
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
SUPREME COURT NO:-091901

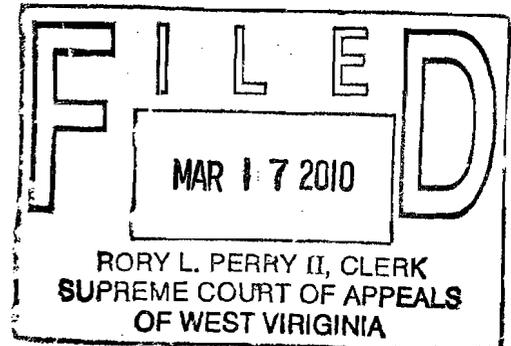
35494

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

PLAINTIFF / APPELLANT

v.

Genesis Healthcare Corporation; Genesis Healthcare Holding Company II, Inc.; 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 Holdings, LLC; Glenmark Associates, Inc.; Marmet Health Care Center, Inc. n/k/a MHCC, Inc., Canoe Hollow Properties, LLC; Robin Sutphin and Shawn Eddy;



DEFENDANTS /
APPELLEES

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

ORAL PRESENTATION REQUESTED

McHUGH FULLER LAW GROUP, PLLC
James B. McHugh, WV Bar No. 10350
Michael J. Fuller, Jr., WV Bar No. 10150
D. Bryant Chaffin, WV Bar No. 11069
97 Elias Whiddon Rd.
Hattiesburg, MS 39402
Telephone: 601-261-2220
Facsimile: 601-261-2481
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

I. Cases.....iii

II. Statutes.....vi

III. Other authorities.....vii

A. INTRODUCTION AND NATURE OF RULING.....1

B. FACTS OF THE CASE.....3

C. ASSIGNMENTS OF ERROR.....4

D. LEGAL ARGUMENT.....5

**I. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS’
MOTION TO DISMISS AND ORDERING THIS MATTER TO
ARBITRATION.....5**

**a. The Circuit Court failed to find that the arbitration
agreement in this matter violates West Virginia law,
specifically W. Va. Code § 16-5C-15(c).....5**

**b. The Circuit Court failed to find that Defendants
waived the right to compel arbitration.....11**

**c. The Circuit Court failed to find that the arbitration
agreement is unenforceable.....13**

**i. The Circuit Court failed to find a lack of
consideration for the document at issue.....16**

**ii. The Circuit Court failed to find that the purported
arbitration agreement is an unconscionable
contract of adhesion.....16**

**iii. The Circuit Court failed to find that Defendants
breached their fiduciary duty to Clarence Brown.....19**

**iv. The Circuit Court failed to find that the purported
admission agreement only names “Marmet Health Care
Center” as a party and thus cannot require Plaintiff
to arbitrate his claims against the other Defendants.....22**

- v. The Circuit Court failed to find that even if Defendants' arbitration clause were valid, it is impossible to conduct arbitration according to its own terms.....23
- vi. The Circuit Court failed to find that any decision on the merits of Defendants' motion should be stayed pending completion of discovery and depositions pertinent to the arbitration issue.....25
- II. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANT CANOE HOLLOW PROPERTIES, LLC'S MOTION TO DISMISS.....29
 - a. The Circuit Court failed to apply the proper legal standard and accept all the well-pleaded allegations in Plaintiff's Complaint as true and draw all reasonable inferences in favor of the Plaintiff.....29
- E. CONCLUSION.....33
- CERTIFICATE OF SERVICE.....34
- EXHIBITS.....A - C

TABLE OF AUTHORITIES

| I. <u>Cases</u> | Pg. |
|---|------------|
| <i>Aetna Casualty and Surety Co. v. Federal Insurance Co. of New York</i> , 148 W.Va. 160, 133 S.E.2d 770 (1963))..... | 32 |
| <i>Alpine Prop. Owners Assn. v. Mountaintop Dev. Co.</i> , 179 W.Va. 12, 365 S.E.2d 57 (1987))..... | 33 |
| <i>American Reliable Ins. Co. v. Stillwell</i> , 212 F. Supp.2d 621 (N.D. W. Va. 2002)..... | 12 |
| <i>Arnold v. United Cos. Lending Corp.</i> , 204 W.Va. 229, 511 S.E.2d 854, 862 (1998)..... | 18 |
| <i>Arrants v. Buck</i> , 130 F.3d 636, 640 (4th Cir.1997)..... | 15 |
| <i>Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co.</i> , 186 W.Va. 613, 413 S.E.2d 670 (1991))..... | 18 |
| <i>AT & T Techs., Inc. v. Communications Workers of Am.</i> , 475 U.S. 643, 658, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)..... | 15 |
| <i>Berger v. Cantor Fitzgerald Securities</i> , 942 F. Supp. 963, 966 (S.D. NY 1966)..... | 25 |
| <i>Bruner v. Timberlane Manor Ltd. Psp.</i> , 155 P.3d 16 (Ok. 2006)..... | 9, 10 |
| <i>Cabany v. Mayfield Rehabilitation and Special Care Center et al</i> , 2007 WL 3445550 (Tenn. Ct. App. Nov. 15, 2007)..... | 26 |
| <i>Carideo v. Dell, Inc.</i> , Slip Copy, 2009 WL 3485933 (W.D. Wash. 2009)..... | 24 |
| <i>Carter v. SSC Odin Operating Co., LLC</i> , 885 N.E.2d 1204 (Ill. Ct. App. 2008); <i>appeal denied Carter v. SSC Odin Operating Co., LLC</i> , 897 N.E.2d 250 (Ill. 2008); <i>cert. denied SSC Odin Operating Co., LLC v. Carter</i> , 129 S.Ct. 2734 (U.S. 2009)..... | 7, 8, 10 |
| <i>Catlin v. United States</i> , 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)..... | 2 |
| <i>Chapman v. Kane Transfer Co., Inc.</i> , 160 W.Va. 530, 236 S.E.2d 207 (1977)..... | 30, 31 |
| <i>Chastain v. Robinson-Humphrey Co., Inc.</i> , 957 F.2d 851, 854 (11th Cir.1992)..... | 15 |
| <i>Conley v. Gibson</i> , 355 U.S. 41, 45-46, 78 S.Ct. 99 [102], 2 L.Ed.2d 80 [84] (1957)..... | 30 |
| <i>Conrad v. ARA Szabo</i> , 198 W.Va. 362, 369-70, 480 S.E.2d 801, 808-09 (W.Va. 1996)..... | 30 |

| | |
|--|--------|
| <i>Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock</i> , 14 So. 3d 695 (Miss. 2009)..... | 24 |
| <i>Doctor's Associates, Inc. v. Casarotto</i> , 517 U.S. 681, 116 S.Ct. 1652 (1996)..... | 8, 14 |
| <i>Drake v. West Virginia Self-Storage, Inc.</i> , 203 W.Va. 497, 509 S.E.2d 21 (W.Va. 1998)..... | 16 |
| <i>Dunn v. Consolidation Coal Co.</i> , 379 S.E.2d 485 (W.Va. 1989)..... | 30 |
| <i>Durm v. Heck's, Inc.</i> , 184 W.Va. 562, 566, 401 S.E.2d 908, 912 (1991)..... | 2 |
| <i>Ewing v. Board of Educ. of County of Summers</i> , 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (W.Va. 1998)..... | 29 |
| <i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)..... | 14 |
| <i>Fitzhugh v. Granada Healthcare & Rehab., Ctr.</i> , 58 Cal. Rptr. 3d 585 (2007)..... | 9 |
| <i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20, 33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)..... | 14 |
| <i>Graham v. Beverage</i> , 211 W.Va. 466, 475, 566 S.E.2d 603, 612 (W.Va. 2002)..... | 32 |
| <i>Gregory v. Interstate/Johnson Lane Corp.</i> , 188 F.3d 501 (4 th Cir. 1999)..... | 14 |
| <i>Hooters of Am., Inc. v. Phillips</i> , 173 F.3d 933, 938 (4th Cir. 1999)..... | 14 |
| <i>Jividen v. Law</i> , 194 W.Va. 705, 461 S.E.2d 451 (1995))..... | 32 |
| <i>John W. Lodge Distributing Co., Inc. v. Texaco, Inc.</i> , 161 W.Va. 603, 245 S.E.2d 157 (W.Va. 1978)..... | 16, 29 |
| <i>Kanawha Valley Bank v. Friend</i> , 162 W.Va. 925, , 253 S.E.2d 528 (W.Va.1979)..... | 20 |
| <i>Kaplan</i> , 514 U.S. at 943..... | 15 |
| <i>Keesecker v. Bird</i> , 490 S.E.2d 754, 766 (1997)..... | 20 |
| <i>Kindred Healthcare, Inc. v. Peckler</i> , 2006 WL 1360282 (KY)..... | 26-27 |
| <i>McGraw v. American Tobacco Co.</i> , 681 S.E.2d 96 (W.Va. 2009)..... | 2 |

