IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPELLANT'S BRIEF
No. 35546

JEFFREY TAYLOR, as Representative of the Estate of LEO TAYLOR,

Appellant/Plaintiff

vs.

MHCC, INC f/k/a MARMET HEALTH CARE CENTER; CANOE HOLLOW PROPERTIES, LLC; GENESIS HEALTH CARE CORPORATION D/B/A MARMET HEALTH CARE CENTER; GLENMARK LIMITED LIABILITY COMPANY; GLENMARK ASSOCIATES, INC.; GLENMARK PROPERTIES, INC.; HELSTAT, INC.; GMA PARTNERSHIP HOLDING COMPANY, INC.; GMA – MADISON, INC.; GMA – BRIGHTWOOD, INC.; HORIZON ASSOCIATES, INC.; HORIZON MOBILE, INC.; HORIZON REHABILITATION, INC.; GENESIS ELDERCARE CORPORATION; GENESIS ELDERCARE STAFFING SERVICES, INC.; GENESIS ELDERCARE MANAGEMENT SERVICES, INC.; GENESIS ELDERCARE HOSPITALITY SERVICES, INC.; GENESIS ELDERCARE NETWORK SERVICES, INC.; GENESIS ELDERCARE REHABILITATION SERVICES, INC.; GENESIS ELDERCARE PHYSICIAN SERVICES, INC.; GENESIS HEALTH VENTURES OF WEST VIRGINIA, INC.; GENESIS HEALTH VENTURES OF WEST VIRGINIA, LP; FORMATION CAPITAL, INC.; FC-GEN ACQUISITION, INC.; GEN ACQUISITION CORPORATION; AND JER PARTNERS, LLC.,

Appellee/Defendants

Andrew L. Paternostro
Jeff D. Stewart
The Bell Law Firm, PLLC
Post Office Box 1723
Charleston, West Virginia 25326-1723
Telephone: (304) 345-1700

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PROCEEDING AND NATURE OF RULING BELOW

This is an appeal of a civil action brought by Appellant/Plaintiff, Jeffrey Taylor, as Personal Representative of the Estate of Leo Taylor (hereinafter "Appellant/Plaintiff" or "Mr. Taylor"), from an order entered by the Kanawha County Circuit Court granting Appellee/Defendant MHCC, Inc. f/k/a Marmet Health Care Center, Inc.'s (hereinafter "Appellee/Defendant" or "MHCC") Motion to Dismiss. Through its Motion, MHCC sought to dismiss Mr. Taylor's claims for personal injury, negligence and wrongful death claiming they were barred by the terms and conditions of a "Mandatory Arbitration" provision contained within a thirteen page "Admission Agreement." The Motion, which was included in Defendant's Answer to the Complaint, consisted of only one paragraph, containing three sentences and no citation of law. [See, Complaint and Motion to Dismiss and Answer of MHCC, Inc. F/K/A/ Marmet Health Care Center.]

In response to Defendant's Motion to Dismiss, Plaintiff filed his Response to the Motion setting forth arguments as to why the Motion should be denied with substantial citation to supporting statutes and case law, including a recent decision made by the same Circuit Court on substantially similar facts where the Motion to Dismiss was correctly denied. [See, Plaintiff's Response to MHCC, Inc.'s Motion to Dismiss]. [See also, Order entered by Judge Charles King, Jr., in Burgess v. Beverly Enterprises-West Virginia, Inc, et al., 07-C-2165 (Kan. Co. W.Va. 2008) attached as Exhibit 2 to Plaintiff's Motion for Reconsideration of the Court's Ruling of September 23, 2009].

On August 26, 2009, at approximately 2:30 p.m., just over twenty-four hours before the scheduled hearing and in violation of West Virginia Trial Court Rule 6(c), Defendant served Plaintiff with its Reply. In contrast to its initial Motion, the Reply Brief set forth Defendant's

arguments, many of which were either (a) entirely new arguments not previously raised in its Motion to Dismiss or (b) supported by case law from foreign jurisdictions with no mention of West Virginia law. Further, much of the cited law was not on point to the arguments raised by Plaintiff.

Oral argument on the Motion to Dismiss occurred the following day, August 27, 2009, at which time the Defendant made several additional assertions of fact to the Court, which were false and entirely unsupported by the record, including claiming that (1) the fee required to initiate arbitration is the same as the filing fees paid to the Court (when, in fact, the fee required to initiate arbitration is significantly higher than Court filing fees), (2) the restraints imposed by the Arbitration Clause were equally restrictive on both parties (the Arbitration Agreement actually permits the Defendant to initiate suit in a Court of law for certain matters, but prohibits the Plaintiff from ever doing so), (3) a resident could have been admitted to the facility without agreeing to the Arbitration clause (the Arbitration Clause makes clear that it is a mandatory requirement for admission and gives no opportunity to "opt out" as is done elsewhere in the Admissions Agreement), (4) a resident was entitled to leave MHCC whereby ending its agreement with MHCC with a mere seven (7) days notice (when in fact the Mandatory Arbitration provision states that it survives termination of the Admission Agreement).

Following argument, the Court directed the parties to submit proposed findings of fact and conclusions of law, to which the parties complied. [See, Findings of Fact and Conclusions of Law of Defendant MHCC, Inc.] [See also Plaintiff's Proposed Order Denying Defendant's Motion to Dismiss attached as Exhibit D to Plaintiff's Motion to Reconsider.] The Plaintiff took this opportunity to set straight the factual inaccuracies and unsupported claims previously presented to the Court by MHCC. Without regard to the clear error it was about to commit, on

September 23, 2009, the Court entered the Defendant's Findings of Fact and Conclusions of Law **verbatim**, including typographical and formatting errors, and accepted as fact several of the unsupported assertions made by MHCC. [See Court Order, filed September 29, 2009] No reference was made to the proposed findings and conclusions submitted by Plaintiff, despite the fact that Plaintiff highlighted the various incorrect and factually unsupported assertions made by the Defendant in its Argument before the Court.

