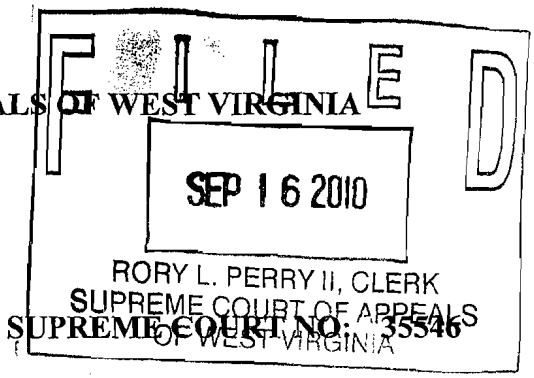

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Jeffery Taylor, Personal Representative of the Estate of Leo Taylor

SUPREME COURT NO: 35546

APPELLANT

v.

MHCC, INC. f/k/a MARMET HEALTH CARE CENTER, INC.; 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 ACQUISTION, INC.; GEN ACQUISTION CORPORATION; AND JER PARTNERS LLC.,

APPELLEE

RESPONSE OF APPELLEE MHCC, INC. F/K/A MARMET HEALTH CARE CENTER, INC. IN OPPOSITION TO APPELLANT'S BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEFFERY TAYLOR, as Personal Representative of the Estate of LEO TAYLOR,

SUPREME COURT NO: 35546

APPELLANT,

v.

MHCC, INC. f/k/a MARMET HEALTH CARE CENTER, INC.; 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 ACQUISTION, INC.; GEN ACQUISTION CORPORATION; AND JER PARTNERS LLC.,

APPELLEE.

RESPONSE OF APPELLEE, MHCC, INC., F/K/A MARMET HEALTH CARE CENTER, INC., IN OPPOSITION TO APPELLANT'S BRIEF

I. INTRODUCTION

Appellant seeks to overturn the September 29, 2009 Order of the Kanawha County Circuit Court referring Appellant's claim to arbitration pursuant to the Admissions Agreement Appellant's mother knowingly and voluntarily signed on admission of Mr. Taylor in February,

2006. The Order correctly found Appellant's claims against MHCC F/K/A Marmet Healthcare Center, Inc. ("Marmet") were subject to mandatory arbitration. This Court should affirm. [1]

II. PROCEEDINGS BELOW

On January 23, 2009, over two years after the death of his father, Appellant brought this action against Marmet and several Genesis entities, one of which had purchased Marmet in November, 2006. Marmet filed a Motion to Dismiss and Answer. Marmet's Motion to Dismiss was based on the mandatory arbitration provision in the Admissions Agreement. Marmet raised several defenses in its Answer, one of which was Plaintiff's failure to file his action within the statute of limitations. The Court never addressed that defense as it granted Marmet's Motion to Dismiss based on the arbitration provision.

On July 2, 2009, two months after filing its Motion to Dismiss, Marmet filed and served its Notice of hearing for the Motion, returnable August 24, 2009 before the Honorable James Stucky, Judge. (Later, at the request of Plaintiff's counsel, Marmet agreed to move the hearing to August 27, 2009.) Plaintiff filed its Response to Marmet's Motion August 24, 2009, almost four (4) months after Marmet filed the Motion and over seven (7) weeks after Marmet filed the Notice of hearing. Marmet immediately filed its Reply less than two (2) days later on August 26, 2009. Judge Stucky heard the Motion August 27, 2009, with both counsel presenting oral argument. The Court did not rule then, but asked both parties to submit a proposed Order with findings of fact and conclusions of law. On September 15, 2009, both parties submitted proposed Orders. On September 23, 2009, Judge Stucky signed an Order, which was not entered until September 29, 2009. On September 26, 2009, Appellant filed a Motion for Reconsideration.

[1] Appellant's claims against the Genesis entities allegedly arise from their care of Appellant's deceased after Genesis purchased Marmet. The Genesis admissions agreement had no mandatory arbitration provision in it. After filing the Petition, Appellant and the Genesis entities stipulated to a stay of the proceedings against Genesis while Appellant pursues this Appeal.

That Motion was fully briefed and counsel supplied additional material to the Court. The Court reviewed Plaintiff's Motion for Reconsideration and the supplemental material. On September 23, 2009 Judge Stuckey entered the Order he signed September 23, 2009, which Order Marmet proposed. It dismissed Appellant's claims against Marmet and referred them to arbitration. This Appeal followed.

