potentially hundreds of thousands of West Virginians, represented by its members, whose rights may be implicated by the Court's disposition of this matter.

A. The arbitration agreement at bar is unconscionable under Dunlap v. Berger and is also unlawful under the West Virginia Nursing Home Act.

In 2002, this Court decided State ex rel. Dunlap v. Berger and set forth a series of syllabus points regarding arbitration law in West Virginia. Dunlap has been a prolific, leading case – it has been cited in fifty-nine opinions from thirty-one different jurisdictions in just eight years, while being criticized only twice. It has been cited with specific favor by the courts of last resort in California, Illinois, New Mexico, Washington, and Wisconsin, the United States Court of Appeals for the First Circuit, and by federal district courts in Arizona, California, Washington, and Florida.

Dunlap announced, based on centuries of contract law precedent in American law, that

> exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable

State ex rel. Dunlap v. Berger, 211 W.Va. 549, 559-560 (2002). The arbitration agreement in this case just what Dunlap prohibits and does so as directly as possible, by specifically waiving rights deemed unwaivable by statute and administrative regulation.

In the West Virginia Nursing Home Act ("NHA"), the Legislature specifically provided that "[a]ny waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy." W.Va. Code § 16-5C-15(c)(emphasis supplied). The Legislature expressly contemplated the idea that nursing homes might seek to do what the Defendants below did here – seek a waiver of the patient's NHA rights under the law before they arise and expressly prohibited such conduct. An arbitration agreement that is actually illegal must be per se unconscionable and would likely fall into the category described in Board of Ed. of Berkeley County v. W. Harley Miller, Inc., 160 W.Va. 473 (1977): "when arbitration is wholly inappropriate, given the nature of the contract."

The West Virginia Code of State Rules further explicates and defines the meaning of the statute, an authority granted to the Secretary of Health and Human Resources in W.Va. Code § 16-5C-2 and 3. The State Rules hold that:

> Residents, residents' families or legal representatives, and ombudsmen may also independently pursue violations of [§ 16-5C-15] in court. Any waiver by a resident or his or her legal representative of the right to commence an action under W. Va. Code §16-5C-15, whether oral or in writing, is void as contrary to public policy.

W.V.C.S.R. 64-13-16.9.d.7 (emphasis supplied). Accordingly, the arbitration agreement at bar is illegal, and therefore per se unconscionable and unenforceable.[2] It was error for the Circuit Court to enforce it.

[2] A prominent commentator on these matters and a former Justice of this Court, Richard Neely, noted that corporations "put illegal and unconscionable clauses in their contracts all the time. For example, when St. Paul Insurance Company sold malpractice insurance in West Virginia, St. Paul's policy contained an arbitration clause – something expressly prohibited by a written

B. The arbitration agreement at bar is unconstitutional in that it is a purported waiver of fundamental rights by proxy and without due process to ensure the waiver is knowing and intelligent.

As a matter of constitutional law in West Virginia, fundamental rights including access to the courts cannot be waived under the circumstances of this case. The rights holder at the time the arbitration agreement was Clarence Brown, who did not sign. His basic right of access to our courts could not be waived for him by someone else, particularly without any showing whatsoever that Clarence knowingly or intentionally relinquished that right. Norfolk and Western R. Co. v. Sharp, 183 W.Va. 283 (1990) ("as with all basic constitutional rights, any waiver must be based on an informed and knowing decision. See W.Va. Const. art. III, § 10."); State ex rel. Cosner v. See, 129 W.Va. 722 (1947) ("The right to trial by jury is a substantial right which has always been very highly esteemed and carefully guarded against infringement, especially in criminal cases, and it can not be taken away by implication").

The concept of unconscionability in West Virginia incorporates the citizens' rights to enforce and vindicate the rights and protections afforded under West Virginia law, including common law and statutory relief. A contractual provision, whatever its provenance, which substantially limits such rights is presumptively unconscionable and a waiver, if one is suggested must be knowing and intelligent. Dunlap at 560. Since the party alleging waiver of those rights here failed to show a knowing and intelligent waiver, the agreement is unenforceable.