Beyond the Circuit Court's errors in adopting Defendant's factually inaccurate findings, the Circuit Court's Order was also contrary to the laws created by the West Virginia Legislature and the laws governing contract formation and enforceability as set forth by West Virginia Courts. The Circuit Court ignored Plaintiff's arguments, which arguments were wholly supported by numerous West Virginia Supreme Court decisions, as well as a ruling from the same Circuit Court in Burgess, *supra*, and granted MHCC's Motion, **without explanation**. The Order was filed with the Circuit Clerk on September 29, 2009. An attested copy was prepared by the Circuit Clerk on October 1, 2009, and the attested copy was mailed to and received by Appellant's counsel on October 5, 2009.

The crucial findings of fact and conclusions of law adopted by the Court and set forth as its Order are clearly erroneous and unsupported by West Virginia law or the facts on the record. Appellant now seeks relief and asks this Supreme Court to overturn the lower Court's ruling.

STATEMENT OF FACTS

On February 8, 2008, Leo Taylor was admitted to Defendant's health care facility by his wife, Ellen Taylor. As a licensed nursing home, MHCC was subject to the provisions of W.Va. Code §§ 16-5C-1 *et seq.* and W.Va. C.S.R. §§ 64-13 *et seq.*, which provide the statutory and regulatory foundations for long-term nursing facilities. During his residency, the facility failed

to meet the applicable standards of care. As a result, Mr. Taylor suffered from numerous injuries and violations of his rights as a nursing home resident, including falls, pressure ulcers, dehydration and other injuries. Mr. Taylor ultimately died as a result of MHCC's acts and omissions.

Plaintiff, Jeffrey Taylor (Leo Taylor's son), was appointed as Personal Representative of Leo Taylor's estate and subsequently brought the instant action by filing his Complaint with the Kanawha County Circuit Court on January 23, 2009. Defendant MHCC filed its "Motion to Dismiss and Answer" on May 1, 2009. The Motion stated, **in its entirety**:

> Plaintiff's decedent agreed to be subject to the terms and conditions of an Admissions Agreement with Marmet Health Care Center, Inc. Under that Admissions Agreement, any claim Plaintiff's decedent had or has against MHCC is subject to binding, final arbitration. This action is therefore precluded and must be dismissed as to MHCC.

A copy of a document purported to be the Admission Agreement was provided by Defendant's counsel. It consisted of thirteen pages of closely spaced type in small font, with blank spaces to fill in the parties' names or to check specific options. [See, Exhibit 1, to Plaintiff's Response to Defendant, MHCC, Inc.'s Motion to Dismiss.] Page 12 of the Agreement contained a paragraph labeled "Mandatory Arbitration" (hereinafter, "Arbitration Clause"), which stated, in full:

> **MANDATORY ARBITRATION:**
> **Except for Facility's efforts to collect monies due from Resident and Facility's option to discharge Resident for such failure, which the parties agree may be heard by a Court of competent jurisdiction in the city or county where the Facility is located, all disputes and disagreements between Facility and Resident (or their respective successors, assigns or representatives) arising out of the enforcement or interpretation of this Agreement or related hereto or the services provided by Facility hereunder including, without limitation, allegations by Resident of neglect, abuse or negligence which the Resident and Facility are able to resolve**

> **between themselves shall be submitted to binding arbitration in accordance with the *Commercial Arbitration Rules* of the American Arbitration Association then in effect. The party filing the arbitration (making a claim) shall be solely responsible for payment of the initial arbitration filing fee in accordance with the Rules of the American Arbitration Association fee schedules. The arbitrator or arbitrators shall be entitled to award recovery of the arbitration fees, attorney's fees and out-of-pocket expenses incurred by the prevailing party up to a maximum award of $5000. The arbitrator shall also have the authority to issue interlocutory and final injunctive relief. The arbitrator's decision shall be binding on the parties and conclusive as to the issues addressed, and may be entered as a judgment in a court of competent jurisdiction and not subject to further attack or appeal except in instances of fraud, coercion or manifest error. During the pendency of any arbitration proceeding, Facility and Resident shall continue to perform their respective obligations under this Agreement subject, however, to the right of either part to terminate this Agreement as established herein. The obligation of Facility and Resident to arbitrate their disputes or disagreements shall survive termination of this Agreement.**

As is apparent from the title of the provision itself —MANDATORY ARBITRATION— the signing of the provision was a prerequisite to admission. There is no evidence on the record to the contrary. As is also evident from a plain letter reading of the Arbitration Clause, it does not allow for the recovery of punitive damages, it requires Plaintiff to pay an initial arbitration filing fee (which we know from the AAA's Standard Fee Schedule, *infra*, is substantially more expensive than the $260 Circuit Court Filing Fee), and requires Plaintiff, if he loses, to pay arbitration fees, attorney's fees and out-of pocket expenses incurred. Additionally, and contrary to the misrepresentations made by Defendant's Counsel, there exists no opt-out language in the Arbitration Clause allowing the resident or his legal representative to reconsider his or her alleged consent to arbitration (although such opt-outs do occur elsewhere in the Agreement, making it clear the inability to opt-out of the Arbitration Clause was intentional by its drafters).