| | |
|---|--------|
| <i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985))..... | 15 |
| <i>Mooring v. Kindred Nursing Center</i> , 2009 WL 130184 (Tenn. Ct. App. January 20, 2009)..... | 26 |
| <i>Morrison v. Circuit City Stores, Inc.</i> , 317 F.3d 646, 666 (6th Cir. 2003)..... | 27 |
| <i>Moses H. Cone Mem'l Hosp.</i> , 460 U.S. at 24, 103 S.Ct. 927..... | 14 |
| <i>Murphy v. Smallridge</i> , 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996)..... | 29 |
| <i>Napier v. Compton</i> , 558 S.E.2d 593, 598 (2001)..... | 21 |
| <i>Nisbet v. Watson</i> , 162 W.Va. 522, 530, 251 S.E.2d 774, 780 (1979)..... | 22 |
| <i>Nitro Distributing, Inc. v. Dunn</i> , 194 S.W.3d 339 (Mo. 2006)..... | 26 |
| <i>Office of the Commissioner of Insurance v. Hartford Fire Insurance Co.</i> , 623 So.2d 37, 40 (La.App. 1st Cir.1993)..... | 20 |
| <i>Owens v. National Health Corp.</i> , 263 S.W.3d 876 (Tenn. 2007)..... | 25 |
| <i>Owens v. Nexion Health at Gilmer, Inc.</i> , 2007 WL 841114 (E.D.Tex. Mar.19, 2007)..... | 24 |
| <i>Pauley v. Kelly</i> , 255 S.E.2d 859, 863 (W.Va. 1979)..... | 29 |
| <i>Perry v. Thomas</i> , 482 U.S. 483, 492, n. 9, 107 S.Ct. 2520, 2527, n. 9 (1987))..... | 8, 10 |
| <i>Petre v. Living Centers – East, Inc.</i> , 935 F.Supp. 808 (E.D. La. 1996)..... | 20 |
| <i>Phillips v. Columbia Gas of West Virginia</i> , 347 F.Supp. 533 (S.D.W.Va.1972) affirmed 4 Cir., 474 F.2d 1342..... | 31 |
| <i>Place at Vero Beach, Inc. v. Hanson</i> , 953 So.2d 773 (Fl. 4th Dist. 2007)..... | 9 |
| <i>Price v. Halstead</i> , 355 S.E.2d 380 (W.Va. 1987)..... | 30 |
| <i>Raines v. National Health Corporation d/b/a NHC Healthcare, et al.</i> , 2007 WL 4322063 (Tenn. Ct. App. Dec. 6, 2007)..... | 26 |
| <i>SA - PG Ocala, LLC v. Stokes</i> , 935 So.2d 1242 (Fl. 5th Dist. 2006)..... | 9 |
| <i>Schenck v. Living Centers-East, Inc., et al</i> , 917 F.Supp. 432 (E.D.La.1996)..... | 20, 21 |

| | |
|---|--------|
| <i>Smith v. Blackledge</i> , 451 F.2d 1201 (4th Cir. 1971)..... | 31 |
| <i>Southland Corporation v. Keating</i> , 465 U.S. 1, 104 S.Ct. 852 (1984)..... | 10 |
| <i>State ex rel. the Barden and Robeson Corp. v. Hill</i> , 539 S.E.2d 106 (W Va. 2000).. | 11,12 |
| <i>State ex rel. Clites v. Clawges</i> , 685 S.E.2d 693 (W.Va. 2009)..... | 10 |
| <i>State ex rel. Kitzmiller v. Henning</i> , 437 S.E.2d 452, 454 (1993)..... | 19, 20 |
| <i>State ex rel. Saylor v. Wilkes</i> , 613 S.E.2d 914 (W. Va. 2005)..... | 17 |
| <i>Steelworkers v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960))..... | 15 |
| <i>Sticklen v. Kittle</i> , 287 S.E.2d 148, 149 (W.Va. 1981)..... | 30 |
| <i>Sydnor v. Conseco Fin. Servicing Corp.</i> , 252 F.3d 302, 305 (4th Cir. 2001)..... | 14 |
| <i>Ting v. AT&T</i> , 319 F.3d 1126, 1148 (9th Cir. 2003)..... | 25 |
| <i>Virginian Export Coal Co. v. Rowland Land Co.</i> , 100 W.Va. 559, 131 S.E. 253 (1926). | 15 |
| <i>Volt Info. Sciences, Inc. v. Board of Trustees</i> , 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989))..... | 15 |
| <i>Walker v. Ryan's Family Steak Houses, Inc.</i> , 400 F.3d 370 (6th Cir. 2005)..... | 27 |
| <i>Ways v. Imation Enterprises Corp.</i> , 214 W.Va. 305, 589 S.E.2d 36 (W.Va. 2003)..... | 15 |
| <i>Whitehair v. Highland Memory Gardens, Inc.</i> , 327 S.E.2d 438 (W.Va. 1985)..... | 30 |

| | |
|------------------------------------|------------|
| II. <u>Statutes</u> | Pg. |
| 9 U.S.C.A. § 2..... | 14, 25 |
| 42 C.F.R. § 483.10..... | 5 |
| 63 O.S.2001, § 1-1904..... | 9-10 |
| 63 O.S.2001, § 1-1939..... | 9-10 |
| 210 ILCS 45/3-606 (West 2006)..... | 7 |
| 210 ILCS 45/3-607 (West 2006)..... | 7 |

| | |
|--|--------------|
| N.J.S.A. §30:13-8.1..... | 9 |
| W. Va Code § 16-5C-15, <i>et seq</i> | 5, 6, 10, 11 |
| W. Va Code § 53-5-1..... | 6 |
| W. Va. Code § 58-5-1..... | 2 |

III. Other Authorities

| | |
|---|----|
| AAA Healthcare Policy Statement..... | 23 |
| Archive of AAA Healthcare Policy Statement..... | 23 |
| 5 Wright and Miller, Federal Practice and Procedure, s 1366 (1969)..... | 31 |
| W. Va. Const. Art. 3, § 13..... | 33 |
| W. Va. R. Civ P. Rule 3..... | 6 |
| W. Va. R. Civ P. Rule 54(b)..... | 2 |

Plaintiff/Appellant (hereinafter "Plaintiff"), by and through the undersigned attorneys, hereby requests Oral Argument in the instant appeal of the Circuit Court of Kanawha County, West Virginia's Orders granting Defendants Marmet Health Care Center, Inc.'s and Robin L. Sutphin's Motion to Dismiss pursuant to the mandatory arbitration provisions of the Admissions agreement regarding Plaintiff and Defendant Canoe Hollow Properties, LLC's Motion to Dismiss. For the reasons set forth herein, Plaintiff submits that his appeal is well taken and that the Circuit Court's Orders should be reversed and Plaintiff's cause against all of the Defendants reinstated. In support thereof, Plaintiff states as follows:

INTRODUCTION AND NATURE OF RULING

This matter is a civil tort action in which the Plaintiff alleged negligence, medical malpractice, malice and/or gross negligence, fraud, breach of fiduciary duty, statutory survival, wrongful death, and premises liability claims against the Defendants as the owners, operators, and managers of Marmet Health Care Center, for injuries suffered by Clarence Brown during his residency at the facility. Defendants Marmet Health Care Center, Inc. and Robin L. Sutphin moved to dismiss Plaintiff's claims pursuant to a mandatory arbitration provision included in an "Admissions Agreement" purportedly signed by Clayton Brown on March 26, 2004, despite the fact that Clarence Brown was initially admitted to Defendants' facility nearly eight years prior on April 27, 1996. Defendant Canoe Hollow Properties, LLC, also moved to dismiss Plaintiff's claims asserting that Canoe Hollow Properties, LLC did not "operate or control the operations" of Marmet Healthcare Center, Inc.

