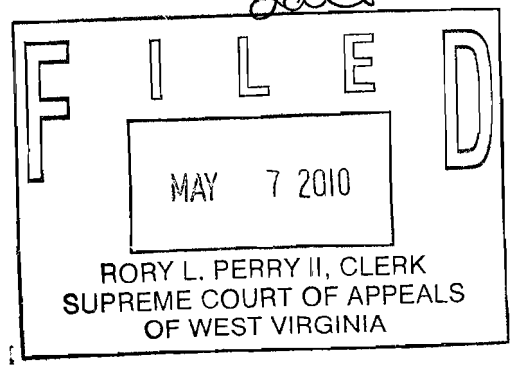
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

SUPREME COURT NO: 35494

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;

APPELLEES.

RESPONSE OF APPELLEES MARMET HEALTH CARE CENTER, INC., CANOE HOLLOW PROPERTIES, LLC AND ROBIN SUTPHIN

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

COUNSEL FOR APPELLEES
MARMET HEALTH CARE
CENTER, INC., CANOE
HOLLOW PROPERTIES, LLC
AND ROBIN SUTPHIN

May 7, 2010

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APPELLANT

v. **SUPREME COURT NO. 35494**

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;

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I. INTRODUCTION

This matter is before the Court because Appellant seeks to overturn two Orders of the Circuit Court. The first Order dismissed Canoe Hollow Properties, LLC ("Canoe Hollow") because the only evidence before it was that Canoe Hollow only owned the facility, but did not operate it or play any role in patient care. The second Order referred the Appellant's claim to arbitration pursuant to the Admissions Agreement Appellant knowingly and voluntarily signed in March 2004 and to which Appellant testified he should be bound. The Circuit Court got it right. This Court should affirm.

II. RELEVANT FACTS

Clayton Brown is the brother and former legal guardian of Gordon Brown, who was voluntarily admitted to the care of Marmet Health Care Center, Inc. ("Marmet") in April, 1996. Gordon Brown ("Mr. Brown" or "Gordy") was born with severe cerebral palsy and other disabling conditions and was unable to care for himself. At the time of his admission to Marmet, his mother was also a resident there. She made the decision to have Gordy admitted to Marmet because she liked the care she was receiving and wanted him to receive the same care and to be close to her. Marmet made a place for him so he could be with her.

The Sutphin families and Pat Maroney, natives of the towns of Marmet and East Bank respectively, founded Marmet in 1986 as a small 60 bed nursing facility. There was no such facility available then in eastern Kanawha County. Pat Maroney's mother, Mary, was Marmet's first resident. Marmet started as an intermediate care facility. In 1996, Marmet was licensed to provide skilled nursing services. In 1998, Larry Pack, also of Marmet, bought some of the Sutphin interests and Pat Maroney's interests in Marmet. In 2000, Marmet expanded its capacity and became West Virginia's first licensed Alzheimer's Center. It was called "Mary's Garden" in honor of Marmet's first resident. On November 30, 2006, Genesis Corp. bought Marmet.

By written lease dated January 31, 2003 ("Lease"), Marmet leased from Canoe Hollow the building and property on which Marmet operated its nursing facility. Canoe Hollow played no role in the operation of Marmet or the care of its residents. Section 26 of the Lease expressly: 1) provides that the relationship of the parties is solely landlord and tenant; 2) confirms Canoe Hollow has no ownership interest in Marmet's enterprise: and 3) negates joint venture, agency partnership, or the right of representation. Robin Sutphin is the former administrator of Marmet. She is a licensed registered nurse, the daughter in law of one of the original founders of Marmet

and the wife of Calvin Sutphin II, a former administrator of Marmet. There is no claim or evidence that anything for which Appellant seeks recovery from Marmet or Ms. Sutphin did not arise out of the Agreement and/or care of Mr. Brown at Marmet.

Gordy Brown was a resident at Marmet over 11 years. On occasion, he would leave Marmet for personal reasons, or for admission to the hospital for conditions for which Marmet could not treat him. On re-admission to Marmet, Appellant , as his legal guardian, would either sign a new Admissions Agreement, or acknowledge the continuing existence and validity of the previous Admissions Agreement, like the March 26, 2004 Agreement. Marmet added the arbitration clause at issue then because Marmet had lost its liability insurance coverage due to the well chronicled medical malpractice maelstrom of that time. This occurred even though Marmet had never had a lawsuit alleging negligent patient care in its then 18 years of existence. (Indeed, Appellant's action in the summer of 2008 is the first such claim ever against Marmet.) No Marmet potential resident has ever refused to agree to arbitrate any claims and no prospective member would be rejected admission even if he or she refused to sign. The arbitration clause was introduced and used so Marmet could attempt to resolve any dispute by a less costly, quicker, less adversarial process.

Clayton Brown admits in his testimony that he had access to the facility to visit his brother and took active part in and authorized the decisions concerning the medical and daily care of his brother. These included the authorization of Mr. Brown's medical care, discharge and re-admissions of Gordy from the facility for various reasons and use of Mr. Brown's discretionary funds. Clayton Brown also admits: he signed the March 2004 Admissions Agreement; initialed various pages and provisions of it, read or was otherwise aware of the arbitration clause; raised no objection to it; had the right to consult with counsel but failed to do

so; believes his word should be his bond; and has no reason to offer here why that should not be the case.