Finally, although Leo Taylor and his representative had a right to seek "discharge" from the facility by giving seven (7) days written notice (See page 10 of the Admission Agreement), contrary to Defendant's misrepresentation to the Court, this provision did not operate to cancel or invalidate the Arbitration Clause (contained on page 13 of the Admission Agreement) as the Arbitration Clause states: "(t)he obligation of Facility and Resident to arbitrate their disputes or disagreements shall survive termination of this Agreement." (See page 13 of the Admission Agreement).

The most unconscionable term of the Agreement, however, is found in the Arbitration Clause's very first line, which reserves MHCC's right to file suit in a Court of law for the only two foreseeable reasons MHCC would be filing suit, collection of money owed and eviction proceedings, while requiring Plaintiff to submit **all** disputes with the facility to binding arbitration, at his initial expense. In this case, Ellen Taylor, an elderly woman, was not represented by counsel at the time of her husband's admission to Defendant's nursing home. Furthermore, her husband's admission to the facility was conditioned upon her signing the Admission Agreement. There is no evidence that the Arbitration Clause was ever explained to Ellen Taylor advising her that her agreement to the Mandatory Arbitration provision would eliminate rights provided to her husband by applicable state law, including the right to ask for and receive punitive damages or the right to a jury trial. To the contrary, the final section of the Admission Agreement, found at pages 12-13 of the Agreement, contains a check-list to be completed by the resident or his representative confirming that, purportedly, the most important terms of the Agreement were explained to and reviewed with the resident or his legal representative. This check-list contains reference to every essential term of the Agreement, down to and including "Have received information relating to beauty, and barber services." The check-

list DOES NOT contain an enumerated entry regarding review of the Arbitration Clause or explanation thereof or an understanding of the waiver of rights that it entails.

In adopting a verbatim copy of the Defendants findings of facts and conclusions as its "Order", the Circuit Court (1) ignored the valid arguments made by Plaintiff, (2) failed to review the record and discover that the Defendant's purported "facts" were unsupported by the record and in many instances, completely contradicted by it, (3) ignored the prevailing common law of West Virginia with regards to contract formation and enforcement, and finally, (5) ignored the intent of the West Virginia Legislature in creating § 16-5C-15(c) of the West Virginia Nursing Home Act, which makes ANY waiver by a nursing home resident or their legal representative of the right to commence an action against a nursing home null and void. Beyond that, and as will be briefed below, both this Honorable Court and the US Supreme Court have given due attention to the verbatim adoption of the prevailing party's findings of fact and conclusions of law and do not look favorably upon it.

In short, more than sufficient evidence exists in this case to overturn the Order of the Circuit Court, which is based upon unsupported statements of "fact" and conclusions of law which are contrary to West Virginia law.

ASSIGNMENT OF ERROR

1. The Circuit Court committed reversible error when it adopted as its Order a verbatim copy of MHCC's findings of fact and conclusions of law, with 'Fact' paragraphs 9, 12, 13 and 14 of the Order supported by nothing more than Defense Counsel's misrepresentations at oral argument, and 'Conclusion' paragraphs 2, 3, 4, 5, 6 and 11 being contrary to law, or an incorrect application of it.

Erred Findings of Fact

a. The Circuit Court erred in finding that the mandatory arbitration clause was mutual, when a plain letter reading of the Arbitration Clause makes clear that while it eviscerated any and all rights of a nursing home resident or their representative to bring suit in a court of law, the Appellee reserved for itself the right to bring action in a court of law for the two reasons it would be most likely to institute litigation: collection of money or eviction of a resident. (See Court's Order, Finding of Fact, paragraph 9)

b. The Circuit Court erred in finding that Ellen Taylor was "appreciative of the care and attention she received and wanted her husband to be a resident" at Appellee's facility. The record is void of any proof to support this finding, or proof that Ellen Taylor had any other choice of facility, and the finding is otherwise irrelevant in determining whether a valid and enforceable contract was formed. (See Court's Order, Finding of Fact, paragraph 12)

c. The Circuit Court erred in finding that Ellen Taylor did not have to agree to the mandatory arbitration provision in order to admit her husband to Appellee's facility where the plain language of the arbitration clause makes clear it was mandatory on all residents and their assigns. (See Court's Order, Finding of Fact, paragraph 13)

d. The Circuit Court erred in finding that Ellen Taylor "chose" to admit her husband into the Appellee's facility, where the record is void of any proof that Mrs. Taylor had any other viable option, and the finding is otherwise irrelevant. (See Court's Order, Finding of Fact, paragraph 14)

Erred Conclusions of Law

e. In improperly adopting a verbatim copy of MHCC's findings of fact and conclusions of law as its Order, the Circuit Court erred by misstating Plaintiff's argument regarding WV Code § 16-5C-1 (the "Nursing Home Act") (see Conclusions of Law, paragraph 3) and thereby further erred in misapplying the law to a non-existent argument. As the record makes very clear, Plaintiff's argument since the inception of this case was/is that the Nursing Home Act prohibits **any waiver** by a resident or his or her legal representative of the right to commence an action, which is a very different argument than the one misstated by the Court in paragraph 3 of its Conclusions of Law.

f. In improperly adopting a verbatim copy of MHCC's findings of fact and conclusions of law as its Order, the Circuit Court erred in setting forth Conclusion of Law, paragraph 5, which makes a conclusory statement unsupported by citation to the record or prevailing law. Furthermore, as exemplified by this appeal, Appellant's right to bring suit in a court of law has been waived, which is exactly the conduct the legislature, in drafting WV Code § 16-5C-1, sought to prohibit.

