IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY IN RESPONSE TO APPELLEE MHCC, INC. F/K/A MARMET HEALTH CARE CENTER, INC. IN OPPOSITION TO 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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Appellant's Reply

Notwithstanding Appellee's attempt to misguide this Court by re-characterizing Appellant's arguments, the Appellant's pleadings to date have made clear that this appeal is based on three main errors made by the lower court: (1) the Court made numerous findings of "fact" and conclusions of law that were clearly erroneous and based on nothing more than representations made by the Appellee, which representations are contradicted by the record and by West Virginia law; (2) the arbitration clause is void under West Virginia contract law and the Court failed to make any mention of its analysis (if one even occurred) or ruling on same; and (3) the arbitration clause is contrary to West Virginia statutory law and is therefore void and unenforceable.

Appellant will not usurp this Honorable Court's time by re-stating the arguments that were exhaustively briefed in its previously submitted Appellate Brief. Instead, Appellant will focus on the bottom line in this matter- if this agreement was taken out of the realm of the arbitration debate, and viewed solely on the basis of contract formation, no Court could find that a meeting of the minds occurred. Instead, it would be clear that an unconscionable provision was included in the midst of other legalese, all of which were drafted, in a non-negotiable manner, by the party with the upper-hand. Pursuant to the prevailing case law on the subject, 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. See Dunlap, *infra.* This step was never taken by the lower Court in this matter. "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] ").

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 the present matter, the lower Court's failure to first analyze and rule upon the issues of contract formation prior to dismissing the action was a clear error. Had the trial court undertaken a review of the contract law issues before it, the disparity of bargaining power between the corporation providing the form contract and the elderly woman admitting her husband for end-of-life care, coupled with the non-negotiable nature of the agreement's terms and the unconscionable lack of mutuality leaves no option but to find an unenforceable agreement. In order to have qualified as an enforceable agreement, the mandatory arbitration clause in this matter should not have been presented as a "take it or leave it" provision, particularly since it was drafted by the party with the superior bargaining power.

In a similar, albeit more complex, matter before the United States Court of Appeals for the Ninth Circuit, the Court was recently asked to rule upon an appeal wherein a group of independent business owners each signed a business contract with Defendant, Quixtar, Inc., that included a mandatory alternative dispute resolution process and binding arbitration provision. See Pokorny v. Quixtar, Inc., 601 F.3d 987 (2010). The district court held the mandatory provisions unconscionable and therefore unenforceable. On appeal, the Court determined unconscionability by focusing on whether the contract was one drafted by the stronger party and whether the weaker party had an opportunity to negotiate. See Id at 996. The Court of Appeals ultimately held that an agreement, or a part thereof, is unconscionable if "the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation." Id.

Also much like the present matter, the Defendants in Quixtar argued that the Plaintiffs, independent business owners, could have refused to sign the agreement and gone into another line of work and therefore the arbitration provisions were not unconscionable. The Court disagreed, stating that it does not help Defendants to argue that Plaintiffs could have gone into another line of work, as the availability of alternative business opportunities does not preclude a finding of unconscionability. See Id at 997. In the present matter, Appellee argues that Mrs. Taylor could have chosen any nursing home, and was not forced to admit her husband to their facility is both without merit on the facts, as there is no factual support for that claim, and contrary to law, as demonstrated by the 9th Circuit Court of Appeals.

Finally, the Mandatory Arbitration agreement in Quixtar also included a fee shifting provision similar to the one included herein, wherein the losing party is required to bear the costs of the arbitration, including the prevailing party's attorneys' fees. In Quixtar, the Court found

that this "loser pays" provision unfairly exposed the Plaintiffs to a greater financial risk in arbitrating claims than they would face if they were to litigate those same claims in federal court and therefore contributed to the unconscionability, and ultimate unenforceability of the binding arbitration clause. See Id at 1004.

In the end, the only thing truly proven by the overwhelming number of conflicting cases cited to and relied upon by the parties to this action is that the lower court's ruling in THIS matter should have been based on the facts of THIS matter in determining whether a valid and enforceable contract was formed. The lower Court failed to undertake such a critical analysis, and its ruling must therefore be overturned.

With regards to the Court's error in adopting Appellee's findings of fact and conclusions of law verbatim, Appellee seems to confuse the accepted practice of the prevailing party drafting the Court's Order (in accordance with the Court's findings) with the occurrence in the present matter in which the Court adopted, in whole, the erred facts and conclusions as set forth by the Appellee. In so doing, the Court erred by failing to independently check the facts it was about to adopt; the Court erred in failing to analyze or address the issues of contract law and formation before it; and, the Court erred in adopting verbatim conclusions of law which were either unsupported by the law of this state, or completely contradicted by it.

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, false or incorrect on their face, (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, this Court has oft recited 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 v. Caperton, 196 W. Va. 208, 214, 470 S.E.2d 162, 166 (1996) *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 v. City of Beszsemer City, North Carolina, 470 U.S. 564, 572, 105 S. Ct. 1504, 1510 (1985).

In sum, and as set forth in Appellant's Brief, the Arbitration Clause contained within the Admission Agreement is an illegal, unconscionable, and invalid term, and the Circuit Court erred in making crucial findings of fact and conclusions of law that were unsupported and erroneous. More than sufficient evidence exists in this case to overturn the Order of the Circuit Court and remand this case to the court with instructions to proceed with a new trial schedule.

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

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CERTIFICATE OF SERVICE

I, Jeff D. Stewart, hereby certify that on this the 5th day of October, 2010, caused service of the foregoing **REPLY IN RESPONSE TO APPELLEE MHCC, INC. F/K/A MARMET HEALTH CARE CENTER, INC. IN OPPOSITION TO 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:

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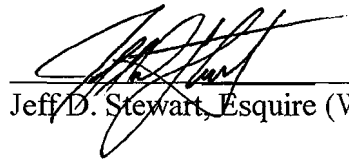

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