C. The arbitration is unenforceable under Arnold v. United Companies Lending Corp.

In Arnold v. United Companies Lending Corp., 204 W.Va. 229 (1998), this Court specifically struck down as unconscionable an arbitration agreement that insisted the customer

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regulation of the Insurance Commissioner." Neely, R., "Arbitration and the Godless Bloodsuckers," West Virginia Lawyer, September/October 2006.

give up all rights of access to the courts, while preserving the right of access for the party drafting the arbitration agreement. Id. at 235. The provision at bar contains just such an unbalanced "court for me, but not for thee" provision, illustrating, among other things, the profoundly different bargaining power between the parties involved.

D. The arbitration is unenforceable because requiring family members who bring their loved ones to nursing homes to surrender their fundamental rights at the door or as a condition of receiving needed care is inherently unconscionable and against public policy.

The arbitration agreement at issue here, wrapped in a set of many different documents typically signed on entry to a nursing home,[3] essentially requires potential nursing home patients to "check their fundamental rights at the door, or stay out on the street." It is unconscionable for a patient in need of care to be forced to make this decision – choosing between the protections of the law and potentially life itself. It is completely out-of-bounds to claim that a mere representative of the prospective patient can waive fundamental rights in such circumstances. West Virginians under substantially less duress have been relieved of obligation under agreements extracted from them by such unequal bargaining positions.

E. The Federal Arbitration Act does not govern the purely intra-state action of admission to a nursing home in this state.

Where the contract at issue involves only a West Virginian seeking medical care at a West Virginia nursing home, there is only intra-state activity at issue. Accordingly, the Federal Arbitration Act, which, as a matter of federal constitutional law, may only reach interstate commercial transactions, has no application. See e.g. Timms v. Greene, 310 S.C. 469, 427

[3] For some reason not appearing of record, the instant admission-type agreement was executed in the middle of Mr. Brown's stay.

S.E.2d 642 (S.C. 1993) (holding that a suit for nursing home injuries lacked sufficient nexus to interstate commerce to be subject to the FAA).

II. ARGUMENT

A. The waiver of the right to adjudicate this matter in court is both unconstitutional and a violation of West Virginia statutory law.

i. Enforcement of the arbitration agreement on the instant facts directly violates West Virginia law.

Dunlap expressed without apology the way in which our very way of life depends on equal access to justice in our courts:

> These constitutional rights-of open access to the courts to seek justice, and to trial by jury – are fundamental in the State of West Virginia. Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws-to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals-tribunals that involve, in the case of the jury, members of the general citizenry. These fundamental rights do not exist just for the benefit of individuals who have disputes, but for the benefit of all of us. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends.

Dunlap at 560 (emphasis in original). The applicability of the protections enshrined in Dunlap is immeasurably enhanced, where, as here, the Legislature has specified that a nursing home patient's rights are non-waivable and the Executive has promulgated specific regulations protecting the patient's right to proceed in court. It is simply illegal for a nursing home to require patients to waive their rights under the Act, including the right to access our courts. W.Va. Code § 16-5C-15(c); W.V.C.S.R. 64-13-16.9.d.7.

In West Virginia, residents of nursing homes have specific rights and protections under the West Virginia Nursing Home Act. In passing the Act, the Legislature declared that

> [I]t is the policy of this state to encourage, promote and require the maintenance of nursing homes so as to ensure protection of the rights and dignity of those using the services of such facilities.
> The provisions of this article are hereby declared to be remedial and shall be liberally construed to effectuate its purposes and intents.

W.Va. Code § 16-5C-1. The Act also set certain minimum standards for nursing home conduct, established a licensure and regulatory regime and, significantly, codified a private right of action. The Act defined the private right of action as follows:

> Any nursing home that deprives a resident of any right or benefit created or established for the well-being of this resident by the terms of any contract, by any state statute or rule, or by any applicable federal statute or regulation, shall be liable to the resident for injuries suffered as a result of such deprivation. Upon a finding that a resident has been deprived of such a right or benefit, and that the resident has been injured as a result of such deprivation, and unless there is a finding that the nursing home exercised all care reasonably necessary to prevent and limit the deprivation and injury to the resident, compensatory damages shall be assessed in an amount sufficient to compensate the resident for such injury. In addition, where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, punitive damages may be assessed. A resident may also maintain an action pursuant to this section for any other type of relief, including injunctive and declaratory relief, permitted by law. Exhaustion of any available administrative remedies may not be required prior to commencement of suit hereunder