g. In improperly adopting a verbatim copy of MHCC's findings of fact and conclusions of law as its Order, the Circuit Court erred by misstating Appellant's argument in paragraph 11 of its Conclusions of Law as, "Plaintiff implies the arbitration provision only applies to them and this makes it unconscionable." Even a cursory review of the record before this Court proves that Plaintiff/Appellant NEVER held this extreme position. The Court again erred in concluding, "under the Arbitration Agreement both parties waived their right to

have ANY claim regarding Leo Taylor's case decided by a court of law..." This is absolutely untrue! A plain letter reading of the Mandatory Arbitration agreement makes clear that had the Taylor family decided to withhold payment to MHCC for its services upon discovering the mistreatment, or had MHCC decided to evict Mr. Taylor thereupon, MHCC reserved for itself the right to bring suit on these grounds in a court of law. Finally, the Court erred by relying on a factually inapposite case (See Miller) and failing to apply the factually relevant case (See Arnold v. United Co. Lending Corp., 204 W. Va. 229, 511 S.E.2d 864) which ruled in Appellant's favor.

2. The Circuit Court found it legally and factually insignificant to rule upon, give explanation of or even make reference to the issues of contractual law before it. The Court provided neither facts nor conclusions which revealed its analysis of the facts of THIS CASE, namely whether the mandatory arbitration clause, as it operated in THIS CASE, was adhesive, unconscionable, wrought with gross inadequacy regarding the bargaining positions of the parties and whether it believed Mrs. Taylor intended to be bound by the arbitration clause. Furthermore, the Circuit Court failed to consider or make mention of even ONE case from the large body of West Virginia law in which a Court denied enforcement of an arbitration agreement based upon facts similar to those herein.

3. The Circuit Court erred in failing to analyze whether the Nursing Home Act's requirement of a private right of action is contravened by the effect of the Arbitration Clause under the present facts.

STANDARD OF REVIEW

When a trial court grants a motion to dismiss, a reviewing court's standard of review is de novo. Antolini v. W. Va. Div. of Natural Res., 220 W. Va. 255, 257, 647 S.E.2d 535, 537 (2007) (*citing*, Syllabus Point 1, Lipscomb v. Tucker County Comm'n, 197 W.Va. 84, 475 S.E.2d 84 (1996) ("Appellate review of a circuit court's order granting a motion to dismiss an appeal from a decision of a county commission is de novo."); Syllabus Point 2, State *ex rel.* McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo.")). Generally, this Court reviews findings of fact for clear error and conclusions of law *de novo*. State of West Virginia *ex rel.* Thornton Cooper, 196 W. Va. 208, 213, 470 S.E.2d 162, 167 (1996). However, ostensible "findings of fact," which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*. *Id.* This includes "mixed questions of law and fact, like pure questions of law, or those involving statutory interpretations." *Id quoting* Note 5 of Appalachian Power Co. v. State Tax Department of West Virginia 195 W.Va. 573, 466 S.E.2d 424 (1995).

Should the Court choose to employ a 'clear error' or 'clearly erroneous' standard as set forth under West Virginia/Federal Rule of Civil Procedure 52(a) for reviewing findings of fact, the United States Supreme Court had provided a working definition to be employed by this Court: "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definitive and firm conviction that a mistake has been committed." Anderson v. City of Beszsemer City, North Carolina, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985).

LAW

I. THE ORDER OF THE CIRCUIT COURT DISMISSING THIS ACTION WAS ERRONEOUS- THE CIRCUIT COURT ERRED BY ADOPTING A VERBATIM COPY OF THE DEFENDANT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH CONTAINED INCORRECT "FACTS" THAT ARE CONTRADICTED BY THE RECORD AND CONCLUSIONS OF LAW WHICH WERE BASED ON MISSTATEMENTS OF FACT AND CONTRARY TO THE LAWS OF WEST VIRGINIA

This Court has often stated that "verbatim adoption of proposed findings and conclusions of law prepared by one party is not the preferred practice" and that "findings of fact should represent the trial judge's own determination." See State *ex rel.* Cooper, *supra*, *quoting* South Side Lumber Co. v. Stone Constr. Co., 151 W. Va. 439, 152 S.E.2d 721 (1967). The U.S. Supreme Court has even commented on this practice, in stating, "We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." See Anderson at 572, 1510.

By adopting a verbatim copy of MHCC's erred findings of fact and conclusions of law as its Order, the Circuit Court's ruling was clearly erroneous as the findings and conclusions were baseless and unfounded on anything contained in the record, or false and contradicted by reliable extrinsic evidence, including the Agreement at issue herein. The Court has committed reversible error by taking many of the statements made by Defendant's counsel at the hearing and adopting them as factual findings, despite them being bare, unsupported assertions without any factual basis in the record. Fact paragraphs 9, 12, 13 and 14 of the Defendant's proposed findings and conclusions filed on September 16, 2009, which doubles as the Court Order, are supported only by what Defense Counsel stated at oral argument, and Conclusion paragraphs 2, 4, 5, 6 and 11 are either contrary to law, or an incorrect application of it.

The most egregious of these errors is the Court's reliance on a misrepresentation made by Defendant to the Court at Oral Argument on August 27, 2009, regarding the costs involved in initiating Arbitration and the additional financial risks imposed by MHCC's Mandatory Arbitration Clause, which are significantly higher than those involved in filing suit in any Circuit Court of West Virginia [See Transcript of Marmet Health Care Center's Motion to Dismiss (pg 24, ln 14).] During Oral Argument, the Court took issue and concern with the difference in filing fees between arbitration and Court filing fees, stating it "make[s] a big difference." Counsel for the Defense falsely assured the Judge there was no difference in the fees, and the Court accepted that assurance as fact.

