IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SHARON A. MARCHIO, Executrix
of the Estate of Pauline Virginia Willett,

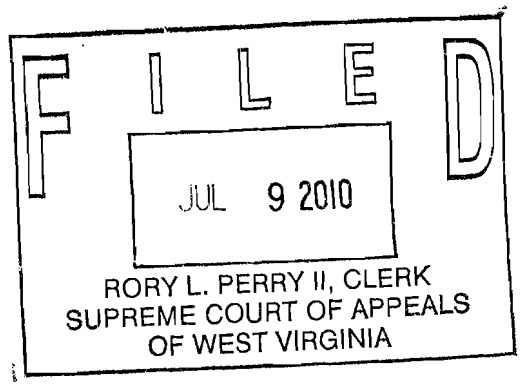
Plaintiff/Appellant,

v.

WV Supreme Court Docket No. 35635

CLARKSBURG NURSING &
REHABILITATION CENTER, INC.,
a West Virginia Corporation,
d/b/a Clarksburg Continuous
Care Center,
SHEILA K. CLARK, Executive Director
of Clarksburg Nursing &
Rehabilitation Center, Inc., d/b/a
Clarksburg Continuous Care Center,
JOHN/JANE DOE #1, and
JENNIFER MCWHORTER,

Defendants/Appellees.



BRIEF OF APPELLANT SHARON A. MARCHIO
(FOR REVIEW OF CERTIFIED QUESTION)

From the Circuit Court of Harrison County
Civil Action No.: 08-C-334-3
The Honorable James A. Matish, Judge

ORAL PRESENTATION REQUESTED

Respectfully submitted by:
Sharon A. Marchio, Executrix of the Estate
of Pauline Virginia Willett, By counsel,

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NOW COMES the Appellant/Plaintiff (hereafter "Plaintiff"), Sharon A. Marchio, Executrix of the Estate of Pauline Virginia Willett, by and through counsel, Frank E. Simmerman, Jr., and Chad L. Taylor, of the Simmerman Law Office, PLLC, and does hereby request oral argument of this instant appeal regarding the answer to a Certified Question by the Circuit Court of Harrison County. For the reasons set forth herein, Appellant respectfully submits that the response to the subject certified question, as embodied in an *Order and Certification* of the Honorable James A. Matish, Judge of the Fifteenth Judicial Circuit, entered February 24, 2010, should more appropriately be answered in the negative. In support thereof, Plaintiff states as follows:

I. TYPE OF PROCEEDING AND NATURE OF RULING IN THE CIRCUIT COURT OF HARRISON COUNTY

Plaintiff Sharon A. Marchio is the duly qualified Executrix of the Estate of her mother, Pauline Virginia Willett. Ms. Willett was a resident of the Clarksburg Continuous Care Center ("Clarksburg Continuous Care"), owned and/or operated by the Defendants, from May 27, 2006, through July 3, 2006.

This lawsuit concerns deficiencies and negligence of Defendants in the care and treatment of Ms. Willett, which caused Plaintiff, as the personal representative of Pauline Virginia Willett, to file her two-count Complaint on July 2, 2008. Plaintiff's Complaint alleges violations of the West Virginia Nursing Home Act (W.Va. Code § 16-5C-1, *et seq.*, hereafter, "NHA"); more specifically, Count I: inadequate staffing, and Count II: deficiencies regarding nutrition, infection control, documentation, and overall

care. By way of further identification of the Appellees/Defendants (hereafter "Defendants"), in addition to the parent corporation of the nursing home facility (Clarksburg Nursing & Rehabilitation Center, Inc.), and the executive director of the facility (Sheila K. Clark), Defendant "John/Jane Doe #1" represents the facility's Clinical Care Specialist, and Defendant Jennifer McWhorter (formerly "John/Jane Doe #2" prior to entry of a *Stipulation of Substitution of Jennifer McWhorter for Defendant John/Jane Doe* #2, on February 12, 2010) was the Director of Nursing for the facility during Ms. Willett's stay.

In response to Plaintiff's Complaint, on or about July 23, 2008, the Defendants filed a *Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration,* with supporting Memorandum, to which Plaintiff responded on or about August 11, 2008. The Circuit Court held a hearing of Defendants' Motion to Dismiss and to Compel Arbitration on October 3, 2008, but reserved ruling on the same, as evidenced by an *Order* entered November 17, 2008. Subsequently, discovery ensued in this matter.

