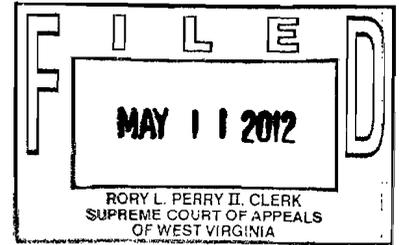


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 35494

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CLAYTON BROWN, as guardian for  
and on behalf of CLARENCE BROWN,  
Plaintiff Below, Appellant,

v.

GENESIS HEALTHCARE CORPORATION;  
GENESIS HEALTHCARE HOLDING COMPANY II, INC.  
GENESIS HEALTH VENTURES, INC. OF WEST VIRGINIA;  
GENESIS ELDERCARE CORPORATION;  
GENESIS ELDERCARE NETWORK SERVICES, INC.;  
GENESIS ELDERCARE MANAGEMENT SERVICES, INC.;  
GENESIS ELDERCARE REHABILITATION SERVICES, INC.;  
GENESIS ELDERCARE STAFFING SERVICES, INC.;  
GENESIS ELDERCARE HOSPITALITY SERVICES, INC.;  
1 SUTPHIN DRIVE ASSOCIATES, LLC; 1 SUTPHIN DRIVE OPERATIONS, LLC;  
GENESIS WV HOLDINGS, LLC; GLENMARK ASSOCIATES, INC.;  
MARMET HEALTH CARE CENTER, INC. n/k/a MHCC, INC.;  
CANOE HOLLOW PROPERTIES, LLC;  
ROBIN SUTPHIN; and SHAWN EDDY,  
Defendants Below, Appellees.

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Appeal from the Circuit Court of Kanawha County  
Honorable Tod J. Kaufman, Judge  
Civil Action No. 08-C-23

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and

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 35546

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JEFFREY TAYLOR, personal representative of  
the ESTATE OF LEO TAYLOR,  
Plaintiff Below, Appellant,

v.

MHCC, INC., f/k/a MARMET HEALTH CARE CENTER;  
CANOE HOLLOW PROPERTIES, LLC.  
GENESIS HEALTHCARE CORPORATION, d/b/a  
MARMET HEALTH CARE CENTER; GLENMARK ASSOCIATES, INC.,  
GLENMARK LIMITED LIABILITY COMPANY I;  
GLENMARK PROPERTIES, INC.;  
GENESIS HEALTHCARE CORPORATION;  
GENESIS HEALTH VENTURES OF WEST VIRGINIA, LP;  
GENESIS ELDERCARE CORPORATION;  
GENESIS ELDERCARE NETWORK SERVICES, INC.;  
GENESIS ELDERCARE MANAGEMENT SERVICES, INC.;  
GENESIS ELDERCARE REHABILITATION SERVICES, INC.;  
GENESIS ELDERCARE STAFFING SERVICES, INC.;  
GENESIS ELDERCARE PHYSICIAN SERVICES, INC.;  
GENESIS ELDERCARE HOSPITALITY SERVICES, INC.  
HORIZON ASSOCIATES, INC., HORIZON MOBILE, INC.;  
HORIZON REHABILITATION, INC. GMA PARTNERSHIP  
HOLDING COMPANY, INC.; GMA - MADISON, INC.;  
GMA BRIGHTWELL, INC.; HELSTAT, INC.;  
FORMATION CAPITAL, INC.; FC-GEN ACQUISITION, INC.;  
GEN ACQUISITION CORPORATION; AND  
JER PARTNERS, LLC,  
Defendants Below, Appellees.

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Appeal from the Circuit Court of Kanawha County  
Honorable James C. Stucky, Judge  
Civil Action No. 09-C-128

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and

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 35635

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

v.

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

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Certified Question from the Circuit Court of Harrison County  
Honorable James A. Matish, Judge  
Civil Action No. 08-C-334-3

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**APPELLEES CLARKSBURG NURSING & REHABILITATION CENTER, INC.,  
SHEILA K. CLARK, AND JENNIFER McWHORTER'S  
SUPPLEMENTAL BRIEF ON REMAND**

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Respectfully submitted by:  
CLARKSBURG NURSING &  
REHABILITATION CENTER, INC.,  
SHEILA K. CLARK, and JENNIFER McWHORTER