Following a hearing on Defendants' motions, the Circuit Court of Kanawha County granted Defendants' motions. See Orders, attached as Exhibit A and B,

respectively. Specifically, the Court held that Plaintiff is required to arbitrate all of his claims against the Remaining Defendants and that the Remaining Defendants' Motion to Dismiss was granted, the Court's Scheduling Order was vacated, and this action was dismissed. *Id.* Further, the Court ordered the dismissal of Defendant Canoe Hollow Properties, LLC. *Id.*

As this matter was dismissed in its entirety by the Circuit Court's August 25, 2009, Order, attached as Exhibit A, Plaintiff's appeal is appropriate and jurisdiction is proper in this Court. See *McGraw v. American Tobacco Co.*, 681 S.E.2d 96, Syl. pt. 1 (W.Va. 2009) (A circuit court order compelling arbitration "is not subject to direct appellate review prior to the dismissal of the circuit court action unless the order compelling arbitration otherwise complies with the requirements of West Virginia Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure.") Unlike the case in *McGraw* in which the circuit court "retained jurisdiction over the dispute for purposes of implementing, interpreting and enforcing the consent decree and MSA," the Circuit Court in this matter's Order was unequivocally final. *Id.* at 100. See also *Durm v. Heck's, Inc.*, 184 W.Va. 562, 566, 401 S.E.2d 908, 912 (1991) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)) ("Generally, an order qualifies as a final order when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'")

FACTS OF THE CASE

Clarence Brown, at the age of 46, was admitted to Marmet Health Care Center on or about April 27, 1996. He remained a resident of the facility until May 16, 2007. During his residency, Clarence Brown suffered multiple pressure sores, dehydration, malnutrition, contractures, aspiration pneumonia, and infections. He ultimately died as

a result of these injuries on June 10, 2008. Eight years into his residency, on March 26, 2004, Defendants had Mr. Brown's brother, Clayton Brown, sign an "Admissions Agreement" which purportedly contained a mandatory arbitration provision.

Plaintiff filed his initial Complaint in this matter on January 7, 2008, against the owners, operators, and managers of Marmet Health Care Center, Inc. Plaintiff filed an amended Complaint on July 2, 2008, and completed service on Defendants on August 4 and August 18, 2008, respectively. Plaintiff reached a settlement agreement with the Genesis Defendants shortly thereafter. However, Defendants Marmet Health Care Center, Inc., Canoe Hollow Properties, LLC, and Robin L. Sutphin were not part of this settlement agreement. Further, these Defendants failed to file an answer although properly served. Plaintiff filed an application for default on September 30, 2008, and subsequently moved for default judgment. The application was later withdrawn.

Defendants Marmet Health Care Center, Inc., Canoe Hollow Properties, LLC, and Robin L. Sutphin ultimately answered Plaintiff's Amended Complaint. Subsequently, Defendant Canoe Hollow Properties moved for dismissal of the claims against it. This Motion was heard by the Circuit Court, was granted, and is part of the instant appeal. Additionally, the parties conducted depositions and worked together pursuant to an agreed scheduling order, exchanging written discovery. On April 7, 2009, Defendants Marmet Health Care Center, Inc., Canoe Hollow Properties, LLC, and Robin L. Sutphin served their Motion to Dismiss pursuant to the mandatory arbitration provisions of the Admission agreement regarding Plaintiff. Following a hearing, this motion was also granted, thus comprising the remainder of the instant appeal. Within the appropriate time limits provided by West Virginia law, Plaintiff filed his Petition for Appeal in this matter which was granted by this Court on March 4, 2010.

ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS AND ORDERING THIS MATTER TO ARBITRATION.

- a. The Circuit Court failed to find that the arbitration agreement violates West Virginia law.**
- b. The Circuit Court failed to find that Defendants waived the right to compel arbitration.**
- c. The Circuit Court failed to find that the arbitration agreement is unenforceable.**
 - i. The Circuit Court failed to find a lack of consideration for the document at issue.**
 - ii. The Circuit Court failed to find that the purported arbitration agreement is an unconscionable contract of adhesion.**
 - iii. The Circuit Court failed to find that Defendants breached their fiduciary duty to Clarence Brown.**
 - iv. The Circuit Court failed to find that the purported admission agreement only names "Marmet Health Care Center" as a party and thus cannot require Plaintiff to arbitrate his claims against the other Defendants.**
 - v. The Circuit Court failed to find that even if Defendants' arbitration clause were valid, it is impossible to conduct arbitration according to its own terms.**
 - vi. The Circuit Court failed to find that any decision on the merits of Defendants' motion should be stayed pending completion of discovery and depositions pertinent to the arbitration issue.**

II. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANT CANOE HOLLOW PROPERTIES, LLC'S MOTION TO DISMISS

- a. The Circuit Court failed to apply the proper legal standard and accept all the well-pleaded allegations in Plaintiff's Complaint as true and draw all reasonable inferences in favor of the Plaintiff.**

LEGAL ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS AND ORDERING THIS MATTER TO ARBITRATION.

- a. The Circuit Court failed to find that the arbitration agreement in this matter violates West Virginia law, specifically W. Va. Code § 16-5C-15(c).

42 C.F.R. § 483.10 requires that nursing facilities “protect and promote” the rights of each resident. Moreover, 42 C.F.R. § 483.10(a)(2) prohibits a nursing facility from interfering with a resident’s exercise of his or her rights. Similarly, the West Virginia legislature enacted certain laws to “ensure protection of the rights and dignity” of nursing home residents. See W. Va. Code § 16-5C-1. Pursuant to such protections, nursing home residents who are deprived of “any right or benefit under, 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,” may file suit for such deprivations. W. Va. Code § 16-5C-15(c). That section further states 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), emphasis added. This section further provides that in addition to compensatory damages sufficient to compensate the resident for injuries, and punitive damages where the deprivation of any right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, “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.” *Id.*, emphasis added.

Rule 3 of the West Virginia Rules of Civil Procedure states that “a **civil action** is

commenced by filing a complaint **with the court.**" W. Va. R. Civ. P. 3(a), emphasis added. Further, an examination of W. Va. Code § 16-5C finds repeated references to actions being brought in Circuit Courts. See W. Va. Code § 16-5C-1 et seq. Most importantly, some of the relief provided for in § 16-5C-15(c), including injunctive and declaratory relief, can **only** be awarded by a Circuit Court. See generally W. Va. Code § 53-5-1 et seq; W. Va. Code § 53-5-1 ("Every judge of a circuit court shall have general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of his circuit, or the party against whose proceeding the injunction be asked reside in or out of the same.") Thus, W. Va. Code § 16-5C-15(c) clearly precludes a contracted change of forum or other waiver that would limit a Plaintiff's right to commence an action in a court of law.

Thus, under West Virginia law, a resident of a nursing home, like Mr. Brown, or his legal representative, may not waive any right to commence an action under W. Va. Code § 16-5C-15, as the statute states that any such attempted waiver "shall be null and void." See W. Va. Code § 16-5C-15(c). Further, such an action may pursue specific remedies, at least some of which could not be awarded through arbitration, mediation, or other alternative dispute resolution procedures. The statute also proclaims a public policy of protecting residents' constitutional rights, one of which is certainly a right to trial by jury. Any deprivation of that or any other constitutional right, whether by arbitration agreement or otherwise, violates West Virginia law.

Other states have also recognized and upheld public policy reasons for protecting nursing home residents from arbitration agreements when residents' rights

statutes provide for such actions to be brought in a court of law. The Illinois Court of Appeals recently declared a nursing home arbitration agreement to be unenforceable on virtually identical grounds. See *Carter v. SSC Odin Operating Co., LLC*, 885 N.E.2d 1204 (Ill. Ct. App. 2008); *appeal denied Carter v. SSC Odin Operating Co., LLC*, 897 N.E.2d 250 (Ill. 2008); *cert. denied SSC Odin Operating Co., LLC v. Carter*, 129 S.Ct. 2734 (U.S. 2009). By denying certiorari, the United States Supreme Court has implicitly approved of the *Carter* decision, thereby enforcing its role as persuasive authority for other states' courts.