W.Va. Code § 16-5C-15(c). The Act further specified that remedies under the West Virginia Nursing Home Act's private right of action are "are cumulative and shall be in addition to all other penalties and remedies provided by law." W.Va. Code § 16-5C-15(d). Accordingly, the remedies under the Act cannot be offset, declared duplicative or merged into another proceeding – they are always preserved in addition to other rights a citizen may have.

Most importantly for the instant case, the Legislature specifically provided that "Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy." W.Va. Code § 16-5C-15(c). The Legislature expressly contemplated the idea that nursing homes might seek to do what the Defendants below did here – seek a waiver of the patient's rights under the law before the fact and it expressly prohibited such conduct. An arbitration agreement that is actually illegal must be per se unconscionable and would likely fall into the category described in Board of Ed. of Berkeley County v. W. Harley Miller, Inc., 160 W.Va. 473 (1977): "when arbitration is wholly inappropriate, given the nature of the contract."[4]

The West Virginia Code of State Rules further explicates and defines the meaning of the statute, an authority granted to the Secretary of Health and Human Resources in W.Va. Code § 16-5C-2 and 3. The State Rules hold that:

> Residents, residents' families or legal representatives, and ombudsmen may also independently pursue violations of [§ 16-5C-15] in court. Any waiver by a resident or his or her legal representative of the right to commence an action under W. Va. Code §16-5C-15, whether oral or in writing, is void as contrary to public policy.

W.V.C.S.R. 64-13-16.9.d.7 (emphasis supplied). Accordingly the statute and the regulations make it clear that the rights of nursing home patients under W.Va. Code § 16-5C-15 are just the

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[4] Multiple Circuit Courts have held as amicus curiae suggest here. See e.g. Luttrell v. Canterbury of Shepherdstown, July 30th, 2008 Order (Jefferson County, W.Va.) (exhibit A) (Nursing home arbitration agreement void because of general contract law and NHA and such laws are not preempted by the FAA); Keaton v. Beverly Enterprises, Inc., July 10th, 2009 Order (Kanawha County, W.Va.) (exhibit B) (NHA applied equally to all contracts, so enforceable and not preempted by the FAA). But see, Brown v. McDowell Nursing and Rehabilitation, November 7th, 2007 Order (McDowell County, W.Va.) (Nursing home arbitration provision enforceable) (exhibit C).

type of specific rights and protections that cannot be taken away before they arise in an adhesion contract under Dunlap. The Legislature further specified that relief under the private right of action for nursing home patients was "cumulative and in addition to" all other remedies available. W.Va. Code § 16-5C-15(d). Accordingly, it cannot be taken away in favor of a stunted arbitration process with limited remedies selected by nursing homes.

Therefore, not only is the right of access to the courts guaranteed in our constitution, and subject to waiver under only the most exacting standards, it is specifically preserved for this type of case and this type of plaintiff in the governing statutory text and the administrative regulations. It could perhaps be considered cumulative that this Court's own Rules, promulgated under its constitutional powers, specify in Rule 38(a) of the Rules of Civil Procedure, that "[t]he right of trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate." Id. (emphasis supplied). The circuit court's order should therefore be reversed.

ii. Enforcement of the instant arbitration agreement, as to a Nursing Home Act case, is unconstitutional.

Furthermore, Dunlap took note of how this Court stated in Syllabus Point 2 of State ex rel. May v. Boles, 149 W.Va. 155, 139 S.E.2d 177 (1964): "Courts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right." See also Woodruff v. Bd. of Tru. of Cabell Huntington, 173 W.Va. 604, 611 (1984), holding that the West Virginia Constitution, Article III, § 1 is "more stringent in its limitation on waiver [of fundamental constitutional rights] than is the federal constitution."