III. RELEVANT FACTS

In February, 2006, Ellen Taylor admitted her husband, Leo Taylor, to Marmet. Appellant is the son of Leo and Ellen Taylor. On admission, Mr. Taylor was 86 years old and suffered from advanced dementia. He was unable to care for himself. Mrs. Taylor was of advanced years and unable to care for him. Mrs. Taylor chose Marmet for her husband. There were several other facilities available for Mr. Taylor. Nothing required Mrs. Taylor to choose Marmet. Mrs. Taylor could have chosen any other facility in the area. In fact, Mrs. Taylor was so pleased with the care Mr. Taylor was receiving at Marmet, that she chose Marmet for herself when she needed rehabilitative care. Mrs. Taylor was a resident at Marmet during part of the time Mr. Taylor was a resident there.

On admission of Mr. Taylor, Mrs. Taylor signed an Admissions Agreement with Marmet. That Admissions Agreement contained a mandatory arbitration provision. Mr. Taylor was a resident at Marmet until December 27, 2006, when he was taken to the hospital with an infection. He died in the hospital January 14, 2007 from the infection. Mrs. Taylor died shortly thereafter.

In 1986, the Sutphin families and Pat Maroney, natives of Marmet and East Bank, founded Marmet, as a small, intermediate care nursing facility. Eastern Kanawha County had no such facility then. Pat Maroney's mother, Mary, was Marmet's first resident. 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 to become West Virginia's first licensed Alzheimer's Center. It was called "Mary's Garden" in honor of Marmet's first resident. In 2004, Marmet added the arbitration clause at issue to its Admissions Agreement because Marmet had lost its liability insurance coverage due to the well-chronicled medical malpractice maelstrom then. This occurred even though Marmet had never had a lawsuit alleging negligent patient care in its then 18 years of existence. No Marmet potential resident has ever refused to agree to arbitrate any claims. 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.

IV. ARGUMENT

Summary

Appellant's challenge to the Circuit Court's Order of September 29, 2009 rests on: 1) alleged technical defenses to the enforceability of the mandatory arbitration provision in the Admissions Agreement, including West Virginia's Nursing Home Act and other claimed violations of State contract law; 2) alleged error by the Circuit Court in adopting Marmet's proposed findings of fact and conclusions of law; and 3) claims that Appellant was disadvantaged by the timing and content of Marmet's Reply. None of these grounds has merit. West Virginia employs a *de novo* standard of review for the dismissal of claims on arbitrability. **Ruckdeschel v. Falcon Drilling Co.**, 225 W.Va. 450, 693 S.E.2d 815 (2010). West Virginia law presumes that an arbitration agreement is a valid, binding contract, which was bargained for and intended to be exclusive. This Court has held its review is limited to determining whether there is

a valid agreement to arbitrate and whether the claims at issue fall with the scope of the arbitration provision. **Ruckdeschel**. Both are true here.

Nothing in West Virginia's Nursing Home Act alters basic contract law here or the enforceability of arbitration provisions. Mrs. Taylor knowingly and voluntarily admitted Mr. Taylor to Marmet and signed the Admissions Agreement, which included the arbitration provision. During the time Mr. Taylor was a resident of Marmet (which included time Mrs. Taylor was also resident at Marmet), Mrs. Taylor had ample opportunity to review the care and treatment received by Mr. Taylor and could have removed him from Marmet if she chose to do so. Mrs. Taylor agreed, as attorney in fact, to arbitrate any disagreement regarding Mr. Taylor's care. Appellant's claims here relate solely to Mr. Taylor's health care. If any prejudice was created by Marmet's Reply, it was caused by the timing and breadth of Appellant's Response to the Motion to Dismiss. Appellant did not file his Response until four (4) months after Marmet filed its Motion to Dismiss and only three (3) days before the hearing. Finally, Appellant has failed to show that the Circuit Court's Order and decision to uphold the arbitration provision is clearly against the evidence or in conflict with West Virginia law. For these reasons, the Court should affirm the Circuit Court's Order.

