

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

CIVIL ACTION NO.: 08-C-334-3
Honorable James A. Matish

CLARKSBURG NURSING &
REHABILITATION CENTER, INC.,
a West Virginia Corporation,
d/b/a Clarksburg Continuous
Care Center,
SHIELA K. CLARK, Executive Director
of Clarksburg Nursing &
Rehabilitation Center, Inc., d/b/a
Clarksburg Continuous Care Center,
JOHN/JANE DOE #1, and JOHN/JANE DOE #2

Defendants.

ORDER AND CERTIFICATION

On July 24, 2008, the Defendants filed Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration. On August 13, 2008, Plaintiff filed a Response to Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration. On August 21, 2008, the Defendants filed a Reply to Plaintiff's Response to Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration. A Notice of Hearing was filed on September 10, 2008, and this Court conducted a hearing on the matter on October 3, 2008.

Essentially, the Defendants content that Plaintiff should be bound by the Resident Admission Agreement, which contains an arbitration clause, as Plaintiff signed the Agreement as the representative of Pauline Virginia Willett. Plaintiff

contends that this arbitration provision is void as contrary to public policy pronounced in the West Virginia Nursing Home Act, West Virginia Code § 16-5C-15(c). Defendant counters by arguing that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, preempts the West Virginia Nursing Home Act, rendering the arbitration provision enforceable.

After full consideration of the written pleadings and the oral argument of the parties, the Court found that the legal issue raised was a question of first impression in West Virginia and that the following certified question should be submitted to the West Virginia Supreme Court of Appeals for consideration. Accordingly, the Court hereby certifies the following question for the Supreme Court's consideration:

1) 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.

Yes
 No

Pursuant to West Virginia Code § 58-5-2, the Court also certifies that the above question arises as a purely question of law relating to the challenge of the sufficiency of a pleading.

It is, therefore, hereby **ORDERED** that further proceedings in this matter be stayed until such questions shall have been decided by the West Virginia Supreme Court of Appeals and the decision thereof certified back to this Court.

The Plaintiff is directed to file with the Circuit Clerk an original and nine (9) copies of a petition and a designation of the record within thirty (30) days of the date of the entry of this order and certification and the Defendants are directed to file an original and nine (9) copies of a response and designation of such additional portions of the record within fifteen (15) days of the filing of the petition, if Defendants choose to file a response.

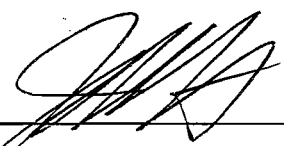
It is, further, **ORDERED**, that within thirty (30) days of the designations of the record by the parties, the Circuit Clerk is **ORDERED** to assemble, paginate, and index the designated portions of the record by the parties, and, together with the original and copies of the petition and any opposing response, transmit the same to the Clerk of the West Virginia Supreme Court of Appeals.

Finally, it is **ORDERED** that the Circuit Clerk shall forward certified copies of this Order to the following:

Mark A. Robinson, Esquire
Ryan Brown, Esquire
Counsel for Defendants
Flaherty, Sensabaugh &
Bonasso, PLLC
Post Office Box 3843
Charleston, WV 25338-3843

Frank E. Simmerman, Jr., Esquire
Counsel for Plaintiff
Simmerman Law Office, PLLC
254 East Main Street
Clarksburg, WV 26301

ENTER: 02/24/2010



Judge James A. Matish

STATE OF WEST VIRGINIA,

COUNTY OF HARRISON,

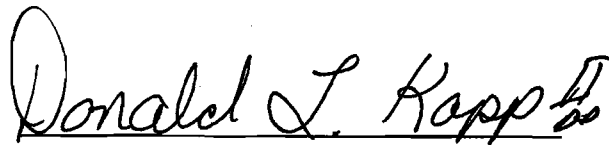
I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit Court of Harrison County, certify that the foregoing are the original papers filed and a complete record of the proceedings had in the within action of Sharon A. Marchio, Executris of the Estate of Pauline Virginia Willett v. Clarksburg Nursing & Rehabilitation Center Inc etal

CERTIFIED QUESTION

No. 08-C-334-3, as designated by the petitioner.

Given under my hand and the seal of said court, this the

9th day of April, 2010.



Clerk of the Fifteenth Judicial Circuit Court of Harrison County, West Virginia