Section One of Article III, West Virginia's Bill of Rights, specifically provides that certain rights are inherent in every West Virginian upon "entering into a state of society" and that

they "cannot, by any compact, deprive or divest their posterity of these fundamental rights. See also Woodruff v. Bd. of Tru. of Cabell Huntington, 173 W.Va. 604, 611, 319 S.E.2d 372, 379 (1984), holding that the West Virginia Constitution, Article III, § 1 is "more stringent in its limitation on waiver [of fundamental constitutional rights] than is the federal constitution." A "knowing and intelligent waiver" of fundamental constitutional rights is required and they may only be waived by the rights holder, and not by proxy. State v. Neuman, 179 W.Va. 580, 371 S.E.2d 77 (1988); Sharp, supra; State ex rel. Cosner v. See, supra. It should go without saying that this is law of general application that cannot be preempted by the FAA.

In this case, the rights and remedies under the Act belonged to Mr. Clarence Brown, while he was alive, and passed to his estate and his statutory beneficiaries upon his wrongful death. Those rights did not belong to Clayton Brown at the time the arbitration agreement was purportedly signed and Clayton Brown therefore had no power to dispose of those rights at all, much less under the heightened scrutiny required by Art III, § 1 or Neuman, Sharp and See. Moreover, the rights of the statutory beneficiaries in a wrongful death action can never belong to a decedent (since such rights arise only upon death) and therefore cannot be bargained away by the decedent, much less a representative, before death occurs.

These state law rights, equally applicable to all types of contracts, are enforceable without limitation by the Federal Arbitration Act. Dunlap at 564 ("we hold that the Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] does not bar a state court that is examining exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public from considering whether the provisions are unconscionable-

merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration.")[5]

B. The arbitration agreement is unconscionable in that it asymmetrically preserves court access for its drafter while taking it away from the consumer.

In a provision typical of unconscionable arbitration agreements, the instant agreement has a "court for me, but not for thee" clause. The nursing home keeps its rights to go to court against residents for the only thing nursing homes ever sue their residents for: the payment of money for charges for care. Only the resident is required to arbitrate her claims against the facility. This type of unconscionable asymmetry has been struck down before and should be here as well. In Arnold v. United Companies Lending Corp., 204 W.Va. 229 (1998), this Court specifically struck down as unconscionable an arbitration agreement that insisted the customer give up all rights of access to the courts, while preserving the right of access for the party drafting the arbitration agreement. Id. at 235.

Furthermore, as in Arnold, the nursing home failed to offer any alternatives to the agreement requiring Mr. Brown to arbitrate (but not the nursing home). Id. at 236. The lack of meaningful alternatives illustrates the grossly unequal bargaining power. Also, as in Arnold, the Browns had no access to legal counsel, while the nursing home clearly handed them an attorney-drafted agreement. Id. The agreement is therefore unconscionable on multiple levels. As Arnold concluded:

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[5] Illinois' appellate court recently held in Carter v. SSC Odin Operating Co., LLC that provisions of Nursing Home Care Act invalidating a resident's waiver of the right to sue or the right to jury trial were not preempted by Federal Arbitration Act (FAA) and the United States Supreme Court did not disturb the decision. 885 N.E.2d 1204 (Ill.App. 5 Dist., 2008) (Appeal denied, 897 N.E.2d 250 (Table); certiorari denied, 129 S.Ct. 2734)

> Like the "rabbits and foxes situation," discussed in Miller, supra, the wholesale waiver of the Arnolds' rights together with the complete preservation of United Lending's rights "is inherently inequitable and unconscionable because in a way it nullifies all the other provisions of the contract." 160 W.Va. at 480, 236 S.E.2d at 443.

Id. at 236-37. Respondents' arbitration agreement suffered from the defects found fatal in Arnold, but to a heightened degree – where the consumers in Arnold were seeking "only" a loan, the nursing home resident involved in this case was seeking care necessary for the preservation of his life and quality of life.

The inclusion of provisions of all these different types elegantly illustrates the purpose of arbitration clauses like the one at bar: it is to create a forum where the plaintiff cannot prevail. If the intent was to create an "efficient" forum, there is no reason why the nursing home would be reluctant to take its own cases there. But of course efficiency has nothing to do with it. The nursing home wants to strip its residents of their right to go to court for relief, while preserving its own such rights. Such a fundamentally unfair provision in an adhesion contract is unconscionable and should not be enforced.