In *Carter*, two "Health Care Arbitration Agreements" were executed by a "legal representative" in connection with a resident's admission to a nursing home. The trial judge concluded that the agreements were not enforceable because they were "in direct violation of emphatically stated public policy." *Id.*

The Illinois statutes examined by the *Carter* Court provide:

Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.

210 ILCS 45/3-606 (West 2006); and

Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

210 ILCS 45/3- 607 (West 2006).

In affirming the decision of the trial court, the Illinois Court of Appeals wrote:

First, neither section 3-606 nor section 3-607 mentions arbitration agreements at all, nor by their terms are they limited to those agreements. The sections, by their explicit terms, **apply equally to all contracts attempting to restrict the right of nursing home residents to "commence an action"** pursuant to the Nursing Home Care Act or to waive the right to a trial by a jury in an action commenced pursuant to the

Nursing Home Care Act, regardless of whether the contract involves arbitration.... Second, to the extent that the sections may void agreements calling for arbitration, this is an incidental, tangential effect of the sections, not their primary purpose, and so the sections can hardly be said to "specifically target arbitration agreements." To the contrary, the sections apply to all contracts involving nursing home residents, not merely to contracts invoking arbitration.... **Although it is certainly true that if the Nursing Home Care Act expressly directed its prohibitions only at arbitration agreements it would, as the defendant contends, run afoul of the Federal Arbitration Act, the Nursing Home Care Act does no such thing.** Applying the *Casarotto* and *Thomas* rule to the facts in this case, we conclude that because the public policy expressed in sections 3-606 and 3-607 concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy to the agreements and so voids the agreements.

Carter v. SSC Odin Operating Co., LLC, 885 N.E.2d at 1208 (emphasis added).

The Court in *Carter* recognized the rule set forth in *Doctor's Associates, Inc v. Casarotto*, 517 U.S. 581, 116 S.Ct. 1652 (1996) and *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987) that "state law is inapplicable and is not preempted by the Federal Arbitration Act if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Carter*, 885 N.E.2d at 1209. Like the Illinois statutes examined in *Carter*, the West Virginia statutes cited above declare a public policy for the protection of the rights of West Virginia nursing home residents. They do not expressly limit or otherwise "direct its prohibitions" only at arbitration, but apply equally to all contracts that attempt to restrict the right of a nursing home resident to "commence an action."

In addition to the United States Supreme Court's recent denial of certiorari in *Carter*, there is a growing trend in other states to uphold this public policy. New Jersey also has a statute that expressly declares void as against public policy any provision or clause waiving or limiting the right to sue for negligence or malpractice in any admission

agreement or contract between a patient and a nursing home or assisted living facility licensed by the Department of Health and Senior Services. See N.J.S.A. §30:13-8.1.

Similarly, a California appellate court recently held that the public policy of protecting vulnerable nursing facility residents, as codified in California Health and Safety Code section 1430, which declares void as against public policy a nursing home resident's waiver of her right to bring a lawsuit in court against the facility for violations of the Patients Bill of Rights, was favored over the general policy favoring arbitration. *Fitzhugh v. Granada Healthcare & Rehab., Ctr.*, 58 Cal. Rptr. 3d 585 (1st Dist. Cal. Ct. App. 2007). Likewise, in *SA - PG Ocala, LLC v. Stokes*, 935 So.2d 1242 (Fl. 5th Dist. 2006), and in *Place at Vero Beach, Inc. v. Hanson*, 953 So.2d 773, 775 (Fl. 4th Dist. 2007), different Florida appellate courts held that arbitration agreements that violate Florida's residents rights statute are contrary to public policy and void. "It would be against public policy to permit a nursing home to dismantle the protections afforded patients by the Legislature through the use of an arbitration agreement." *SA-PG-Ocala, LLC v. Stokes*, 935 So.2d at 1243.

Similarly, the Oklahoma Supreme Court in *Bruner v. Timberlane Manor Ltd. Psp.*, 155 P.3d 16 (Ok. 2006), considered the validity of an arbitration agreement executed in conjunction with the admission of a nursing home resident to Grace Living Center. In its in-depth analysis of the applicability of Oklahoma law in the enforcement of the arbitration agreement, the Oklahoma Supreme Court held that § 1-1939 of the Nursing Home Care Act, which prohibits arbitration agreements in the nursing home context, controls over § 1857 of the Oklahoma Uniform Arbitration Act, which announces a policy favoring arbitration. As recognized by the *Bruner* Court, the Nursing Home Care Act requires the State Department of Health to establish a comprehensive system of

licensure and certification to protect the health, welfare and safety of the residents and assure accountability for reimbursed care. 63 O.S.2001, § 1-1904. It also imposes liability upon the nursing home owner and licensed administrator for intentional or negligent injury to a resident, and it declares a resident's waiver of the right to commence an action against the owner or administrator or to have a jury trial thereon to be null, void and without legal effect. 63 O.S.2001, § 1-1939. The *Bruner* Court found this to be clear rejection of arbitration agreements between nursing homes and their residents to be binding and enforceable under Oklahoma law.

Plaintiff anticipates that Defendants will argue that the Federal Arbitration Act preempts state law that invalidates or undercuts the enforceability of an arbitration agreement. Such argument, however, ignores the fact that W. Va. Code § 16-5C-1 does not specifically target arbitration agreements but instead prohibits "any waiver" of the "right to commence an action." See W. Va. Code § 16-5C-15(c). Citing *Southland Corporation v. Keating*, 465 U.S. 1, 11, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) and *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), this Court has recently recognized that the Federal Arbitration Act preempts state law that would directly invalidate or undercut the enforceability of arbitration agreements specifically. *State ex rel. Clites v. Clawges*, 685 S.E.2d 693 (W.Va. 2009). This is simply not the case here.

As the Illinois Appellate Court opined, and the United States Supreme's Court's implicitly approved in *Carter, supra*, if the public policy at issue concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy to the agreements and thereby voids the agreements. Respectfully, the

Carter opinion is plainly persuasive authority to be considered by this Court and for which Defendants have no response.

Plaintiff further anticipates that Defendants will argue that because some of the relief provided for in §16-5C-15(c), including injunctive and declaratory relief, is not being sought here, Section 16-5C-15(c) does not prohibit the waiver at issue. This argument is not supported by the statutory language or any authority. Section 16-5C-15(c) prohibits any waiver of the right to bring an action, not just the right to bring an action seeking certain types relief. Thus, such argument would be without merit.

This Court, like the Appellate Courts in other states discussed above, should conclude that because the public policy expressed in § 16-5C-15(c) concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy. As stated previously, the code section quoted herein does not specifically prohibit arbitration, rather it specifically prohibits any waiver of a resident's right for certain specific relief, some of which could not be awarded by an arbitrator, mediator, or other alternative dispute resolution methods. Plaintiff therefore submits that reversal of the Circuit Court is appropriate.

b. The Circuit Court failed to find that Defendants waived the right to compel arbitration.

Additionally, in this matter the Defendants clearly took actions that were inconsistent with the right to compel arbitration. On this basis alone, Defendants' Motion should have been denied. As this Court explained in *State ex rel. the Barden and Robeson Corp. v. Hill*, 539 S.E.2d 106 (W Va. 2000), "as with any contract right, an arbitration requirement may be waived through the conduct of the parties." In *Hill*, a

church brought suit against builders it had hired to construct an addition to the church building. The contract between the church and the builders contained an arbitration provision. The church subsequently filed suit, alleging that the construction had not been conducted in accordance with the terms of the agreement. The Complaint was served but the builders did not file an answer, and the church moved for default judgment. The builders then moved to set aside the judgment. Among the builders' argument was that the court lacked subject matter jurisdiction due to the arbitration agreement. On appeal, the Court noted that "unexcused conduct that results in the entry of a default judgment is no less of an implicit waiver of a right to arbitration than any other procedural forfeiture." *Id.* at 112.

