IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 35635

SHARON A. MARCHIO, EXECUTRIX OF THE ESTATE OF PAULINE VIRGINIA WILLETT,

APPELLANT,

v.

CLARKSBURG NURSING & REHABILITATION CENTER, INC.; SHEILA K. CLARK AND JENNIFER MCWHORTER,

APPELLEES.

BRIEF OF *AMICUS CURIAE* AMERICAN HEALTH CARE ASSOCIATION IN SUPPORT OF APPELLEES

On Review of Certified Question

From the Circuit Court of Harrison County
(Hon. James A. Matish, Civil Action No. 08-C-334-3)

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ARGUMENT

I. The Circuit Court's Judgment Is Simply A Proper Application Of Binding, On-Point Interpretations Of The Federal Arbitration Act By The United States Supreme Court.

Appellant asks this Court to entertain the argument that a state statute declaring void agreements to arbitrate certain types of claims (here, nursing home-related claims) is compatible with, and should be enforceable alongside, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). In doing so, however, Appellant has approached the wrong forum. As other state courts have recognized – including one state supreme court that recently overturned the decision primarily relied on by Appellant here – the United States Supreme Court has clearly and repeatedly determined that, as a matter of federal law, the FAA preempts such statutes. What Appellant is truly seeking, therefore, is a revision to the FAA; accordingly, Appellant's argument is properly made to Congress, not this Court.

The arguments raised by Appellant do not present open questions for resolution here. As this Court has noted, the interpretation of the reach of the FAA is a matter of federal law. *See, e.g., State ex rel. City Holding Co. v. Kaufman*, 216 W.Va. 594, 598, 609 S.E.2d 855, 859 (W.Va. 2004) ("The Federal Arbitration Act applies to an agreement to arbitrate, and the determination as to whether all of the claims are referable to arbitration is a matter governed by application of federal law."). And this Court, like any state court, is "bound by the decisions of the United States Supreme Court construing federal law." *Ratliff v. Norfolk Southern Ry.*, 224 W.Va. 13, 19 n.17, 680 S.E.2d 28, 34 n.17 (W.Va. 2009) (citing *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 220-21

(1931)). Fortunately, the several decisions of the United States Supreme Court relevant to the issue presented here – decisions which support and in fact mandate the Circuit Court's judgment – were nicely summarized in the Illinois Supreme Court's recent decision in *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207 (Ill. 2010), which applied them in the context of claims concerning nursing home treatment.

In *Carter*, the Illinois Supreme Court held that certain provisions of Illinois' Nursing Home Care Act which prohibited the waiver of the right to bring a judicial action to assert claims under that Act[1] conflicted with and were preempted by the FAA. In doing so, the Illinois Supreme Court reversed the decision of an Illinois intermediate appellate court upon which Appellant places the bulk of her reliance concerning the issue of FAA preemption: *Carter v. SSC Odin Operating Co.*, 885 N.E.2d 1204 (Ill. App. Ct. 2008). *See* Appellant's Br. at 12-17 (citing and discussing the *Carter* lower appellate court decision).[2]

The Illinois Supreme Court's decision in *Carter* is particularly helpful here, because, as Appellant expressly and correctly admits, **"[t]he situation in *Carter* is practically identical to that of the parties in the instant action."** Appellant's Br. at 14

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[1] *See* 210 ILL. COMP. STAT. 45/3-606 (providing that "[a]ny waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect."); and 210 ILL. COMP. STAT. 45/3-607 (providing that "[a]ny party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to commencement of an action, shall be null and void, and without legal force or effect.").

[2] Appellant does not mention the Illinois Supreme Court's April 15, 2010, decision, although it was released on April 15, 2010 – well before the filing of the Appellant's brief on July 8, 2010.

(emphasis added). As here, the plaintiff in *Carter* sought to avoid arbitration by way of state statutory provisions specifically declaring void any agreement waiving the right to resolve nursing home-related claims in court. *See* 927 N.E.2d at 1210-12. And as should be the conclusion here, the Illinois Supreme Court held that the United States Supreme Court had already resolved this issue in several decisions standing for the proposition that, as a matter of federal law, the FAA preempts any state law attempt to undermine contracting parties' ability to agree to arbitrate claims. *Id.* at 1215-20 (discussing, among other decisions, *Southland Corp. v. Keating*, 465 U.S. 1 (1984), *Perry v. Thomas*, 482 U.S. 483 (1987), and *Preston v. Ferrer*, 552 U.S. 346 (2008)).

As shown in the *Carter* decision's detailed discussion, the Illinois Supreme Court's reading of the United States Supreme Court's decisions is clearly correct, and those decisions are similarly dispositive here. As these binding decisions illustrate, the FAA preempts not simply state statutes that preclude arbitration in *any* contract, but even statutes that attempt to preclude arbitration as to *certain types of claims*:

- In *Southland*, the Supreme Court held that a state statute declaring void any contractual provision barring judicial consideration of claims brought under the California Franchise Investment Law was preempted by the FAA. *See* 465 U.S. at 16 n.11 ("We conclude ... that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of any contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.").