Marmet's staff loved and cared for Gordy Brown. He was family. He developed deep and loving attachments to the staff, his roommate and a resident he considered his "mother". He left Marmet in May 2007, when his brother moved to Tennessee and took Mr. Brown with him. It was there, over a year later, in June 2008, at age 68, Mr. Brown died, not from "his injuries" but from complications related to cerebral palsy. Clayton Brown filed this action initially against Genesis Healthcare Corporation (Genesis). [1] and others. Genesis had provided care to Gordy after Genesis purchased Marmet in November 2006. Clayton Brown settled with Genesis and then proceeded against Marmet, Robin Sutphin and Canoe Hollow. Subsequently, the Circuit Court found that Canoe Hollow only owned the real estate and building upon and in which Marmet Health Care operated and thus had no duty to any client of the facility. As to Marmet and Robin Sutphin, the Circuit Court found that the Appellant must arbitrate his claims. In doing so, the Circuit Court correctly interpreted West Virginia law governing arbitration provisions and general contract law. Its Order should not be disturbed. Appellant raises several grounds in support of this appeal. For the reasons below, all fail and this Court should affirm.

III. ARGUMENT

A. The Admissions Agreement is valid and enforceable

Appellant argues the Admissions Agreement is not enforceable because Appellant signed it years after Gordy had first been admitted as a resident; it lacked consideration; it is

[1] After the settlement with Genesis, Mr. Brown's family sent a card to Marmet thanking them for the wonderful care they had given Gordy.

unconscionable; and because it did not have the exact legal name of Marmet. [2] These arguments lack merit.

Appellant voluntarily entered into different contracts at different times for Marmet to provide for Gordy's care. The Admissions Agreement of March 2004 is the applicable contract here. In that contract, Marmet agreed to provide various services for Gordy's care. The Agreement included an arbitration provision because Marmet had lost its liability insurance coverage through no fault of its own. That coverage couldn't be purchased then. It was unavailable. Appellant agreed to pay for Marmet's services. This is sufficient consideration to support the contract and the arbitration provision. There is no requirement that the arbitration provision be supported by separate consideration exclusive to it. In fact, it is illegal under the federal regulations governing Medicare rates and reimbursement for a provider like Marmet to alter the rates of reimbursement and charges for its care. Those rates are set by the government and are not subject to individual adjustment by the provider. Marmet could not legally do so even if it chose to do so. Marmet[3] promised to provide and in fact provided daily nursing home care and assistance to Gordy. [4] These activities were coordinated, monitored and regularly reviewed by case managers at Marmet. Appellant was notified of regular meetings held to discuss Mr. Brown's progress and participated in some of them. In exchange, Appellant, as the legal guardian of Mr. Brown, promised to pay a fixed fee for the services. At times, the cost of

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[2] The Amicus Brief alleges that Appellant as a "mere representative" of Mr. Brown had no right to agree to arbitration on Mr. Brown's behalf. This is simply not true. Appellant was fully empowered to enter into contracts on Mr. Brown's behalf as his Guardian, by virtue of that appointment in 1996 in accordance with W.Va. Code 44A. See also, **Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc.**, 623 F.Supp.2d 1235 (E.D. Wash. 2009) **and Owens v. Coosa Valley health Care, Inc.**, 890 So.2d 983 (Ala. 2004) guardian has authority to bind nursing home resident in arbitration agreements.

[3] There is no question the party Appellant sued is the same as the entity that signed the contract, is referenced in it and which provided Mr. Brown's care over eleven years. See, **Fayetteville Bldg. and Loan Assn. v. Mutual Fire Ins. Co. Of West Virginia**, 141 S.E. 634 (W.Va. 1928)

[4] The staff was also very fond of Gordy and provided emotional support. As summed up by CNA Cathy Eller, who was there the day Mr. Brown first came to Marmet, "everybody got attached to him" and "it was a sad day when he left."

this care exceeded the fixed payment to Marmet.[5] This is a classic case of quid pro quo. Additionally, Appellant was afforded and reminded of the many rights available to him under the contract and the law, including filing any grievances with the director of Social Services, State Department of Health, Long-Term Care Ombudsman or the Nursing Home Advisory Committee, as well as the right to have his room reserved for medical and non-medical leave of absence.

The contract was not 'unreasonably favorable' to Marmet. Appellant needed to provide Marmet only 7 days' notice in the case of a voluntary discharge, while Marmet was required to give 30 days' notice. Mr. Brown could not be discharged because of a change in the payment source for the service or because of a change in his care needs. When Mr. Brown left the facility for hospitalizations or non-medical reasons, Appellant, as legal guardian, could and did demand Marmet hold Mr. Brown's room until he returned. Appellant, as legal guardian, retained the right to direct the spending of funds in Mr. Brown's discretionary account and to direct the method of payment though Medicaid. In fact, Appellant took advantage of many of these services during Mr. Brown's long stay at Marmet. The truth is Appellant knew, when he signed the contract containing the arbitration provision, Mr. Brown was beloved, long-time and well cared for resident of Marmet and that is why Appellant continued to use Marmet as a care facility for Mr. Brown. If Appellant ever felt otherwise, he was free to take Mr. Brown to any one of a number of similar facilities in the Kanawha Valley. He never did so.

There is no evidence to support a claim of duress when Appellant signed the contract. Marmet personnel explained the agreement to the Appellant. Appellant had every opportunity to read it and never asked for more time to consider it. Appellant testified he considered other places for Gordy, but kept him at Marmet because Appellant was happy with the care.