In truth, the initial filing fee for arbitration, which is due IN FULL at the time of filing, ranges from a fee of **$750** for claims up to $10,000, to a fee of **$10,200** for claims up to $10,000,000. Additionally, a 'Case Service Fee' is required to be paid prior to the first hearing, with such fees ranging from $200 up to $4,000 depending on the amount of the claim. [See 'Standard Fee Schedule' of the American Arbitration Association's Commercial Arbitration Rules, attached as Exhibit E to Plaintiff's Motion for Reconsideration] Even the smallest possible claim in front of an arbiter, as made MANDATORY by the Arbitration Clause at issue herein, would cost the resident or legal representative upwards of $1000 for the filing of a claim, as compared to the $260 filing fee required by the Circuit Courts of West Virginia.

The error lying herein is that the Court itself stated that a difference in fees would make a big difference in the ruling on this matter, but the Court did no research to determine the validity of MHCC's claim that the cost for arbitration is no different than the Court's filing fees, and instead adopted the Defendant's misstatement as fact. This was clear error on the part of the Court. Furthermore, the Appellee relies on the inapposite 1st Circuit case of Rosenberg v. Merrill

Lynch to support its contention that the costs associated with arbitration are not excessive, despite the Standard Fee schedule that proves otherwise. See Rosenberg v. Merrill Lynch, 170 F.3d 1 (1999). By way of background, which Appellee did not provide, Rosenberg was an employment discrimination case brought pursuant to the Federal Civil Rights Act of 1991, where the Appellate Court ruled in FAVOR of Plaintiff Rosenberg and upheld the lower Court's denial of the Motion to Compel arbitration against her. Despite the denial of arbitration which goes in Appellant's favor, the Rosenberg case is inapplicable inasmuch as objection to the arbitration clause was originally based on claims of "structural bias" in the NYSE arbitral forum. While the 1st Circuit disagreed with the District Court's reasons for denying the Motion to Compel, it ultimately agreed with its holding and arbitration was not ordered. Following this case, Merrill Lynch saw the error of its ways, and as noted by the 1st Cir. Court of Appeals, "Merrill Lynch abandoned its policy of requiring employees to agree to arbitrate employment discrimination claims." Id at 6.

Regarding the overarching Appeal, the high costs involved with initiating arbitration serve to prevent nursing home residents and their representatives from pursuing the claims preserved for them by the West Virginia Legislature under the Nursing Home Act, and the Arbitration Clause's violation of that right relegates it as null and void, being contrary to public policy.

The next factually inaccurate finding adopted by the Court in its Order concerned Ellen Taylor's subjective feelings towards MHCC- which is neither relevant nor contained anywhere within the record. There is absolutely nothing in the record to support the self-serving statement that Ellen Taylor "was appreciative of the care and attention she received and wanted her husband to be a resident." See, Court's Order at paragraph 12. By including this assertion and

giving it the imprimatur of the Court, the Court puts a significant spin on this case that put the facility in high regard while unfairly portraying the Plaintiff as unappreciative and ungrateful. The record is void of any such evidence, and therefore the Court's adoption of the same as "Fact" is a clear error.

Likewise, the Defendant's assertion that Mrs. Taylor "had the right to take Mr. Taylor to any facility she "chose," is again baseless in the record. See, Court's Order at paragraph 14. There is nothing in the record reflecting any "choice" beyond the fact that she did admit him to MHCC; the record is utterly devoid of the factual context surrounding the circumstances in which Mrs. Taylor had to take her husband to Defendant's nursing home facility.

The next crucial error in fact made by the Court in its Order is found in paragraph 13, which states that Mrs. Taylor "did not have to agree to the mandatory arbitration provision in order to secure the admission of Mr. Taylor to Marmet. Marmet would have admitted Leo Taylor even if Mrs. Taylor had refused to accept the mandatory arbitration provision." This is not only unsupported by any part of the record, it is false and **contradicted by the Admission Agreement itself**. The Admission Agreement contains several places for a resident or his representative to approve or disapprove of services; **the Arbitration Clause is not one of these**. In the Agreement, the resident has a right to accept or refuse outside dietary services or to have barber and cosmetology services provided. Wherever there is a choice to be made, there are appropriate places for the resident to check off and/or initial his refusal or consent. There is absolutely no similar accept/refuse option related to or anywhere near the Arbitration Clause. It is well established that without language to the contrary, the inclusion of certain items excludes all others. See Hensley *et al.* v. Erie Insurance Co., 168 W. Va. 172, 177, 283 S.E.2d 227, 230 (1981). This rule, although most frequently associated with the construction of statutes, also

applies to contracts. Id. (*citing* State *ex rel.* City of Charleston v. Hutchinson, 154 W. Va. 585, 176 S.E.2d 691 (1970); Harbert v. County Court of Harrison County, 129 W. Va. 54, 64, 39 S.E.2d 177, 186 (1946)).

It is telling that the Agreement contains numerous places where a resident can accept or decline provisions of the contract but that the Arbitration Clause **is not one**. Finally, there is no language in the Agreement whatsoever that informs the resident that the Mandatory Arbitration Clause is optional and not a precondition to admission. To the contrary, it is labeled in bold, capital letters "**MANDATORY ARBITRATION**," and is sandwiched between various other paragraphs of legalese.

In short, the factual finding contained in paragraph 13 of the Court's Order is not only unsupported by the record, it is clearly false. For the Circuit Court to have adopted such a finding, when the very contract at issue in this matter contradicts the finding, is a perfect example of the "clearly erroneous" standard set forth in Anderson, *supra*. As Hensley, *supra*, makes clear, it is for this Honorable Court to conclude that MHCC's exclusion of an opt-out provision or any reference to review of the Mandatory Arbitration provision to the Admission Agreement was intentional, again making paragraph 13 of the Court's findings of fact clearly erroneous.

II. THE ARBITRATION CLAUSE AT ISSUE HEREIN IS VOID UNDER WEST VIRGINIA LAW

A. BY ADOPTING A VERBATIM COPY OF THE DEFENDANT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AS ITS ORDER, THE COURT FAILED TO ADDRESS THE THRESHOLD QUESTION OF WHETHER A VALID CONTRACT HERE EXISTED UNDER WEST VIRGINIA LAW

In addition to the clearly erroneous findings of fact made by the Court in the present matter, there were also numerous erroneous conclusions and misapplications of the law. Before

a West Virginia Court can dismiss an action and compel arbitration, it must first answer the threshold question of whether there is a valid contract under West Virginia State law- this step was never taken by, nor spoken to by the Court. "In addressing a motion to compel arbitration in the context of a civil action, it is for the Court where the action is pending to decide in the first instance as a matter of law whether a **valid and enforceable** arbitration agreement exists between the parties." State *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 271-272 (W.Va. 2002)(*emphasis added*). The determination as to whether there is a valid arbitration contract under West Virginia law must be made before the Federal Arbitration Act (the "FAA") may be applied to the Arbitration Clause. In this regard, the West Virginia Supreme Court has stated: "The FAA ... promotes the enforcement of arbitration agreements involving interstate commerce . . . **but only when such agreements constitute valid contracts under state law**." State *ex rel.* Saylor v. Wilkes, 613 S.E.2d 914, 920 (W.Va. 2005)(*emphasis added*). See also Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996)("[G]enerally applicable contract defenses, such as fraud, duress, or **unconscionability**, may be applied to invalidate arbitration agreements without contravening [the FAA] ").

Moreover, despite Appellee's misplaced reliance on State ex rel. Cooper in its Response to Petition for Appeal (hereinafter "Appellee's Response to Petition for Appeal"), which stood for the proposition that the findings adopted by the circuit court accurately reflect the existing law and the record, the findings adopted by the lower court in this matter reflect neither the law nor the record. See State ex rel. Cooper v. Caperton, *supra.* As pointed out on several instances of easily verifiable fact, in adopting a verbatim copy of the Defendants Findings of Fact and Conclusions of Law, the Court also adopted all of the crucial errors contained therein. [See, MHCC, Inc., F/K/A Marmet Health Care Center's Response To Petition for Appeal, Page 3.]

B. THE ARBITRATION CLAUSE IS UNCONSCIONABLY ADHESIVE AS THERE WAS A GROSS INADEQUACY OF BARGAINING POSITION, NO BARGAINED FOR EXCHANGE AND IT FORCES A SUBSTANTIAL WAIVER OF APPELLANT'S RIGHTS, INCLUDING ACCESS TO THE COURTS, WHILE PRESERVING APPELLEE'S RIGHT TO A JUDICIAL FORUM, AND IS THEREFORE VOID AND UNENFORCEABLE

Whether a contract or contract term is unconscionable is a matter to be determined by the Court. As stated in Syl. Pt. 3 of Troy Min. Corp. v. Itmann Coal Co., 346 S.E.2d 749 (W.Va. 1986), "[u]nconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." Under West Virginia law, "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. 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." State *ex rel.* Saylor v. Wilkes, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005).

Furthermore, while the "bulk of the contracts signed in this country are contracts of adhesion," 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. In defining contracts of adhesion, the West Virginia Supreme Court of Appeals has stated as follows:

> 'Adhesion contracts' include all 'form contracts' submitted by one party on the basis of this or nothing."

State *ex rel.* Dunlap v. Berger, 211 W.Va. 549, 557. These contracts of adhesion are easily identifiable because, "in a contract of adhesion, a party's contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are

often understood in a vague way, if at all. Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds." St. *ex rel.* Dunlap at 557.

To that end, **a finding that a contract is unconscionable, be it adhesive or not, necessarily renders the contract unenforceable.** Miller v. Equifirst Corp., 2006 U.S. Dist. LEXIS 63816 (S.D. W.Va.) (*emphasis added*).

In Appellee's Petition for Appeal, it cites to and relies upon Board of Education v. Miller, Inc., a case previously ruled upon by this Honorable Court. See The Board of Education of the County of Berkeley v. Miller, Inc., 160 W. Va. 473; 236 S.E.2d 439 (1977). Miller involved an agreement between two sophisticated parties, one a substantial contractor and the other a governmental unit. As noted by this Court, "they were represented by counsel, or should have been...and "the dispute which arose under the contract [wa]s a standard rock excavation dispute which occurs with such predictable regularity that both developers and contractors routinely expect it." Id at 482, 445. As stated in Miller, "where the arbitration clause was bargained for and was intended by both parties to provide an effective alternative to litigation, then the courts should require both parties to proceed to arbitration." Id.

While this Court did properly find a bargained for agreement in Miller, it also provided useful guidance in the present matter through its new "rule" which defined the term 'bargained for.' Id at 486, 447. In defining the rule, this Court stated, "[t]he concurring opinion in the first Miller case, *supra*, spoke of the traditional contract of adhesion situation in which one party to a contract may be confronted by another party which holds either a monopolistic or oligopolistic position in some particular line of commerce. While this exception would appear to address the

most likely avenue for abuse in the law of arbitration, there are two more which should be specifically mentioned. Whenever a party can bring an arbitration clause within the unconscionability provisions of § 2-302 of the Uniform Commercial Code, W. Va. Code, 46-2-302 (1963), then that, too, would indicate that there was no meaningful bargaining with regard to the arbitration provision and should invalidate it. Furthermore, when arbitration is wholly inappropriate, given the nature of the contract, and could only have been intended to defeat just claims, the provision cannot be considered to have been bargained for." Id.