A. The Circuit Court's Adoption Of Marmet's Proposed Order Was Proper.

1. West Virginia recognizes the Federal Arbitration Act supersedes State Law.

Contrary to Appellant's assertion, contractual arbitration provisions are not prohibited by West Virginia's Nursing Home Act, or otherwise. West Virginia recognizes 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.' **Adkins v. Labor Ready, Inc.,** 185 F.Supp.2d 628, 633 (S.D.W.Va. 2001) (citing **Dean Witter Reynolds, Inc. v.**

Byrd, 470 U.S. 213, 217-219 (1985). West Virginia has specifically affirmed that the Federal Arbitration Act, as a matter of federal law, pre-empts state law and state courts cannot apply state statutes to invalidate arbitration agreements. See, **State ex rel. Wells v. Matish**, 600 S.E.2d 583 (W.Va. 2004), (per curiam), fn 7, citing **Allied-Bruce Terminix Cos., Inc. v. Dobson,** 513 U.S. 265, 272 (1995) affirming **Southland Corp. v Keating,** 465 U.S. 1 (1984).

This Court opined recently that the FAA is an express declaration by 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 agreements.' " See, **State of West Virginia ex rel. Jill Clites v. Honorable Russell M. Clawges, et. al.**, 685 S.E.2d 693, 698 (W.Va. 2008), citing **Moses H. Cone Memorial Hospital v. Mercury Construction Corp.** 460 U.S. 1, 24 (1983), **Southland Corporation v. Keating,** 465 U.S. 1, 11 (1984) and **Perry v. Thomas,** 482 U.S. 483 (1987). The United States Supreme Court, in the recent case of **Preston v. Ferrer**, 128 S.Ct. 978, 9897 (2008) has made it clear that ("[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."). See also, **State v. Matish**, 600 S.E.2d 583 (W.Va. 2004) (plaintiff does not forgo any substantive rights under arbitration).

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." **Clites at 699, citing Moses H. Cone, at 23.**

As to parties who have agreed to arbitrate, the arbitration provision is binding and enforceable on all causes of action arising under a contract. Further, it is presumed that parties intended to arbitrate where a contract so provides and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract. **Board of Education of the County of Berkeley v. W. Harley Miller, Inc., 236 S.E.2nd 439 (W.Va. 1977).** Appellant ignores these controlling authorities, which have been throughout, a basis of Marmet's position. Instead, Appellant posits that Marmet ... "relies on **Preston v. Ferrer**, 552 U.S. 346 (2008) as its saving grace and sole source of support for its contentions." (Emphasis added.) Once again, Appellant must believe that this Court is unwilling or unable to: read the voluminous authorities Marmet cited to support its position; and to acknowledge that **Preston**, is the most recent United States Supreme Court decision in a long line of decisions affirming "a national policy favoring arbitration" of claims that parties contract to settle in that manner. This policy is succinctly stated by Justice Ginsberg, writing for the majority (Justice Thomas dissenting), in **Preston:**

> Section 2 of the FAA 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner. *Southland Corp.*, 465 U. S., at 10. That national policy, we held in *Southland,* 'appli[es] in state as well as federal courts' and 'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.' *Id.,* at 16. The FAA's displacement of conflicting state law is 'now well-established,' *Allied-Bruce Terminix Cos. v. Dobson,* 513 U. S. 265, 272 (1995), and has been repeatedly reaffirmed, see, *e.g., Buckeye,* 546 U. S., at 445-446; *Doctor's Associates, Inc.* v. *Casarotto,* 517 U. S. 681, 684-685 (1996); *Perry* v. *Thomas,* 482 U. S. 483, 489 (1987). **Preston**, at 349.

Moreover, the majority in **Preston** specifically rejected the opportunity to overrule its prior decisions concerning the FAA and its preemptive effect. In footnote 2, Justice Ginsberg opined "Although **Ferrer** urges us to overrule *Southland,* he relies on the same arguments we

considered and rejected in *Allied-Bruce Terminix Cos. v. Dobson,* 513 U. S. 265 (1995)... Adhering to precedent, we do not take up **Ferrer's** invitation to overrule *Southland.*"

Finally, Appellant ignores the substantial authority in many other jurisdictions which have 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); **McGuffey Health and Rehabilitation Center v. Gibson**, 864 So2d 1061 (S.C. Alabama 2003) ;**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) **Rainbow Health Care Center, Inc., v. Crutcher,** 2008 WL 268321, p.2 and 8. (N.D. Okla.)(not published),; **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).