Insofar as the Circuit Court reserved ruling on their initial Motion to Dismiss, Defendants filed their Answer to Plaintiff's Complaint on or about November 12, 2008, along with a second Motion to Dismiss, essentially asserting that West Virginia's Medical Professional Liability Act (hereafter "MPLA") provides the exclusive remedy for Plaintiff's allegations, and moving the Court to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

The Circuit Court heard Defendants' second Motion to Dismiss on January 29, 2009, and reserved ruling on the same. At this hearing, the prospect of submitting certified questions on the issues raised by Defendants' two Motions to Dismiss was discussed, namely, (1) the relationship between the West Virginia Nursing Home Act (W.Va. Code § 16-5C-1, *et seq.*) and the West Virginia Medical Professional Liability Act (W.Va. Code § 55-7B-1, *et seq.*); and (2) the legality, applicability and/or enforceability of the arbitration agreement made part of the nursing home admission documents in this matter, considering West Virginia Code § 16-5C-15(c).

Thereafter, recognizing that certification to the West Virginia Supreme Court of Appeals was the proper method of resolving the pending issues of law, Judge Matish entered an *Order Setting Deadline for Parties' Submission of Proposed Certified Questions to the Court*, on September 21, 2009. On October 2, 2009, Defendants filed *Defendants' Certified Questions Regarding (1) the Enforceability of the Arbitration Agreement Between Plaintiff and Clarksburg Nursing and Rehabilitation Center and (2) the Applicability of the West Virginia Nursing Home Act to Plaintiff's Claims*; and on or about October 2, 2009, Plaintiff filed her *Motion for Certification of Questions of Law Contained Herein to the West Virginia Supreme Court of Appeals, Pursuant to West Virginia Code § 58-5-2, Regarding the Validity of the Subject Arbitration Agreement, and Memorandum in Support of Position that the MPLA/NHA Issue has been Resolved by the West Virginia Supreme Court.*

Further, the parties subsequently filed a response to their adversary's proposed certified questions.

Following its review of the parties' proposed certified questions, supporting memoranda, and responses to the same, the Circuit Court of Harrison County concluded that only one certified question was appropriate for submission to the West Virginia Supreme Court of Appeals, that being on the issue of the arbitration agreement, as reflected in the Court's February 24, 2010, *Order Answering Certified Question*. In the Court's Order, Judge Matish framed this single certified question as follows:

> Is West Virginia Code § 16-5C-15(c), which provides in pertinent part that "[a]ny waiver by a resident or his or her representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy," preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, when a nursing home resident's representative has executed an arbitration agreement as part of the nursing home's admission documents and the arbitration agreement contains the following terms and conditions:
>
> a. the arbitration agreement applies to and binds both parties by its terms;
>
> b. the arbitration agreement contains language in upper case typescript stating as follows: "THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO

HAVE ANY CLAIM DECIDED IN COURT OF LAW BEFORE A JUDGE AND A JURY."; and

c. the resident's representative is specifically advised that she has the right to seek legal counsel concerning the arbitration agreement, the execution of the arbitration agreement is not a pre-condition to admission to the nursing home facility, and the arbitration agreement may be rescinded by the resident through written notice to the facility within thirty (30) days of signing the arbitration agreement.

Answer: Yes.

Accordingly, Plaintiff Sharon A. Marchio, as a party aggrieved by the Circuit Court of Harrison County's answer to the aforementioned certified question, requests that this Court reverse the Circuit Court's ruling, by answering this question in the negative.

II. STATEMENT OF FACTS

As mentioned above, this action is brought by Sharon A. Marchio as the personal representative of her mother, Pauline Virginia Willett. Ms. Willett was a resident of Clarksburg Continuous Care from May 27, 2006 through July 3, 2006. At such time, Ms. Willett was ninety-four (94) years old and suffered from Alzheimer's dementia, ischemic cardiomyopathy, a previous myocardial infarction, hypertension,

COPD, asthma, osteoarthritis, and osteoporosis. It was noted in Ms. Willett's Pre-Admission Screening for the nursing home that while serious, her health conditions were not terminal.

Ms. Willett had previously resided with the Plaintiff, her daughter who was her principal care giver, but due to the Plaintiff's own health concerns, the Plaintiff was temporarily unable to care for Ms. Willett. Therefore, the decision was made to place Ms. Willett in a nursing home facility for a period of not more than three (3) months while the Plaintiff recovered, and after such time it was intended that Ms. Willett would return to her daughter's home.

