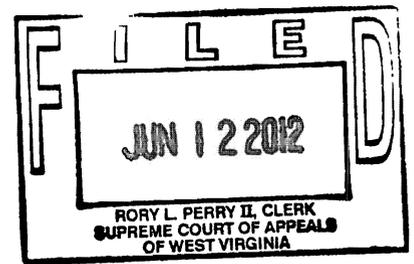


No. 12-0717



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE EX REL. AMFM LLC, Commercial Holdings, Inc.,
k/n/a Commercial Holdings, LLC; Integrated Commercial Enterprises, Inc.; Manzanita
Holdings, LLC; Manzanita Management, Inc.; Lifetree, LLC;
Wisteria, LLC; McDowell Nursing & Rehabilitation Center, Inc.; d/b/a McDowell
Nursing & Rehabilitation Center; and Patty Lucas;

Petitioner,

v.

THE HONORABLE JUDGE CHARLES E. KING,
Judge of the Circuit Court of Kanawha County,
West Virginia

Respondent.

From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 11-C-2144

PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Whether the Circuit Court of Kanawha County exceeded its legitimate powers in failing to compel arbitration under an agreement reached between Nancy Belcher (“Ms. Belcher”)—the daughter, caregiver, designated health care surrogate, apparent agent, and eventual power of attorney of her mother, Beulah Wyatt (“Ms. Wyatt”), and McDowell Nursing and Rehabilitation Center (“McDowell Nursing”).

INTRODUCTION

Pursuant to Rule 16 of the *Revised West Virginia Rules of Appellate Procedure*, Petitioners ask this Court to issue a Writ of Prohibition to vacate an Order by the Honorable Charles E. King, Judge of the Circuit Court of Kanawha County, because the Circuit Court erred when it determined that Ms. Belcher lacked the apparent and/or ostensible authority to legally bind Ms. Wyatt to the arbitration agreement with McDowell Nursing.

STATEMENT OF THE CASE

A. Overview of the Case

This Petition concerns an arbitration agreement that was entered into on September 10, 2009 between Ms. Belcher, the daughter, caregiver, and health care surrogate of Ms. Wyatt, and McDowell Nursing. (App. 86-87.) Ms. Belcher had been deemed Ms. Wyatt's health care surrogate pursuant to the *West Virginia Health Care Decisions Act*, West Virginia Code § 16-30-1, *et seq.*, for the purpose of making health care decisions on her behalf because, both prior to and during Ms. Wyatt's admission, she was not "competent to handle her own affairs, due to dementia, and her cognitive and physical skills were impaired." (App. 8; 69.) Based upon Ms. Belcher's representation that she was Ms. Wyatt's daughter, live-in caregiver, and health care surrogate, the staff at McDowell Nursing viewed Ms. Belcher as Ms. Wyatt's agent, who presumably knew and understood her mother's core values and beliefs. Accordingly, McDowell Nursing relied upon Ms. Belcher's appearance of authority when presenting the various contracts and agreements to Ms. Belcher for her signature on Ms. Wyatt's behalf, including the subject arbitration agreement. (App. 69; 86-87.)

Notably, the arbitration agreement which is at controversy in this case was binding on **both** parties, and was not a precondition for Ms. Wyatt's admission to McDowell Nursing.

(App. 86-87.) In fact, a unilateral “opt out provision” allowed Ms. Wyatt and/or Ms. Belcher, as Ms. Wyatt’s representative, to rescind the agreement within thirty (30) days of signing so long as proper notice was given to McDowell Nursing. (App. 86-87.) The language contained in the arbitration agreement clearly stated in large font and bold print that **“THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT”** to have a claim decided in a court of law before a judge and jury. (App. 86-87.) That being said, neither Ms. Wyatt nor Ms. Belcher ever contacted the facility to rescind the agreement during the thirty (30) day opt out period. Furthermore, shortly after becoming a resident of McDowell Nursing, on or about December 8, 2009, Ms. Wyatt deliberately appointed Ms. Belcher to be her power of attorney.¹ (App. 88-90.) Thereafter, Ms. Wyatt remained a resident of McDowell Nursing until her death on or about July 31, 2010. (App. 8; 69.)

B. Relevant Procedural History

Despite the presence of the arbitration agreement, Plaintiff below commenced this civil action by filing a Complaint on or about December 1, 2011, in the Circuit Court of Kanawha County, West Virginia. (App. 1-65; 68.) In addition to alleging that Petitioners-Defendants below committed acts of medical negligence, gross negligence, and wrongful death, Plaintiff below, Lelia Gresham Baker, Individually and on behalf of the Estate of Beulah Wyatt, alleged that Petitioners-Defendants below failed to “discharge their obligations of care to” Ms. Wyatt. (App. 9; 69.) Plaintiff further alleged that, as a result of this wrongful conduct, Ms. Wyatt suffered “physical and emotional trauma” throughout her stay at McDowell Nursing, which began on or about September 10, 2009 and ended on or about July 31, 2010. (App. 8-9; 69.)

¹ Ms. Wyatt chose to delegate to Ms. Belcher her power of attorney, and even retained an attorney to draft the instrument in an effort to properly carry out her wishes.

Petitioners-Defendants below denied any and all liability. Moreover, based on the presence of the arbitration agreement at issue in this Petition, on January 10, 2012, Petitioners-Defendants below filed their *Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration*. (App. 68-94.)