Appellant's argument that W.Va. Code § 16-5C-15, *et. seq.*, prohibits nursing home residents or their legal representatives from entering into arbitration agreements with a nursing home facility is in direct conflict with mandatory Supreme Court precedent and must be rejected.

2. West Virginia recognizes the right to arbitrate and WV Code § 16-5C-15(c) does not prohibit an agreement to arbitrate.

Appellant argues that West Virginia's Nursing Home Act prohibits arbitration provisions in the nursing home context, but provides no West Virginia case citation in support. This is because there is nothing in the nursing home statute to prohibit such agreement and no decision which supports that conclusion. WV 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). These sections refer to **the right to bring an action**. They do not dictate the forum for the action, or the rules governing it. Mrs. Taylor did not waive the right to commence an action, she simply agreed on where and how it would be adjudicated.

West Virginia has also rejected the argument that statutory claims are exempt from arbitration provisions. Recently this Court opined that by 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, **Wells v. Matish**, 600 S.E.2d 583, 590-591(W.Va. 2004) and **State of West Virginia ex rel. Jill Clites v. Honorable Russell M. Clawges, et. al.**, 685 S.E.2d 693, 699 (W.VA. 2008), citing **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,** 473 U.S. 614, 628 (1985). Other courts have also considered and rejected Appellant's argument. See, **Slusser v. Life Care Center of America, Inc.,** 977 So.2d 662 (Fla. Dist. Ct. App. 4th 2008) (arbitration agreement not unconscionable even though it waived the resident's access to the courts) and **Bland v. Health Care and Retirement Corp**., 927 So 2d 252 (Fla. Ct. App. 2006); **Northport Health Services of Arkansas, LLC v. Robinson**, 2009 WL 140983 (W.D. Ark.)(statute does not preclude an agreement to arbitrate); **Sanford v. Castleton Health Care Center, LLC**, 813 N.E.2d 411 (Ind. App. Ct. 2004) (right to a 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 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.)

3. The Court properly found the Contract valid and enforceable.

Appellant argues the Circuit Court failed to address the question of whether the contract was valid under West Virginia Law. This is simply not true. The Circuit Court did address the validity of the contract and the arguments raised by the Appellant. Here, as before the Circuit Court, the Appellant has argued that the contract is not enforceable because the agreement is unfair, unconscionable and one of adhesion. The Circuit Court rejected these arguments after hearing the facts and properly applying West Virginia law. See, Conclusions of Law, Paragraphs 9, 10 and 11.

The Appellant tries to paint a sinister picture of the circumstances surrounding the admission of Mr. Taylor. However, there is no evidence supporting that conclusion. Appellant argues that Marmet has a "monopolistic or oligopolistic position in some particular line of commerce ..." that would make this a contract of adhesion. There is no evidence offered to support that claim. It is simply not true. The Charleston phonebook in 2006 listed fourteen nursing home facilities in the area. There was no evidence presented that Mrs. Taylor tried, but was unsuccessful, to admit Mr. Taylor to any of them. There is no evidence that Mrs. Taylor could not have taken Mr. Taylor to any of them, or moved him there at any time. Mrs. Taylor knew about Marmet and the care provided there. She chose to take her husband there when he

need care. She chose Marmet for her rehabilitative care. Nothing in the record suggests Mrs. Taylor was unable to understand the contract. And there is no evidence to suggest she was under duress or was coerced when signing the agreement. The evidence is to the contrary. The arbitration agreement is conspicuous and preceeded by a paragraph setting forth the resident's right to consult with a lawyer. The contract does not favor Marmet. In fact, it expressly references all the many rights available to Mr. Taylor, 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 leaves of absence. Mrs. Taylor need provide only seven (7) days' notice in the case of a voluntary discharge, while Marmet was required to give thirty (30) days' notice. Mrs. Taylor also acknowledged by specifically initialing several places on the agreement that she had received information on outside healthcare providers and services; Marmet's policies regarding treatment options; advanced directives and use of restraints; Medicaid benefit coverage information; care plan conference notification information; and federal patient privacy rights. Further, the arbitration agreement places the same obligation and conditions upon both Appellant and Marmet. It does not limit or expand discovery or any rights of either party; it provides for the recovery of fees up to $5000; and it does not limit damages, punitive or otherwise.

To prove a contract provision is unconscionable, a party 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.**, 346 S.E.2d 749 (W.Va. 1986). Mere inequity of bargaining power alone does not indicate an unconscionable contract." **Adkins**, 185 F.Supp.2d 636. *Even contracts of adhesion, or form contracts are not necessarily invalid as unconscionable.* See, **State of West Virginia ex rel. Jill Clites v. Honorable Russell M.**

Clawges, et. al., 685 S.E.2d 693 (W.Va. 2009). A court assumes that a party to a contract has read and assented to its terms and agreed to be bound by it, absent fraud, misrepresentation, or duress. However, if a party alleges that an arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract. See, **Clites**, p. 700, citing **Board of Ed. v. Miller,** 236 S.E.2d 439 (W.Va. 1977). One must consider the totality of circumstances, such as the Circuit Court did here, and conclude it is fair and proper to enforce the agreement the parties have reached. See, for example, **Miller v. Equifirst Corporation of WV**, 2006 WL 2571634 (S.D.W.Va. 2006) and **Schultz v. AT&T,** 376 F.Supp.2d 685 (N.D.W.Va. 2005). This determination must be affirmed unless clearly wrong. It is not.

Other jurisdictions have addressed 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)(a person is charged with knowing the contents of the document he signs); **Etting v. Regents Park at Aventura, Inc.**, 891 So2d 558 (Fla. Dist. Ct. App. 2d 2008) (resident's blindness did not render agreement invalid); **Mitchell v. Kindred Health Care**, 2008 WL 492650 (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); **Sanford v. Castleton Health Care Centers: Slusser v. Life Care Center of America, Inc.,** 977 So.2d 662 (Fla. Dist. Ct. App. 4th 2008) (arbitration agreement not unconscionable even though it waived the resident's access to the courts) ; **Consolidated**

Resources Healthcare Fund Ltd., v. Fenelus, 853 So.2d 500 (Fla. Dist. Ct. 4th 2003)(arbitration clause not unconscionable even though plaintiff did not read it); **Coker v. Health Care and Retirement Corp.**, 927 So2d 252 (Fla. Dist. CT. App. 2d. 2006) (arbitration agreement not unconscionable despite contention that no one explained to plaintiff what she was signing); See also, **Garrison v. Superior Ct.**, 132 Cal. App 4th 253 (Cal. App. 2005); **Community Care Center of Vicksburg, LLC v. Mason**, 966So.2d 220 (Miss. Ct. App. 2007); **Hogan v. Country Villa Health Svcs.**, 148 Cal. App. 4th 259 (Cal. Ct. App. 2007) and **Estate of Eckstein ex rel. Lucky v. Life Centers of America, Inc.**, 623 F.Supp.2d 1235 (E.D. Wash. 2009).

4. The Circuit Court properly entered Marmet's proposed Order.

Appellant complains that the Circuit Court's adoption of Marmet's proposed Order, including its Findings of Fact and Conclusions of Law, constitutes reversible error. There is no authority offered to support this claim. Further, it flies in the face of the realities of the modern practice of law. Courts routinely ask the parties to submit proposed Orders, including findings. There is no authority that verbatim adoption of proposed findings and conclusions of law prepared by one party constitutes reversible error. In West Virginia, a finding of fact made by a trial court will be given the same weight as the verdict of a jury and will not be disturbed by an appellate court unless the evidence plainly and decidedly preponderates against such finding." Syllabus Point 8, **Sanders v. Roselawn Mem. Gardens, Inc.,** 159 S.E.2d 784 (W.Va. 1968); Syllabus Point 1, **Trenton Construction Company, Inc. v. Straub,** 310 S.E.2d 496 (W.Va. 1983), cited by **Freeman v. Poling,** 338 S.E.2d 415 (W.Va. 1985). Even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. See, e.g., **Freeman v. Poling,** 338 S.E.2d 415 (1985) and **EEOC v.**

Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983) rev'd on other grounds sub nom. Under West Virginia case law, the message is clear: it does not matter who prepared the findings for the circuit court. What matters is that the findings adopted by the circuit court accurately reflect the existing law and the record. See, **State ex rel. Cooper v. Caperton**, 470 S.E.2d 162 (W.Va. 1996). Here, Appellant fails to present any evidence that the Circuit Court was plainly wrong. Appellant had every chance to present his evidence below. He bore the burden of proof, but didn't present any evidence to meet it. The Circuit Court correctly rejected his arguments. Its findings should not be disturbed.