In the present matter, Ellen Taylor, elderly herself, made the difficult decision to seek the professional care of a nursing home for her ailing husband. She was neither an attorney, nor in the company of an attorney when she admitted her husband. She trusted in MHCC, a facility that holds itself out to the community as one to be trusted with loved ones, not to lead her astray. The facility indicated where Ellen Taylor was to sign the Agreement, as they do on a daily basis as a matter of procedure and in the normal course of business. There is no check-box or line contained within the Agreement that indicates Ellen Taylor had the option to avoid Mandatory Arbitration, or that the same was even explained to her. In fact, a review of the Agreement reveals the Arbitration Clause was sandwiched between other paragraphs of "legalese" such that no layman would be likely to read or understand its contents. There is no indication that Mrs. Taylor was given the opportunity to question or reflect upon any of the provisions contained within the preprinted form contract presented to her and marked for her signature by the facility. Furthermore, and based on the above quoted dicta of this Court in Miller, Appellant asserts that arbitration is wholly inappropriate, given the nature of this contract, and could only have been intended to defeat just claims. This Mandatory Arbitration provision cannot be considered to have been bargained for under the facts, and pursuant to the record, in this case.

Contrary to the cases cited to in the Court's Order, and those relied upon in Appellee's Response to Petition for Appeal, the present matter does not involve two sophisticated parties negotiating a bargained for exchange, and therefore must be held as unconscionable. By way of contrast, we have this Court's prior ruling in the matter of State *ex rel.* Wells, which the Appellee cites to as purportedly applicable to the matter at hand. See State *ex rel.* Wells v. Matish, 215 W. Va. 686; 600 S.E.2d 583 (2004). The case occurred upon the filing of a Writ of Prohibition to correct errors allegedly made by the lower court enforcing arbitration in favor of an employer news station, and against the Plaintiff, employee news anchor. In determining whether, based on contract law, the arbitration clause was part of a "bargained for" agreement, this Honorable Court explained that the contract involved in Wells was substantially different than the one in Dunlap (which did rule in our favor) because "it is clear that the terms were negotiated, and the agreement was customized to accommodate Mr. Wells' unique circumstances including his naval reserve duty. Furthermore, it cannot be said that Mr. Wells was an unsophisticated party who was forced to sign a form contract. Rather, Mr. Wells was an experienced anchor and reporter who, along with his wife, actively and jointly negotiated his employment agreement. Mr. Wells was given the opportunity to examine the agreement at home and modifications were made after his overnight review." Wells at 692, 589. This Court then stated, "[i]n light of these facts, we are unable to find that the employment contract at issue in this case was one of adhesion like that in Dunlap." Id.

The Arbitration Clause in this matter is obviously an adhesive contract, as evidenced by its preprinted, non-negotiated, take-it-or-leave-it language without any option for the resident to refuse an offensive provision. This Court has made clear that provisions in a contract of adhesion that, if applied, would impose unreasonably burdensome costs or would have a

substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless a court determines that exceptional circumstances exist that make the provisions conscionable. State *ex rel.* Dunlap at 566-567.

If this limitation was the only offensive portion of the Clause, it would, under Dunlap, be invalid and unenforceable. In the present matter, though, the level of unconscionability escalates. The Arbitration Clause first requires the disputing party (in this case the resident) to pay the costs of arbitrating the matter up front. It also attempts to bind all successors, assigns, or representative to its illegal provisions. And, perhaps most egregiously, it eviscerates the resident's rights to access to the Courts **while reserving for itself that very same right.** Pursuant to the one-sided Arbitration Clause drafted by it, MHCC is permitted to bring suit in a Court of law for the only two foreseeable actions MHCC would need to bring against a resident: (1) the collection of money; or (2) eviction of a resident. As to the residents, MHCC gives them no option other than arbitration. Even the right of appeal following arbitration is severely restricted. This is a grossly unfair and unjust provision, rendering the Arbitration Clause unconscionable. Accordingly, the Arbitration Clause in the present matter is oppressive, one-sided, imposes costs far beyond those required by the courts, limits the statutory rights of those bound by it and is unquestionably unconscionable and unenforceable under West Virginia law. The Circuit Court erred in either failing to make this determination, or making it in MHCC's favor.

Finally, by way of example, the Tennessee Court of Appeals, in ruling on a matter similar to the one herein, refused to enforce an arbitration clause in a nursing home admittance agreement against a plaintiff who could not and had not read the contract when the proponent of

the contract had taken it upon herself to explain the contract to him, rather than ask him to read it, and had neglected to mention that he was waiving his right to a jury trial under the contract. See Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731, 735. The proponent of the contract had not asked the plaintiff if he could read and did not read the contract to him verbatim; rather, she paraphrased the contents of the agreement. Id. at 732. Although the proponent of the contract explained the dispute resolution process discussed therein to the plaintiff and told him that arbitration was binding, the court thought it was crucial that she had not explained that he was waiving the right to a jury trial. Id. at 735. Weighing this fact along with circumstances demonstrating that the parties had not bargained over the arbitration terms and that the clause was not within the reasonable expectations of an ordinary person, the court refused to enforce the arbitration provision. Id.