Mark A. Robinson (WV Bar ID #5954)  
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COME NOW Defendants/Appellees Clarksburg Nursing & Rehabilitation Center, Inc., Sheila K. Clark, and Jennifer McWhorter [hereinafter collectively referred to as “Clarksburg Nursing”], by counsel, Mark A. Robinson, Ryan A. Brown, and the law firm of Flaherty Sensabaugh Bonasso PLLC, and, pursuant to this Court’s April 3, 2012 Order file their Supplemental Brief pursuant to Rule 10(h) of the *West Virginia Rules of Appellate Procedure*. For reasons more fully set forth below, Clarksburg Nursing asserts that the limited question to be addressed by this Court on remand from the Supreme Court of the United States relates solely to the *Brown* and *Taylor* cases. As set forth in its February 21, 2012 Mandate, the Supreme Court of the United States summarily vacated this Court’s June 29, 2011 slip opinion in *Brown, et al. v. Genesis Healthcare Corporation, et al.* Of particular importance to the limited question being considered herein, the Supreme Court’s opinion, by expressly referencing *only* “the particular arbitration clauses in Brown’s case and Taylor’s case” excluded the *Marchio* case from review on remand. *Marmet Health Care Center, et al. v. Brown, et al.*, 565 U.S. \_\_\_ at p. 5 (2012) (slip op.) (per curiam). Thus, pursuant to the familiar maxim *expressio unius est exclusio alterius*, *Brown* and *Taylor* are subject to review on remand to this Court; *Marchio* is not.

### DISCUSSION

The Supreme Court’s ruling in *Marmet Healthcare Center* could not be clearer; the first sentence of opinion states that “[s]tate and federal courts must enforce the Federal Arbitration Act (FAA) 9 USC § 1 *et seq.*, with respect to all arbitration agreements covered by that statute.” *Marmet Health Care Center* at p. 1. Thus, *Brown*’s central holding – that “the FAA does not pre-empt the state public policy against predispute arbitration agreements that apply to claims . . . against nursing homes” – is “both incorrect and inconsistent with clear instruction in the

precedents of this Court.” *Id.* at p. 3. On this basis, the Supreme Court summarily vacated this Court’s June 29, 2011 opinion.

The sole issue upon remand is whether this Court’s “ ‘alternativ[e]’ holding that the particular arbitration clause in the *Brown* and *Taylor* cases were unconscionable” was influenced by the “invalid, categorical rule . . . against predispute arbitration agreements.” *Id.* at p. 4. The Supreme Court’s instruction on this issue is clear: “[o]n remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses in *Brown*’s case and *Taylor*’s case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA.” *Id.* at p. 5.

The particular arbitration agreement at issue in the *Marchio* case was not addressed by this Court’s June 29, 2011 opinion and is not before this Court on remand from the Supreme Court of the United States. Throughout Section II of its opinion, the Supreme Court listed only “*Brown*’s case and *Taylor*’s case”, omitting *Marchio*. This Court has cited the doctrine *expressio unius est exclusio alterius* (“the express mention of one thing implies the exclusion of another”) on more than sixty occasions. *See e.g.* Syl. Pt. 3, *Manchin v. Dunfee*, 327 S.E.2d 710, 174 W. Va. 532 (1984).

A plain application of this familiar legal maxim to the Supreme Court’s opinion in this case leads to only one conclusion: *Marchio* is not subject to further review on remand to this Court. Rather, this Court’s proceedings on remand should be limited to deeming the certified question answered in the affirmative as reformulated and dismissing the Petition in the *Marchio* case with instructions that the arbitration agreement be enforced consistent with the opinion of the Supreme Court of the United States herein.

WHEREFORE, for the foregoing reasons, Clarksburg Nursing & Rehabilitation Center, Inc., Sheila K. Clark, and Jennifer McWhorter respectfully request that this Court deem the certified question at issue in the *Marchio* appeal answered in the affirmative as reformulated and issue a mandate in the *Marchio* case commanding enforcement of the arbitration agreement consistent with the mandate of the Supreme Court of the United States.

**CLARKSBURG NURSING &  
REHABILITATION CENTER, INC., SHEILA  
K. CLARK, AND JENNIFER McWHORTER,**

**By Counsel.**



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**CERTIFICATE OF SERVICE**

I, the undersigned counsel for Clarksburg Nursing & Rehabilitation Center, Inc., Sheila K. Clark, and Jennifer McWhorter, hereby certify that a true and correct copy of the within *Appellees Clarksburg Nursing & Rehabilitation Center, Inc., Sheila K. Clark, and Jennifer McWhorter's Supplemental Brief on Remand*, was served on this 11th day of May, 2012, via facsimile and U.S. Mail, first class postage prepaid, on the following counsel of record:

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