B. The Circuit Court's Factual Findings Were Proper.

1. Mrs. Taylor knowingly and voluntarily contracted with Marmet and agreed to arbitrate any dispute.

Appellant argues that the Circuit Court adopted as factual findings "Defense Counsel's misrepresentation at oral argument" and as such, committed reversible error. Specifically, Appellant is critical that the Court adopted as factual findings that Ellen Taylor was appreciative of the care and attention she received at Marmet, wanted her husband to be a resident and that she "had the right to take Mr. Taylor to any facility she chose" and argues the record is void of any such evidence. Marmet introduced the only evidence on these issues. The Court accepted Marmet's evidence and Appellant is unhappy with that result.

Appellant, who carried the burden of proof to negate the plain language and enforceability of the contract, introduced no evidence regarding the making of the contract. The undisputed record, confirmed by the Affidavit of Robin Sutphin, Marmet's Administrator at the time Mrs. Taylor admitted her husband to Marmet and the person who went over the Admissions Agreement with Mrs. Taylor in February 2006, establishes that Mrs. Taylor was a resident at Marmet during part of the time her husband was a resident at Marmet; Mrs. Taylor was familiar

with the facility; and Mrs. Taylor appeared to be relaxed and comfortable with her decision to admit her husband to Marmet. There were several other facilities available for such care at the time Mr. Taylor was admitted to Marmet. There is no evidence Mrs. Taylor could not have taken her husband to any of them if she desired to do so. Mrs. Taylor also could have moved Mr. Taylor to another facility after his admission to Marmet. She did not do so. The Charleston phone book in 2006 listed over fourteen (14) nursing home facilities in the area. This is a matter of public record. There is no evidence Mrs. Taylor tried to admit, or wanted Mr. Taylor admitted someplace other than Marmet.

Mrs. Taylor died before her son ever filed this action. Appellant has not offered any evidence to dispute any of the factual findings adopted by the Court, but instead urges this Court to find, somehow, that Mrs. Taylor did not intend to do that which she specifically did. The Circuit Court refused to do so and properly concluded Mrs. Taylor was not restricted in her consideration of other facilities for her husband (or herself) when she chose Marmet. Finally, even if this Court questions any of these factual findings, none is dispositive, or changes the applicable law or correct result reached by the Circuit Court.

Appellant also complains about the Circuit Court's acceptance of the evidence of Mrs. Taylor's right to refuse to agree to arbitration upon admission of Mr. Taylor. Again, the court considered all argument and evidence. The record is clear that Mrs. Taylor reviewed the Admission Agreement including the Arbitration provision before she signed it. She raised no concerns about it. There is no evidence or suggestion of duress, coercion, or that Mrs. Taylor was misled. Moreover, contrary to Appellant's argument, the evidence showed that Marmet **would have admitted Mr. Taylor, even if Mrs. Taylor had refused to agree to the Arbitration Provision.** (See Affidavit of Robin Sutphin.) Mrs. Taylor reviewed the contract.

She signed the contract. She considered and chose what services she wanted for her husband. Immediately preceding the Arbitration section there is a section titled ACKNOWLEDGMENT, which clearly advised Mrs. Taylor of her right to consult with an attorney before signing. By signing, she acknowledged that she had read and understood the agreement.

This case is distinguishable from the one cited by Appellant of **Howell v. NHC Healthcare**, 109 S.W.3d 731 (Tenn. App. 2003). In that case, there was substantial testimony that Mr. Howell, was under pressure to find a facility for his wife. He could not read. He had limited intelligence and was uneducated. All of these limitations were obvious to the nursing home person presenting the contract. Here, there is no evidence to suggest that Mrs. Taylor was unsophisticated, uneducated, or that her age or circumstances rendered her unable to understand what she was doing. Appellant presented no evidence or argument to even suggest that Mrs. Taylor act of signing the Admissions Agreement was anything other than a knowing and voluntary act. There is no evidence or argument made that the contract is not written in plain, understandable terms.

Further, there is **no evidence** Marmet misrepresented the terms of the Agreement, took advantage of Mrs. Taylor, or refused to allow her ample time to review it or to seek legal counsel. She was not presented the contract on a "take it or leave it" basis. There is no evidence to suggest that Mrs. Taylor was a helpless victim in need of protection from overreaching. She made a meaningful choice to sign the Agreement. The reality is that Appellant, not wishing to be bound by his mother's agreement to arbitrate, seeks to undo that which she knowingly and voluntarily did. Respectfully, there is no legal or factual basis for this Court to permit that result.

2. Appellant offered no evidence that arbitration fees are excessive or his remedies limited.

Of the four factual findings cited as error, Appellant believes the most "egregious " is the Court's finding that: "The mandatory arbitration provision is mutual and does not impose on the Plaintiff any potential burden or cost which is not also potentially imposed upon MHCC." Appellant states that the Court was misled that there was no difference in the fees of arbitration when compared to those of litigation. Appellant misrepresents the clear and plain language of this finding of fact; the language in the Agreement; the evidence and information available to the Circuit Court which supports this finding; and the influence statements of counsel could have had on the Circuit Judge.

First, Appellant cites no case which has found an arbitration agreement unenforceable because of a difference in fees from those incurred in civil litigation. Second, the Court rejected Appellant's factually unsupported argument that the arbitration clause does not allow for the recovery of punitive damages and "requires Plaintiff, if he loses, to pay arbitration fees, attorney's fees and out-of-pocket expenses incurred." The Appellant continues to make this argument even now. Appellant is wrong, as demonstrated by the plain language of the arbitration provision.

The provision states: "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..." Under this language, **both** Appellant and Marmet are subject to the same initial expenses and fee if either should file a claim for arbitration. There is no unequal burden on either. (The language does not attempt to limit damages, whether punitive or otherwise.) Concerning expense reimbursement, the clause states "...the 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.**" (Emphasis added.) Clearly, under this language, the arbitrator

has the discretionary authority to direct that the arbitration fees be paid by the non-prevailing party, and even then, it is limited to $5,000. Again, this applies equally to both parties. Thus, if Appellant filed an arbitration claim and prevailed, Marmet could be directed to reimburse Appellant that amount and Appellant would then not have incurred **any unreimbursed cost.**

Appellant also argues that Marmet's comments about the costs of arbitration were accepted by the Court and somehow led to this erroneous finding. There is nothing in the Order to support this argument. Appellant offered no evidence to show that arbitration fees would be burdensome. Here, Appellant merely recites the fee schedule and the range of what 'could' be assessed. Again, these charges apply equally and can be assessed against the non-prevailing party. They are also subject to many variables, which again apply equally to both parties. (See, for example: pre selection of an arbitrator, which reduces the processing fee by 50%; lower filing fees for cases with one arbitrator; the refund of the filing fee or a portion thereof under certain circumstances; and the award of fees and expenses to any party by the arbitrator. (pp. 19-20 of Exhibit 3 to Petition Response.) This is true of all AAA arbitrations. It is not true for civil actions, where the Plaintiff bears the initial filing fee and service charges and is assessed court costs and attorneys' fees, which may never be recoverable.

In addition, Courts have recognize that parties to civil litigation often face costs that are not typically found in arbitration, such as the cost of longer proceedings, protracted discovery and delays. See for example, **Wells v. Matish**, citing **Circuit City Stores Inc. v. Adams**, 532 U.S. 105 (2001) and **Bradford v. Rockwell**, 238 f.3d 549, 552 (4th Cir. 2001). See also, **Rosenberg v. Merrill Lynch**, 170 F3d 1, 16 (1st Cir. 1999)(concluding that the mere possibility that the claimant would have to pay up to tens of thousands of dollars in forum fees did not warrant nullifying arbitration agreement in part because "arbitration is often far more affordable

to plaintiffs and defendants alike than is pursuing a claim in court")[2]; and **Gilmer v. Interstate/Johnson Lane Corp.**, 500 U.S. 20, 31 (2001)(although these procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.) (quoting **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.**, 473 U.S. 614 (1985) at 628.

Appellant argues that Marmet's only "foreseeable" claims against a resident would be for eviction for failure to pay or collection of monies and therefore the arbitration clause is grossly unfair. This is wrong. For example, Marmet may have a claim against a disruptive patient; or Marmet may disagree with a course of treatment authorized by someone with medical authority over a resident and want to avoid any controversy that could arise therefrom. In these instances, Marmet could not resort to litigation, but would be bound by the arbitration provision. Further, the arbitration clause does not limit appeal rights, nor Appellant's damages, as alleged.

