

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Clayton Brown, as guardian for
and on behalf of Clarence Brown,
Plaintiff below, Appellant

vs.) No. 35494

Marmet Health Care Center, Inc., et al.,
Defendants below, Appellees

-AND-

Jeffery Taylor, personal representative
of the Estate of Leo Taylor,
Plaintiff below, Appellant

vs.) No. 35546

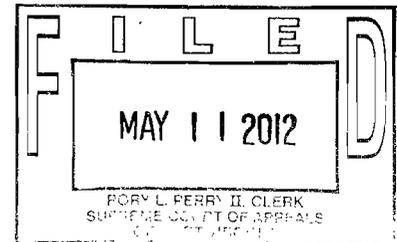
MHCC, Inc., f/k/a/ Marmet Health Care Center
et al., Defendants below, Appellees

-AND-

Sharon Marchio, Executrix of the Estate of
Pauline Virginie Willet, Plaintiff

vs.) No. 35635

Clarksburg Nursing & Rehabilitation Center, Inc.,
et al, Defendants



**SUPPLEMENTAL BRIEFING OF CLAYTON BROWN, AS
GUARDIAN FOR AND ON BEHALF OF CLARENCE BROWN**

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LIMITED QUESTION PRESENTED

Are the arbitration agreements at issue unconscionable based on solid contract formation defenses?

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Summary of the Argument

In both the *Brown* and *Taylor* matters, as this Court noted in its original opinion, the underlying contracts were unconscionable for reasons entirely separate from the stated public policy against pre-injury agreements exculpating defendants from liability for personal injuries. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, --- S.E.2d ----, 2011 WL 2611327, *30, *32-33 (W.Va. 2011). In the *Marchio* case, this Court did not address or decide questions of unconscionability because the only issue before the Court was a certified question related to the question of preemption of the West Virginia Nursing Home Act, an issue it decided in favor of the nursing home. *Id.* On remand, however, this Court's unconscionability and unenforceability rulings may be applied to bar arbitration.

The circumstances surrounding the formation of the agreements in both *Brown* and *Taylor* made them procedurally unconscionable as contracts of adhesion imposed on vulnerable patients who lacked a real choice as to whether to enter into them. The substantive unconscionability is exemplified in the one-sided application of these arbitration agreements. The Defendants/nursing homes literally reserved their right to sue the residents in their facilities for payment or even ejection, while stripping the residents' rights to sue if they are neglected, abused, or even killed by the Defendants.

Further, these arbitration contracts are void for several other reasons. For example, an integral and material term of the arbitration agreements in all three matters, *Brown*, *Taylor*, and *Marchio*, requires use of a forum that is no longer available; thus the contracts are impossible to enforce. In *Marchio* and *Taylor*, it appears that there was not sufficient authority to enter into the arbitration agreements at issue.

Statement of Facts of Procedural History

This consolidated appeal involves three civil tort actions in which separate claims were alleged against nursing home owners, operators, and managers. Clarence Brown, at the age of 46, was admitted to Marmet Health Care Center on or about April 27, 1996 for the care he needed, and his family was assured that he would get that care. He remained a resident of the facility until May 16, 2007. Eight years into his residency, on March 26, 2004, the nursing home had Mr. Brown's brother, Clayton Brown, sign an "Admissions Agreement" which contained a mandatory arbitration provision. As Justice Benjamin raised at the oral arguments before this Court in the *Brown* matter on January 19, 2011, this violates Federal Medicare laws that make it illegal for the nursing home to ask for additional consideration from its residents.

Similarly, Leo Taylor was a resident of Marmet from February 8, 2006, through December 6, 2006. Leo Taylor's wife, who held a Medical Power of Attorney granting authority to make "any and all decisions regarding Leo Taylor's care, including nursing home care" signed an identical arbitration agreement to that found in the *Brown* matter. After Leo Taylor suffered injuries at Marmet, suit was brought against the nursing home defendants ("*Taylor*"). As in the *Brown* matter, the Circuit Court of Kanawha County, West Virginia, granted a motion to compel arbitration despite several valid defenses to the contract at issue.

Marchio involved a residency at Clarksburg Nursing & Rehabilitation Center. As was the case in *Taylor*, there existed only a Medical Power of Attorney held by the individual that signed the respective arbitration agreement.¹ In that case, this Court

¹ Although there was testimony by Sharon Marchio that she had her mother's "power of attorney",

considered a certified question on appeal regarding whether West Virginia Code § 16–5C–15(c) was 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. The circuit court had answered the certified question in the affirmative.

Following this Court's decision on June 29, 2011 in *Brown v. Genesis Healthcare Corp. et al.*, No. 35494; *Taylor v. MHCC Inc. et al.*, No. 35546; *Marchio v. Clarksburg Nursing & Rehabilitation Center Inc. et al.*, No. 35635, ___ S.E. 2d ___, 2011 WL 2611327 (W. Va. June 29, 2011), the nursing home defendants petitioned for review by the United States Supreme Court, which ultimately vacated and remanded, leading to the supplemental briefing at bar.

Argument

- I. **This Court's finding of unconscionability in *Brown* and *Taylor* was not influenced by its categorical holding that pre-dispute agreements are bit governed by the FAA.**

The United States Supreme Court recognized that this Court proposed an "alternativ[e]" holding that the particular arbitration clauses in *Brown's* case and *Taylor's* case were unconscionable." *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1204 (U.S. 2012), citations omitted. The Court found that it was unclear "to what degree the state court's alternative holding was influenced by the invalid, categorical rule discussed above, the rule against predispute arbitration agreements." *Id.* Thus, the Supreme Court directed that this Court "must consider whether, absent that general public policy, the arbitration clauses in *Brown's* case and *Taylor's* case are

the only document that has been shown to exist is a "Combined Medical Power of Attorney and Living Will" that provides authority over decisions involving "health care."

unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA.” *Id.*

This Court’s alternative holding applied established and routine principles of state contract law. It is well-settled that “States may regulate contracts, *including arbitration clauses*, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’” *Allied-Bruce Terminix Co’s, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (emphasis added).

This Court expressly stated in its alternative ruling that the *Brown* and *Taylor* agreements were unconscionable under conventional West Virginia contract principles because the circumstances of their formation reflected procedural unconscionability, and their terms—in particular their one-sidedness as to the obligation to arbitrate—were substantively unconscionable. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, --- S.E.2d ---, 2011 WL 2611327 at *30 (W.Va. 2011). This Court has previously denied arbitration in matters with one-sided contracts, noting that 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.’” *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (W.Va. 1998) (citing Syl. pt. 4, *Art’s Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991)). In *Arnold*, the relative positions of the parties were a national corporate lender on one side and elderly, unsophisticated consumers on the other, which the Court found to be “grossly unequal.” *Id.* (citing *Art’s Flower Shop*, 186 W.Va. at 618, 413 S.E.2d at 675. This Court held in *Arnold* that given the nature of this arbitration agreement, combined

with the great disparity in bargaining power, “one can safely infer that the terms were not bargained for and that allowing such a one-sided agreement to stand would unfairly defeat the Arnold’s legitimate expectations.” *Id.*

The matter in *Arnold*, like the matters at bar, involved an arbitration agreement that retained the rights to the Courts for the drafter of the agreement but required the other party to waive all rights. When the facts of *Arnold* are considered and compared to the facts in the matters at bar, it is clear that these matters, like *Arnold*, involve “contract[s] between the rabbits and foxes” and should not be allowed to stand.

The FAA “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). West Virginia’s requirements that agreements not be procedurally unfair and that their substantive terms not be one-sided or non-mutual in no way “apply only to arbitration” or “derive their meaning from the fact that an agreement to arbitrate is at issue.” Further, the factual circumstances here plainly justify application of these conventional contract-law principles. Under normal West Virginia contract-law standards, the arbitration agreements here are one-sided, non-mutual, and should not be enforced. In examining the arbitration clauses at issue, this Court need look no further than the provision allowing the nursing home defendants to seek judicial redress over nonpayment of fees or to evict the resident from the facility, but prohibiting the residents and their families from obtaining any type of judicial relief in the *Brown* and *Taylor* matters. Indeed, the agreement plainly reserves the nursing home defendants’ right of access to the courts, while requiring the residents and their families

to arbitrate any claims they might have related to abuse and neglect of their loved ones. See Arbitration Agreement at issue in *Brown and Taylor*. They also imposed significant fees on residents who sought to initiate arbitration while preserving the more inexpensive option of the Courts for the nursing home defendants. *Id.*

Many courts have invalidated purported contracts containing “non-mutual arbitration provisions”, requiring only the party with less economic bargaining power to submit claims to arbitration, because they are so “one-sided” as to be illusory or unconscionable. See *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (W.Va. 1998); *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991)). See e.g., *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (where one party bears the “unfettered right to alter the arbitration agreement's existence or its scope” the agreement is illusory); and other cases cited in *Hollis et al., State Law*, 2003 J. Disp. Resol. at 483–89; *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1173 (9th Cir. 2003) (one-sided arbitration agreement is unconscionable and unenforceable); *Iberia Credit Bureau v. Cingular Wireless LLC, et al.*, 379 F.3d 159, 169–70 (5th Cir.2004) (one-sided arbitration clause unenforceable due to unconscionability); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (arbitration agreement lacked mutuality and was therefore illusory and enforceable); *Simpson v. Grimes*, 849 So.2d 740, 749, (3d Cir. 2003) (accord). See also *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361, 366–67 (2000) (agreement lacked mutuality of obligation where consumer was bound by arbitration in every aspect, yet company could “proceed immediately to court to collect amounts due it”); *Taylor v. Butler*, 142 S.W.3d 277, 286–87 (Tenn. 2004) (contract held to be unconscionable and void because one party had

to submit all claims to arbitration, but the other reserved a right to a judicial forum); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172–73 (9th Cir.2003) (arbitration clause failed because employer had “unilateral power to modify or terminate” it). This Court’s application of unconscionability principles to these contracts reflects a broad judicial consensus.

II. It is impossible to conduct arbitration under the agreements at issue according to their own terms.

Although not related to unconscionability, other significant reasons exist for determining that the arbitration agreements at issue are void. The arbitration clauses at issue fail because an integral part of the agreement to arbitrate is no longer available. In *Brown and Taylor*, the agreements to arbitrate states that a dispute arising between the parties “shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect.” However, in 2003, the American Arbitration Association amended its rules to provide that it “no longer accept[s] the administration of cases involving individual patients without a post-dispute agreement to arbitrate.”² The AAA continues to administer health-care arbitrations in which “businesses, providers, health care companies, or other entities are involved on both sides of the dispute.” *Id.* The AAA stated that the policy was a part of its “ongoing efforts ... to establish and enforce standards of fairness for alternative dispute resolution....”³

In *Brown and Taylor*, the arbitration agreements at issue clearly select the AAA and its rules. Since the AAA is no longer available and does not support arbitration in

² AAA Healthcare Policy Statement, <http://www.adr.org/sp.asp?id=32192>.

³ Archive of AAA Healthcare Policy Statement, <http://web.archive.org/web/20060930010034/http://www.adr.org/sp.asp?id=21975>.

cases involving individual patients without a post-dispute agreement to arbitrate, a material and integral term to the agreement at issue is unavailable and the contract should not be effectively rewritten to enforce arbitration.

III. There was no authority to enter into the arbitration agreement on behalf of the decedent.

In both the *Taylor* and *Marchio* matters, there was insufficient authority to enter into the arbitration agreements at issue. In both cases, there apparently existed Medical Powers of Attorney held by the individuals that signed the respective arbitration agreements.⁴ The arbitration agreements in these matters were not “health care” decisions that would be permitted under a limited power of attorney for health care. Arbitration is not related to health care in any way and has nothing to do with treatments, diagnoses, or any other aspect of the care of a resident in a nursing home. In *Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito*, 19 So.3d 340 (Fla.App. 2 Dist. 2009), the Florida Court of Appeals held that even a durable power of attorney was insufficient authority to enter into an arbitration agreement on behalf of the principle. In that case, the Court found that the power of attorney did not “unambiguously make[] a broad, general grant of authority” to the power of attorney but instead granted authority related to property interests. *Id.* at 341-42. (citing *Estate of McKibbin v. Alterra Health Care Corp. (In re Estate of McKibbin)*, 977 So.2d 612 (Fla. 2d DCA), *review denied*, 987 So.2d 79 (Fla.2008). *Cf. Jaylene, Inc. v. Moots*, 995 So.2d 566, 568 (Fla. 2d DCA 2008).

Many state Courts have adopted the position that health care or medical powers

⁴ Although there was testimony by Sharon Marchio that she had her mother's “power of attorney”, the only document that has been shown to exist is a “Combined Medical Power of Attorney and Living Will” that provides authority over decisions involving “health care.”

of attorney are insufficient authority to enter into an arbitration agreement on behalf of the principle. See *Life Care Ctrs. of Am. v. Smith*, 298 Ga.App. 739, 681 S.E.2d 182, 183–85 (Ga.Ct.App.2009) (holding that the plain language of a healthcare power of attorney did not give daughter the right to sign away her mother's right to a jury trial); *Lujan v. Life Care Centers of America*, 222 P.3d 970 (Colo.Ct.App.2009) (health care proxy's decision to agree to arbitrate was unauthorized); *McNally v. Beverly Enters., Inc.*, 191 P.3d 363, No. 98,124, 2008 WL 4140635, at *1–2 (Kan.Ct.App. Sept.5, 2008) (per curiam) (holding that a healthcare power of attorney conferred by a resident to his wife explicitly limited the powers of the agent to those set out in writing in the document); *Tex. Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345, 352–53 & n. 7 (Tex.App.2007) (determining that the medical power of attorney signed by the resident's daughter had not taken legal effect at the time the documents were signed and there was no evidence that the resident was even aware that her daughter had signed any documents on her behalf). See also *Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (Md. 2010); *Monticello Community Care Center, LLC v. Estate of Martin*, 17 So.3d 172 (Miss.Ct.App. 2009); *Moffett v. Life Care Centers of America*, 187 P.3d 1140 (Colo.App. 2008); *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla.Dist.Ct.App. 2005). *Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.*, 66 So. 3d 396 (Fla.App. 2 Dist. 2011).

Before a third party can bind a person to a contract, it is axiomatic that the third party must have appropriate legal authority to do so. Otherwise, the party cannot be bound by its terms. See *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (to require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the

"first principle" of arbitration that "a party cannot be required to submit [to arbitration] any dispute which she has not agreed so to submit."); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The nursing home defendants in *Taylor* and *Marchio* bear the burden of establishing that the respective individuals were agents and duly authorized to execute the agreements to waive constitutional rights on behalf of the nursing home residents.

Thus, the *Taylor* and *Marchio* agreements are void for this reason, in addition to the others set forth herein.

IV. The *Marchio* case should be sent back to the Circuit Court for further development of the record.

This Court held in *Brown* that the lower court "failed to state any findings of fact or conclusions of law that would assist in appellate review of the orders" and the lack of such substance to permit a meaningful review of the court's decision was "reason alone" to reverse the Court's decision. *Brown v. Genesis Healthcare Corp. et al.*, No. 35494; *Taylor v. MHCC Inc. et al.*, No. 35546; *Marchio v. Clarksburg Nursing & Rehabilitation Center Inc. et al.*, No. 35635, ___ S.E. 2d ___, 2011 WL 2611327, *30 (W. Va. June 29, 2011). Further, this Court stated that "two of the three arbitration clauses are, as a matter of law, unconscionable and unenforceable against the plaintiffs." *Id.* "In the third case [*Marchio*], the circuit court did not consider the conscionability of the agreement, and only certified a question regarding the preemption of Section 15(c) of the Nursing Home Act by the FAA." *Id.* Plaintiff submits that the *Marchio* matter must therefore be sent back to the Circuit Court for discovery, further development, and consideration by the Circuit Court of the conscionability of the agreement and the availability of the forum.

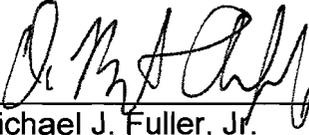
Conclusion

For the foregoing reasons, this Court's determination that the arbitration clauses were unconscionable was not 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 and the Court should enter a new opinion reversing the respective Circuit Court Orders in these matters.

Respectfully submitted, this the 10th day of May 2012,

Clayton Brown, as guardian for
and on behalf of Clarence Brown,
Plaintiff below, Appellant

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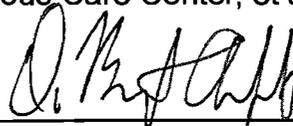
CERTIFICATE OF SERVICE

We do hereby certify that on the 10th of May 2012, we served the foregoing upon all counsel of record by facsimile and by depositing true and correct copies in the U.S. Mail, postage prepaid, and addressed to:

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