- In *Perry*, the Supreme Court held that a state statute which nullified agreements to arbitrate claims brought under the California Labor Code for the collection of wages was preempted by the FAA. *See* 482 U.S. at 484, 492 n.9 (stating that "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" is not a defense that "govern[s] issues concerning the validity, revocability, and enforceability of contracts generally").
- In *Preston*, the Supreme Court held that the FAA preempted a state statute that required claims brought under the California Labor Code to be heard by the Labor Commissioner, regardless of an agreement that such disputes would be heard by an arbitrator. *See* 552 U.S. at 352-59.

Accord, e.g., Doctor's Assocs. v. Casarotto, 517 U.S. 681, 683-88 (1996) (holding that the FAA preempted a Montana statute that which declared void any arbitration agreement that did not comply with special drafting rules).

These decisions are directly on-point here. In this case, as in the "practically identical" *Carter* decision, Appellant's Br. at 14, the plaintiff relies on a West Virginia statute, W. VA. CODE § 16-5C-15(c), that precludes arbitration of claims relating to nursing home treatment (i.e., claims brought under the West Virginia Nursing Home Act, W. VA. CODE § 16-5C-1 *et seq.*). As the Illinois Supreme Court acknowledged in *Carter*, under decisions such as *Southland*, *Perry* and *Preston*, such a statute is not an FAA-acknowleged defense to a contract that "exist[s] at law or in equity for the revocation of *any* contract," 9 U.S.C. § 2 (emphasis added), but is instead a provision specifically undermining agreements to arbitrate that conflicts with and is preempted by the FAA.

Accordingly, the judgment of the Circuit Court in this case was correct and should be affirmed.

II. Arbitration Agreements Benefit All Parties Involved In Nursing Litigation Cases, Including Residents And Their Families, And Preserves Public Resources.

Even if this Court were a proper forum for a determination concerning the use of arbitration agreements in nursing home disputes, sound public policy reasons support the allowance of such agreements. *Amicus curiae* American Health Care Association (AHCA) supports the use of arbitration because, when compared to traditional litigation, its members' experiences are that arbitration is more efficient, less adversarial, and has a reduced time to settlement. Most nursing home litigation cases are resolved through settlement and arbitration facilitates that process.

The United States Supreme Court has noted that "arbitration's advantages often would seem helpful to individuals, . . . who need a less expensive alternative to litigation." *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 280 (1995). The Court continued, "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . ." *Id.*

Appellant's argument in this case is undergirded by the misguided assumption that nursing home arbitration agreements can never really be fair and equitable. Appellant suggests that this Court should "exercise restraint" in determining public policy. Yet

Appellant in the same breath would have this Court uphold a determination, contrary to existing federal law, that all nursing home arbitration agreements must be "singled out" for discriminatory treatment under the FAA because of an unsupported presumption that nursing home residents and their families are incapable of making informed decisions about whether to choose arbitration as a method for dispute resolution. Such a notion is at odds with residents' federally protected right to self-determination. *See* 42 C.F.R. § 483.10 (a resident has the right to exercise his or her rights as a citizen or resident of the United States and has the right to be free of interference or discrimination in the exercise of those rights). There is not, nor should there be, a presumption in the law that nursing home residents are incapable of exercising their rights, including the right to arbitrate disputes.

This case is just one example of where electing to arbitrate was a completely reasonable decision. The terms of the arbitration agreement are fair and treat the interests of both parties in an equitable manner. The arbitration agreement at issue in the underlying litigation is based on a model agreement developed first in 2002 by the AHCA as a service to its member facilities and the residents they serve for possible use in the admission process. The agreement is consistent with the position taken on arbitration by the Centers for Medicare and Medicaid Services, the federal government agency that oversees nursing homes. *See* Dep't of Health and Human Services, Centers for Medicare and Medicaid Services, *Survey and Certification Memorandum* (S&C 03-10), Steven A. Pelovitz (January 9, 2003). AHCA's model agreement in no way alters the rights or remedies available to a resident under state tort law. It states in plain English that entering

into the arbitration agreement is not a condition of admission into the facility. Further, the model form provides a 30-day window for the resident or their representative to reconsider and, in writing, rescind the arbitration agreement. This 30-day "cooling off period" far exceeds the period of time found on most arbitration clauses. While AHCA should not be understood to suggest that such terms are necessary for an arbitration agreement to be enforceable, they validate the United States Supreme Court's pronouncements that arbitration can be beneficial to litigants. *See Circuit City Stores, Inc. v. Adams*, 523 U.S. 105, 123 (2001); *Allied-Bruce Terminix*, 513 U.S. at 280.

In enacting the Federal Arbitration Act, Congress recognized that arbitration is an efficient and effective means of resolving disputes. In the context of nursing homes, arbitration provides benefits to both nursing homes and their residents. Arbitration typically involves focused discovery aimed at the crux of the dispute, and arbitration proceedings are not subject to the delays of crowded trial court dockets. Conversely, litigation often involves more expensive, broad discovery and often-times lengthy delays, which can be time-consuming and stressful to all participants. Most importantly, arbitration, like litigation, provides a fair and equitable means of dispute resolution.