On or about May 21, 2006, Ms. Willett was briefly admitted to United Hospital Center (hereafter "UHC") in Clarksburg, West Virginia, for treatment of severe diarrhea, abdominal cramps, and uncontrolled diabetes. On or about May 27, 2006, Ms. Willett was discharged from UHC and transferred to Clarksburg Continuous Care. Included as part of the nursing home's seventy-three (73) page Admissions Agreement, was the subject arbitration agreement which Plaintiff executed on May 25, 2006, in preparation for her mother's transfer to the nursing home (agreement attached hereto as Exhibit 1).

During the following five (5) weeks at Clarksburg Continuous Care, Ms. Willett's condition dramatically declined, ultimately leading to her death, on July 6, 2006. Upon admittance to Clarksburg Continuous Care on May 27, 2006, Ms. Willett

presented alert, able to communicate her needs and answer questions appropriately, and was pleasant and cooperative with staff. During her time at Clarksburg Continuous Care, however, Ms. Willett suffered rapid weight loss, two (2) urinary tract infections, worsening of her decubitus ulcers including an infected pressure sore, a fungal infection of the groin area, diarrhea caused by Clostridium difficile (C-Diff) resulting in isolation, and was transferred to the emergency room for an abdominal mass. Further, in contrast to Ms. Willett's communicative and pleasant demeanor upon admittance to Clarksburg Continuous Care, near the time of her discharge from the facility, Ms. Willett appeared withdrawn, less interactive with others, began refusing meals, and was noted to be lethargic.

The debilitated state in which Ms. Willett was found by family members on July 3, 2006, caused her family to insist that she be transported to the emergency room of UHC for evaluation and treatment. Consequently, Ms. Willett was sent to the emergency room at UHC whereat she presented with a cough and difficulty breathing. During Ms. Willett's evaluation at the hospital, it was discovered that she was dehydrated, had pneumonia, septicemia, an acute myocardial infarction (MI), and was in renal failure and congestive heart failure.

As a result of the Defendants' delay in seeking physician intervention with a resulting delay in diagnosing and treating Ms. Willett's conditions, she never recovered from these afflictions and ultimately expired in the morning of July 6, 2006, at UHC.

Ms. Willett's death certificate notes that the immediate cause of her death was respiratory arrest, however, additional conditions leading to her death include sepsis and pneumonia, each of which were discovered and diagnosed at UHC on or about July 4, 2006, and were deemed to have been present in the days immediately preceding Ms. Willett's death.

As a result of the care and treatment that Ms. Willett's family witnessed at the Clarksburg Continuous Care facility, the Plaintiff filed a complaint with the West Virginia Department of Health and Human Resources's Office of Health Facility Licensure and Certification (OHFLAC). A subsequent survey was conducted of the facility on October 5, 2006, which resulted in the Plaintiff's complaint being verified and the facility being cited for numerous deficiencies regarding the care and treatment of Ms. Willett ("resident 95"), and other residents, regarding the exercise of resident rights, documentation, nutrition, and infection control (survey report attached hereto as Exhibit 2). The primary corrective action noted on the survey report for each deficiency involving Ms. Willett was that "[r]esident #95 is no longer a resident of the facility." Such a "*remedial measure*" was only possible because of Ms. Willett's untimely death which was proximately caused and/or contributed to by the negligence and deficiencies of the Defendants.

Such OHFLAC survey report further references an interview conducted by the surveyors with the Director of Nursing and the Clinical Care Specialist of Clarksburg Continuous Care wherein the Clinical Care Specialist stated, with regard to the cited

deficiencies, "that they had fallen behind due to staffing", thus, essentially conceding or admitting that inadequate staffing caused and/or contributed to the deficiencies in Ms. Willett's care.

Accordingly, on July 2, 2008, Sharon A. Marchio caused this action to be filed and seeks damages, including punitive damages, from the Defendants pursuant to West Virginia Code § 16-5C-15(c) for her mother's pain, suffering, loss of capacity to enjoy life, loss of dignity, and ultimate death.

III. ASSIGNMENT OF ERROR AND RULING BELOW

As previously noted, the Circuit Court of Harrison County has answered its proposed certified question in a manner adverse to Plaintiff, and it is submitted on behalf of Plaintiff that the Circuit Court erred in answering the question affirmatively by failing to give meaning and effect to the pertinent provisions of the West Virginia Nursing Home Act (W.Va. Code § 16-5C-1, *et seq.*).