[5] For example, Medicaid would not authorize payment for a medication Marmet felt would benefit Mr. Brown so Marmet provided the medication at no cost.

Appellant also alleges Marmet was in a superior bargaining position and fraudulently induced him into signing the contract. There is no evidence offered to support such a claim. It is baseless and undermined by uncontroverted facts and Appellant's testimony. Appellant is an educated, sophisticated man. He graduated high school and went to college. He was in the military and has worked as a salesman, millwright and clerk. He was familiar with Marmet and its staff. During the entire time Mr. Brown was a resident of Marmet, Appellant had ample opportunity to observe Mr. Brown's care. Appellant visited the facility during Mr. Brown's stay and was involved in Mr. Brown's treatment plan. He was free to discharge Mr. Brown at any time. Mr. Brown was, at times, admitted to the hospital for care and after discharge from the hospital, re-admitted to Marmet at Appellant's request. Appellant was consistently and regularly informed of his rights as the legal guardian to have any number of social services investigate the care and treatment of Mr. Brown. During this time, Appellant investigated other facilities in the area, but didn't transfer Gordy because "...I liked the way [Marmet] treated Gordon--or cared for Gordon." Dep. p. 53.

Appellant's brief states that the Agreement was not explained before Appellant "apparently" signed it. This is contrary to Appellant's testimony. Appellant testified the contract was explained to him, he was given time to read it and he signed it.

Q. So you signed a document then—
A. They explained it to me as I went if I remember, you know. I would assume that's what happened. I don't remember even signing it.
Q. ...you recognize your signature?
A. Yes.
Q. So you know you signed it?
A. Yes. Dep. p. 68.

.....

Q. ...[t]here wasn't anything that prevented you from reading it even if you didn't, you may have read it, you just don't know whether you did or not?
A. Right. Dep. p. 73

.....

Q. You agree with me that that paragraph that you just read says that if you've got a dispute against Marmet regarding the care of your brother that you've agreed to submit it to final and binding arbitration, right?
A. Right.
Q. And that's part of a document that you signed back on March the 26th of 2004 –
A. Okay.
Q. And that's what you agreed to do if you had such a dispute, correct?
A. That's what I signed, right. Dep. p. 74-75.

.....

Q. When you agree to something, Mr. Brown, is your word your bond?
A. Yes.
Q. Is there a reason that your word should not be your bond in this case?
(Objection by counsel.)
A. I don't see why not.
Q. You don't see any reason why your word shouldn't be your bond in this case?
A. It should be.
Q. It should be? You agreed to arbitrate four-and-a-half years ago if you had a dispute with Marmet, right?
A. Yes.
Q. That's in fact what you have here in this lawsuit a dispute against Marmet, right?
A. Yes.
Dep p 71, lines 9-24, and 72, line 1.

The Arbitration Agreement does not unduly favor either party. Here, the arbitration agreement places the same obligations and conditions upon both the Appellant and Marmet. It does not limit or expand discovery, damages or any rights of either party. The Arbitration clause does not limit appeal rights, nor does it limit the Appellant's damages. The arbitration clause does not reduce either party's access to remedies, but merely changes the forum to resolve a dispute. Appellant can institute suit and a court can enforce any arbitration result. Appellant's argument that the arbitration provision waives a "fundamental constitutional right" is misleading. Every arbitration agreement does so. That is the nature of arbitration. However, that is no less true for Marmet as for Appellant. Any waivers are not unilateral, but mutual. Both *parties* waived their right to have any claim arising from the care of Mr. Brown decided by a court of law and, in the alternative, agreed to arbitrate. Both parties have equal rights in arbitration. Appellant argues incorrectly that Marmet's only "foreseeable" claims against a resident would be

for collection of monies and therefore the arbitration clause is grossly unfair. This is wrong. For example, Marmet may want to cease care for a non-delinquent, disruptive patient, or Marmet may disagree with a course of treatment authorized by someone with medical authority over a resident. In either case, Marmet could not resort to litigation, but is bound by the arbitration provision.

Moreover, even if Marmet did not have to arbitrate any of its claims, that does not make the contract unconscionable. See, for example, **Miller v. Equifirst Corporation of WV**, 2006 WL 2571634 (S.D.W.Va 2006). In **Miller**, plaintiffs alleged that the Arbitration Agreement they signed along with loan agreements was an invalid because the defendant retained access to judicial form for certain claims and arbitration for others while the plaintiff was required to arbitrate all claims.[6] In dismissing plaintiffs' argument, the United States District Court for the Southern District of West Virginia concluded that when considering a totality of circumstances as a matter of law, such a retention of rights by the defendant is not so one-sided as to render the agreement unenforceable. Id. at 11.

The Agreement here is evenly balanced. It had adequate consideration, was not unduly unfair to Appellant and did not state unreasonable terms. The Appellant was not pressured to sign the Agreement. He was provided an opportunity to confer with counsel. He did not do so. He was a reasonably educated, intelligent, experienced person, who had been involved in his brother's care decisions for many years. He had considered, but rejected moving his brother to other facilities because he liked the treatment his brother received at Marmet. Appellant admits

[6] The Amicus brief cites **Arnold v. United Companies Lending Corporation**, 511 S.E2d 854 (W.Va. 1998) for support. **Miller,** however, distinguished Arnold for the same reasons argued here. In **Arnold** the plaintiffs had no education and had waived their rights to recover consequential, punitive and treble damages and had waived the right to appeal an award rendered by an arbitrator. The Lending institution was a national organization who had solicited the plaintiffs at home and under the contact would not be subject to arbitration for any of its claims.

Marmet explained the Agreement to him. There is **no evidence** Marmet misrepresented the terms of the Agreement, took advantage of Appellant, or refused to allow Appellant ample time to review it or to seek legal counsel. Appellant did not feel threatened or coerced, nor was the contract presented on a "take it or leave it" basis. Appellant made a meaningful choice to sign the Agreement. Whatever parade of horribles one might seek to conjure to protect helpless victims from overreaching, unconscionable agreements, none is present here. This is not David versus Goliath, or anything approaching it. The reality here is that Appellant, now after securing counsel, seeks for himself a way to undo that which he voluntarily agreed to do (arbitrate), so that he may attempt to maximize his recovery. Appellant asks the Court to protect Appellant from himself. Respectfully, there is no legal or factual basis for the Court to do so.

The Court can assume Appellant intended to abide by the Agreement as drafted absent fraud, misrepresentation, duress, or the like, of which there is no evidence here. See, **Schultz v. AT&T Wireless Services, Inc.,** 376 F. Supp. 2d 685 (N.D.W.Va. 2005). Many other jurisdictions have reviewed this same issue and enforced arbitration provisions signed by nursing home residents as a part of admissions agreements. See, **Mariner Health Care, Inc. v. Weeks,** 2006 WL 2056588 (N.D. Miss 2006) person is charged with knowing the contents of the document he signs; **Etting v. Regents Park at Aventura, Inc.,** 891 So.2d 558 (Fla. Dist. Ct. App. 2d 2008) resident's blindness did not render agreement invalid; **Mitchell v. Kindred Health care Operating,** 2008 WL 493650 (Tenn. Ct. App. 2008), appeal denied, poor memory not enough to make agreement unconscionable; **Fortune v. Castle Nursing Homes, Inc.,** 2007 WL 4227458 (Ohio Ct. App. 5th 2007) 70 year old former factory worker was savvy enough to understand contract; See also, **Community Care Center of Vicksburg, LLC v. Mason,** 966

So. 2d 220 (Miss. Ct. App. 2007) and **Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc.,** 623 F.Supp2d 1235 (E.D. Wash. 2009).

It is presumed that an arbitration provision in a written contract was intended to be the exclusive means of resolving disputes arising under the contract unless the contract provision was unconscionable. See, **Strawn v. AT&T Mobility, Inc.,** 593 F.Supp2d 894 (S.D.W.Va. 2009) and **State of West Virginia ex rel. Dunlap v. Berger**, 211 W.Va. 549 (2002). In order to prove that a contract provision is unconscionable, the Appellant must prove that there was a "***gross inadequacy*** in bargaining power" **and** "terms ***unreasonably favorable*** to the stronger party." ***Troy Mining Corp. v. Itmann Coal Co.***, 176 W.Va. 599, 604 1986)) (emphasis supplied) and see, **Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Company Of West Virginia, Inc.,** 13 S.E.2d 670, 674 (1991) (quoting Restatement (Second) of Contracts 234 comment *637 d) and see e.g., **Board of Ed. of the County of Berkeley v. W. Harley Miller, Inc.**, 236 S.E.2d 439 (W.Va. 1977).

Appellant simply hasn't done so. A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, or even because an inequality results in an allocation of risks to the weaker party. The mere inequity of bargaining power alone does not indicate an unconscionable contract. See, ***Adkins***, at 636. However, there is no evidence to suggest that the Appellant was in an "unequal' bargaining position. In fact, here Appellant could still have secured admission to Marmet without agreeing to arbitrate. He also could have taken his brother elsewhere. Given all these facts, the Appellant doesn't qualify for any exceptions to the general rule.

Nor does the fact that Appellant waived the right to a jury trial require the Court to evaluate the agreement to arbitrate under a more demanding standard. When a party waives his

right to adjudicate disputes in a judicial forum, the "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." **Sydnor v. Conseco Financial Servicing Corp.,** 252 F.3d 302, 307 (4th Cir.2001) (quoting **Pierson v. Dean, Witter, Reynolds, Inc.,** 742 F.2d 334, 339 (7th Cir.1984). This position is consistent with decisions from other jurisdictions on this very issue. See, for example, **Sanford v. Castleton Health Care Center, LLC,** 813 N.E.2d 411 (Ind. App. Ct. 2004) right to jury may be waived in a nursing home contract by agreement of parties; **Bedford Health Properties, LLC v. Davis,** 2008 WL 5220594 (Miss. Ct. App. 2008) admission agreement did not alter the patient's legal rights in providing for a mutually agreed-upon forum for the parties to litigate their claims; and **Philpot v. Tennessee Health Management, Inc.,** 279 S.W.3d 573 (Tenn.Ct.App. 2007) appeal denied, agreement to arbitrate was not unconscionable even though there could have been a circumstance in which the resident, but not the nursing home, would have a claim subject to compelled arbitration.