C. THE MANDATORY ARBITRATION CLAUSE, IN ITS OPERATION, ACTS AS A WAIVER OF APPELLANT'S RIGHT TO COMMENCE AN ACTION AND IS THEREFORE NULL AND VOID PURSUANT W. VA. CODE §16-5C-15(C)

As previously stated, MHCC is a licensed nursing home which was, and remains, subject to the provisions of W.Va. Code §§ 16-5C-1 *et seq.* (commonly referred to as the Nursing Home Act) and its related rules, W.Va.C.S.R. §§ 64-13 *et seq.*

The Nursing Home Act ("NHA") provides a "private right of action" for a resident whose rights have been deprived by a nursing home:

> Any nursing home that deprives a resident of any right or benefit created or established for the well-being of this resident by the terms of any contract, by any state statute or rule, or by any applicable federal statute or regulation, shall be liable to the resident for injuries suffered as a result of such deprivations. Upon a finding that such resident has been deprived of such a right or benefit, and that the resident has been injured as a result of such deprivation, and unless there is a finding that the nursing home

> exercised all care reasonably necessary to prevent and limit the deprivation and injury to the resident, compensatory damages shall be assessed in an amount sufficient to compensate the resident for such injury. In addition, where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, punitive damages may be assessed. A resident may also maintain an action pursuant to this section for any other type of relief, including injunctive and declaratory relief, permitted by law.

W.Va. Code § 16-5C-15 (c). The section further states:

> **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.**

Id. (Emphasis added).

The NHA was passed by the Legislature in 1977 to "promote and require the maintenance of nursing homes so as to ensure protection of the rights and dignity of those using the services of such facilities." W.Va. Code § 16-5C-1. The provisions of the NHA are to be "liberally construed to effectuate its purposes and intents." *Id.*

In its Response to Plaintiff's Motion for Reconsideration, the defense relies on Preston v. Ferrer, 552 U.S. 346 (2008), as its saving grace and sole source of support for its contentions. It fails to point out that Preston was a very fact specific determination, which involved the signing of a contract by two attorneys, on equal footing, both of whom understood the terms to which they were agreeing, and both of whom had the resources and ability to bring a claim wherever so directed. Preston fails to apply to the case at bar for two reasons: (1) Preston is based on the fact-specific finding that the parties to the contract both intended to be bound to arbitration, and (2) that the party being forced to arbitrate had the financial wherewithal to submit his claim to arbitration, for without such a finding, the substantive right to redress afforded by a statute would necessarily be waived.

Not only does the NHA provide a private cause of action, but it also specifically provides for the possibility of punitive damages, "where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, punitive damages may be assessed." W.Va. Code § 16-5C-15. The Arbitration Clause at issue in this case does not provide for the award of punitive damages and is therefore null and void as a violation of the Nursing Home Act.

As was stated above, the excessive costs associated with the initial filing of an arbitration claim would necessarily prohibit a Petitioner from obtaining these rights, whereby waiving his right to the redress afforded to him under the Nursing Home Act and violating the law. Additionally, the failure to provide for punitive damages, as required by the Nursing Home Act, once again gives rise to the clear errors made by the Circuit Court in its Order on this matter.

CONCLUSION

Despite the clear language of the West Virginia Nursing Home Act, MHCC placed into its resident Admission Agreement an Arbitration Clause so one-sided that it operates to prevent all but the wealthiest residents from enforcing their right to seek relief in West Virginia courts, while preserving MHCC's right of access to same. It is an unconscionable provision, which operates as a contract of adhesion, giving residents and their legal representatives no meaningful alternative if arbitration, with its high-priced fees, is not an affordable option. The Mandatory Arbitration provision was not bargained for and Appellant was neither aware of, nor seeking, an alternative to litigation. There is no evidence on the record that the Arbitration Clause was ever explained to Ellen Taylor, and based on the laws of contract interpretation cited above, the contract speaks to the opposite. Various terms within the Admission Agreement required the checking of a box or line to indicate the understanding of, or agreement with, a provision. The

Arbitration Clause is suspiciously void of any such box or line, and is sandwiched between other terms of legal jargon likely to be overlooked or not understood by a layman, and especially by an elderly woman facing the decision to admit her husband to a skilled nursing facility. In sum, the Arbitration Clause contained within the Admission Agreement is an illegal, unconscionable, and invalid term, and the Circuit Court erred in making crucial findings and conclusions that were unsupported and erroneous.

RELIEF REQUESTED

For the foregoing reasons and for all other reasons on the face of the record, Appellant/Plaintiff, Jeffrey Taylor, moves this Honorable Court to reverse the Circuit Court's granting of a Motion to Dismiss against him and remand this case to such Court with instructions to proceed with a new trial schedule in accordance with this Court's instructions.

APPELLANT/PLAINTIFF JEFFREY TAYLOR,
as Personal Representative of the
Estate of LEO TAYLOR
By Counsel

Andrew L. Paternostro, Esquire (WV. State Bar No. 5541)
Jeff D. Stewart, Esquire (WV State Bar No. 9137)
THE BELL LAW FIRM, PLLC
Post Office Box 1723
Charleston, West Virginia 25326-1723
(304) 345-1700
(304) 344-1956 Facsimile

CERTIFICATE OF SERVICE

I, Jeff D. Stewart, hereby certify that on this the 16th day of August, 2010, caused service of the foregoing **APPELLANT'S BRIEF** to be made upon counsel of record by depositing true and accurate copies of the same in the regular course of the United States mail, postage prepaid, in an envelope addressed as follows:

Shawn P. George, Esquire
George & Lorensen, PLLC
1526 Kanawha Boulevard, East
Charleston, WV 25311

Jace Goins, Esquire
Jennifer Hill, Esquire
Steptoe & Johnson, PLLC
Chase Tower
P. O. Box 1588
Charleston, WV 25326-1588

Jeff D. Stewart, Esquire (WV State Bar No. 9137)