In the instant case, Plaintiff's Complaint was filed on January 7, 2008. Plaintiff filed an amended Complaint on July 2, 2008, and completed service on Defendants on August 4 and August 18, 2008, respectively. The Defendants at bar initially failed to answer the Complaint. Plaintiff filed an application for default on September 30, 2008, and subsequently moved for default judgment. The application was later withdrawn, but here, as in *Hill*, the unexcused conduct of the Defendants is an implicit waiver of the right to compel arbitration.

Additionally, in *American Reliable Ins. Co. v. Stillwell*, 212 F. Supp.2d 621 (N.D. W. Va. 2002), the federal district court stated:

A party may waive its right to insist on arbitration if the party "so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." ... But even in cases where the party seeking arbitration has invoked the "litigation machinery" to some degree "[t]he dispositive question is whether the party objecting to arbitration has suffered actual prejudice".

Id. at 628.

Because Defendants substantially utilized the litigation machinery, they should not be able to later compel arbitration. After answering the Amended Complaint, Defendant Canoe Hollow Properties moved for dismissal of the claims against it. This Motion was heard by the Circuit Court and was ultimately granted and is part of the instant appeal. In addition, the parties conducted depositions and were working pursuant to an agreed scheduling order to move this case toward trial. See Agreed Scheduling Order and Correspondence from Defendants discussing witness Plaintiff's witness list and the expert disclosures of both parties pursuant to the scheduling order, attached to Plaintiff's Petition for Appeal. Further, Defendants responded to discovery propounded by Plaintiff and have, in turn, propounded their own discovery requests upon Plaintiff. See Defendants' Certificate of Service of discovery requests, attached to Plaintiff's Petition for Appeal. These acts are wholly inconsistent with Defendants' position and the Circuit Court's ruling that arbitration is the proper forum for this matter.

At a minimum, if Defendants truly intended to arbitrate this matter, they wasted the Circuit Court's valuable time and resources by involving it in a matter that, in Defendants' apparent view, was improperly before the Court in the first place. Plaintiff submits, however, that Defendants clearly waived their right to attempt to compel arbitration through their actions. Thus, the Circuit Court's ruling should be reversed.

c. The Circuit Court failed to find that the arbitration agreement is unenforceable.

Even if Defendants were not found to have waived the right to compel arbitration, the Circuit Court erred in failing to find that the arbitration agreement is unenforceable. In order to determine whether parties should be compelled to arbitrate a dispute, courts perform a two-step inquiry: (1) whether there existed a valid, enforceable agreement to

arbitrate and (2) whether the claims at issue fall within the scope of that agreement. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). Although “highly circumscribed,” the “judicial inquiry ... is not focused solely on an examination for contractual formation defects such as lack of mutual assent and want of consideration.” *Id.* Rather, the Federal Arbitration Act (FAA) specifically contemplates that parties may also seek revocation of an arbitration agreement “under ‘such grounds as exist at law or in equity,’ including fraud, duress, and unconscionability.” *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (quoting 9 U.S.C.A. § 2).

In determining whether a valid arbitration agreement arose between two parties, a court should look to the state law that ordinarily governs the formation of contracts. 9 U.S.C. § 2; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24, 103 S.Ct. 927). Specifically, “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (internal quotations and citations omitted). For instance, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (citing cases).

Furthermore, the Fourth Circuit has held that while there is a federal policy favoring the enforcement and broad interpretation of arbitration agreements, “parties cannot be forced to submit to arbitration if they have not agreed to do so.” *Gregory v. Interstate/Johnson Lane Corp.*, 188 F.3d 501 (4th Cir. 1999) (citing *Chastain v.*

Robinson-Humphrey Co., Inc., 957 F.2d 851, 854 (11th Cir.1992) (citing *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989))). The Fourth Circuit further stated, “[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.” *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). This is so because “[t]he first principle ... is that ‘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.’ ” *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 658, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). See also *Kaplan*, 514 U.S. at 943 (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration.”); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) (“Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate.”).

Under West Virginia law, the fundamental elements of a valid contract are (1) competent parties, (2) legal subject-matter, (3) valuable consideration, and (4) mutual assent. *Ways v. Imation Enterprises Corp.*, 214 W.Va. 305, 589 S.E.2d 36 (W.Va. 2003) (citing *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926)). “There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.” *Id.* Plaintiff submits that Defendants failed to establish that a valid agreement to arbitrate exists in this matter. Further, grounds exist both in law and in equity that allow any purported

agreement to be revoked.

i. The Circuit Court failed to find a lack of consideration for the document at issue.

Despite being titled an "Admission Agreement", the document at issue was purportedly signed on March 26, 2004. As previously stated, Clarence Brown was in fact initially admitted to Defendants' facility nearly eight years prior on April 27, 1996. Further, he had resided at Defendants' facility, without interruption, from October 10, 2003, through the date the "Admission Agreement" at issue was apparently signed. Defendants failed to show, and in fact simply cannot show, that Mr. Brown was afforded any valuable consideration for the document at issue, as he was already a resident of Defendants' facility and, unlike Defendants, gained nothing from its terms. It is a well-established, fundamental principle of contract law in West Virginia that a valid contract requires valuable consideration. Similarly, an unambiguous written contract may be modified or superseded by a subsequent contract only if based on valuable consideration. *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 606, 245 S.E.2d 157 (W.Va. 1978) (citations omitted). Lacking consideration for the purported agreement, there can be no valid contract.

ii. The Circuit Court failed to find that the purported arbitration agreement is an unconscionable contract of adhesion.

Even if the contract for arbitration was entered into between Defendants and Clarence Brown, nevertheless, state law contract defenses preclude its enforcement in this case. This Court has recognized "two types of unconscionability, procedural and substantive." *Drake v. West Virginia Self-Storage, Inc.*, 203 W.Va. 497, 500 509 S.E.2d 21 (W.Va. 1998)(citations omitted). "Procedural unconscionability is concerned with the inequities and unfairness in the bargaining process; . . . [s]ubstantive

unconscionability is involved with determining unfairness in the contract itself.” *Id.* The purported arbitration agreement in this matter is both procedurally and substantively unconscionable and should not be enforced.

In examining the arbitration clause at issue in this case, this Court need look no further than the provision allowing Defendants to seek judicial redress over nonpayment of fees, but prohibiting Plaintiff from obtaining any type of judicial relief. Indeed, the agreement plainly reserves Defendants right of access to the courts, while requiring Plaintiff to arbitrate any claims he might have. See Arbitration Agreement at issue, attached hereto as Exhibit C. It is difficult to imagine that Defendants would have any claim whatsoever against a Resident except to collect monies due. Defendants, the party with superior bargaining position, clearly reserved a right of access to the courts for themselves by including an option to litigate any claims they might reasonably expect to have against a resident—to collect past due amounts and to defend any decision to discharge a resident. On the other hand, residents of the facility and their family have no choice but to submit their claims to arbitration. This provision plainly violates West Virginia law.

In *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914 (W. Va. 2005), this Court explained its analysis of arbitration agreements:

We have recognized that it is likely that the bulk of the contracts signed in this country are contracts of adhesion and are generally enforceable. However, when the “gross inadequacy in bargaining power” combines with terms “unreasonably favorable to the stronger party,” the contract provisions will be found unconscionable which in turn renders the contract unenforceable.

Id. at 922.

The Court has further addressed the issue, stating:

[W]here an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, *while preserving the lender's right to a judicial forum*, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law.

Arnold v. United Cos. Lending Corp., 204 W.Va. 229, 511 S.E.2d 854, 862 (1998)(emphasis added).

This Court in *Arnold* stated that "[a] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and 'the existence of unfair terms in the contract.'" *Id.* at 861 (quoting *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991)). Applying this test, this Court noted that "the relative positions of the parties, a national corporate lender on one side and elderly, unsophisticated consumers on the other, were 'grossly unequal.'" *Id.* (footnote omitted). Additionally, there was "no evidence that the loan broker made any other loan option available to the Arnolds." Finally, the Court found that "the terms of the agreement are 'unreasonably favorable' to United Lending." Based on these reasons, the Court found the arbitration agreement to be unconscionable and therefore, unenforceable.