On March 6, 2012, Plaintiff filed his *Response to Defendants' Motion to Dismiss and Compel Arbitration*. (App. 95-218). Respectively, on March 5, 2012, Petitioners-Defendants below filed their *Supplemental Brief in Support of Their Motion to Dismiss and Compel Arbitration*, and on March 12, 2012, they filed their *Reply to Plaintiff's Response to Defendants' Motion to Dismiss and Compel Arbitration*. (App. 219-230; 231-250.)

A hearing on the Petitioners-Defendants' below Motion was held before the Circuit Court on March 13, 2012. Thereafter, by Order dated March 28, 2012, the Circuit Court denied *Defendants' Motion to Dismiss and Compel Arbitration*. (App. 251-255.) As is evident upon even a cursory glance of the *Order on Defendants' Motion to Dismiss and Compel Arbitration*, no rationale was given by the Circuit Court for two (2) of its findings: (1) that the health care surrogacy was not intended to allow a surrogate to waive one's constitutional right to trial by jury, and (2) the finding that Ms. Belcher lacked even apparent and/or ostensible authority to waive Ms. Wyatt's right to jury trial and engage in arbitration. (App. 251-255.) The Circuit Court simply noted that the West Virginia Health Care Decisions Act—the basis for health care surrogacy law in West Virginia—does not provide a foundation for the arbitration agreement to be signed by Ms. Belcher. (App. 251-255.) Additionally, the Circuit Court cursorily concluded that there was “not sufficient evidence” to support the position that Ms. Belcher had the apparent authority to waive Ms. Wyatt's right to a jury trial. (App. 251-255.) It is from this ruling that Petitioners-Defendants below seek the extraordinary relief of a writ of prohibition in light of the

fact that the Circuit Court of Kanawha County's March 13, 2012 rulings are unclear and in direct contravention of established legal principles.

SUMMARY OF THE ARGUMENT

The Circuit Court of Kanawha County abused its discretion when it denied the *Defendants' Motion to Dismiss and Compel Arbitration* because it incorrectly found that there was insufficient evidence to support the proposition that Ms. Belcher had the apparent and/or ostensible authority to legally bind Ms. Wyatt to the arbitration agreement with McDowell Nursing. Specifically, the Circuit Court cursorily concluded that (1) the health care surrogacy of Ms. Belcher was not sufficient to allow her to sign the arbitration agreement and to waive her mother's constitutional right to a jury trial despite signing a host of other documents (some of which were also non-health care related) and having those enforced; and (2) that Ms. Belcher did not have apparent and/or ostensible authority to sign the arbitration agreement on her mother's behalf despite the fact that she had been appointed her health care surrogate and later even became her mother's power of attorney. Inasmuch as the United States Supreme Court vacated this Court's decision in *Brown v. Marmet Healthcare, Inc.*, 132 S. Ct. 1201 (2012), the circuit court was faced with an issue of singular import: whether Ms. Belcher had the authority to sign the arbitration agreement waiving the constitutional right to a trial by jury on Ms. Wyatt's behalf.

When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-307 (2006), the trial court must first determine whether a valid arbitration agreement exists between the parties. Specifically, in regard to the instant Petition, the Circuit Court found that no valid arbitration agreement existed between the parties because Ms. Belcher, Ms. Wyatt's daughter, health care surrogate, and subsequent power of attorney, did not have the authority to legally bind Ms. Wyatt to the arbitration agreement with

McDowell Nursing. Contrary to the Circuit Court's conclusion, however, there is plenty of evidence suggestive of Ms. Belcher's apparent and/or ostensible authority to legally bind her mother to agreements with third parties such as McDowell Nursing. For example, it was conveyed to McDowell Nursing that Ms. Belcher had lived with Ms. Wyatt and essentially provided care to her. Moreover, Ms. Wyatt authorized Ms. Belcher to sign documents on her behalf on numerous prior occasions.

The term "apparent authority"² refers to a third-party's reasonable belief, based upon some outward manifestation by the principal, that another was cloaked with legitimate authority to act on the principal's behalf. Accordingly, when a third-party seeks to impose liability on a principal pursuant to the theory of apparent agency, the third-party must demonstrate two particular elements: (1) that his belief that an apparent agency existed was based upon some manifestation by the principal, and (2) that his belief in the apparent agency's existence was reasonable.

In the matter at hand, Ms. Belcher was Ms. Wyatt's daughter and health care surrogate. In other words, Ms. Belcher, who as her daughter and caregiver was presumed to know her mother's core values and beliefs, was cloaked with the authority to make medical and health care decisions on Ms. Wyatt's behalf upon a determination by her physicians that she was unable to make her own medical decisions due to the onset of Alzheimer's Disease. In appointing Ms. Belcher, Ms. Wyatt's daughter, as Ms. Wyatt's health care surrogate, the physicians were in essence asserting that they believed Ms. Belcher presumably knew Ms. Wyatt's wishes and beliefs and would exercise her decision-making discretion in a manner that demonstrated that she had her mother's best interests in mind. Accordingly, based on these facts, it was reasonable for

² The theory of apparent agency is also referred to as "ostensible agency" or "agency by estoppel." These terms are often used interchangeably. See *Burless v. WVU Hosp., Inc.*, 601 S.E.2d 85, 92, n. 7 (W. Va. 2004).

McDowell Nursing to believe that Ms. Belcher had the authority to sign the arbitration agreement on Ms. Wyatt's behalf. Hence, adequate evidence exists demonstrating that Ms. Belcher was the apparent agent of Ms. Wyatt when she signed the arbitration agreement with McDowell Nursing, thus legally binding Ms. Wyatt to the agreement's provisions.