C. The arbitration agreement is unconscionable in that it seeks a waiver of fundamental rights from a representative in the most fraught of circumstances – where a waiver of the same is required to obtain needed medical care.

Unconscionability has been aptly characterized as "the contract between the rabbits and the foxes, in which the foxes impose the clause that all disputes will be resolved by a panel of foxes, or by a panel of wolves." Board of Educ. of Berkeley County v. W. Harley Miller, Inc., 160 W.Va. 473, 486 (1977). When one party has "grossly unequal" bargaining power, as in for example Arnold, unconscionability has been found. When one party literally holds the key to necessary medical care, the disparity in bargaining power rises, practically speaking, to the level of duress.

The legislators who enacted W.Va. Code § 16-5C-15 and W.Va.C.S.R. 64-13-16.9.d.7 clearly recognized the duress inherent in a nursing home setting: "Mom or dad needs nursing home care, and these forms have to be signed before they can get it or it will be refused or taken away." Those forms are going to be signed. If the nursing homes could simply take away the rights under § 16-5C-15 by making waiver of those rights a condition of entering the home, the law's protections would be nullified ab initio in all cases, and the rights of West Virginians in those situations would be cruel joke.

The situation in regard to arbitration agreements in nursing home or hospital admission agreements is simply one of profoundly unequal bargaining power. The relationship of unequal bargaining power to the doctrine of unconscionability was described in Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599 (1986), where this Court quoted the Restatement (Second) of Contracts as follows:

> A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in allocation of risks to the weaker party. But gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

Id. at 604. Of course here the bargaining position is not only dramatically unbalanced,[6] the terms are also unequal and unreasonably favorable to the Respondents, who drafted the agreement. Such an agreement is unconscionable. Id. See also e.g. SA-PG-Ocala, LLC v. Stokes, 935 So.2d 1242 (2006) ("It would be against public policy to permit a nursing home to dismantle the

[6] For comparison's sake, in Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co., 186 W.Va. 613 (1991), the disparity in bargaining power between a local business and a monopoly provider of yellow-page listings was sufficiently large to create unconscionability – how much more unbalanced was Clayton Brown's position as against the nursing home in this case?

protections afforded patients by the Legislature through the use of an arbitration agreement."); Bruner v. Timberlane Manor Ltd. Psp., 155 P.3d 16 (Ok. 2006) (same).[7] In light of Miller, and Arnold as well as Stokes and Bruner, reversal is clearly proper.

D. Allowing a family member to be solicited for a "waive your rights at the door or stay out in the street" agreement is even worse.

The situation of "waive your rights at the hospital door" is substantially aggravated where, as here, the patient doesn't even sign the forms – it is left to a family member to decide whether or not to "waive" mom or dad's fundamental rights in favor of an unbargained-for, unequal and unfair arbitration agreement. Such circumstances simply cannot give rise to a knowing and intelligent waiver of important rights. Even if the statute failed to specify that the rights were non-waiveable, they could not be waived under such extraordinary duress.

The West Virginia Constitution demands that waivers of fundamental rights be knowing and intelligent and undertaken by the rights-holder. A court must inquire carefully to ensure that the rights holder understands what they are giving up. See e.g. Neuman, supra; Sharp, supra; See, supra. This is self-evidently impossible for a person who is incapacitated to make such decisions and has been put in a nursing home for care. Likewise, a family member, presented with a form contract waiving such rights, is in no position to make the kind of constitutionally-required "knowing and intelligent" waivers required by Neuman. See also Woodruff, supra, 173 W.Va. 604, 611 (1984), holding that the West Virginia Constitution, Article III, § 1 is "more stringent in its limitation on waiver [of fundamental constitutional rights] than is the federal constitution."

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[7] Indeed – even the arbitrators themselves believe pre-dispute agreements to resolve issues regarding medical care are suspect and the arbitrators named in the instant agreement, the American Arbitration Association, refuse to take such cases. See Brief of Appellant at 23.

E. The Federal Arbitration Act does not govern the purely intra-state action of admission to a nursing home in this state.

Where the contract at issue involves only a West Virginian seeking medical care at a West Virginia nursing home, there is only intra-state activity at issue. Accordingly, the Federal Arbitration Act, which, as a matter of federal constitutional law may only reach interstate commercial transactions, has no application. Several states have so held. See e.g. Bruner v. Timberlane Manor Ltd. Partnership, 155 P.3d 16 (Okla. 2006) (Nursing home admission contract for state resident in facility licensed by Oklahoma involved local transaction and had insufficient connection to interstate commerce, and, thus, the Federal Arbitration Act (FAA) did not preempt Oklahoma's Nursing Home Care Act statute that invalidated any waiver of the right to commence an action against the nursing home owner or licensee); Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (S.C. 1993) (holding that a suit for nursing home injuries lacked sufficient nexus to interstate commerce to be subject to the FAA); see also Laur & Mack Contracting Co., Inc. v. Di Cienzo, 234 A.D.2d 999, 651 N.Y.S.2d 831 (N.Y.A.D. 4th Dept., 1996) (without record evidence of a foreign or interstate transaction, appeal seeking application of the FAA could not succeed); Columbus Anesthesia Group, P.C. v. Kutzner, 218 Ga.App. 51, 459 S.E.2d 422(Ga.App., 1995) (agreement for Georgia doctor to perform medical services for corporation in Georgia not subject to the FAA); Community Care of America of Alabama, Inc. v. Davis, 850 So.2d 283 (Ala. 2002) ("Because it arose out of a localized activity, the primary purpose of the labor-intensive transaction between Davis and Community Care was intrastate."). See also generally 11 A.L.R. Fed. 2d 233.

While there is, on the other hand, case law indicating that transactions because of medical care can be subject to the FAA, because such transactions "in the aggregate" influence interstate commerce, the Timms case has the better reasoning and follows the most recent and significant

commerce clause pronouncements of the United States Supreme Court. In Brzonkala v. Morrison, 529 U.S. 598 (2000) and United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court reversed the then-sixty-year-old course of finding that virtually everything affects interstate commerce under the aggregation doctrine of Wickard v. Filburn, 317 U.S. 111 (1942) and the High Court recognized limits on Congress' Commerce Clause Power. In Brzonkala, the Court wrote:

> [E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In Jones & Laughlin Steel, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'

Id. at 608. Certainly a West Virginian admitting himself, or a loved one to a West Virginia nursing home to receive care in West Virginia is a local event. If a court deemed such an event "interstate commerce," simply because, well, there are other people in other states doing the same things, it would have "obliterate[d] the distinction between what is national and what is local and create a completely centralized government." Id.

Indeed, the Brzonkala and Lopez decisions were vital to maintaining federalism, as without some bulwark against the infinite-regress arguments of Wickard, everything would be subject to federal power, with no remaining scope for state regulation. As Lopez put it:

> [but for the decision in Lopez] Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories ..., it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate

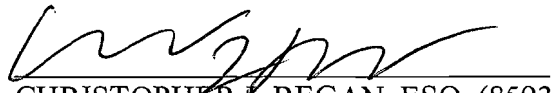
Id. at 564. The wholly intra-state transaction of admitting oneself or a family member to an in-state nursing home is simply beyond the reach of the commerce power and therefore, the FAA.

CONCLUSION

WHEREFORE, in view of all of the foregoing, your amicus curiae respectfully requests that the Judgment of the Circuit Court be REVERSED and that the arbitration agreement at issue be invalidated for the reasons stated herein.

RESPECTFULLY SUBMITTED,

AMICUS CURIAE WEST VIRGINIA ASSOCIATION FOR JUSTICE

by: 

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CERTIFICATE OF SERVICE

Service of the foregoing AMICUS CURIAE BRIEF ON BEHALF OF WEST VIRGINIA ASSOCIATION FOR JUSTICE was had upon the defendants by mailing a true copy thereof, by United States Mail, postage-prepaid, to their attorneys at their last-known addresses shown below, this 12 day of April, 2010 as follows:

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EXHIBITS

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