IV. ARGUMENT AND DISCUSSION OF THE LAW

A. The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, Does Not Preempt West Virginia Code § 16-5C-15(c) Because the Subject Arbitration Agreement is Null and Void as Contrary to Public Policy.

The arbitration agreement executed by Plaintiff is not binding upon the parties to this action because it is in direct violation of West Virginia Code § 16-5C-15(c) of the West Virginia Nursing Home Act, and is thus explicitly "null and void as contrary to public policy." W.Va. Code § 16-5C-15(c). The relevant portion of this code provision 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 as contrary to public policy.

Id.

Moreover, this waiver-invalidating provision is conspicuously found in the West Virginia Nursing Home Act, the very Act which the Plaintiff charges the Defendants with violating, and such provision is not unique to nursing homes insofar as it also appears in West Virginia statutes regarding assisted living residences (*See* W.Va. Code § 16-5D-15(f)) and residential care communities (*See* W.Va. Code § 16-5N-15(c)). *See also similar anti-waiver provisions in* W.Va. Code § 21-5-10 (Wage Payment and Collection Act); W.Va. Code § 31-17-17(b) (West Virginia Residential Mortgage Lender, Broker and Servicer Act); and W.Va. Code § 38-8-15 (Exemptions from Levies).

1. Generally applicable state laws may invalidate arbitration agreements unless the subject state law specifically targets arbitration agreements.

The subject arbitration agreement executed by Plaintiff and by Clarksburg Continuous Care's authorized agent contains the provision that "[t]his Arbitration Agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. §§ 1-16." Despite this provision, the language of the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*, hereafter "FAA") itself states that an arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (*emphasis added*) 9 U.S.C. § 2.

Courts interpreting this statutory language have held that state laws will apply to arbitration agreements, and accordingly may also invalidate the same, as long as the subject state law does not specifically target arbitration agreements. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)("When deciding whether the parties agree to arbitrate a certain matter. . . courts generally. . . should apply ordinary state-law principles that govern the formation of contracts."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir.2002)("Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation."). More specifically, the United States Supreme Court in *Doctors's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, held that the above-cited language of section 2 of the FAA "declares that state law may be applied "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."" (*emphasis by the Court*) *Id.* at 686-687 citing *Perry v. Thomas*, 482 U.S. 483, 492, 107 S.Ct. 2520, 2527 (1987). The *Doctor's Associates* Court stated further that "Courts may not. . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." (*emphasis by the Court*) 517 U.S. at 687.

Though not involving a statutory anti-waiver provision, the West Virginia Supreme Court has held an arbitration agreement invalid under general state law principles. In *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914 (2005) *cert denied* 546 U.S. 958, the Supreme Court found that the FAA applies to arbitration agreements "only when such agreements constitute valid contracts under state law," and

subsequently invalidated the subject arbitration agreement based upon unconscionability and adhesion. *Id.* at 216 W.Va. 772, 613 S.E.2d 920. Thus, the Supreme Court has recognized that a general applicable contract law may invalidate an arbitration provision.

In the instant case, West Virginia Code § 16-5C-15(c) is a general prohibition on *"any* waiver" which interferes with the statutory right of a nursing home resident, or their representative, to bring a private action pursuant to the Nursing Home Act which in no way singles out arbitration agreements. Moreover, insofar as the interest of "public policy" concerns the validity, revocability, and enforceability of contracts generally, the subject arbitration agreement's violation of public policy (pursuant to the NHA) represents a legitimate state law contract defense which should void such agreement. *Carter v. SSC Odin Operating Co., LLC,* 885 N.E.2d 1204, 1209 (Ill. App. 5 Dist. 2008), *See also, Kinkel v. Cingular Wireless LLC,* 223 Ill.2d 1, 15-19, 306 Ill.Dec. 157, 857 N.E.2d 250 (2006).

Therefore, the NHA should be deemed to invalidate the subject arbitration agreement in this case and this Court should accordingly answer the subject certified question in the negative.

2. Courts have held that such an anti-waiver provision in the nursing home context invalidates arbitration agreements.

While this Court has not had occasion to rule on the specific issue that is subject of this Brief, the Circuit Court of Jefferson County, West Virginia issued an Order

regarding this precise issue in a similar case. On July 30, 2008, the Honorable Gina M. Groh entered an *Order Denying Defendants' Motion to Compel Specific Performance of Arbitration Agreement and to Stay This Action Pending Arbitration* (Order attached hereto as Exhibit 3) in the matter of *Luttrell v. Canterbury of Shepherdstown Limited Partnership, et al.* In declaring that the arbitration agreement in that case was void, Judge Groh cited West Virginia caselaw holding that contracts which contravene public policy are void. *See Wellington Power Corp. v. CNA Sur. Corp.*, 217 W.Va. 33, 39, 614 S.E.2d 680, 686 (2005)("no action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law or otherwise void.").

Judge Groh held further that because West Virginia Code § 16-5C-15(c) does not apply solely to arbitration agreements nor even mentions arbitration, this provision is one of "general applicability" which could indeed void "any type of contract or agreement by which the resident waived her rights to commence an action against a nursing home." Or. Denying Defs.' Mot. Dismiss p. 7 (July 30, 2008). Accordingly, Judge Groh concluded that West Virginia Code § 16-5C-15(c) "is part of the State contract law that the FAA *itself* applies to the interpretation of arbitration agreements." (*emphasis by the Court*) *Id.*

In reaching her decision, Judge Groh relied on one of the few other reported decisions on the precise issue at bar, a decision by the Appellate Court for the Fifth District of Illinois affirming the denial of the defendant's Motion to Compel Arbitration. *See Carter v. SSC Odin Operating Co., LLC*, 885 N.E.2d 1204 (Ill. App. 5 Dist. 2008). The

Carter Court had before it two anti-waiver sections of the Illinois Nursing Home Care Act, one of which being almost identical to the relevant section of West Virginia's Nursing Home Act stating:

> Any 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.

381 Ill.App.3d 717, 721, 885 N.E.2d 1204, 1208, citing 210 ILCS 45/3-606 (West 2006).

In concluding that the aforementioned section of the Illinois Nursing Home Act was not pre-empted by the FAA, the *Carter* Court held, first, that the Illinois anti-waiver provisions, like the relevant West Virginia provision, do not mention arbitration agreements at all and thus would apply equally to all contracts which seek to limit an individual's right to bring a suit under the nursing home act; and second, "to the extent that the sections may void agreements calling for arbitration, this is an incidental, tangential effect of the sections, not their primary purpose, and so the sections can hardly be said to 'specifically target arbitration agreements.'" 381 Ill.App.3d at 722 (citing *Doctor's Associates, Inc.*, 517 U.S. 681, 685, and *Perry*, 482 U.S. 483, 492 n. 9).

The situation in *Carter* is practically identical to that of the parties in the instant action: the plaintiff, on behalf of the resident, signed an arbitration agreement which specifically mentioned the FAA, as part of documents regarding the resident's admission to a nursing home. When the resident expired, the plaintiff filed suit alleging violations of Illinois's Nursing Home Act and for wrongful death which resulted in the

defendants filing a Motion to Compel Arbitration. As mentioned above, the *Carter* Court denied defendants' Motion to Compel Arbitration deeming the arbitration agreement void pursuant to the Illinois anti-waiver statute.

Thus, insofar as the underlying facts and relevant statutory provision is similar, this Court should adopt the reasoning of the *Carter* Court, and relied on by the Jefferson County Circuit Court. In doing so, Plaintiff respectfully requests that this Court declare that the subject arbitration agreement is null and void by answering the subject certified question in the negative.

3. Negative authority is distinguishable.

In an effort to candidly advise the Court of all applicable authority which Plaintiff is aware, in addition to the two aforementioned Courts, *Luttrell* and *Carter*, which have deemed arbitration agreements in the nursing home context void as violative of public policy, Plaintiff is aware of three Courts which have came down on the other side of the fence. These decisions are distinguishable, however, from the matter at hand.

First, in the Circuit Court of McDowell County, West Virginia, the Honorable Rudolph J. Murensky, II, ruled in an *Order Granting Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration*, entered November 7, 2007, that the Plaintiff and nursing home defendants were required to submit their differences to arbitration pursuant to a pre-admission arbitration agreement (Order attached hereto as Exhibit 4). Judge Murensky's Order, however, contains no mention or discussion of the

FAA nor the anti-waiver provision of the Nursing Home Act. From the Order, rather, it appears that Judge Murensky's decision was based solely on the issue of unconscionability. Insofar as this Order does not discuss the legal authority at issue in the subject certified question, it should not influence this Court's ruling.