As a recent Aon Global Risk Consulting report entitled "Long Term Care – 2008 General Liability and Professional Liability Actuarial Analysis" found, "Arbitration reduces the time to settlement by more than two months on average." It further found that "very few claims actually go all the way to arbitration [as] most claims are settled in advance." Long Term Care – 2008 General Liability and Professional Liability Actuarial Analysis, AON Global Risk Consulting, p.23 (Accessible at

http://www.ahcancal.org/research_data/liability/Documents/2008LiabilityActuarialAnalysis.pdf). Timely resolution of disputes is of unique importance to residents of long term care facilities and their families. Often the individuals are very frail elderly in their twilight years and it is a comfort for families to reach a settlement during their loved one's lifetime.

In addition, because it vastly reduces transaction costs, arbitration may also enable patients and their families to retain a greater proportion of any financial settlement than with traditional litigation. The same 2008 AON report found that "currently, 55.2% of the total amount of claims costs paid for GL/PL claims in the long term care industry is going directly to attorneys. This means that less than half of the dollars spent on liability is actually going to the patients and their families." *Id.* at 30. The decreased transaction costs associated with arbitration means more of any award received goes to the party whom is most deserving – the patient or resident, not their legal representative.

Lastly, the results of another AON study specifically looking at arbitration impacts negates any conclusion that arbitration results are not fair and equitable. AON concluded that when compared to civil litigation:

- For outcomes where ADR is not contested and outcomes that do not involve ADR, the likelihood of indemnity is the same; the presence or absence of ADR does not seem to impact whether or not indemnity is awarded.
- Average provider expenses for outcomes subject to ADR agreements tend to be 41% lower than outcomes that are not subject to ADR agreements.
- Challenges to arbitration have the highest associated expense. Claims resolved

after the ADR agreement is invalidated tend to have much higher total costs than those resolved after the ADR agreement is upheld.

American Health Care Association Special Study on Arbitration in the Long Term Care Industry, AON Global Risk Consultants, June 16, 2009, p.4 (Accessed at http://www.ahcancal.org/research_data/liability/Documents/2009ArbitrationStudy.pdf).

AHCA contends that holding that the West Virginia anti-waiver provision to be preempted by the FAA – a holding consistent with United States Supreme Court precedent – also achieves the best result because preserving the use of arbitration in West Virginia, and nationally, conserves public resources. Because the majority of nursing home care is reimbursed by the federal government through the Medicare and Medicaid programs, West Virginia courts should not establish a policy exception for West Virginia nursing home providers, their residents and families that denies their access to arbitration.

In recent years, litigation against nursing homes has increased, resulting in skyrocketing insurance costs and leading to a crisis which threatens to limit the availability of long-term nursing care. Nursing homes and their residents have therefore turned to arbitration as a fair, cost-effective, and more efficient way of resolving disputes.

The move by nursing home providers to seek agreements with residents and their families to use arbitration as a dispute resolution tool is a prudent and logical decision flowing from the litigation climate that facilities face. A 2006 federal government review of nursing home liability issues and the public policy debate therein concluded:

> At the root of this policy issue are the views and perceptions of the American public. In negotiating settlements, plaintiffs and defendants make decisions about compensation for damages based upon their shared

> judgments of what juries would decide if cases were to go to trial. Most every person interviewed during this study, whether they were associated with the plaintiff side or the defendant side of the issue, agreed that the decisions of juries in nursing home negligence cases are virtually impossible to predict. One insurer said that it had conducted mock jury trials, testing the exact same case in the exact same manner, in front of multiple juries, with highly diverse results. Because the decisions of juries are so hard to predict, regardless of the facts of the case, both plaintiff and defense counsel almost always prefer to settle cases without a jury trial.

Recent Trends In The Nursing Home Liability Insurance Market, U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, June 2006 (Available At Http://Aspe.Hhs.Gov/Daltcp/Reports/2006/Nhliab.pdf).

The study also supports the conclusion that a dramatic increase in litigation against nursing homes, which began in approximately 1995, has resulted in both contraction and instability in the liability insurance market for nursing home providers. Ultimately, the cost of nursing home litigation and increasing insurance expense for liability costs is borne by state and federal taxpayers. This is so because nursing home care is overwhelmingly reimbursed by Medicare and Medicaid. Costs from general liability and professional liability consume five and one-half (5.51%) percent of the 2009 Medicaid per diem reimbursement rate for West Virginia providers. Approximately seventy (70%) percent of nursing home care is paid for by Medicare and Medicaid in West Virginia. Therefore, it is in the interest of West Virginia providers and citizens for the Court to affirm the Circuit Court's decision on the certified question so as to preserve arbitration as a fair, but cost effective and efficient way for West Virginia nursing home providers and their residents to resolve liability issues.

CONCLUSION

For the foregoing reasons, the Circuit Court's judgment is due to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby affirm that copies of the foregoing ***"Brief of Amicus Curiae American Health Care Association in Support of Appellees"*** were mailed via U.S. First Class Mail postage prepaid and/or electronic mail to their regular mailing addresses, on this 6th day of August, 2010 to the following parties:

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