Finally, there is nothing in the arbitration clause that requires either party to use an AAA arbitrator. The agreement requires only the use of the AAA Rules to arbitrate. Specifically, it provides for disputes to be submitted to binding arbitration "in accordance with Commercial Arbitration Rules of the [AAA] then in effect." This practice is acceptable in nursing home contracts and allows a party more flexibility in the control of costs. See, for example, **Carideo v. Dell, Inc.**, 2009 WL 3485933 (W.D. Wash)(Slip copy) (where arbitration clause selects merely the rules of a specific arbitral forum, any arbitral forum can apply those rules). See also,

[2] Appellant tries to distinguish **Rosenberg,** deny its applicability and promote its decision denying arbitration. Appellee acknowledges that arbitration was not ordered because of the fact specific circumstances surrounding the signing of the contract, none of which are alleged here. Despite that, the Court's discussion and rejection of the Plaintiff's allegation that arbitration fees were excessive is sound and supported by the U.S Supreme Court cases cited in the opinion. See, **Rosenberg**, p. 16 citing, **Gilmer and Mitsubishi.**

Estate of Eckstein ex rel. Luckey v. Life Care Centers of America, Inc., 623 F. Supp2d 1235 (E.D. Wash. 2009).

3. Appellant suffered no prejudice by the timing or content of Marmet's Reply.

Appellant also complains that the timing and content of Marmet's Reply was unfair. This argument is also meritless. The Rules do not specify a time for filing a Reply brief. Marmet's Reply was timely under the circumstances. Specifically, Marmet filed its Motion to Dismiss April 30, 2009. Plaintiff filed its Response four (4) months later, August 24, 2009 at 2:55 p.m., by facsimile. This was less than three (3) days before the hearing on the Motion. Marmet filed its Reply thirty-six (36) **hours** later. Appellant concedes the arguments were fully briefed and argued, which further undermines Appellant's position. Moreover, Marmet's Reply addressed the arguments Appellant made in its Response to Marmet's Motion to Dismiss. This is what a Reply is supposed to do. Appellant should not be rewarded for the condition he created. By not filing his Response until three (3) days before the hearing, Appellant forced Marmet to Reply quickly and comprehensively, which Marmet did. It's hardly reasonable for Appellant to suggest or expect, as he does by implication, that Marmet should simply stand by, fail to reply and be a punching bag for whatever claims Appellant choses to throw out.

Appellant also asserts that the Circuit Court ignored Appellant's arguments; adopted Marmet's arguments based on case law from foreign jurisdictions and did not address West Virginia law. Again, this is false. The Circuit Court allowed both sides ample time to file briefs, to make oral argument and to supply evidence and authority supporting each side's respective position. Marmet set forth fully West Virginia law regarding the standards for reviewing contracts and arbitration agreements. Marmet properly addressed the issues raised by the Appellant and cited West Virginia law, the Federal Arbitration Act and supporting United States

Supreme Court authority for Marmet's position. The Circuit Court, considered the case law submitted by Appellant and Marmet, assessed the facts and rightly found that the authorities submitted by Marmet were controlling.

V. CONCLUSION

For these reasons and others of record, Marmet respectfully urges the Court to deny the appeal.

MARMET HEALTH CARE CENTER, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JEFFREY TAYLOR, AS REPRESENTATIVE OF THE ESTATE OF LEO TAYLOR,

SUPREME COURT NO: 35546

APPELLANT

v.

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 ACQUISTION, INC.; GEN ACQUISTION CORPORATION; AND JER PARTNERS LLC.,

APPELLEES.

CERTIFICATE OF SERVICE

I, Shawn P. George, do hereby certify that I served the foregoing Response of Appellee MHCC, Inc. f/k/a Marmet Health Care Center, Inc. in Opposition to Appellant's Brief on counsel of record, regular U.S. Mail, this 16th day of September, 2010 as follows:

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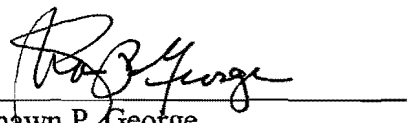

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