B. West Virginia Code§ 16-5C-15(c) does not prohibit an agreement to arbitrate

Appellant also argues that arbitration provisions are prohibited in the nursing home context by West Virginia's nursing home act. This is also untrue. W.Va. Code §16-5C-1 et. seq. provides that nursing homes "shall be liable" for any right or benefit denied to its residents and that any waiver by a resident or his legal representative of the right to commence an action shall be null and void. W.Va. Code §§16-5C-1 and 16-5C-15 (c). This section refers to the right to bring an action. It does not govern the forum for the action. Appellant did not waive his right to commence an action. He simply agreed on where and how it would be adjudicated. Here, Appellant seeks money damages for alleged negligent care. That remedy is available in arbitration. While it is true that only a Court can order injunctive and declaratory relief, none is

sought here. The Legislature made a conscience effort to prohibit the waiver of certain rights and could have specifically prohibited the waiver of the right to a trial by a jury. It did not do so. There is no constitutional right to a jury trial for a civil dispute. If there were, no arbitration agreement relating to a civil matter could be enforceable. We know that is not the case in West Virginia or elsewhere. This action does not seek any relief that cannot be awarded by an arbitrator. Thus, West Virginia state law does not prohibit the parties from contractually agreeing to arbitrate

C. Arbitration under the statute is not against public policy

In West Virginia, there is nothing inherently unfair or inequitable about arbitration agreements. This Court has consistently lauded the merits of arbitration as a means to resolve conflict." See, **Adkins v. Labor Ready, Inc.,** 185 F.Supp.2d 628 (S.D.W.Va. 2001); **State ex. rel. Wells v. Matish**, 600 S.E.2d 583 (W.Va. 2004) per curium and **Board of Education of the County of Berkeley v. W. Harley Miller, Inc**., 236 S.E.2d 439 (1977).

West Virginia recognizes that The Supreme Court of the United States has interpreted the Federal Arbitration Act, **9 U.S.C. 1** ***et seq***., to be an express declaration by Congress favoring arbitration of disputes "notwithstanding any state substantive or procedural policies to the contrary." This Court recognized that the FAA embodies a 'strong federal public policy in favor of enforcing arbitration agreements' and is designed to 'ensure judicial enforcement of privately made agreements to arbitrate.' In short, this Court has held that arbitration provisions are binding and enforceable on all causes of action arising under a contract, where parties have agreed to arbitrate those terms. See, **Adkins**, 185 F.Supp.2d at 637) (citing **Dean Witter Reynolds, Inc. v. Byrd,** 470 U.S. 213, 217-219 (1985).

West Virginia accepts the widely held view that the FAA pre-empts state law invalidating or limiting arbitration provisions in contracts. Recently, this Court opined that the FAA is an express declaration by the Congress favoring arbitration of disputes and found there is " 'nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law' and that the 'Congress intended to foreclose state legislative attempt to undercut the enforceability of arbitration agreement.'" See, **State of West Virginia ex rel. Clites, v. Honorable Russell Clawges**, 685 S.E.2d 693, 698 (W.VA. 2009) citing **Moses H. Cone Memorial Hospital v. Mercury Construction Corporation**, 460 U.S. 1, 24, 103 S.Ct. 927 (1983), **Southland Corporation v. Keating**, 465 U.S. 1,11,16, 104 S.CT. 852 (1984) and **Perry v. Thomas,** 482 U.S. 483, 107 S.Ct. 2520 (1987) and the recent case of **Preston v. Ferrer**, 128 S.Ct. 978, 987 (2008) ("[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.").

West Virginia's position is clear: a plaintiff may assert any claim arising under a West Virginia statute and still agree to arbitrate that claim since "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." See, **Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.**, 473 U.S. 614, 628, 105 S.ct. 3346 (1985) cited by **Clawges**, p. 699.

Appellant, however, argues that in West Virginia, public policy protects nursing home residents from arbitration agreements when statutes provide for such actions to be brought in a court of law. Appellant tries to circumvent FAA preemption by arguing that the restriction on the patient's "right to commence an action" is a general public policy that is prohibited in all

nursing home acts. In support of this argument, Appellant relies heavily on an Illinois statue and the case of **Carter v. SSC Odin Operating Company, LLC**, 885 N.E.2d 1204 (Ill. Ct. App. 2008)(appeal denied). **Carter** is distinguishable because, unlike the West Virginia Nursing Home Act, the Illinois Nursing Home Care Act specifically prohibits any waiver of the right to a jury trial. More importantly, The Second District of the Ill. Ct. of Appeals quickly rejected **Carter** for the very reasons Marmet urges here. See, **Fosler v. Midwest Care Center II, Inc.**, 391 Ill.App.3d 397, 405, 911 N.E.2d 1003, 1010 (2009)(Appeal dismissed).[7] The **Fosler** court considered the Illinois Nursing Home statue and its preemption by the FAA. In finding the state law could not be applied to invalidate arbitration agreements without contravening the FAA, **Fosler** concluded that when the FAA conflicts with a state law requiring litigants be provided a judicial forum for resolving disputes, the Supremacy clause requires the state statute must "give way" to arbitration. **Fosler**, at 1012, citing **Perry** at 491. In the analysis, **Fosler** observed that the state statute did not apply to contracts in general, but to **specific** contracts involving nursing home care. This kept it from being a general contract defense and would make Illinois public policy favoring arbitration in general incongruent with the Illinois statute providing nursing home residents a specific judicial forum of a trial by jury. In rejecting **Carter,** the **Fosler** court opined "Because public policy informs all state statutes to some degree, one could cite **Carter** for the absurd proposition that any state statute attempting to rewrite a contract provision regarding dispute resolution is a 'legitimate state law contract defense of a violation of public policy' and, therefore, is not preempted [by the FAA.] Under such interpretation, one could hardly imagine a situation where ... the FAA ever *would* preempt a state law that addressed a

[7] The **Fosler** court opined that **Carter** misapplied the Supreme Court case of **Perry v. Thomas,** 482 U.S. 483, 107 S. Ct. 2520 (1987) and "[u]ntil the Supreme Court is persuaded that a state statue that manifests a public policy in favor of a judicial forum is a general defense to contract enforceability for the purposes of the FAA," Illinois is "compelled to follow **Perry** and reject **Carter**." **Fosler**, p. 1012.

party's ability to agree on the method of dispute resolution." See, **Fosler, citing Carter,** 911 N.E.2d 1013.