Furthermore, under certain circumstances, an apparent agency may be created even when there is no manifestation by the principal that an agent was authorized to act on his behalf. It has been held on numerous occasions that ratification by the principal of an unauthorized act of an agent may in some instances be effected contrary to the real intention of the principal; however, ratification by the principal of the act of the agent is ordinarily presumed to be based upon the intention of the party. In the instant situation, it was particularly reasonable for McDowell Nursing to hold the belief that Ms. Belcher had the authority to sign the arbitration agreement on Ms. Wyatt's behalf based on the fact that Ms. Wyatt had been diagnosed with Alzheimer's Disease, and further that, by not rescinding the arbitration agreement during the opt out period, Ms. Wyatt essentially acquiesced in receiving the benefits and protections of the arbitration provision in consideration of her surrendering the constitutional right to trial by jury. It is important to note that McDowell Nursing also would be equally bound to said provision. In addition, approximately three months following Ms. Wyatt's admission to McDowell Nursing, Ms. Belcher's authority in regard to her mother's affairs was strengthened through her appointment as Ms. Wyatt's power of attorney. Thus, this action demonstrated that Ms. Wyatt essentially ratified Ms. Belcher's previous decisions on her behalf. Consequently, as ratification of an action thus inures to the resident the benefits and burdens of the arbitration agreement, Ms. Belcher's signing of the arbitration agreement on Ms Wyatt's behalf should be legally binding.

It should also be noted that Ms. Belcher signed many documents on Ms. Wyatt's behalf,

yet the Plaintiff only wants to invalidate the arbitration agreement. The FAA, 9 U.S.C. §§ 1-16, however, prevents state courts from singling out arbitration provisions by providing that such provisions be placed 'upon the same footing as other contracts.' To this extent, the arguments in Plaintiff's brief are contradictory. On the one hand, he contends that Ms. Belcher did not have authority to enter into contracts on Ms. Wyatt's. On the other hand, however, he tends to insinuate that the agreement is valid but that an integral part of the contract is no longer available thus eviscerating the core of the parties' agreement. Plaintiff cannot have it both ways.

Once a court finds that an arbitration provision is governed by the FAA, and that the plaintiff's claims fall within the scope of that provision, the duty of the Court is clear, it must compel arbitration. *See* 9 U.S.C. § 3-4. Accordingly, because there is no other adequate means for Petitioners-Defendants below to obtain the desired relief, because Petitioners-Defendants below will be irreparably damaged if the Circuit Court's March 28, 2012 Order is enforced, and because the lower court's order is clearly erroneous and raises important legal issues, this Court should find that the Circuit Court of Kanawha County erred when it found that Ms. Belcher did not have the authority to enter into the arbitration agreement with McDowell Nursing on Ms. Wyatt's behalf and thus should issue a writ of prohibition preventing the Circuit Court from enforcing the March 28, 2012 Order.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the *West Virginia Revised Rules of Appellate Procedure*. This case is appropriate for a Rule 20 argument because it involves issues of first impression, issues of fundamental public importance, and constitutional questions regarding the validity of a court ruling.

STANDARD OF REVIEW

Issuance of an extraordinary writ is not a matter of right; rather, it is a matter of discretion sparingly exercised. According to the West Virginia Supreme Court of Appeals, “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.” Syl. Pt. 1, *State of West Virginia ex rel. Atkins v. Burnside*, 569 S.E.2d 150, 157 (W. Va. 2002) (per curiam) (citing Syl. Pt. 1 *Crawford v. Taylor*, 75 S.E.2d 370 (W. Va. 1953)). When determining whether to grant a writ of prohibition where it is claimed that the lower court exceeded its legitimate authority, this Court has stated that it

will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 2, *State ex rel. Atkins*, 569 S.E.2d 150 (citing *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996)).

Accordingly, this Court will use prohibition to correct only “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Syl. Pt. 1, *State ex rel. DeFrances v. Bedell*, 446 S.E.2d 906 (W. Va. 1994) (quoting Syl. Pt. 1,

Hinkle v. Black, 262 S.E.2d 744 (W. Va. 1979)). For the reasons discussed *infra*, a writ of prohibition is proper in this case to remedy the clear legal error set forth in the Circuit Court of Kanawha County's March 28, 2012 Order.

ARGUMENT

BECAUSE MS. BELCHER, AS DAUGHTER, CAREGIVER, HEALTH CARE SURROGATE, AND SUBSEQUENT POWER OF ATTORNEY, HAD THE AUTHORITY TO LEGALLY BIND MS. WYATT TO THE ARBITRATION AGREEMENT WITH MCDOWELL NURSING, PETITIONERS ARE ENTITLED TO A WRIT OF PROHIBITION PREVENTING THE CIRCUIT COURT FROM ENFORCING ITS MARCH 28, 2012 ORDER.

The arbitration agreement signed by daughter, health care surrogate, and Power of Attorney Belcher on behalf of Ms. Wyatt stated that it would be governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. The FAA was enacted in 1925 “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288-9 (2002). The FAA “embodies a ‘strong federal public policy in favor of enforcing arbitration agreements,’ and is designed to ‘ensure judicial enforcement of privately made agreements to arbitrate.’” *Adkins v. Labor Ready, Inc.*, 185 F. Supp.2d 628, 633 (S.D.W. Va. 2001) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217-9 (1985)). The FAA “provides that written arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.” *Doctor’s Assoc., Inc. v. Casarotto*, 116 S. Ct. 1652, 1655 (1996) (citing 9 U.S.C. § 2).

In the case of *Southland Corporation v. Keating*, 104 S. Ct. 852 (1984), the United States Supreme Court held that Section 2 of the FAA **applies in state courts as well as federal courts**. Accordingly, the FAA withdraws the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. In other words, when presented with a valid arbitration agreement, the act leaves no place for the exercise of discretion by a court, but instead mandates that the court shall direct the parties to proceed to

arbitration on issues as to which an arbitration agreement has been signed. *Adkins*, 185

F.Supp.2d at 633.

When confronted with the question of whether to compel arbitration under the FAA, the West Virginia Supreme Court has held that

the authority of the trial court is limited to determining the threshold issues of (1) **whether a valid arbitration agreement exists between the parties**; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.

Ruckdeschel v. Falcon Drilling, Co., L.L.C., Syl. Pt. 4, 693 S.E.2d 815 (W. Va. 2010) (citing Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 692 S.E.2d 293 (W. Va. 2010)). Thus, the first step in this analysis is whether or not a valid arbitration agreement exists in this matter. In regard to the instant situation, Plaintiff insists that no valid arbitration agreement existed because Ms. Belcher did not have the authority to enter the arbitration agreement with McDowell Nursing on behalf of Ms. Wyatt. Contrary to the Circuit Court's conclusion, a valid agreement to arbitrate does, in fact, exist because there is evidence strongly suggestive of the fact that Ms. Belcher had the apparent authority to legally bind Ms. Wyatt to the arbitration agreement's provisions. Moreover, by accepting the benefits of the arbitration agreement with McDowell Nursing as well as by subsequently appointing Ms. Belcher as her power of attorney, Ms. Wyatt effectively ratified Ms. Belcher's conduct in binding Ms. Wyatt to arbitration. Consequently, a writ of prohibition should issue in order to remedy the clear legal error presented by the Circuit Court of Kanawha County's March 28, 2012 Order.

A. MS. BELCHER, AS DAUGHTER, CAREGIVER, AND HEALTH CARE SURROGATE OF MS. WYATT, HAD THE APPARENT AND/OR OSTENSIBLE AUTHORITY TO ENTER INTO AND EFFECTIVELY BIND MS. WYATT TO THE ARBITRATION AGREEMENT WITH MCDOWELL NURSING.

Plaintiff below first argues that no valid agreement to arbitrate existed between Ms. Wyatt and McDowell Nursing because Ms. Belcher did not have the authority to sign and, in effect legally bind, Ms. Wyatt to the terms of such agreement. This argument fails, however, because Ms. Belcher, as Ms. Wyatt's daughter and appointed health care surrogate, **did** have the authority to enter into the arbitration agreement on Ms. Wyatt's behalf. Based upon the outward appearances and manifestations on Ms. Wyatt's part, McDowell Nursing was justified in its belief that Ms. Belcher did indeed have the authority to so act.

“Proof of an express agency is not essential to the establishment of the relation of principal and agent.” *Ronconi v. Cook*, 150 S.E. 4, 5 (W. Va. 1929). It is a generally accepted premise of agency law that, under certain circumstances, an apparent agency may be created even when there is no manifestation by the principal that an agent was authorized to act on his behalf. In fact, “agency to do a particular act may be inferred from the adoption and ratification, by the principal, of acts of like kind performed for him by the agent.” *Gen. Elec. Credit Corp. v. Fields*, 133 S.E.2d 780, 783 (W. Va. 1963); *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141 (W. Va. 1969) (citing *Payne Realty v. Lindsey*, 112 S.E. 306; *Rees Electric Co. v. Mullens Smokeless Coal Co.*, 89 S.E.2d 619). Simply put, a principal may be bound by the actions or conduct of an unauthorized agent if the act of the agent is “within the apparent scope of his authority.” *Gen. Elec. Credit Corp.*, 133 S.E.2d at 783. That being said, “[t]he principal cannot accept the benefits, without also bearing the burdens, of the agent’s acts.” *Id.*

According to general agency law principles, the terms “apparent authority” or “ostensible authority”³ refers to a third-party’s reasonable belief, based upon some outward manifestation by the principal, that another was cloaked with legitimate authority to act on the principal’s behalf. The West Virginia Supreme Court of Appeals has long held that

[o]ne who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship.

All Med, LLC v. Randolph Engineering, Co., 2012 W. Va. LEXIS 90, 17 (2012); *See also, John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141, 148 (W. Va. 1969) (citing *Gen. Elec. Credit Corp. v. Fields*, 133 S.E.2d 780). Accordingly, it seems as if the doctrine of apparent agency essentially exists for the protection of prudent, but nevertheless misled, third-parties.

When a third-party seeks to impose liability on a principal pursuant to the theory of apparent agency, however, the third-party must demonstrate two particular elements: (1) that his belief that an apparent agency existed was based upon some manifestation by the principal, and (2) that his belief in the apparent agency’s existence was reasonable. According to the West Virginia Supreme Court of Appeals, “[t]he law indulges no presumption that an agency exists; on the contrary a person is legally presumed to be acting for himself and not as the agent of another person.” *All Med, LLC v. Randolph Engineering, Co.*, 2012 W. Va. LEXIS at 15-6; *See also, John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d at 146. Thus, the “burden of proving an agency rests upon him who alleges the existence of the agency.” *Id.* Moreover, the Court has placed a duty on one who deals with an agent to ascertain the precise parameters surrounding the agency relationship because “if the agent exceeds his authority, the

³ The theory of apparent agency is also referred to as “ostensible agency” or “agency by estoppel.” These terms are often used interchangeably. *See Burless v. WVU Hosp., Inc.*, 601 S.E.2d 85, 92, n. 7 (W. Va. 2004).

contract will not bind the principal, but will bind the agent.” *John W. Lohr Funeral Home, Inc.*, 166 S.E.2d at 147.

In the *Ronconi* case, a contract was signed by a musician and a church’s pastor, on behalf of the church, for the musician to create a church opera and to manage the opera’s performances. 150 S.E. at 5. The musician was to receive twenty percent of the proceeds netted from the opera’s performances. *Id.* The musician adequately rendered his contracted for services, and the opera netted \$2,398 in profits. *Id.* Thereafter, pursuant to the terms of the contract, the musician sought his compensation, but the church refused to make payment. *Id.* In so refusing, the church maintained that the pastor did not have the authority to enter into the contract on behalf of the church. *Id.* Accordingly, the musician filed suit seeking his just payment. *Id.* The trial court, however, sided with the church, so the musician appealed. *Id.*

On appeal, the West Virginia Supreme Court reversed the trial court and rendered judgment for the musician, finding that “[p]roof of an express agency was not essential to establish the relationship of principal and agent.” *Id.* Specifically, the Court noted that the opera was promoted as a production of the church, and that the pastor was the “manager” of said production. *Id.* Moreover, the Court determined that the pastor’s acts in signing the contract and assisting with the production’s assembly were so open, apparent, and notorious that the church trustees must have known about them. *Id.* Consequently, the Court inferred the pastor’s agency on behalf of the church from the surrounding facts and circumstances. *Id.*

Similarly, in the instant case, the agency relationship between Ms. Wyatt, as principal, and Ms. Belcher, as agent, can easily be inferred from the attendant facts and circumstances. For instance, it is believed that Ms. Belcher lived with Ms. Wyatt for an extended period of time in order to render to her essential care. Moreover, upon information and belief, Ms. Wyatt had

previously permitted Ms. Belcher to sign documents on her behalf. Accordingly, McDowell Nursing has pointed to representations sufficient to demonstrate that it was reasonable for it to believe that Ms. Belcher was the agent of Ms. Wyatt in signing the admission documents, which included the arbitration agreements. Thus, Ms. Wyatt's holding out of her daughter, Ms. Belcher, as her agent created the appearance of authority upon which it was reasonable for McDowell Nursing to rely.

Although no West Virginia cases have squarely addressed the existence of apparent authority in the nursing home setting, there have been several cases from other jurisdictions which have. For instance, in the case of *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, LLC*, 2007 U.S. Dist. LEXIS 78247 (N.D. Miss. 2007), a resident was admitted to a nursing home by her daughter who was the resident's health care surrogate. Upon admission, the daughter signed various admissions agreements, including an arbitration agreement. *Id.* at 3.

A lawsuit was later filed on behalf of the resident's estate and the nursing home sought to enforce the arbitration agreement. In an attempt to defeat the arbitration agreement, the plaintiff alleged that the daughter did not have authority to bind her mother to the contract. *Id.* The United States District Court of the Northern District of Mississippi disagreed with the plaintiff's argument. The *Gulledge* court found that the patient was not competent to make her own decisions and her daughter, as the health care surrogate, had the power to enter into agreements with the nursing home on her mother's behalf. *Id.* Therefore, the plaintiff was bound by all the contracts the daughter signed on behalf of her mother, including the arbitration agreement.

Moreover, in the case of *Moffett v. Life Care Centers of America*, 187 P.3d 1140 (Colo. 2008), a patient was admitted to a healthcare facility by her son who signed an arbitration agreement as part of the admissions process. The plaintiff later filed a lawsuit against the facility

for wrongful death and the facility moved to compel arbitration. The *Moffett* court held that the son had the authority as his mother's medical power of attorney to execute applicable admissions forms, including arbitration agreements, on behalf of his mother.

In the matter at hand, Ms. Belcher was, first and foremost, Ms. Wyatt's daughter. Moreover, as previously mentioned, it is believed that Ms. Wyatt lived with her daughter for several years prior to her admission to McDowell Nursing so that Ms. Belcher could render to Ms. Wyatt the daily care that she required. As such, it could easily be presumed that Ms. Belcher was in touch with Ms. Wyatt's core beliefs and values. In addition, Ms. Belcher was deemed Ms. Wyatt's health care surrogate by her physicians. Accordingly, in the instant situation, it was reasonable for McDowell Nursing to believe that Ms. Belcher, as Ms. Wyatt's daughter and health care surrogate, had the knowledge and authority to sign the arbitration agreement on Ms. Wyatt's behalf. Moreover, it was reasonable for McDowell Nursing to hold such a belief based on Ms. Wyatt's own conduct and representations as she allowed Ms. Belcher to participate in her admission process. Furthermore, Ms. Wyatt permitted Ms. Belcher to sign the other nursing home admission documents on her behalf. Hence, adequate evidence exists which supports the apparent agency relationship between Ms. Wyatt and Ms. Belcher which is sufficient for Ms. Wyatt to be legally bound to the provisions of the arbitration agreement with McDowell Nursing. Consequently, the Circuit Court of Kanawha County exceeded its legitimate authority when it concluded that Ms. Belcher lacked the authority to bind Ms. Wyatt to the arbitration agreement's provisions and failed to compel arbitration pursuant to the FAA.