In the matter at bar, the same facts are at issue before this Court. The arbitration clause unreasonably favors the stronger party – here the Defendants – while taking away the weaker nursing home resident's access to the courts. The arbitration clause is part of the standardized form admission agreement, drafted by Defendants, and there was no opportunity to negotiate its terms. It was offered on a "take it or leave it" basis with no chance to bargain. The arbitration clause lacks the mutuality of obligation necessary for enforcement. One party is bound to arbitrate while the other is free to go to court. It is difficult to imagine a less fair procedure to nursing home residents. In sum,

the arbitration clause is a one-sided unfair adhesion contract placing unreasonable burdens on nursing home residents while providing incalculable benefits for the Defendants. Based on the applicable West Virginia precedent, the arbitration clause at issue is unconscionable and unenforceable.

iii. The Circuit Court failed to find that Defendants breached their fiduciary duty to Clarence Brown.

Defendants are engaged in the custodial care of elderly, helpless individuals who are chronically infirm, mentally impaired, and/or in need of nursing care and treatment. While a resident at Defendants' facility, Mr. Brown was both physically and mentally weak, causing him to be totally dependent upon Defendants to provide for his every need. Defendants had a fiduciary and confidential relationship with Mr. Brown and his family. This relationship created an affirmative duty on Defendants to place Clarence Brown's interests above their own and to not entice his family to waive his constitutional rights in order to receive medical care. This Court has recognized that a fiduciary relationship arises:

[W]herever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interests, in the whole or in part, or the bodily custody, of one person, is placed in the charge of another.

State ex rel. Kitzmiller v. Henning, 437 S.E.2d 452, 454 (1993).

This Court has further described the conduct expected of a fiduciary, stating that they are held to the highest standard of care towards their ward, and as recognized by Justice Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is

unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd....

Keesecker v. Bird, 490 S.E.2d 754, 766 (1997) at fn 12, quoting *Kanawha Valley Bank v. Friend*, 162 W.Va. 925, 928-29 n. 2, 253 S.E.2d 528, 530 n. 2 (W.Va.1979).

In *State ex rel. Kitzmiller v. Henning*, *supra*, this Court recognized that a fiduciary relationship exists between a physician and patient: "Although we have not had occasion to address the fiduciary nature of the physician-patient relationship, all reported cases dealing with this point hold that a fiduciary relationship exists between a physician and a patient. Information is entrusted to the doctor in the expectation of confidentiality and the doctor has a fiduciary obligation in that regard." *Id.*

In *Petre v. Living Centers – East, Inc.*, 935 F.Supp. 808 (E.D. La. 1996), the Federal District Court for the Eastern District of Louisiana squarely addressed whether those providing long-term care stand in a confidential relationship to residents such that fiduciary duties arise:

A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:

One is said to act in a "fiduciary capacity" when the business which he transacts, or the money or property he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the part and a high degree of good faith on the other part. *Office of the Commissioner of Insurance v. Hartford Fire Insurance Co.*, 623 So.2d 37, 40 (La.App. 1st Cir.1993). While this Court concedes that fiduciary relationships are most often found in financial dealings, the Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the *Schenck* court, "one would hope at least in principle that entrusting a valued family member to the care of a business entity

such as a nursing home would carry similar responsibilities” as those created by a business relationship. *Schenck v. Living Centers-East, Inc., et al*, 917 F.Supp. 432, 437-38 (E.D.La.1996).

Id. at 812.

Just as the relationship between physician and patient is one of trust and confidence regarding disclosure of necessary information, the relationship between Defendants and Clarence Brown and his family was one of trust and confidence. Defendants had a higher duty to affirmatively speak the truth to Mr. Brown and his family because of Mr. Brown’s infirmities.

It is well settled that a presumption of fraud arises where the fiduciary is shown to have obtained any benefit from the fiduciary relationship:

Thus, if in a transaction between parties who stand in a relationship of trust and confidence, the party in whom the confidence is reposed obtains an apparent advantage over the other, he is presumed to have obtained that advantage fraudulently; and if he seeks to support the transaction, he must assume the burden of proof that he has taken no advantage of his influence or knowledge and that the arrangement is fair and conscientious....

Napier v. Compton, 558 S.E.2d 593, 598 (2001).

Under the terms of the arbitration provision at issue, Defendants obtained a benefit at the expense of Mr. Brown and his family. This benefit, the waiver of Mr. Brown’s constitutional right to a jury trial, is above and beyond the duties a resident normally assumes in a nursing home admission, let alone years into a residency. Because of the fiduciary relationship that existed between Mr. Brown and Defendants at the time the document in question was signed, Defendants had an affirmative duty to disclose all of the terms of the agreement that worked to their benefit, including the applicable rules of procedure. Defendants should not be allowed to impose rules of procedure on a resident to whom they owed a fiduciary duty without disclosing to the

resident the substance of those rules.

Defendants presented no evidence that they adequately or accurately explained to Plaintiff or Clarence Brown the substance or effect of the procedural rules applicable to the arbitration provision. The failure to disclose and explain the benefits these rules impart to Defendants or the restrictions they impose on Clarence Brown and his family breached Defendants' fiduciary duty to Mr. Brown.

- iv. **The Circuit Court failed to find that the purported admission agreement only names "Marmet Health Care Center" as a party and thus cannot require Plaintiff to arbitrate his claims against the other Defendants.**

The purported admission agreement only names "Marmet Health Care Center" as a party. See Arbitration Agreement at issue, attached as Exhibit C. As far as Plaintiff is aware, there is no legal entity named solely "Marmet Health Care Center." Plaintiff has named Marmet Health Care Center, Inc. n/k/a MHCC, Inc. as a Defendant in this matter. Despite defining "representative" on the first page, the document does not define the "Facility" or anything further in regard to the party or parties included in the Agreement. Thus, the document cannot be read to include all of the named Defendants in this matter that are not specifically stated in the Agreement to be parties to the contract.

It is well-settled that the drafter of a contract, particularly an adhesion contract, has a duty of choosing language carefully, as any ambiguous language is strictly construed against the preparer of a contract so long as the construction chosen by the non-drafter is reasonable. See, e.g., *Nisbet v. Watson*, 162 W.Va. 522, 530, 251 S.E.2d 774, 780 (1979). A plain reading of the purported arbitration agreement indicates that the Defendants in this matter are not parties to the agreement. Thus, the Circuit Court

erred in granting Defendants' motion and ordering that Plaintiff must arbitrate his cause against all of the Defendants, and reversal is therefore appropriate.

v. The Circuit Court failed to find that even if Defendants' arbitration clause were valid, it is impossible to conduct arbitration according to its own terms.

The arbitration clause at issue states that a dispute arising between the parties "shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect." However, in 2003, the American Arbitration Association amended its rules to provide that it "no longer accept[s] the administration of cases involving individual patients without a post-dispute agreement to arbitrate." AAA Healthcare Policy Statement, <http://www.adr.org/sp.asp?id=32192>. The AAA continues to administer health-care arbitrations in which "businesses, providers, health care companies, or other entities are involved on both sides of the dispute." *Id.* The AAA stated that the policy was a part of its "ongoing efforts ... to establish and enforce standards of fairness for alternative dispute resolution...." Archive of AAA Healthcare Policy Statement, <http://web.archive.org/web/20060930010034/http://www.adr.org/sp.asp?id=21975>. The Senior Vice President of the AAA was quoted as follows:

Although we support and administer pre-dispute arbitration in other case areas, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special consideration.

Id.

In the case at bar, there is no dispute that the date of the purported agreement is March 26, 2004, prior to many of Mr. Brown's injuries and clearly prior to any dispute related to his care arose. Thus, even if it was appropriate to determine that the

agreement in question was enforceable, which it is not, or that Plaintiff agreed to arbitrate his claims, which he did not, because of the change in AAA rules, the arbitral forum is not available to the parties and compliance with the clause is a legal impossibility.

