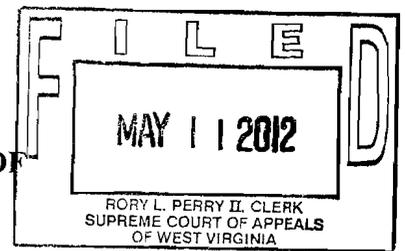


IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA



APPELLANT'S SUPPLEMENTAL 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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INTRODUCTION

This Court has invited the parties to submit supplemental briefs on the sole question of whether it's determination that the arbitration clauses were unconscionable was influenced by its categorical holding that pre-dispute agreements to arbitrate personal injury or wrongful death claims are not governed by the FAA. More concisely, the Supreme Court of the United States has remanded the matter back to this Honorable Court to refocus and reinforce its earlier holding that the arbitration clause hereunder is unenforceable under state common law principles, and this Court has given the parties an opportunity to respond.

Simply stated, if the offending portions of this Court's earlier ruling (regarding FAA preemption and per se unconscionability) were extracted entirely from its Opinion, its ruling would still be proper because "the three arbitration clauses are, as a matter of law, unconscionable and unenforceable against the plaintiffs" and the extensive briefing of these issues by the Court supports its ultimate conclusion. See Brown v. Genesis Healthcare Corp., 2011 W. Va. LEXIS 61 (W. Va. June 29, 2011). The mandatory arbitration clause herein was adhesive, unconscionable, wrought with gross inadequacy regarding the bargaining positions of the parties and was wholly and legally unenforceable on these grounds, without more. This Court recognized the crucial deficiencies in the formation of a legally enforceable contract in this matter, separate and apart from its overruled discussion of per se unconscionability and FAA preemption. This honorable Court should AFFIRM the pertinent portions of its prior ruling.

Appellant outlined the procedural background and underlying facts of this case in its original Appellant's Brief and will not rehash those facts and circumstances here. Instead, he will offer a solid legal argument in support of this Court's prior ruling that the arbitration clause at

issue herein was unconscionable pursuant to the basic principles of West Virginia contract law; a decision upon which comes prior to, and is separate and apart from, any application of the FAA.

ARGUMENT

I. THE FAA SAVINGS CLAUSE PROVIDES FOR THE INVALIDATION OF ARBITRATION CLAUSES USING GENERAL CONTRACT PRINCIPLES

The Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., provides that a written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (U.S. 2012); quoting 9 U.S.C.S. § 2 (*emphasis added*). Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation and generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration clause. See State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders, 717 S.E.2d 909, 917-18 (W. Va. 2011) (citing Syllabus Point 2, State ex rel. TD Ameritrade, Inc. v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010)).

As the United States Supreme Court made clear in its remand of this matter, 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. “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).

II. THE DOCTRINE OF UNCONSCIONABILITY PERMITS THE COURT TO REFUSE TO ENFORCE AN ARBITRATION CLAUSE

In a recent opinion issued by this Court in a case not dissimilar from the one at bar, this Court made a prolific and powerful statement regarding the perceived hostility of the courts of West Virginia towards agreements to arbitrate:

This Court is conscious of the "ancient judicial hostility to arbitration" that the FAA was intended to correct, and the courts of this State are not hostile to arbitration or to adhesion contracts. **We are hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute.**

State ex rel. Richmond Am. Homes, supra, 717 at 913 (W. Va. 2011) (*emphasis added*). This statement sums up the basis for striking the arbitration clause in the present matter and captures the enforceable portion of this Court’s holding in its earlier opinion, now on remand.

In its June 29, 2011 Opinion in this matter, this Court dedicated a majority of its well-reasoned decision to an exhaustive review of the principles of unconscionability and contract formation. See, e.g., Brown Syl. Pt 12-20. This Court spent nearly ONE HUNDRED pages exploring the ins-and-out of unconscionability in the realm of arbitration clauses hidden within nursing home admissions agreements. Its ultimate decision, that “after a comprehensive discussion of the doctrine of unconscionability, we conclude that, in two of the cases on appeal, the arbitration agreements at issue are unconscionable and unenforceable as a matter of law,” had

absolutely nothing to do with the application of, or preemption by, the FAA nor with the Court's theory on per se unconscionability. Instead, this Courts ruling on the issues of preemption and per se unconscionability dealt with creating jurisprudence for the resolution of these oft litigated issues in the wake of the influx of nursing home admission arbitration disputes. Again, it had nothing to do with the individual cases before it. Thus, this Court's finding that both procedural and substantive unconscionability made the enforcement of the arbitration clause in Mr. Taylor's admission agreement in error was both proper and well supported.

The bottom line here is that where a party alleges that an arbitration provision is unconscionable, or was thrust upon him because he was unwary and taken advantage of, or that the contract is 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 Richmond Am. Homes, *supra*, at 919 (W. Va. 2011). This Court undertook a painstaking review of each of these facets of unconscionability and concluded, in a well-supported decision, that the arbitration clause was adhesive, unconscionable and ultimately unenforceable.

III. THE ARBITRATION CLAUSE HEREUNDER IS UNCONSCIONABLY ADHESIVE AS THERE WAS A GROSS INADEQUACY OF BARGAINING POSITION, NO BARGAINED FOR EXCHANGE AND IT FORCES A SUBSTANTIAL WAIVER OF APPELLANT'S CONSTITUTIONAL RIGHTS

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, this Court has stated:

‘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*).

Two recent cases have explored similar issues regarding unconscionability and contract formation under West Virginia law, and both cases have held in favor of unconscionability on facts similar to those hereunder. In State ex rel. Richmond Am. Homes, *supra*, forty residents

sued the builder of their homes alleging improper construction which caused injury when radon gas leaked into their homes. The builder attempted to enforce an arbitration agreement contained in the sales agreement, despite the fact that many of the residents had never signed the arbitration agreement. Based on facts not dissimilar to those hereunder, including the imposition of higher arbitration costs that might deter the pursuit of a claim, the arbitration provision was found to be ambiguous, unconscionable and unenforceable. This Court, in its review, reiterated many of the same principles it explored in the original Opinion in this matter regarding procedural and substantive unconscionability. It made clear, once again, that “[a]greements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability.” *Id.*, 717 S.E.2d at 922. Moreover, this Court made the important distinction that “[t]he mere fact that an arbitration provision is prominent and specifically initialed by a signatory plaintiff does not mitigate its unconscionable effect. Reliance on a written warning misses the point. The legal enforceability vel non of exculpatory provisions in contracts of adhesion has little to do with whether there are self-serving caveats in a document that is not going to be read, and everything to do with **whether the provisions would operate to deprive people of important rights and protections that the law secures for them.**” *Id.* at 922-23 (*emphasis added*).

Next, in the matter Koontz v. Wells Fargo, the Plaintiffs took out a mortgage with Wells Fargo and signed the documents under hurried circumstances and without thorough explanation of the documents being signed. Koontz v. Wells Fargo, N.A., 2011 U.S. Dist. LEXIS 35569, 8-15 (S.D. W. Va. Mar. 31, 2011). The Plaintiffs were in a disadvantaged position, being unsophisticated laymen who knew little about the documents being signed. In consideration of the gross inadequacy of bargaining power between the parties, the lack of explanation of the

documents being signed and emotional duress either perceived or actually experienced by the signor, the Court could not deny the appearance of unconscionability.

Without repeating the dozens of pages facts already on the record and summarized in this Court's Opinion, the Arbitration Clause in the present matter was labeled "MANDATORY ARBITRATION" and the signing of the provision was a prerequisite to admission. The Arbitration Clause did not allow for the recovery of punitive damages, it required the payment of an exorbitant initial arbitration filing fee. If the Plaintiff lost, Plaintiff was required to pay arbitration fees, attorney's fees and out-of pocket expenses incurred. Additionally there exists no opt-out language in the Arbitration Clause allowing the resident or his legal representative to reconsider his or her alleged consent to arbitration (although such opt-outs do occur elsewhere in the Agreement, making it clear the inability to opt-out of the Arbitration Clause was intentional by its drafters). Finally, the Agreement reserved the drafter's right to file suit in a Court of law while requiring Mr. Taylor to submit **all** disputes with the facility to binding arbitration, at his expense.

Moreover, in the Taylor case, the signor of the agreement was not represented by counsel at the time of signing and was under a form of emotional duress, as the signing of the agreement was a prerequisite to admission. There is no evidence that the Arbitration Clause, and its intended purpose of extinguishing a constitutional right of access to the courts, was ever explained, including the right to ask for and receive punitive damages or the right to a jury trial. To the contrary, the final section of the Admission Agreement in this matter contains a check-list to be completed by the resident or his representative confirming that, purportedly, the most important terms of the Agreement were explained to and reviewed with the resident or his legal representative. This check-list contains reference to every essential term of the Agreement, down

to and including “Have received information relating to beauty, and barber services.” The check-list DOES NOT contain an enumerated entry regarding review of the Arbitration Clause or explanation thereof or an understanding of the waiver of rights that it entails. The Mandatory Arbitration provision herein cannot be considered to have been bargained for under the facts of this case.

Finally, the Arbitration Clause in this matter is an adhesive contract, as evidenced by its preprinted, non-negotiated, take-it-or-leave-it language without any option for the resident to refuse an offensive provision. This Court has made clear that provisions in a contract of adhesion that, if applied, would impose unreasonably burdensome costs or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable. State ex rel. Dunlap at 566-567. The Arbitration Clause in the present matter is oppressive, one-sided, imposes costs far beyond those required by the courts, limits the statutory rights of those bound by it and is unquestionably unconscionable, adhesive and unenforceable. The Court’s Opinion to this end was proper, well-reasoned and supported by the laws of West Virginia.

CONCLUSION

This Supplemental Brief comes as a result of the Supreme Court of the United States’ remand of the matter back to this honorable Court to reinforce its earlier holding that the arbitration clause hereunder is unenforceable under state common law principles.

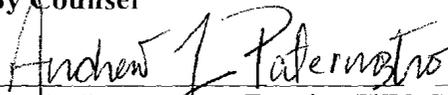
The most direct route to confirming its prior holding of unconscionability is to remove the portions of this Court’s earlier ruling (regarding FAA preemption and per se unconscionability)

and then confirm that the exhaustive briefing on procedural and substantive unconscionability still holds water, which it does.

The mandatory arbitration clause herein was adhesive, unconscionable, wrought with gross inadequacy regarding the bargaining positions of the parties and was wholly and legally unenforceable on these grounds, without more. This Court recognized the crucial deficiencies in the formation of a legally enforceable contract in this matter, separate and apart from its overruled discussion of per se unconscionability and FAA preemption. This Honorable Court should AFFIRM the pertinent portions of its prior ruling.

**APPELLANT/PLAINTIFF JEFFREY TAYLOR,
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CERTIFICATE OF SERVICE

I, Andrew L. Paternostro, hereby certify that on this the 11th day of May, 2012, caused service of the foregoing **APPELLANT'S SUPPLEMENTAL 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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