This view is consistent with the one held by this Court which recognizes that the FAA preempts state law that would invalidate the enforceability of arbitration agreements. This Court has recently found arbitration agreements are valid and enforceable, as a matter of federal law except "upon such grounds that exist in law or in equity for the revocation of *any* contract. 9 U.S.C. § 2. [Emphasis in original text]." **Clawges,** p. 699. Moreover, West Virginia recognizes that state statutes cannot, in effect, prohibit arbitration.

> A court may not then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot. See, Clawges, p. 699, citing **Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,** 460 U.S. 1,23 (1983).

West Virginia's view on this issue is clearly in line with **Fosler.**

Appellant's assertion that Oklahoma prohibits arbitration agreements in nursing home contracts is also misleading. In 2008, the U.S. District Court for the Northern District of Oklahoma considered the Oklahoma Nursing Home Care Act and the FAA. The District Court rejected the rational of **Bruner v. Timberlane Manor Limited Partnership.,** 155 P.3d 16 (Ok. 2006) and instead found that the FAA preempted Oklahoma's prohibition of arbitration agreements in specific types of contracts-those involving nursing home care. See, **Rainbow Health Care Center, Inc., v. Crutcher,** 2008 WL 268321, p.2 and 8. (N.D. Okla.)(not reported). [8]

[8] The Court in **Rainbow** specifically addressed the **Bruner** decision but could not reach "a similar conclusion." **Rainbow,** p. 6. Interestingly, the **Rainbow** decision was also cited as support in **Fosler,** p.1014.

Finally, the California and Florida cases cited by Appellant do not support his argument. In the California case, the issue was whether a cause of action under the California Patient Bill of Rights survived the death of the patient. If so, then the specific language in the arbitration agreement expressly stating that the patient **did not** waive her right to bring a lawsuit in court for violations under the California's Patient's Bill of Rights, applied to claims by her estate. In both Florida cases, the arbitration provisions in nursing home contracts were found void because they dictated the use of a "clear and convincing" standard for the award of damages. In fact, both States have recognized and upheld the right to arbitrate in nursing home contracts. See, **Slusser ex rel. Slusser v. Life Care Centers of America, Inc.**, 977 So. 2d 662 (Fla. Dist. Ct. App. 4thDist. 2008) where the court held that an arbitration agreement executed by a nursing home resident was not unconscionable simply because it waived the resident's access to the courts to resolve claims under Florida Nursing Home Act; **Consolidated Resources Healthcare Fund I, Ltd. V. Fenelus**, 853 So.2d 500 (Fla. Dist. Ct. App. 4th Dist 2003) arbitration clause not unconscionable even though plaintiff did not read it; **Coker v Health Care and Retirement Corp.**, 927 So.2d 252 (Fla. Dist. Ct. App. 2d Dist 2006) arbitration agreement not unconscionable despite contention that no one explained to plaintiff what she was signing; **Garrison v. Superior Ct.,** 132 Cal. App. 4th 253 (Cal. Ct. App. 2005) arbitration agreement enforceable against legal guardian; and **Hogan v. Country Villa Health Svcs.,** 148 Cal. App. 4th 259 (Cal. Ct. App. 2007).[9]

[9] In his brief, Appellant also refers to the New Jersey statute expressly prohibiting the waiver of the right to trial in nursing home contracts, but cites no case law in support thereof. Both the 2nd Circuit and New Jersey Superior Court have ruled on the issue of preemption. Applying **Southland** and **Perry**, the Courts found the FAA preempted the New Jersey Franchise Practices Act where it conflicted with the pro-arbitration policy of the FAA. See, **Doctor's Assc., Inc. v. Hamilton,** 150 F3d. 157 (2nd Cir. 1998) and **B&S Limited, Inc. v. Elephant & Castle Int., Inc.**, 906 A2d 511 (N.J. Super. 2006) .

Finally, other jurisdictions have also upheld arbitration provisions in nursing home contracts. See for example, **Owens v. Coosa Valley Health Care, Inc.**, 890 So. 2d 983 (Alabama 2004) and **Briarcliff Nursing Home, Inc. v. Turcotte**, 894 So. 2d 661 (Alabama 2004); **Mathews v. Life Care Ctrs. Of America, Inc.**, 177 P.3d 867 (Ariz. Ct. App. 2008); **Moffett v. Life Care Centers Of America, Inc.,** 2008 WL 2053067 (Colo. Ct. App. May 15, 2008); **Northport Health Services of Arkansas, LLC v. Robinson**, 2009 WL 140983 (W.D. Ark.); **Triad Health Management of Georgia, III, LLC v. Johnson**, 679 S.E.2d 785 (Ga. 2009); **Sanford v. Castleton Health Care Center, LLC,** 813 N.E.2d 411 (Indiana 2004) rehearing denied, 2004; **Miller v. Cotter**, 671 N.E. 2d 537 (Mass. 2007); **Community Care Center of Vicksburg, LLC v. Mason**, 966 So. 2d 220 (Ct. of App. Mississippi 2007); **Raper v. Oliver House, LLC,** 637 S.E.2d 551 (N.C. App. 2006); **Hayes v. The Oakridge Home**, 908 N.E. 2d 408 (Ohio 2009); **Mannion v. Manor Care Inc.,** 2006 WL 6012873 (Pa.Com.Pl.); **Philpot v. Tennessee Health Management, Inc.**, 279 S.W.3d 573 (Tenn. Ct.App. 2007), appeal denied; **Estate of Eckstein ex rel. Luckey v. Life Care Centers of America**, Inc., 623 F.Supp.2d 1235 (E.D. Wash. 2009). This list of cases contradicts Appellant's assertion that there is "a growing trend in other states" to uphold the denial of arbitration provisions in nursing home contracts[10]. It also helps explain why Appellant spends so much time trying to qualify his claim as an exception to the preemption dictates of the FAA.[11] Those efforts also fail.

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[10] The Amicus brief argues that the FAA does not govern here because the claims do not arise from interstate activity. The authorities cited however have been rejected by the same jurisdiction or are simply not applicable here. See, for example, **Rainbow Health Care Center, Inc., v. Crutcher,** 2008 WL 268321, p.2 and 8. (N.D. Okla.)(not published), rejecting **Bruner v. Timberlane Manor**, 155 P.3d 16 (Okla. 2006). See, also, **Owens v. Coosa Valley Health Care, Inc.** 890 So2d 983 (S.C. Alabama 2004), **McGuffey Health and Rehabilitation Center v. Gibson**, 864 So2d 1061 (S.C. Alabama 2003) and **Triad Health Management of Georgia, III, LLC v. Johnson**, 679 S.E.2d 785 (Ct. of App. Georgia 2009), (finding contract between nursing home and patient involves interstate commerce subject to FAA preemption.) For the FAA to apply, the contract must have only the slightest nexus to interstate commerce as broadly construed. This is not a rigorous inquiry. Healthcare is such an activity. See, **The Citizens**

D. Parties may arbitrate in accordance with State and Federal Procedures

The Appellant asserts that the Agreement is unenforceable because the arbitration organization mentioned no longer conducts this type of arbitration. This is simply not true. When contacted, the AAA indicated that it would accept this matter for arbitration if a court ordered the parties to arbitrate. See, **Owens v. National Health Corporation**, 263 S.W.3d 876 (Tenn. 2007). Additionally, even assuming the AAA is not available to arbitrate the dispute here, (which it is) Appellant's argument ignores the language of the arbitration provision. The Agreement **does not** require a specific arbitrator. Rather, it mandates only the specific rules to be applied by the arbitral forum. Disputes are submitted to binding arbitration "in accordance with *Commercial Arbitration Rules* of the [AAA] then in effect." Interestingly, Appellant's cited legal authority on this point actually supports Marmet's position. In **Carideo,** the court found that "Where the arbitration clause selects merely the rules of a specific arbitral fourm, as opposed to the fourm itself, and another arbitral forum could apply those rules, the unavailability of the

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Bank v. Alafabco, Inc. 539 U.S. 52, 123, S.Ct. 2037 (2003) and **Summit Health, Ltd. v. Pinhas,** 500 U.S. 322, 111 S.Ct. 1842 (1991) wherein hospitals purchase of out of State medical supplies and acceptance of Medicare/Medicaid establish interstate commerce. Here, Mr. Brown was a Medicare patient. His care involved the use of supplies, equipment, food and care, some of which was purchased from out of state suppliers and used by the Marmet staff. This is enough to find that the contract between Marmet and Mr. Brown involved interstate commerce. See **Pinhas**, 500 U.S. 322, 329, and see, **Dole v. Odd Fellows Home Endowment Board**, 912 F.2d 689, 694 (4th Cir. 1990),**Triad Health Management of Georgia v. Johnson,** 679 S.E.2d 785 (Ga. 2009), **Trinity Mission of Clinton, LLC v. Barber,** 988 So.2d 910 (Miss. 2007), **Miller v. Cotter**, 863 N.E.2d 537 (Mass. 2007), **Oesterle, v. Atria Management Co., LLC**, 2009 WL 2043492 (D.Kan.), and **Bales v. Arbor Manor**, 2008 WL 2660366 (D.Neb.)(not reported).

[11] Appellant's argument that Marmet had a fiduciary duty to Mr. Brown which somehow triggers a different standard regarding the enforceability of the arbitration clause is one such failed effort. First, there is no breach of any duty here, let alone a fiduciary one. Appellant, not Gordy Brown, signed the Agreement. Appellant was competent to do so. He did so voluntarily **after** Marmet explained it to him, including the arbitration clause. It is enforceable. Second, West Virginia has not held that a nursing home has a fiduciary duty to a resident. Third, even if West Virginia did so, it would be irrelevant to the issue before the Court here, which is whether a voluntarily signed arbitration clause in a nursing home admissions agreement is enforceable. It is.

implicitly intended arbitral forum will not require the court to condemn the arbitration clause." **Carideo v. Dell, Inc.**, 2009 WL 3485933 (W.D. Wash.)(Slip copy).

Finally, Appellant ignores that the Federal Arbitration Act provides for instances in which an arbitrator specified in the arbitration agreement is unavailable to conduct the arbitration. So does State law. See 9 U.S.C. § 5 (1999) and West Virginia Code §55-10-1. See for example, **Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc.**, 623 F. Supp2d 1235 (E.D. Wash. 2009) where under state and federal law, the unavailability of the AAA did not render the arbitration agreement unenforceable and See, **Owens**, p. 885-886.