Second, the United States District Court for the Northern District of Oklahoma held in *Rainbow Health Care Center, Inc. v. Crutcher*, (only Westlaw citation available, 2008 WL 268321 (N.D.Okla. 2008), that the Oklahoma Nursing Home Care Act's (Okla. Stat. tit. 63, § 1-1900.1 *et seq.*) anti-waiver provision[1] did not prevent the FAA's preemption regarding a nursing home arbitration agreement. *Id.* While similar, the applicable statute at issue in *Rainbow* is distinguishable from the West Virginia NHA. More specifically, and as the Court will note from the footnoted provision of the Oklahoma Nursing Home Care Act, the Oklahoma statute requires that parties submit their claims to a "trial by jury", and seeks to invalidate any agreement to the contrary. Section 16-5C-15(c) of the West Virginia NHA, however, is more general in nature by merely preserving a nursing home resident's right to "commence an action". Further, the West Virginia NHA is also distinguishable in that it provides the general contract defense rationale for its anti-waiver provision, stating that any waiver is "contrary to

[1] "Any party to an action brought under this section 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 the commencement of any action, shall be null and void, and without legal force or effect." Okla. Stat. tit. 63, § 1-1939(E).

public policy." Accordingly, and as discussed previously, such a general contract defense should not result in preemption by the FAA in the instant case.

Third, the Appellate Court of Illinois for the Second District, in *Fosler v. Midwest Care Center II, Inc.*, 391 Ill.App.3d 397, 911 N.E.2d 1003 (2009), disagreed with its sibling circuit's decision in *Carter* and held that the FAA did in fact preempt the anti-waiver provisions codified within the Illinois Nursing Home Care Act. Candidly, the *Fosler* Court simply reached a different conclusion than the *Carter* Court despite examining the same nursing home care act anti-waiver provisions, and essentially the same authority.

In its opinion, though, the *Fosler* Court acknowledged that "public policy can be a defense to enforcing a contract." *Id.* at 1010. Further, "[p]ublic policy is the legal principle that no one may lawfully do that which has the tendency to injure the welfare of the public." *Id.* citing *O'Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill.2d 333, 341, 130 Ill.Dec.401 (1989). Accordingly, insofar as the West Virginia NHA at issue explicitly cites public policy as rationale for the subject anti-waiver provision, this Court should deem such provision to be a ground as "exist[s] at law or in equity for the revocation of any contract", thus, not requiring preemption by the FAA. Additionally, it is worthy of note that, distinguishable from the *Fosler* ruling, the *Carter* decision was appealed, but denied writ of certiorari to the United States Supreme Court. *SSC Odin Operating Co., LLC, v. Carter*, 129 S.Ct. 2734 (2009).

Therefore, Plaintiff respectfully requests that this Court give meaning and effect to the West Virginia Nursing Home Act, enacted by the Legislature to "ensure protection of the rights and dignity of those using the services of [nursing home] facilities", W.Va. Code § 16-5C-1, in determining that the FAA does not preempt the NHA.

B. A Distinction Must be Made when Determining the Validity of Arbitration Agreements in the Nursing Home Context.

In its *Order Answering Certified Question*, the Circuit Court of Harrison County cited recent authority, which, when coupled with more seasoned Federal cases, caused it to find that the FAA preempted the subject anti-waiver provision of the NHA.[2] While such decisions concern arbitration agreements with respect to preemption by the FAA, Plaintiff submits that an important distinction must be made when dealing with the issue of the FAA's preemption of arbitration agreements in the nursing home context, particularly when at issue is an explicit legislative statute deeming any waiver of a resident's right to bring an action void as contrary to public policy.

As this Court recently held, "our law has a bias against preemption. Preemption of topics traditionally regulated by states - like health and safety - is greatly disfavored in the absence of convincing evidence that Congress intended for a federal law to displace a state law." *Morgan v. Ford Motor Company*, 680 S.E.2d 77 (2009), citing,

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[2] See generally, *Preston v. Ferrer*, 552 U.S. 346, 128 S.Ct. 978 (2008); *Pine Ridge Coal Company v. Loftis*, 217 F.Supp.2d 905 (S.D.W.Va.2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir.2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037 (2003).

among others, *CSX Tranp. Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)("Given the importance of federalism in our constitutional structure. . . we entertain a strong presumption that federal statutes do not preempt state laws; particularly those laws directed at subjects-like health and safety- 'traditionally governed' by the states").

At issue in the case at bar, is a statute designed with the specific purpose to protect the health and safety of nursing home residents in the State of West Virginia. *See generally*, W.Va. Code § 16-5C-1. To this end, the Legislature of this state deemed it necessary to include within the NHA, an explicit pronouncement that it is contrary to the public policy of West Virginia to permit any waiver by a nursing home resident of her right to commence an action for violations of the NHA. Meaning and effect must be given to such a bold statement made to protect the rights of those less able than most to protect themselves.

Further, a distinction between arbitration agreements in the nursing home context, and arbitration agreements generally, is not exclusive to state lawmakers. More particularly, in 2008, both houses of the United States Congress introduced nearly identical bills entitled the "Fairness in Nursing Home Arbitration Act". (Senate Bill 2838 and House Bill 6126 attached hereto as Exhibit 5). Such bills sought to specifically modify the FAA by stating that

> [a] pre-dispute arbitration agreement between a long-term care facility and a resident of a long-term care facility (or anyone acting on behalf of

such a resident, including a person with financial responsibility for that resident) shall not be valid or specifically enforceable.

Id. Unfortunately, these bills never made it out of committee before the end of the session, but certain members of Congress saw fit to re-introduce such bills again in 2009, each of which have been referred to committee (Senate Bill 512 and House Bill 1237, attached hereto as Exhibit 6).

Fully recognizing that a bill is not a law, Plaintiff submits that such bills evidence that, at very least, some members of Congress, the very body that enacted the FAA, acknowledge a distinction between arbitration agreements in the nursing home context and arbitration agreements generally. Further, no matter where one's political values lie, Plaintiff respectfully suggests that for members of the current Congress, arguably one of the most far-reaching in memory with respect to the bounds of federal authority, to introduce bills *restricting* preemption by a federal statute (FAA), speaks volumes about the importance of protecting the rights of nursing home residents.

Moreover, the Circuit Court, and Defendants, rely heavily on the United States Supreme Court's decision in *Preston v. Ferrer*, 552 U.S. 346 (2008), to support their position that the FAA supercedes the West Virginia NHA. Such reliance is misplaced, however, because the *Preston* decision is clearly distinguishable from the issue before this Court.

More particularly, *Preston* is a fact-specific matter concerning a contract entered into by two attorneys, one a former Florida trial court judge acting as a television

personality (Ferrer), and the other a California attorney who rendered services to those in the entertainment industry (Preston). *Id.* at 350. The contract at issue in *Preston* contained a provision whereby the parties agreed to arbitrate any dispute thereunder. *Id.* When a dispute arose regarding payment for services, Preston demanded arbitration pursuant to the contract, but Ferrer asserted that the entire contract was invalid because Preston had acted as a talent agent without a license in violation of the California Talent Agencies Act (TAA). *Id.* The TAA included a provision that any contract with an unlicensed individual for talent agency services was "illegal and void." *Id.* at 355. The TAA also provided that when controversies arose under the Act, the parties shall submit the matter to the California Labor Commissioner. *Id.* Thus, the issue before the *Preston* Court was whether the parties were required to submit the issue of the subject contract's validity to arbitration, pursuant to the contract's language and the FAA, or to the Labor Commissioner, per the TAA. *Id.* at 351. The United States Supreme Court held that the parties in *Preston* were required to arbitrate the dispute pursuant to the FAA.

The decision in *Preston* is in no way dispositive of the instant issue in this matter. *Preston* did not concern an express statutory anti-waiver provision, citing public policy as its justification, and *Preston* did not concern the nursing home context. As discussed above, these are important distinctions which must be appreciated.

In a recent decision, this Court acknowledged that it is to "exercise restraint" when using its broad power to determine public policy, and that it typically defers "to

the West Virginia legislature because it 'has the primary responsibility for translating public policy into law.'" *Swears v. R.M. Roach & Sons, Inc.*, 2010 WL 1839408 (2010)(only Westlaw citation currently available), citing *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 135, 141, 506 S.E.2d 578, 584 (1998). Through the Nursing Home Act, and specifically § 16-5C-15(c), the West Virginia legislature translated this state's public policy loud and clear: any waiver by a nursing home resident to bring an action under the NHA shall be null and void as ***contrary to public policy***.

Such a profound statutory provision is not at issue, nor discussed, in *Preston*, thus rendering that decision not on-point with the facts of the case before this Court.

Therefore, Plaintiff respectfully requests that this Court recognize the distinction acknowledged by elected representatives in this state, and at the national level, between arbitration agreements in the nursing home context and arbitration agreements in general, and in doing so, answer the subject certified question in the negative.

C. Defendants' Arguments Regarding the Applicability of the FAA are Not Relevant Insofar as the Subject Arbitration Agreement is Void on its Face.

In their pleadings, Defendants outlined the tests for determining, and have made attendant arguments regarding, the validity of an arbitration agreement under the FAA. These tests are not relevant to this matter, however, insofar as the West Virginia Nursing Home Act provision controls and subsequently invalidates the subject arbitration agreement before the need to even examine the same under the FAA.

As discussed above, West Virginia Code § 16-5C-15(c) is a generally applicable anti-waiver provision which should be deemed controlling for the current issues before this Court. In addition, the language of the subject provision is clear in its meaning. West Virginia Code § 16-5C-15(c) states "any waiver" is null and void and there is no question that the arbitration agreement at issue in this case was meant to be a waiver of the parties' right to file suit against each other insofar as the agreement contains a capitalized disclaimer stating

> THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND ***WAIVING*** THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.

Further, the word "action", as in West Virginia Code § 16-5C-15(c)'s "the right to commence an *action* under this section", is defined by Black's Law Dictionary as "[a] civil or criminal *judicial proceeding*." *(emphasis added) Black's Law Dictionary* p. 24 (Bryan A. Garner ed., 7th ed., West 2000). Thus, the subject arbitration agreement was indeed a *waiver* of the right to bring an *action* as contemplated and prohibited by West Virginia Code § 16-5C-15(c). This clear interpretation of § 16-5C-15(c) was acknowledged by Judge Groh in her *Luttrell* Order. Or. Denying Defs.' Mot. Dismiss p. 12. Therefore, it remains clear that West Virginia Code § 16-5C-15(c) applies to the issue at hand and invalidates the subject arbitration agreement prior to the necessity of any consideration regarding the agreement's validity under the FAA.

IV. CONCLUSION AND RELIEF REQUESTED

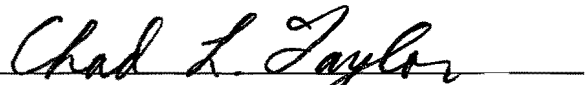
In operating a nursing home facility in the State of West Virginia, Defendants are charged with knowledge of, and compliance with, the West Virginia Nursing Home Act (W.Va. Code § 16-5C-1 *et seq.*). Thus, the Defendants should not now be permitted to deny the existence or applicability of the explicit anti-waiver provision contained in West Virginia Code § 16-5C-15(c).

WHEREFORE, because the subject arbitration agreement is null and void pursuant to the explicit statutory language of the West Virginia Nursing Home Act, specifically West Virginia Code § 16-5C-15(c), Plaintiff respectfully requests that this Court adopt the reasoning the Circuit Court of Jefferson County, West Virginia, and of the Appellate Court of Illinois, Fifth District, and thereby permit Plaintiff to pursue her statutorily provided remedy pursuant to the NHA, by answering the subject certified question in the negative.

Plaintiff/Appellant Requests the Opportunity of Oral Presentation of this Matter.

POINTS AND AUTHORITIES RELIED UPON
TABLE OF CASES

Respectfully Submitted,
Plaintiff, By Counsel,



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SHARON A. MARCHIO, Executrix
of the Estate of Pauline Virginia Willett,

Plaintiff/Appellant,

v. WV Supreme Court Docket No. 35635

CLARKSBURG NURSING &
REHABILITATION CENTER, INC.,
a West Virginia Corporation,
d/b/a Clarksburg Continuous
Care Center,
SHEILA K. CLARK, Executive Director
of Clarksburg Nursing &
Rehabilitation Center, Inc., d/b/a
Clarksburg Continuous Care Center,
JOHN/JANE DOE #1, and
JENNIFER MCWHORTER,

Defendants/Appellees.

CERTIFICATE OF SERVICE

I, Chad L. Taylor, do hereby certify that I served the foregoing **BRIEF OF APPELLANT SHARON A. MARCHIO** this 8th day of July, 2010, by depositing a true and exact copy thereof in the United States mail, postage prepaid, upon the following:

Mark A. Robinson (WV Bar ID # 5954)
Ryan A. Brown (WV Bar ID #10025)
FLAHERTY, SENSABAUGH &
BONASSO, P.L.L.C.
Post Office Box 3843
Charleston, West Virginia 25338-3843

Chad L. Taylor

Chad L. Taylor (W. Va. Bar No. 10564)

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE