

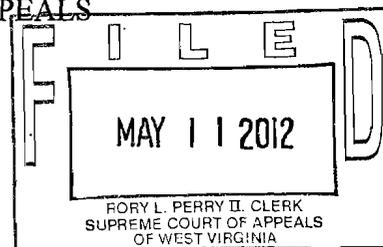
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.

SUPPLEMENTAL BRIEF OF APPELLANT SHARON A. MARCHIO

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 pursuant to this Court's Order entered April 3, 2012, and Rule 10(h) of the Rules of Appellate Procedure, hereby respectfully submits this supplemental brief in anticipation of re-argument in this matter set for Wednesday, June 6, 2012.

I. STATEMENT OF THE CASE AND LIMITED QUESTION POSITED

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 prompted 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.

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*. Defendants' Motion to Compel Arbitration was argued before the Circuit Court of Harrison County, and ultimately resulted in the Honorable James A. Matish, by *Order Answering Certified Question* entered February 24, 2010, submitting the following certified question to this Court:

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 [A] 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.

Thereupon, a briefing schedule was established on the issue of the aforementioned certified question by this Court’s Order entered June 2, 2010, and the matter was consolidated with *Brown v. Genesis Healthcare Corp., et al.*, (Supreme Court Docket No. 35494), and *Taylor v. MHCC, Inc., et al.*, (Supreme Court Docket No. 35546), for purposes of argument, consideration and decision. Argument was heard in the three consolidated matters on January 19, 2011, and a decision was rendered June 29, 2011. *Brown v. Genesis Healthcare Corp.*, 2011 W.Va. LEXIS 61 (June 29, 2011). With respect to the *Marchio* matter, this Court reframed the question certified by the circuit court and answered in the affirmative - finding that the Federal

Arbitration Act (“FAA”) preempted Section 15(c) of the West Virginia Nursing Home Act. *Id.* at 131. Nevertheless, by its June 29, 2011, opinion, this Court held that, as a matter of public policy, the pre-injury arbitration clauses at issue in the three consolidated matters were unenforceable. *Id.* at 115-116.

Taking issue with this Court’s holding, the consolidated Appellees/Defendants filed two Petitions For A Writ of Certiorari with the Supreme Court of the United States in or about September 2011.¹ Briefs in Opposition were filed in response to each of the Petitions for a Writ of Certiorari by the Appellants/Plaintiffs.

Thereafter, by per curiam opinion issued February 21, 2012 (*Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (U.S. 2012)), the Supreme Court of the United States granted certiorari, vacated the judgment of this Court, and remanded the consolidated cases to this Court for further proceedings. The mandate received by this Court from the Supreme Court of the United States attendant to its February 21, 2012, opinion prompted this Court to set the instant matter for re-argument under Rule 20 – to be held on Wednesday, June 6, 2012 – on the following limited question:

Was this Court’s determination that the arbitration clauses were unconscionable influenced by its categorical holding that pre-dispute agreements to arbitrate personal injury or wrongful death claims are not governed by the Federal Arbitration Act?

To address the limited question posited by the Court, Plaintiff Sharon Marchio respectfully submits this supplemental brief for the Court’s consideration.

¹ One Petition for a Writ of Certiorari was submitted by the Appellees/Defendants in the *Marchio* matter, and a second Petition was collectively submitted by the Appellees/Defendants in the *Brown* and *Taylor* matters.

II. SUMMARY OF ARGUMENT

With respect to the *Brown* and *Taylor* matters, this Court deemed the respective records sufficient to hold that the arbitration agreements in those two matters were unconscionable, and thus unenforceable on grounds independent of a public policy basis. In regard to *Marchio*, this Court held that the issue of unconscionability, specifically (*see Brown*, 2011 W.Va. LEXIS 61, at p. 11), and other grounds (*see Id.* at FN 170, p. 132) for the invalidation of the subject arbitration agreement, may be raised by the parties on remand.

Ms. Marchio's purpose in filing this supplemental brief is to advise the Court that an additional issue exists affecting the enforceability of the subject arbitration agreement which the circuit court should be specifically directed to consider on remand - namely, whether the arbitration agreement is enforceable when the sole arbitration forum prescribed by the agreement is not available. Accordingly, Ms. Marchio requests that this Court remand her case to the Circuit Court of Harrison County with the directive that the circuit court specifically consider the issue of unconscionability *and* the unavailability of the selected arbitration forum, among other grounds which may be raised by the parties, in determining the enforceability of the subject arbitration agreement.

IV. ARGUMENT

In its June 29, 2011, opinion, this Court held that the arbitration agreements at issue in the *Brown* and *Taylor* matters were "unconscionable and unenforceable as a matter of law." *Id.* at p. 11. Such "alternative" holding is an adequate and independent basis on which to deem the respective agreements unenforceable that is distinct from this Court's "categorical" holding that

pre-dispute agreements to arbitrate personal injury or wrongful death claims are violative of public policy.

As the Supreme Court of the United States indicated in the decision above, if the arbitration agreements at issue are unconscionable or otherwise unenforceable under state common law principles which are not specific to arbitration, they would not be pre-empted by the Federal Arbitration Act (FAA). *Marmet Health Care Center*, 132 S. Ct. at 1204. This Court similarly recognized that “nothing in Section 2 of the FAA overrides normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or unconscionability – may be applied to invalidate an arbitration agreement.” *Brown*, 2011 W.Va. LEXIS 61, at p. 74.

In addition to its analysis of the FAA’s preemption of the West Virginia NHA and public policy concerns with pre-injury arbitration agreements, this Court performed a comprehensive analysis of the law on unconscionability in West Virginia. *Id.* at p. 80 - 104. With respect to the *Brown* case, based upon the record, this Court held that the arbitration clause was procedurally and substantively unconscionable. *Id.* at p. 119 & 120. With respect to the *Taylor* case, this Court similarly found that the records “tip[ped] the scale toward a finding of procedural unconscionability.” *Id.* at p. 127.

As to Ms. Marchio’s matter, this Court ably noted that “the issue of unconscionability was not considered by the trial court, *but may be raised by the parties on remand.*” *Emphasis added*, *Id.* at p. 11. Moreover, having reformulated, and then answered, the limited question certified by the Circuit Court of Harrison County, this Court directed that “[o]n remand, we leave

it to the parties to determine whether the [arbitration] clause may be challenged on some other ground.” *Id.* at FN 170, p. 132.

In addition to the issue of unconscionability, there exists a separate, and perhaps initial, inquiry which should be performed by the circuit court in the *Marchio* matter on remand. This inquiry concerns the fact that the sole arbitration forum prescribed by the arbitration agreement is unavailable. More specifically, the *Marchio* arbitration agreement requires arbitration be conducted, exclusively, by the National Arbitration Forum (NAF). This forum designation renders the arbitration agreement unenforceable because as of July 24, 2009, the NAF stopped accepting consumer claims for arbitration.

The Resident and Facility Arbitration Agreement in the *Marchio* case provides

that any legal dispute, controversy, demand or claim . . . that arises out of or relates to the Resident Admission Agreement or any service or health care provided by the Facility to the Resident, *shall be resolved exclusively* by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the Code of Procedure of the National Arbitration Forum (“NAF”) which is hereby incorporated into this Agreement, and not by lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

Emphasis added, Id. at Appendix 2, p. 135-136. The arbitration agreement then directs the resident to the NAF for “[i]nformation regarding. . . its arbitration services, fees for services and Code of Procedure.” *Id.* at 136. Thus, integral to the *Marchio* arbitration agreement is a provision designating the NAF as the exclusive arbitration forum in which the Respondent may assert her claims.

The problem, however, as alluded to above, is that “the designated arbitration forum, the NAF, can no longer accept [consumer] arbitration cases pursuant to a consent decree it entered with the Attorney General of Minnesota.” *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 217 (Pa. Super. Ct. 2010)², *see also*

<http://www.adrforum.com/newsroom.aspx?&itemID=1528&news=3>. Accordingly, the parties are without an arbitrator, and the agreement is left unenforceable.

Admittedly, Ms. Marchio did not raise this issue regarding the unavailability of the selected arbitration forum in the proceedings below which began in the summer of 2008 with the filing of Defendants’ Motion to Compel Arbitration - one year prior to the NAF’s decision to stop accepting consumer arbitrations. This issue was addressed, however, in Ms. Marchio’s Brief In Opposition to Defendants’ Petition for a Writ of Certiorari filed with the Supreme Court of the United States, and remains a valid challenge to the subject arbitration agreement appropriate for review by the circuit court on remand.³ Notably, the Supreme Court of the United

² When presented with an arbitration agreement in the nursing home context which mirrors the precise choice of forum language of the *Marchio* arbitration agreement, the Superior Court of Pennsylvania held that the NAF’s unavailability rendered the agreement unenforceable. *Stewart*, 9 A.3d at 219 (recognizing that the “legal conclusion that the [arbitration] Agreement [is] unenforceable due to the NAF’s unavailability is supported by a majority of the decisions that have analyzed language similar to that in the Agreement.”).

³ This Court’s June 29, 2011, opinion recognized the limited manner in which the *Marchio* matter came before this Court, noting that the Circuit Court of Harrison County “only certified a question regarding the preemption of Section 15(c) of the Nursing Home Act by the FAA.” *Emphasis added, Brown*, 2011 W.Va. LEXIS 61, at p. 116. Further, recognizing that “[t]he plaintiff in Ms. Willett’s case did not raise any additional challenges to the arbitration clause other than arguing it was void under Section 15(c) of the Nursing Home Act,” this Court nonetheless left it to the parties to determine whether other grounds exist on which to challenge the subject arbitration agreement. *Id.* at FN 170, p. 132.

States did not opine on this issue nor make any specific finding with respect to the *Marchio* case.⁴

Recognizing that the enforceability of the *Marchio* arbitration agreement based upon the unavailability of the NAF is not an issue presently before this Court, Ms. Marchio does not brief the issue herein, but merely advises the Court that this issue exists and necessitates inquiry by the circuit court on remand. Accordingly, Ms. Marchio respectfully requests that when remanding this matter to the Circuit Court of Harrison County, this Court direct the circuit court to not only consider the issue of unconscionability, but also whether the NAF's unavailability renders the arbitration agreement unenforceable, among other applicable challenges which may be raised by the parties.

IV. CONCLUSION

WHEREFORE, based upon this Court's findings regarding the *Marchio* matter memorialized in its June 29, 2011, opinion, Plaintiff/Appellant Sharon A. Marchio respectfully requests that her case be remanded to the Circuit Court of Harrison County for determination whether the subject arbitration agreement is enforceable considering: the issue of unconscionability, the unavailability of the selected arbitration forum, and such other grounds which may be raised by the parties.

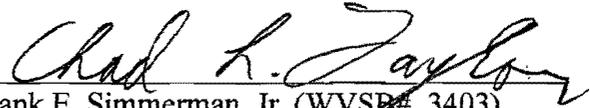
Plaintiff/Appellant Requests the Opportunity of Oral Presentation of this Matter at the Re-Argument Scheduled for June 6, 2012.

⁴ The Supreme Court of the United States merely noted that this Court's June 29, 2011, decision did "not address[] the question whether the arbitration agreement in Marchio's case is unenforceable for reasons other than public policy." *Marmet Health Care Center, Inc.*, 132 S. Ct. at 1204.

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CERTIFICATE OF SERVICE

I, Chad L. Taylor, do hereby certify that I served the foregoing **SUPPLEMENTAL BRIEF OF APPELLANT SHARON A. MARCHIO** this 10th day of May, 2012, by depositing a true and exact copy thereof in the United States mail, postage prepaid, upon the following:

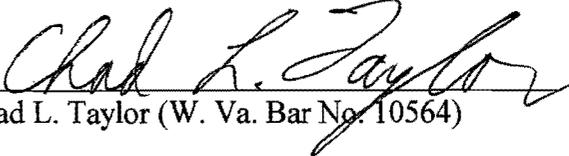
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