E. The Appellees did not waive the right to arbitrate.

Appellant argues that Appellees have "substantially utilized the litigation machinery..." and thus waived their right to arbitration. Neither fact nor law supports this argument. Arbitration should be asserted in an Answer under W.Va. R. Civ. P. 8(c). Marmet and Sutphin invoked all defenses available under Rule 8(c) in their Answer. Canoe Hollow never answered the Amended Complaint because it filed a Motion to Dismiss, which the Circuit Court granted. Canoe Hollow never participated in any discovery. Marmet and Sutphin did so to comply with the Court's Scheduling Order and to obtain evidence necessary to compel arbitration. Appellant suggests that Appellees should not have engaged in discovery or otherwise complied with the Court's Scheduling Order. This argument is meritless. Neither Marmet nor Sutphin has any discretion or authority to ignore a Court Order. The emptiness of Appellant's argument here is made more apparent when one considers that Appellant, at the end of his brief below, spent four pages trying to convince the Circuit Court to stay ruling on Appellees Motion to compel arbitration until completion of discovery and depositions. Moreover, West Virginia authority, which Appellant concedes is controlling here, requires Appellant to demonstrate **actual**

prejudice by any delay in Appellees substantially utilizing the litigation machinery seeking arbitration. **American Reliable Ins. v. Stillwell**, 212 F. Supp. 2d 621 (N.D. W. Va. 2002. (Appellant's Brief at 12.) Appellant offers none.

F. Discovery on the arbitration issue was complete

It is not disputed that: Appellant was the legal guardian of Gordy Brown; Appellant signed the Agreement; Gordy Brown did not have the capacity to enter into a contract with Marmet (he possessed the intellect of a child); and in 2004, only Appellant had the legal authority to sign a binding contract to admit Gordy Brown to Marmet, or to conduct his affairs. Appellant testified about his knowledge of Marmet and the signing of the Agreement. Further, Appellant conducted discovery to which Marmet and Sutphin responded. If Appellant sought more information regarding the Agreement, he could have pursued it. He did not do so and should not be heard to complain about it now. There was ample, uncontroverted evidence to support the Circuit Court ruling, including the testimony of Appellant.

G. Canoe Hollow was properly dismissed

Appellant also complains that Canoe Hollow's Motion to Dismiss was improvidently granted. This argument is baseless. Appellant states that the Circuit Court had only the pleadings to consider on Canoe Hollow's Motion to Dismiss. This is wrong. In fact, the Circuit Court had, reviewed and questioned Appellant's counsel on the effect of the written lease between Canoe Hollow and Marmet, which was attached as an Exhibit to Canoe Hollow's Reply in support of its Motion to Dismiss. Appellant had no evidence to support a finding that Canoe Hollow could be liable for the alleged negligence of Marmet and Sutphin. The Court considered the evidence and properly found that Canoe Hollow: simply leased the property to Marmet; played no role in operations or resident care; and owed no legal duty to the Gordy Brown. Any search of the

public records regarding Canoe Hollow would have demonstrated it did not have any role in the operations at Marmet. In filing the claim against Canoe Hollow alleging it was liable for any negligent care to Gordy Brown, Appellant violated his Rule 11 obligations. (Separately, when confronted with the Lease and lack of evidence linking Canoe Hollow to the resident operations and care at Marmet, Appellant realized his allegations were baseless and offered to agree to the dismissal, if Canoe Hollow would agree that the dismissal was without prejudice and Appellant could, at any time before the litigation was final, re-institute proceedings against Canoe Hollow. Canoe Hollow declined the offer as it did not want or deserve to be in limbo and subject to suit indefinitely.) Canoe Hollow was properly dismissed.

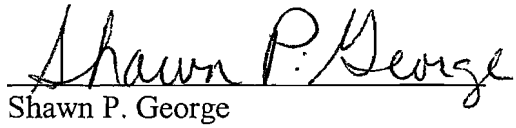
IV. CONCLUSION

For all the foregoing reasons and others of record, the Circuit Court correctly dismissed Canoe Hollow and ordered arbitration of Appellant's claims against Marmet and Sutphin. This Court should affirm.

Respectfully submitted,

MARMET HEALTH CARE CENTER, INC.
CANOE HOLLOW PROPERTIES, LLC AND
ROBIN SUTPHIN

By Counsel,



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

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

SUPREME COURT NO. 35494

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;

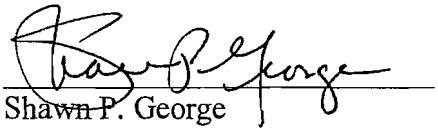
APPELLEES.

CERTIFICATE OF SERVICE

I, Shawn P. George, do hereby certify that I served the foregoing Response of Appellees Marmet Health Care Center, Inc., Canoe Hollow Properties, LLC and Robin Sutphin on counsel of record, regular U.S. Mail, this 7th day of May, 2010 as follows:

Michael J. Fuller, Jr., Esquire
McHugh Fuller Law Group, PLLC
97 Elias Whiddon Road
Hattiesburg, MS 39402

Harry G. Dietzler, Esquire
Hill, Peterson, Carper, Bee & Dietzler, P.L.L.C.
NorthGate Business Park
500 Tracy Way
Charleston, WV 25311-1261



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