B. MS. WYATT RATIFIED THE DECISIONS MADE BY MS. BELCHER ON HER BEHALF BOTH BY ACCEPTING THE BENEFITS OF THE ARBITRATION AGREEMENT AS WELL AS BY SUBSEQUENTLY APPOINTING MS. BELCHER AS HER POWER OF ATTORNEY.

Moreover, through Ms. Wyatt's acceptance of the benefits associated with the signing of the arbitration agreement by Ms. Belcher, Ms. Wyatt essentially ratified Ms. Belcher's conduct. Furthermore, Ms. Wyatt's subsequent appointment of Ms. Belcher as her power of attorney also tended to demonstrate that Ms. Wyatt agreed with and ratified the conduct Ms. Belcher had engaged in on Ms. Wyatt's behalf.

It is a generally accepted premise of agency law that, under certain circumstances, an apparent agency may be created even when there is no manifestation by the principal that an agent was authorized to act on his behalf. It has been held on numerous occasions that ratification by the principal of an unauthorized act of an agent may in some instances be effected contrary to the real intention of the principal; however, ratification by the principal of the act of the agent is ordinarily presumed to be based upon the intention of the party. *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141 (1969) (citing *Payne Realty v. Lindsey*, 112 S.E. 306; *Rees Electric Co. v. Mullens Smokeless Coal Co.*, 89 S.E.2d 619). Simply put, a principal may be bound by the actions or conduct of an unauthorized agent if the principal thereafter approves of the agent's conduct and accepts the benefits and burdens thereof.

In the *Lohr Funeral Home* case, an automobile manufacturer entered into a distribution agreement with a car dealer. *See generally*, 166 S.E.2d 141. The agreement specifically stated that the dealer was **not an agent** of the manufacturer. *Lohr Funeral Home*, 166 S.E.2d at 143. The dealer then entered into a contract with a purchaser for a new car, and the purchaser's existing vehicle was accepted for trade in purposes. *Id.* That being said, the dealer never made any payment whatsoever to the manufacturer on the purchaser's behalf. *Id.* Thereafter, the dealer

filed for bankruptcy, and the purchaser had no choice but to file an action against the manufacturer seeking delivery of the promised automobile and for compensation of the value of his traded-in vehicle. *Id.* at 146. After a jury trial, the case was decided in favor of the plaintiff. *Id.* Consequently, the manufacturer appealed the trial court's decision to the West Virginia Supreme Court. *Id.*

On appeal, the manufacturer assigned as error the trial court's submission, to the jury, of the question regarding the alleged authority of the dealer to act on behalf of the manufacturer. *Id.* The contract or selling agreement between the manufacturer and the dealer itself, however, contained unambiguous language to the effect that the dealer was **not** the agent of the manufacturer for the purposes of selling the manufacturer's products. *Id.* In addition, the evidence did not even indicate an intention on the part of the manufacturer to ratify the unauthorized acts of its dealer. *Id.* at 148. In reversing, the Court concluded that the evidence indicated that the language contained in the contract demonstrated the manufacturer's intent to repudiate any selling efforts of the manufacturer's products by the dealer. *Id.* Furthermore, the manufacturer did "not receive any fruits of the transaction." *Id.* at 149. Accordingly, the plaintiff failed to carry the burden of proving the existence of an apparent agency relationship even under a theory of ratification. *Id.* at 149.

Unlike the outcome in the *Lohr* decision, upon Ms. Belcher's signing of the agreement on Ms. Wyatt's behalf in the instant case, both Ms. Wyatt and McDowell Nursing alike would have been bound by the provisions of the arbitration agreement. Moreover, as previously mentioned, the signing of the arbitration agreement was not a precondition to Ms. Wyatt's ability to be admitted to McDowell Nursing. Thus, participation in the agreement was completely voluntary. Even then, the arbitration agreement included a unilateral "opt out provision," which allowed

either Ms. Wyatt herself or Ms. Belcher as her representative, to rescind the agreement within thirty (30) days of signing so long as proper notice was given to McDowell Nursing. The language contained in the arbitration agreement clearly stated in large font and bold print that **“THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT”** to have a claim decided in a court of law before a judge and jury. That being said, neither Ms. Wyatt nor Ms. Belcher ever contacted the facility to rescind the agreement during the thirty (30) day period contained in the arbitration agreement. Accordingly, by not rescinding the agreement, if a problem arose and she desired to seek the problem’s resolution, Ms. Wyatt would have had the opportunity to exercise her benefit of arbitrating the issue.

In addition to being named Ms. Wyatt’s health care surrogate, on or about December 8, 2009, Ms. Belcher was further appointed as Ms. Wyatt’s power of attorney. In all actuality, Ms. Wyatt deliberately chose to delegate her power of attorney to Ms. Belcher by even retaining an attorney to properly draft the instrument by which the appointment was made. Because ratification of an unauthorized agent’s conduct is presumed to demonstrate the intention of the real party in interest, Ms. Wyatt’s appointment of Ms. Belcher as her power of attorney further evidenced Ms. Wyatt’s satisfaction with and ratification of the previous decisions Ms. Belcher had been making on Ms. Wyatt’s behalf. *See generally, John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 166 S.E.2d 141 (W. Va. 1969) (citing *Payne Realty v. Lindsey*, 112 S.E. 306; *Rees Electric Co. v. Mullens Smokeless Coal Co.*, 89 S.E.2d 619.) Consequently, Ms. Wyatt is bound by Ms. Belcher’s signing of the arbitration agreement with McDowell Nursing because Ms. Wyatt subsequently approved of Ms. Belcher’s signing of the agreement by appointing her

daughter as her power of attorney and because she accepted the benefits and burdens of the arbitration agreement by not rescinding it within the thirty (30) day opt out period. Thus, the Circuit Court of Kanawha County exceeded its legitimate authority when it concluded that Ms. Belcher lacked the authority to bind Ms. Wyatt to the arbitration agreement's provisions and failed to compel arbitration pursuant to the FAA.

C. THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-16, PREVENTS STATE COURTS FROM SINGLING OUT ARBITRATION PROVISIONS.

It should also be noted that Ms. Belcher signed many documents on Ms. Wyatt's behalf, yet the Plaintiff only wants to invalidate the arbitration agreement. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, prevents state courts from singling out arbitration provisions. By enacting Section 2 of the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assoc., Inc. v. Casarotto*, 116 S. Ct. at 1656. Therefore, state courts may not decide that:

[A] contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on unequal 'footing,' directly contrary to the Act's language and Congress's intent.

Id. at 686.

Plaintiff's arguments in her brief are contradictory. On the one hand, he contends that Ms. Belcher did not have authority to enter into a contract on behalf of Ms. Wyatt. While on the other hand, he tends to insinuate that a valid agreement existed but that an integral part of the contract was no longer available, thus eviscerating the core of the parties' agreement. Plaintiff cannot have it both ways. Thus, because arbitration agreements are to be placed on the same "footing" as any other type of contract and because Ms. Belcher had the authority to enter into

the other admission agreements on Ms. Wyatt's behalf, Plaintiff cannot now argue that Ms. Belcher did not have the authority to enter into arbitration agreements with McDowell Nursing on Ms. Wyatt's behalf. Consequently, the Circuit Court of Kanawha County exceeded its legitimate authority when it concluded that Ms. Belcher lacked the authority to bind Ms. Wyatt to the arbitration agreement's provisions and failed to compel arbitration pursuant to the FAA.

D. BECAUSE MS. BELCHER HAD THE AUTHORITY TO LEGALLY BIND MS. WYATT TO THE ARBITRATION AGREEMENT WITH MCDOWELL NURSING, THE CIRCUIT COURT OF KANAWHA COUNTY EXCEEDED ITS LEGITIMATE AUTHORITY WHEN IT DID NOT COMPEL PLAINTIFF TO ARBITRATE HIS CLAIMS PURSUANT TO THE FAA.

In West Virginia, "a valid, written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *See* Syl. Pt. 5, *McGraw v. Amer. Tobacco Co.*, 681 S.E.2d 96 (W. Va. 2009). Additionally, "[i]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract." Syl. Pt. 3, *Clites v. Clawges*, 685 S.E.2d 683 (W. Va. 2009).

The arbitration agreement signed by Ms. Belcher as daughter, health care surrogate, and subsequent power of attorney of her mother, Ms. Wyatt, specifically stated that it would be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.⁴ As previously mentioned, the FAA "provides that written arbitration agreements' shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.'" *Doctor's Assoc., Inc. v. Casarotto*, 116 S. Ct. at 1655 (citing 9 U.S.C. § 2).

⁴ "This Arbitration Agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. §§ 1-16." (Exhibit A).

On February 21, 2012, the United States Supreme Court addressed the validity of arbitration agreements in the nursing home setting under circumstances similar to those at issue in the instant petition. In so doing, the Court issued a writ of *certiorari* and summarily vacated the West Virginia Supreme Court of Appeals' decision in the *Brown* consolidated⁵ appeal. *Marmet Health Care Center, et al. v. Brown, et al.*, 132 S. Ct. 1201 (2012) (per curiam). The Court's ruling was clear: "State and federal courts must enforce the Federal Arbitration Act (FAA) with respect to all arbitration agreements covered by that statute." *Id.* at 1202 (emphasis supplied).

The "clear instructions" contained in the United States Supreme Court's precedent are set forth both in the *Marmet Health Care Center* slip opinion: the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable" to the same extent as any other contract and admits of no exception for personal injury or wrongful death claims; the FAA reflects⁶ "an emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3356 (1985); and "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1747; *Marmet Health Care Center*, 132 S. Ct. at 1203.

Accordingly, the Circuit Court of Kanawha County failed to follow the "clear instruction in the precedent" of the United States Supreme Court by not treating the instant arbitration agreement on the same terms as any other contract. Furthermore, the Circuit Court of Kanawha

⁵ The *Brown* consolidated appeal "involves three negligence suits against nursing homes . . . brought by Clayton Brown, Jeffrey Taylor, and Sharon Marchio." *Marmet Health Care Center*, 132 S. Ct. at 1202-3.

⁶ The *Brown* opinion notwithstanding, the West Virginia Supreme Court has repeatedly emphasized its "policy to foster and encourage arbitration agreements . . ." See e.g. *Clinton Water Assn. v. Farmers Construction Co.*, 254 S.E.2d 692, 695 (W. Va. 1979), *Board of Education v. W. Harley Miller, Inc.*, 221 S.E.2d 882 (W. Va. 1975), *Boomer Coal & Coke Co. v. Osenton*, 133 S.E. 381 (W. Va. 1926).

County exceeded its legitimate authority when it concluded that Ms. Belcher lacked the authority to bind Ms. Wyatt to the arbitration agreement's provisions and failed to compel arbitration pursuant to the FAA.

CONCLUSION

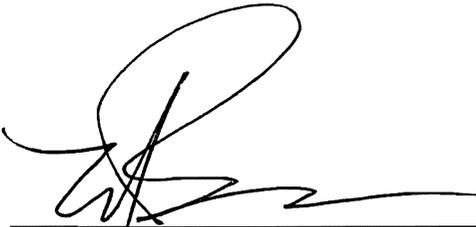
In West Virginia, it is presumed that an arbitration agreement is a written contract that was bargained for and intended to be the exclusive means for resolving a dispute. More importantly, when an arbitration provision is governed by the FAA, a state court may not find that a contract (i.e. an admissions agreement) "is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *See Doctor's Assoc.*, 116 S. Ct. at 1655. Once a court finds that an arbitration provision is governed by the FAA, and that the plaintiff's claims fall within the scope of that provision, the duty of the Court is clear, it must compel arbitration. *See* 9 U.S.C. § 3-4. Thus, because Ms. Belcher had the apparent authority to legally bind Ms. Wyatt to the arbitration agreement with McDowell Nursing, the Circuit Court of Kanawha County was required to place the arbitration agreement on equal footing with all other contracts that Ms. Belcher signed on Ms. Wyatt's behalf which have gone undisputed. Accordingly, because the arbitration agreement at issue is explicitly governed by the FAA, and Plaintiff's claims fall within the scope of the arbitration provision, the Kanawha County Circuit Court had a duty to compel arbitration of Plaintiff's claims against McDowell Nursing.

WHEREFORE, for the reasons set forth herein, Defendants AMFM LLC, Commercial Holdings, Inc., k/n/a Commercial Holdings, LLC; Integrated Commercial Enterprises, Inc.; Manzanita Holdings, LLC; Manzanita Management, Inc.; Lifetree, LLC; Wisteria, LLC; McDowell Nursing & Rehabilitation Center, Inc.; d/b/a McDowell Nursing & Rehabilitation Center; and Patty Lucas respectfully request that this Court GRANT its *Petition for Writ of*

Prohibition and enter an ORDER prohibiting the Circuit Court of Kanawha County from enforcing its March 28, 2012 Order, along with such other and further relief as this Court may deem just and proper.

**AMFM, LLC; Commercial Holdings, Inc.
k/n/a Commercial Holdings, LLC;
Integrated Commercial Enterprises, Inc.;
Manzanita Holdings, LLC; Manzanita
Management, Inc.; Lifetree, LLC; Wisteria,
LLC; McDowell Nursing & Rehabilitation
Center, Inc. d/b/a McDowell Nursing &
Rehabilitation Center; and Patty Lucas;**

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. AMFM LLC, Commercial Holdings, Inc.,
k/n/a Commercial Holdings, LLC; Integrated Commercial Enterprises, Inc.; Manzanita
Holdings, LLC; Manzanita Management, Inc.; Lifetree, LLC;
Wisteria, LLC; McDowell Nursing & Rehabilitation Center, Inc.; d/b/a McDowell Nursing
& Rehabilitation Center; and Patty Lucas;

Petitioner,

v.

Appeal No.: _____

THE HONORABLE JUDGE CHARLES E. KING,
Judge of the Circuit Court of Kanawha County,
West Virginia

Respondent.

CERTIFICATE OF SERVICE

I, Ryan A. Brown, counsel for Petitioners, do hereby certify that **PETITIONERS' PETITION FOR WRIT OF PROHIBITION** was served on the 12th day of June, 2012 via first class U.S. mail, postage prepaid, to the following counsel of record:

James B. McHugh, Esquire
Michael J. Fuller, Jr., Esquire
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Counsel for Plaintiff

The Honorable Charles E. King
13th Judicial Circuit
Kanawha County Courthouse
P.O. Box 2351
Charleston, WV 25328
Respondent



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. AMFM LLC, Commercial Holdings, Inc.,
k/n/a Commercial Holdings, LLC; Integrated Commercial Enterprises, Inc.; Manzanita
Holdings, LLC; Manzanita Management, Inc.; Lifetree, LLC;
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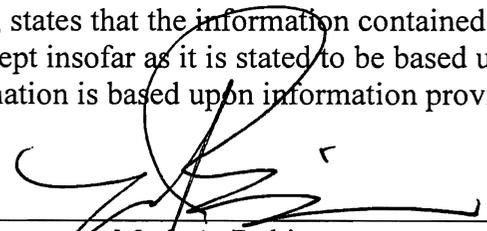
THE HONORABLE JUDGE CHARLES E. KING,
Judge of the Circuit Court of Kanawha County,
West Virginia

Respondent.

VERIFICATION

STATE OF West Virginia.
COUNTY OF Kanawha, to wit:

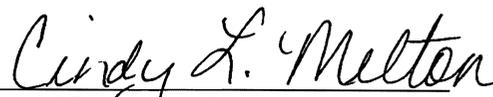
The undersigned, after being first duly sworn, states that the information contained in the foregoing Petition for Writ of Prohibition is true, except insofar as it is stated to be based upon information and belief. To the extent that any information is based upon information provided to me or on my behalf, it is believed to be true.



Mark A. Robinson

Taken, subscribed, and sworn to before the undersigned authority, this 12 day of June, 2012.

My commission expires: September 26, 2013



Notary Public