Courts in other states have addressed this issue and determined that arbitration is inappropriate in such situations. In *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009), the Mississippi Supreme Court examined a similar arbitration agreement that relied upon the AAA and held that the arbitration contract could not be rewritten and therefore could not be enforced. *Id.* The Court in *Braddock* further noted that another national alternative dispute resolution organization, the American Health Lawyers Association ("AHLA") made a similar announcement about arbitrations, announcing that it would administer an arbitration without a post-dispute agreement only if ordered to do so by a court. *Id.* at 706-707 (citing *Owens v. Nexion Health at Gilmer, Inc.*, 2007 WL 841114, at *3 (E.D.Tex. Mar.19, 2007)).

Similarly, in *Carideo v. Dell, Inc.*, Slip Copy, 2009 WL 3485933 (W.D. Wash. 2009), a Washington Federal District Court examined a case where a Defendant moved to compel arbitration based on its mandatory arbitration clause, which provides that the National Arbitration Forum (NAF) will be the arbitrator and bans class actions. NAF, similar to those made by AAA and AHLA, announced that it no longer arbitrates consumer disputes filed after a specific date. *Id.* at *3. The Federal Court held "the parties' selection of NAF is integral to the arbitration clause," that "to appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause." *Id.*

In the case at bar, the arbitration agreement at issue clearly selects the AAA and its rules. Since the AAA is no longer available and does not support arbitration in cases involving individual patients without a post-dispute agreement to arbitrate, the agreement at issue should not have been effectively rewritten to enforce arbitration. Thus, the Circuit Court erred in enforcing arbitration in this matter and should be reversed.

- vi. **The Circuit Court failed to find that any decision on the merits of Defendants' motion should be stayed pending completion of discovery and depositions pertinent to the arbitration issue.**

A court, in reviewing the enforceability of an arbitration agreement, may inquire into "such grounds as exist at law or in equity for the revocation of any contract." See 9 U.S.C. §2. Leading authority from other jurisdictions is in accord that discovery is required before various factual matters relating to the enforceability of an arbitration clause can be decided. As a federal court in the Southern District of New York held:

Discovery is needed before Defendant's motion may be decided, as it should help to clarify several disputed issues of fact that may or may not give rise to special circumstances rendering the U-4 Arbitration Agreement enforceable... Given the Supreme Court's statement in *Gilmer* [v. Interstate/Johnson Lane, 500 U.S. 20 (1991)] that claims of special circumstances such as coercion, fraud or unequal bargaining power are "best left for resolution in specific cases," 500 U.S. at 33, further development of the factual record is warranted.

Berger v. Cantor Fitzgerald Securities, 942 F. Supp. 963, 966 (S.D. NY 1966). See also *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (evidence of surveys conducted by AT&T as to the most advantageous place to insert an arbitration provision was relevant on the issue of enforceability).

The Tennessee Supreme Court recently recognized in *Owens v. National Health Corp.*, 263 S.W.3d 876 (Tenn. 2007), that discovery as to the facts surrounding the

execution of an arbitration agreement, including whether the agreement is presented on a "take it or leave it basis", is necessary before an unconscionability determination can be made. Similarly, the Tennessee Court of Appeals sitting at Nashville, held that discovery was necessary "regarding any steps NHC may have taken to ascertain whether Mr. Cabany was competent to make his own decisions." *Cabany v. Mayfield Rehabilitation and Special Care Center et al*, 2007 WL 3445550 (Tenn. Ct. App. Nov. 15, 2007).

In yet another nursing home arbitration case, the Tennessee Court of Appeals sitting at Nashville remanded the case to the trial court for development of the record on the issues of unconscionability and capacity of the resident, citing both the *Owens* and *Cabany* decisions. The appellate court emphasized the need for the trial court to conduct an evidentiary hearing regarding disputed issues of fact that are material to a party's motion to compel arbitration and further instructed the trial court on remand to "make findings of fact and conclusions of law as to whether the arbitration agreement is enforceable." *Raines v. National Health Corporation d/b/a NHC Healthcare, et al.*, Case No. M2006-01280-COA-R3-CV, 2007 WL 4322063 (Tenn. Ct. App. Dec. 6, 2007). See also, *Mooring v. Kindred Nursing Center*, 2009 WL 130184 (Tenn. Ct. App. January 20, 2009) (necessity of an evidentiary hearing when facts related to an arbitration agreement are disputed).

The Missouri Supreme Court also recently recognized the usefulness of participating in discovery to determine the underlying merits of a motion to compel arbitration in *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. 2006). Likewise, the Kentucky Supreme Court affirmed the trial court's broad discretion in allowing parties to conduct discovery on the enforceability of an arbitration agreement. *Kindred*

Healthcare, Inc. v. Peckler, 2006 WL 1360282 (KY). The Kentucky Supreme Court in *Peckler* held that "an arbitration agreement may be unconscionable, and therefore unenforceable, if the arbitral forum is biased or the terms of the arbitration are so one-sided that no reasonable person would willingly enter into such agreement...." Some of the evidence that should be considered in addressing whether the arbitration agreement is enforceable includes "factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, . . . [and] whether the terms were explained to the weaker party" *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003)(en banc). The same holds true with regard to examination of the costs of arbitration, which may make it impossible for a plaintiff to pursue her claim in that forum.

In *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005), the court struck down an arbitration agreement that employees were required to sign as part of their application process. The *Walker* Court held that the plaintiffs could not be compelled to arbitrate their claims because they did not "knowingly and voluntarily waive their constitutional right to a jury trial." The court provided the following factors for determining if a plaintiff knowingly and voluntarily waived her right to a jury trial:

(1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the [plaintiff] had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; and well as (5) the totality of the circumstances.

Id. at 381.

The holding in *Walker* reinforces the need for comprehensive discovery prior to ruling on an arbitration provision. The Court recognized that, while not readily apparent on the face of the agreement, the arbitral forum was not neutral and, therefore, the

agreement was unenforceable. The Court further acknowledged that the limited discovery provided in the arbitral forum could significantly prejudice the complaining party:

We acknowledge that the opportunity to undertake extensive discovery is not necessarily appropriate in an arbitral forum, the purpose of which is to reduce the costs of dispute resolution... But parties to a valid arbitration agreement also expect that neutral arbitrators will preside over their disputes regarding both the resolution on the merits and the critical steps, including discovery, that precede the arbitration award.

Id. at 383-84.

Had the parties proceeded under the arbitration agreement in *Walker*, the inherent prejudice of the agreement would not have been revealed. Instead, it was through the court's discovery process in determining whether the arbitration agreement was enforceable that the inherent unconscionability of the arbitration clause was determined. Indeed, much evidence was presented to the court that the arbitral forum was not neutral. For instance, Ryan's annual fee accounted for more than 42 percent of the forum's gross income and there was no process in place to prevent signatory companies from improperly influencing its employee adjudicators. Evidence was presented that the managers explained the arbitration provisions inaccurately to the employees. The evidence in the case revealed that Ryan's stated consideration was, in fact, illusory. Thus, the comprehensive discovery permitted by the Court prior to ruling on the enforceability of the arbitration agreement proved to be critical. It is equally critical here, and the Circuit Court erred in failing to allow discovery prior to granting Defendants' motion.

As set forth herein, Defendants' "Admission Agreement" presented years after Mr. Brown's actual admission to the facility bears all of the markings of a contract of

adhesion. Clearly, discovery of facts is needed in order to test the reasonableness of this transaction. Before Plaintiff is deprived of his constitutional right to a trial by jury, these questions should have been answered in discovery.

Plaintiff respectfully submits that for each of the above reasons, individually, reversal of the Circuit Court is appropriate.

II. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANT CANOE HOLLOW PROPERTIES, LLC'S MOTION TO DISMISS

- a. The Circuit Court failed to apply the proper legal standard and accept all the well-pleaded allegations in Plaintiff's Complaint as true and draw all reasonable inferences in favor of the Plaintiff.**

Prior to the Court dismissing Plaintiff's entire cause and thereby compelling arbitration in this matter, Defendant Canoe Hollow moved for dismissal asserting that it owned the real estate and building from which Marmet Healthcare Center operated but did not operate or control the operation of the facility. When the appropriate standard pursuant to West Virginia law is applied to Plaintiff's Complaint, it is clear that the Circuit Court erred in granting Defendant's Motion.

It is well settled that a motion to dismiss should be granted only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Ewing v. Board of Educ. of County of Summers*, 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (W.Va. 1998) (quoting *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (additional citation omitted)). For this reason, motions to dismiss are viewed with disfavor, and [the West Virginia Supreme Court of Appeals] counsel[s] lower courts to rarely grant such motions. *Ewing*, 503 S.E. 2d at 548 (citing *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605-06, 245 S.E.2d 157, 159 (1978)). See also *Pauley v. Kelly*, 255 S.E.2d 859, 863 (W.Va. 1979)

([Motions to Dismiss] are not favored and in considering them, plaintiffs' factual allegations must be construed favorably to them and considered for purposes of the motion to be true).

In reviewing a motion to dismiss, the Circuit Court is required to accept **all the well-pleaded allegations in the complaint as true** and draw **all reasonable inferences in favor of the Plaintiff**. *Conrad v. ARA Szabo*, 198 W.Va. 362, 369-70, 480 S.E.2d 801, 808-09 (W.Va. 1996) (citing *Murphy*, 468 S.E.2d at 168), emphasis added. A complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (citing *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977)). See also *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 [102], 2 L.Ed.2d 80 [84] (1957); *Dunn v. Consolidation Coal Co.*, 379 S.E.2d 485 (W.Va. 1989); *Price v. Halstead*, 355 S.E.2d 380 (W.Va. 1987); *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438 (W.Va. 1985); *Sticklen v. Kittle*, 287 S.E.2d 148, 149 (W.Va. 1981). Pursuant to this standard, Defendants' motion should have been denied.

Plaintiff's First Amended Complaint in this matter alleges that Defendant Canoe Hollow "was, and remains, a corporation engaged in the custodial care of elderly, helpless individuals who are chronically infirm, mentally impaired, and/or in need of nursing care and treatment at Marmet Health Care Center." See First Amended Complaint at para. 30. Plaintiff further alleged that at all times material to this matter, the Defendants, including Defendant Canoe Hollow, "owned, operated, managed and/or controlled, Marmet Health Care Center in Kanawha County, West Virginia and are therefore directly liable for all the care provided at Marmet Health Care Center." *Id.* at para. 35. "The actions of each of Marmet Health Care Center's servants, agents and

employees as set forth herein, are imputed to the Defendants,” including Canoe Hollow. *Id.* Further, Defendant Canoe Hollow is specifically included in Plaintiff’s Counts One, Three, Four, Five, Six, Seven, Eight, and Nine. See Plaintiff’s Amended Complaint.

Respectfully, the Court’s Order contains no findings or statements that Defendant Canoe Hollow only leased the property to Marmet and played no role in the operations or resident care and owed no legal duty to the Plaintiff. See Exhibit B. In fact, the Court never converted Defendants’ motion to a Motion for Summary Judgment. *Id.*

In *Chapman v. Kane Transfer Company, Inc.*, 160 W. Va. 530, 236 S.E. 2d 207 (1977), this Court held that while the “Rules permit a motion under Rule 12(b)(6) and 12(c) to be treated and considered as a motion for summary judgment along with matters outside the pleadings, the reverse treatment, treating a motion for summary judgment as a motion to dismiss or as a motion for judgment on the pleadings, is not countenanced or permitted, particularly where it is obvious that the court has considered matters outside the pleadings among bases for its judgment.” *Chapman*, 160 W. Va. at 536, 236 S.E. 2d at 211. This Court further cited 5 Wright and Miller, Federal Practice and Procedure, s 1366 (1969), in which the writers concluded:

“Once the court decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment and several courts have held that is reversible error for the district court to consider outside matter without converting the motion to dismiss into a motion for summary judgment. . . .”

Id. at 537 (citing *Phillips v. Columbia Gas of West Virginia*, 347 F.Supp. 533 (S.D.W.Va.1972), affirmed 4 Cir., 474 F.2d 1342; *Smith v. Blackledge*, 451 F.2d 1201 (4th Cir. 1971).

Plaintiff anticipates that Defendants will argue that a lease attached to their reply to Plaintiff’s response to Canoe Hollow’s Motion to Dismiss was sufficient evidence for

the Court to dismiss to Plaintiff's action. However, Plaintiff submits that the lease was insufficient, as it did not state that Canoe Hollow did not have any involvement or could not be involved with the operations of the facility. Further, as Plaintiff's counsel argued before the Circuit Court, the lease also provided Canoe Hollow with full access to the lessee's financial information, an indication that Canoe Hollow, at least potentially, played a more involved role than a lessor that is not involved in the operation of the facility. *Id.* Thus, the lease did not operate in the same manner as an affidavit or other evidence that unequivocally provided evidence of Canoe Hollow's involvement, or lack thereof, with the operation of the facility.

It is well settled that in West Virginia "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." *Graham v. Beverage*, 211 W.Va. 466, 475, 566 S.E.2d 603, 612 (W.Va. 2002) (citing Syl. Pt. 6, *Aetna Casualty and Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)). It is not until this initial burden is met that the burden of production shifts to the nonmoving party. *Id.* (citing Syl. Pt. 3, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995)).

More importantly, even if the lease was sufficient evidence as asserted by Defendants to shift the burden, pursuant to the authority cited above, the Circuit Court erred in failing to convert Defendants' motion into one for summary judgment. Further, if such conversion had been made, not only should it have been clear in both the hearing transcript and the Court's Order, but Plaintiff submits that the Circuit Court should have allowed discovery regarding the lease. In any case, in determining whether a genuine issue of material fact exists, the Circuit Court must construe the facts

in the light most favorable to the Plaintiff as the non-moving party. See *Alpine Prop. Owners Assn. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 365 S.E.2d 57 (1987). The Circuit Court in this matter erred in granting Canoe Hollow's Motion to Dismiss and should be reversed.

CONCLUSION

As Plaintiff stated in his pleadings before the Circuit Court and previously in her Petition for Appeal, one of the most important tenets of this country's system of justice is that all persons should have equal access to the courts. The importance of this principle must not be undermined by allowing arbitration agreements in nursing home admission contracts to strip the most vulnerable segment of our society, our nation's elderly, of their Constitutional rights. It is unjust to enforce the arbitration clause at issue against Clarence Brown because it is illegal, invalid and unconscionable.

When the founders of this great nation listed their grievances against "the present King of Great Britain" in the Declaration of Independence, they included among them "depriving us in many cases, of the benefit of Trial by Jury." The Bill of Rights and state constitutions, including West Virginia's, of course, expressly include the right to trial by jury. See W. Va. Const. Art. 3, § 13. While it can be waived, the right at stake here is not *de minimus*.

Mr. Brown entered Defendants' nursing home because he could no longer care for himself and required twenty-four hour nursing care. He and his family relied upon Defendants to provide that care. They did not. Now Defendants have improperly restricted the one avenue of relief left for Mr. Brown's family. Plaintiff respectfully submits that the appeal of the Orders of the Circuit Court of Kanawha County in this matter is well taken, and requests that the Circuit Court's Orders be reversed and Plaintiff's cause reinstated

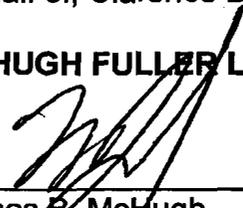
against the Defendants in that forum.

Respectfully submitted, this the 16th day of March, 2010,

Clayton Brown, as guardian for, and on
Behalf of, Clarence Brown

McHUGH FULLER LAW GROUP, PLLC

By: _____


James B. McHugh
West Virginia Bar Number 10350
Michael J. Fuller, Jr.
West Virginia Bar Number 10150
97 Elias Whiddon Rd.
D. Bryant Chaffin
West Virginia Bar Number 11069
Hattiesburg, MS 39402
Telephone: 601-261-2220
Facsimile: 601-261-2481
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16th of March, 2010, I served the foregoing upon all
counsel of record by facsimile (with exhibits) and by depositing true and correct copies
in the U.S. Mail, postage prepaid, and addressed to:

Shawn P. George, Esq.
George & Lorensen, PLLC
1526 Kanawha Blvd. E
Charleston WV 25311



Counsel for Plaintiff/Appellant

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE