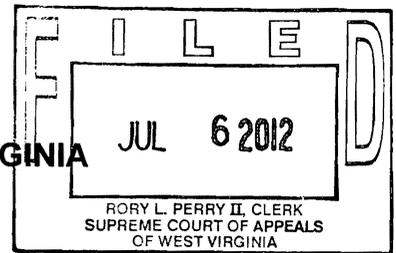


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0717



State of West Virginia 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;  
Patty Lucas; John Does 1 Through 10;  
and Unidentified Entities 1 Through 10  
(as to McDowell Nursing & Rehabilitation Center)

PETITIONERS/DEFENDANTS

v.

Honorable Charles E. King, Judge of the Circuit  
Court of Kanawha County t

and

Lelia Gresham Baker, Individually and  
on behalf of the Estate and Wrongful  
Death Beneficiaries of Beulah Wyatt

RESPONDENTS/PLAINTIFF

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**PLAINTIFF'S RESPONSE TO DEFENDANTS' PETITION  
FOR A WRIT OF PROHIBITION TO THE CIRCUIT COURT  
OF KANAWHA COUNTY, CIVIL ACTION NO. 11-C-2144**

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## INTRODUCTION

Lelia Gresham Baker, Individually and on behalf of the Estate and Wrongful Death Beneficiaries of Beulah Wyatt (hereinafter "Plaintiff"), by and through the undersigned attorneys, hereby responds to the Petition for a Writ of Prohibition filed by 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; Patty Lucas; John Does 1 Through 10; and Unidentified Entities 1 Through 10 (as to McDowell Nursing & Rehabilitation Center) (hereinafter "Defendants"), the Defendants in Kanawha County Circuit Court Cause No. 11-C-2144.

Defendants have asked this Court to take the extraordinary relief of granting a writ of prohibition and interfere with the Circuit Court of Kanawha County's ruling regarding a purported arbitration agreement in this matter. As set forth more fully herein, no valid agreement to arbitrate exists in this matter and this Court should deny Defendants' request for a writ of prohibition to the Circuit Court of Kanawha County. Plaintiff respectfully submits that Defendants' Petition fails to meet the required burden set forth by this Court for the extraordinary relief sought. Plaintiff therefore requests that this Court deny Defendants' petition.

## PROCEDURAL HISTORY AND FACTS

Beulah Wyatt was a resident of McDowell Nursing and Rehabilitation Center, a facility owned, operated and managed by Defendants from on or about September 10, 2009, through on or about July 31, 2010. While in the care of the Defendants, Ms. Wyatt suffered injuries and harm, including, among other things, pressure sores;

infections; dehydration; malnutrition; violations of her dignity, humiliation; and ultimately these injuries contributed to her death. All of these injuries were as the result of Defendants' failure to provide adequate care and adequate staff. Plaintiff filed a Complaint in this Court asserting several causes of action against Defendants, including negligence, gross negligence, willful, wanton, reckless, malicious and/or intentional conduct, violations of the West Virginia Nursing Home Act, W. Va Code § 16-5C-15, medical malpractice for both lethal and non-lethal injuries, fraud, breach of fiduciary duty, premises liability, and violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA).

Defendants subsequently moved to dismiss Plaintiff's Complaint and to compel arbitration. Following briefing by the parties and a hearing on this issue, the Circuit Court of Kanawha County entered an order denying Defendants' Motion to Dismiss and Compel Arbitration. See Order, attached as Appendix A, pp. 1-5. The Court notably found that the relevant facts were not in dispute between the parties. *Id.* At the time of her admission, Beulah Wyatt lacked the ability to make her own medical decisions. *Id.* (citing Exhibit "A" to Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss and Compel Arbitration). This incapacity of Beulah Wyatt was found to be indefinite in duration. *Id.* Nancy Belcher, Beulah Wyatt's daughter, was appointed as health care surrogate as provided in W. Va. Code §16-30-1, et seq., for the purpose of making health care decisions for her mother. *Id.*

Nancy Belcher signed numerous documents related to the admission and care and treatment of Beulah Wyatt. This admission paperwork included an arbitration agreement, which pursuant to its own terms and Defense Counsel's representations, was not required to be executed as part of the admission process. *Id.* (citing Exhibit "B"

to Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss and Compel Arbitration). Defendants also provided the affidavit of Kristy Dickens, who is the Administrative Director for Commercial Holdings, LLC, which indicated that the "arbitration agreement is not required to stay at an AMFM facility...." *Id.* (citing Exhibit "C" to Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration). Although a power of attorney was executed by Beulah Wyatt giving her authority to Nancy Belcher on December 8, 2009, this was three months after her admission to the Defendants' facility and a determination by her treating physician that she was "indefinitely" incapacitated. *Id.* (citing Exhibit "C" to Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss and Compel Arbitration).

Taking these undisputed facts into consideration, the Circuit Court found that Nancy Belcher had the authority to act on the behalf of Beulah Wyatt pursuant to the Health Care Decisions Act, codified at W. Va. Code §16-30-1, et seq., and thus was "authorized to make health care decisions on behalf of the incapacitated person..." The Health Care Decision Act specifically defines what a "health care decision" includes and provides:

"Health care decision" means a decision to give, withhold or withdraw informed consent to any type of health care, including, but not limited to, medical and surgical treatments, including life-prolonging interventions, psychiatric treatment, nursing care, hospitalization, treatment in a nursing home or other facility, home health care and organ or tissue donation.

*Id.* Upon review of the arbitration agreement, the Circuit Court noted that it did not address any type of medical or surgical treatments, life-prolonging interventions, psychiatric treatment, nursing care, hospitalization, treatment in the nursing home, or organ or tissue donation. *Id.* (citing Exhibit "A" to Defendants' Memorandum of Law in

Support of Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration).

In fact, the arbitration agreement itself indicates exactly what it does:

**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.**

*Id.* (citing Exhibit "A" to Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration, emphasis included in original document).

The Circuit Court held that the Health Care Decisions Act was not intended to allow a surrogate to waive one's constitutional right to trial by jury or access to the Courts of this State. *Id.* Therefore the Court held that Nancy Belcher, as surrogate of Beulah Wyatt, did not have authority to waive her constitutional right to a jury trial.<sup>1</sup> The Circuit Court recognized that Nancy Belcher eventually became the power of attorney for Beulah Wyatt, but had concern about this power of attorney as Beulah Wyatt had already been determined to lack capacity. *Id.* However, the Circuit Court did not have to address this concern as the power of attorney was not in existence at the time of Beulah Wyatt's admittance to the Defendants' facility. *Id.* Therefore it could not be the basis for any authority as it relates to the arbitration agreement at issue. *Id.* Finally, the Circuit Court did not find sufficient evidence to support the position that Nancy Belcher had apparent authority to waive Beulah Wyatts' constitutional right to trial by jury.

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<sup>1</sup> (citing *Adams Community Care Center, LLC v. Reed*, 37 So.3d 1155 (MS, 2010), *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fl 4<sup>th</sup> DCA, 2005), *Life Care Centers of America v. Smith*, 681 S.E.2d 182 (GA App. Ct. 2010), *Lujan v. Life Care Centers of America*, 222 P.3d 970 (Col App Ct. 2009), *Flores v. Evergreen at San Diego, LLC*, 148 Cal. App.4<sup>th</sup> 581 (2007)).

Following the Court's Order, the Defendants filed the instant Petition for Writ of Prohibition. Plaintiff submits that the Circuit Court was correct in finding insufficient authority for the arbitration agreement at issue. As further set forth herein, Defendants have failed to establish that there is a valid contract to enforce arbitration. Additionally, there are other reasons that serve to invalidate the agreement at issue as will be discussed below. Because Defendants have failed to demonstrate the extraordinary need for the requested relief, Defendants' Petition must be denied.

## ARGUMENT

### **a. Standard of Review**

It is well settled that prohibition is a "drastic, tightly circumscribed remedy which should be invoked only in **extraordinary situations** and may not be used as a substitute for an appeal." *State ex rel. West Virginia Nat. Auto Ins. Co., Inc. v. Bedell*, 672 S.E.2d 358, 364 (W.Va. 2008), emphasis added, (citing *Health Management v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999); *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 657, 510 S.E.2d 486, 491 (1998); *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring); 72A C.J.S. *Prohibition* § 11 (2004). See also *State ex rel. Kutil v. Blake*, 223 W.Va. 711, 679 S.E.2d 310 (W.Va. 2009) ("[W]e have been guarded about granting relief in prohibition, reserving its use for extraordinary situations."). As early as 1873, this Court stated that "a mere error in the proceeding may be ground of appeal or review, but not of prohibition." *Buskirk v. Judge of Circuit Court*, 7 W.Va. 91, Syl. pt. 3 (1873).

"Prohibition 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 [a petition for appeal] or

certiorari.” *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370, Syl. Pt. 1 (1953). The Defendants have not challenged the Circuit Court of Kanawha County’s jurisdiction but have instead asserted that the Circuit Court abused its discretion. This Court has held:

Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that **the abuse of power is so flagrant and violative of petitioner’s rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.**

*Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973), emphasis added. “A writ of prohibition is available to correct a **clear legal error** resulting from a trial court’s **substantial abuse of its discretion.**” *State ex rel. McCormick, Relator v. Zakaib*, 189 W. Va. 258, 430 S.E.2d 316, Syl. Pt. 3 (1993), emphasis added (*quoting* Syl. Pt. 1, *State Farm Mutual Automobile Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992)).

In order to determine whether a trial court exceeded its jurisdiction, this Court examines 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.

*State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12, Syl. Pt. 4 (1996). These factors are “general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.” *Id.* Importantly, this Court has

held that “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.”

When the appropriate standard and factors are examined in regard to the matter at bar, Plaintiff submits that Defendants have failed to establish the extraordinary circumstances necessary for a writ of prohibition. Plaintiff notes that the Defendants failed to even address several of the five factors set forth in *Berger*. Finally, as to the third factor which is to be given substantial weight, Plaintiff submits that the Circuit Court of Kanawha County’s Order in this matter is not clearly erroneous as a matter of law. In fact, as will be shown herein, the Circuit Court’s Order is supported by applicable law. Thus, Defendants’ petition should be denied.

**b. No valid agreement to arbitrate exists.**

This Court has held:

When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006), 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.*, 225 W.Va. 450, 693 S.E.2d 815 Syl. Pt. 4 (W.Va. 2010) (citing Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc., v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010)). Thus, the Circuit Court was required to first determine whether or not a valid contract existed in this matter.

In order to determine whether parties should be compelled to arbitrate a dispute, courts perform a two-step inquiry: (1) whether there existed a valid, enforceable agreement to arbitrate and (2) whether the claims at issue fall within the scope of that agreement. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

Although “highly circumscribed,” the “judicial inquiry ... is not focused solely on an examination for contractual formation defects such as lack of mutual assent and want of consideration.” *Id.* Rather, the Federal Arbitration Act (FAA) specifically contemplates that parties may also seek revocation of an arbitration agreement “under ‘such grounds as exist at law or in equity,’ including fraud, duress, and unconscionability.” *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (quoting 9 U.S.C.A. § 2).

State contract law governs in determining whether the arbitration clause itself was validly obtained, provided the contract law applied is general and not specific to arbitration clauses. *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996); *Valley Const. Co. v. Perry Host Management Co.*, 796 S.W.2d 365 (Ky. App. 1990). As the Eleventh Circuit recognized in *Chastain v. Robinson-Humphrey Company*, 957 F.2d 851 (11<sup>th</sup> Cir. 1992),

when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration....there is no presumptively valid general contract which would trigger the district court’s duty to compel arbitration pursuant to the Act. If a party has not signed an agreement containing arbitration language, such a party may not have agreed to submit grievances to arbitration at all. Therefore, before sending any such grievances to arbitration, the district court itself must first decide whether or not the non-signing party can none the less be bound by the contractual language.

957 F.2d. at 854. Thus, any established policy favoring arbitration only comes into play *after* it is determined that a valid agreement to arbitrate exists. See *Fleetwood Enters., Inc. v. Gaskamp*, 280 F. 3d 1069, 1070 & 1070 n.5 (5<sup>th</sup> Cir. 2002).

Under West Virginia law, the fundamental elements of a valid contract are (1) competent parties, (2) legal subject-matter, (3) valuable consideration, and (4) mutual assent. *Ways v. Imation Enterprises Corp.*, 214 W.Va. 305, 589 S.E.2d 36

(W.Va. 2003) (citing *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926). “There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.” *Id.* Plaintiff submits that Defendants have not established that a valid agreement to arbitrate exists. Further, grounds exist both in law and in equity that allow any purported agreement to be revoked. Therefore, Defendants’ motion must be denied.

**i. Defendants have failed to meet their burden of establishing a binding contract and, accordingly, their motion must be denied.**

The burden of proof falls squarely upon the Defendants to show that Beulah Wyatt contracted to wave her Constitutional right to a jury trial in favor of arbitration. Beulah Wyatt did not sign the agreement to arbitrate and there is no evidence that anyone with authority signed the agreement on her behalf. Defendants bear the burden of establishing that an individual with authority to contract on behalf of Beulah Wyatt executed the arbitration agreement on her behalf. “It is of course an elementary rule of law that a person dealing with an alleged agent is bound to ascertain his authority, and that, when [attempting to enforce an agreement] against the principal in respect of an act of such agent, the burden is upon the [party attempting to enforce the agreement] to establish, not only the fact of agency, but that the act upon which he relies was within the agent’s authority.” *Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co.*, 259 F. 838 (4<sup>th</sup> Cir. 1919). *See also Bluefield Supply Co. v. Frankel's Appliances, Inc.*, 149 W.Va. 622, 631-32, 142 S.E.2d 898, 906 (W.Va. 1965) (“The general rule is that the authority of an agent to perform the act in question must be proved. . . . The 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; and the

burden of proving an agency rests upon him who alleges the existence of the agency. It is also well established that a person who deals with an agent is bound at his own peril to know the authority of the agent.), citations omitted. Plaintiff submits that Defendants have wholly failed to meet their burden.

The United States Supreme Court has required heightened showings of authority when an agent is giving up important rights, specifically with regard to arbitration. See *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989). The United States Supreme Court has also recognized the right to access courts as a fundamental constitutional right preserved in the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, the First Amendment right to petition the government for redress of grievances, and the Due Process Clause of the United States Constitution.

The application of general principles of agency law must apply. A principal is bound by the actions of his agent within the scope of the agent's real or apparent authority. Absent any evidence of express authority, apparent authority is "that which, though not actually granted, the **principal** knowingly permits the agent to exercise, or which he holds him out as possessing." *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 152 W.Va. 723, 166 S.E.2d 141 (W.Va. 1969), emphasis added. Indeed, the **principal's conduct** is the proper focus of any agency inquiry. *Burless v. West Virginia University Hospitals, Inc.*, 215 W.Va. 765, 601 S.E.2d 85 (W.Va. 2004).

Defendants notably do not address the Circuit Court's finding of undisputed facts that at the time of her admission, Beulah Wyatt lacked capacity. See Order, Appendix pp. 1-5 (citing Exhibit "A" to Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss and Compel Arbitration). This incapacity of Beulah Wyatt was found

to be indefinite in duration. *Id.* Thus, Ms. Wyatt could not have exhibited conduct that would have established Nancy Belcher as her agent. In *Kindred Nursing Centers Ltd. Partnership v. Brown*, --- S.W.3d ----, 2011 WL 1196760 (Ky.App. 2011), the Kentucky Court of Appeals examined an arbitration agreement in the nursing home setting and held that a nursing home resident was not bound by an arbitration agreement signed by his mother under the principles of actual or apparent authority, even if the resident had taken some action consistent with the establishment of such authority, where the resident lacked the mental capacity to act on his on behalf and was incapable of denying any act on his mother's behalf that might have indicated she was acting with his authority to sign the arbitration agreement. Plaintiff notes that Ms. Wyatt's incapacity in this matter would also void the subsequent power of attorney, which was not in existence at the time the purported arbitration agreement was signed nor within the thirty (30) day period within which it could have been voided.

As to Ms. Belcher being Ms. Wyatt's health care surrogate, the Circuit Court correctly determined that pursuant to the Health Care Decisions Act, codified at W. Va. Code §16-30-1, et seq., Ms. Belcher was only "authorized to make health care decisions on behalf of the incapacitated person..." The Health Care Decision Act specifically defines what a "health care decision" includes and provides:

"Health care decision" means a decision to give, withhold or withdraw informed consent to any type of health care, including, but not limited to, medical and surgical treatments, including life-prolonging interventions, psychiatric treatment, nursing care, hospitalization, treatment in a nursing home or other facility, home health care and organ or tissue donation.

*Id.* The arbitration agreement, by Defendants' own admission and its plain language, was not required for admission and, as the Circuit Court noted, it did not address any type of medical or surgical treatments, life-prolonging interventions, psychiatric

treatment, nursing care, hospitalization, treatment in the nursing home, or organ or tissue donation. The arbitration agreement did one thing and one thing only, it waived Ms. Wyatt's Constitutional right to a jury trial.

Although there is no West Virginia case directly on point, courts in other jurisdictions have examined this issue. In *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So. 2d 211 (Miss. 2008), a nursing home resident's daughter signed an arbitration agreement on behalf of the resident. The signer of the agreement, unlike Ms. Belcher in this matter, allegedly held a power of attorney over the resident, although this power of attorney was not made a part of the record. *Id.* at 216. Thus, the Mississippi Supreme Court examined the daughter as a health care surrogate under Mississippi's statute that is very similar to the one here in West Virginia. *Id.*

Ultimately, the *Hinyub* Court discussed the authority of a surrogate to make a "health care decision" pursuant to Mississippi Code Annotated Section 41-41-203(h), which states:

"Health care decision" means a decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including:

- (i) Selection and discharge of health-care providers and institutions;
- (ii) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
- (iii) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

Miss. Code Ann. § 41-41-203(h).

The *Hinyub* Court stated that while its prior decisions in both *Covenant Health Rehab of Picayune v. Brown*, 949 So. 2d 732 (Miss. 2007) and *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005) found the execution of the arbitration

provision as part of the admissions agreement to be part of the “health-care decision,” the arbitration provisions in those cases were an essential part of the consideration for the receipt of “health care”. *Hinyub*, 975 So. 2d at 218. In *Hinyub*, however, as here in the matter at bar, the arbitration agreement was not required for the resident to be admitted to the facility, as it contained the following language: “the execution of this Arbitration is not a precondition to the furnishing of services to the Resident by the Facility”. *Id.*

The Mississippi Supreme Court concluded by stating: “Since signing the arbitration provision was not a part of the consideration necessary for [the resident’s] admission to [the nursing home] and not necessarily in the best interest of [the resident] as required by the [Health Care Surrogacy] Act, [the resident’s daughter] did not have the authority as [the resident’s] health care surrogate to enter into the arbitration provision contained within the admissions agreement.” *Id.*

The decision to submit to arbitration is not a health-care decision. *Id.* See also *Mariner Healthcare, Inc. v. Green*, 2006 WL 1626581, 2006 U.S. Dist. LEXIS 37479 (N.D. Miss. June 7, 2006) (surrogate’s authority to make health-care decisions does not extend to arbitration); *Mariner Health Care, Inc v. Guthrie*, 2005 U.S. Dist. LEXIS 42651 (S.D.Miss. Aug. 24, 2005) (holding the same); *Covenant Health Rehab. of Picayune, L.P. v. Estate of Lambert*, 984 So. 2d 283, \*8-9 (Miss.Ct.App. 2006) (holding that Miss.Code Ann. § 41-41-203(h) and its definition of “health-care decision” do not confer upon health care surrogates the right to bind patients to arbitration); see also *Pagarigan v. Libby Care Ctr., Inc.*, 99 Cal.App.4th 298, 120 Cal.Rptr.2d 892 (Cal.Ct.App.2002); *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296, 301 (Fla.Dist.Ct.App.2005). “Furthermore, arbitration is not among those matters specifically delineated in the

statute as a 'health-care decision.'" *Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, 994 So. 2d 159, 164 (Miss. 2008) (citing Miss.Code Ann. § 41-41-203(h) (Rev. 2005)). "The Mississippi Court of Appeals has correctly cited, quoted, and applied Mississippi Code Annotated Sections 41-41-211 and 41-41-203(h) in concluding that the statute and its definition of 'health-care decision' does not confer upon health-care surrogates the right to bind patients to arbitration agreements." *Id.* (citing *Covenant Health Rehab. of Picayune, L.P. v. Estate of Lambert*, 984 So.2d at 283). "The decision to arbitrate is neither explicitly authorized nor implied within section 41-41-203(h) which defines a health care decision ...." *Id.*

Plaintiff respectfully submits that *Hinyub* is directly on point and while not binding on this Court, is persuasive as to the decision this Court should reach. The arbitration clause in this matter could be cancelled within 30 days and was not a precondition for admission. Thus it could not have been a "health care decision" pursuant to the definition stated in the applicable West Virginia statute quoted above. Ms. Belcher lacked authority to enter into the arbitration agreement on Ms. Wyatt's behalf and the Circuit Court did not abuse its discretion in its ruling. Defendants' petition should be denied.

**ii. The arbitration clauses at issue fail because an integral part of the agreement to arbitrate is no longer available.**

Although the Circuit Court of Kanawha County did not base its ruling on this issue, Plaintiff submits that it is sufficient on its own merit to justify the denial of arbitration in this matter. The arbitration agreement in this matter requires that claims "shall be resolved *exclusively* . . . in accordance with the Code of Procedure of the National Arbitration Forum" ("NAF"). See Arbitration Agreement, attached as part of

Plaintiff's Appendix, pp. 6-7. The NAF's rules require that arbitration pursuant to them "shall be administered only by the National Arbitration Forum or by any entity or individual providing administrative services by agreement with the National Arbitration Forum." *Id.*; NAF Code of Procedure at p. 1.<sup>2</sup> Like the American Arbitration Association (AAA), however, the NAF no longer conducts arbitrations in matters such as the case at bar.<sup>3</sup> In fact, the NAF has gone even further than the AAA and now refuses to conduct consumer arbitrations entirely.<sup>4</sup> The NAF's withdrawal from consumer arbitrations means that it is impossible for arbitration to be enforced according to the NAF's rules. This is a material, integral part of the agreement at issue. Thus, Defendants' motion must fail.

In *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 219 (Pa.Super. 2010), the Pennsylvania Superior Court examined other jurisdictions that had the opportunity to determine whether an arbitration agreement is enforceable in the absence of the NAF. Importantly, the Pennsylvania Court found that the "conclusion that the Agreement was 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.** *Id.*, emphasis added. The Court cited the following cases concluding that the NAF's participation in the arbitration process was an "integral part" of the agreement to arbitrate. *Carideo v. Dell, Inc.*, 2009 WL 3485933, at \*6 (W.D.Wash. 2009) (collecting and discussing cases) ("[T]he court concludes that the selection of NAF is integral to the arbitration clause. The unavailability of NAF as arbitrator presents compounding

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<sup>2</sup> <http://www.adrforum.com/main.aspx?itemID=609&hideBar=False&navID=162&news=3>

<sup>3</sup> <http://www.adrforum.com/newsroom.aspx?itemID=1528>

<sup>4</sup> <http://blogs.wsj.com/law/2009/07/20/in-settlement-arbitration-company-agrees-to-largely-stepaside/tab/print/>.

problems that threaten to eviscerate the core of the parties' agreement. To appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause.”), *Khan v. Dell, Inc.*, 2010 WL 3283529, at \*4 (D.N.J. 2010) (“The plain language of this clause evinces the parties' intent to arbitrate exclusively before a particular arbitrator, not simply an intent to arbitrate generally. The NAF is expressly named, the NAF's rules are to apply, and no provision is made for an alternate arbitrator. The language used is mandatory, not permissive.”); *Ranzy v. Extra Cash of Tex., Inc.*, 2010 WL 936471 (S.D.Tex.2010), *aff'd* by 2010 WL 3377235 (5th Cir. 2010); *Carr v. Gateway, Inc.*, 395 Ill.App.3d 1079, 335 Ill.Dec. 253, 918 N.E.2d 598 (2009), *appeal granted* 235 Ill.2d 586, 338 Ill.Dec. 248, 924 N.E.2d 454 (2010); *see also John R. Ray & Sons v. Stroman*, 923 S.W.2d 80, 87 (Tex.Ct.App. 14th Dist.1996) (“It is true that the purpose of a severability clause is to allow a contract to stand when a portion has been held to be invalid. However, when the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract.”).

As the Fifth Circuit explained in a decision concerning the NAF:

In order to determine whether the designation of the NAF as the sole arbitration forum is an integral part of the arbitration agreement, the court must employ the rules of contract construction to determine the intent of the parties. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

Here, the arbitration agreement plainly states that Ranzy ‘shall’ submit all claims to the NAF for arbitration and that the procedural rules of the NAF ‘shall’ govern the arbitration. Put differently, the parties explicitly agreed that the NAF shall be the exclusive forum for arbitrating disputes.... **[W]here the parties' agreement specifies that the laws and procedures of a particular forum shall govern any arbitration between them, that forum-selection clause is an ‘important’ part of the arbitration agreement.** Thus, a federal court need not compel arbitration in a substitute forum if the designated forum becomes unavailable.

*Ranzy v. Tijerina*, 393 Fed.Appx. 174 (5<sup>th</sup> Cir. 2010) (citations and some internal quotation marks omitted), emphasis added.

Similarly, 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.”<sup>5</sup> 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....”<sup>6</sup>

The Senior Vice President of the AAA was quoted as follows:

Although we support and administer pre-dispute arbitration in other case areas, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special consideration.

*Id.* See *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009) (Similar arbitration agreement that relied upon the AAA could not be rewritten and therefore could not be enforced); *Owens v. Nexion Health at Gilmer, Inc.*, 2007 WL 841114, at \*3 (E.D.Tex. Mar.19, 2007).

The Court in *Moulds* looked to other states and how their courts have dealt with the AAA policy-change issue, finding that no other state court has held that an arbitration may go forward if the arbitration agreement requires AAA administration. *Moulds*, 14 So. 3d at 708-09 (citing *Mathews v. Life Care Ctrs. of Am., Inc.*, 217 Ariz.

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<sup>5</sup> AAA Healthcare Policy Statement, <http://www.adr.org/sp.asp?id=32192>.

<sup>6</sup> Archive of AAA Healthcare Policy Statement, <http://web.archive.org/web/20060930010034/http://www.adr.org/sp.asp?id=21975>.

606, 177 P.3d 867 (2008) (enforced agreement that required AAA arbitrators, but not AAA administration); *Hill v. NHC Healthcare/Nashville, LLC*, 2008 WL 1901198, at \*16-16 (Tenn.Ct.App. Apr.30, 2008) (held agreement unconscionable, but did not reach on forum choice); *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876 (Tenn. 2007) (court enforced agreement that called for either AAA or AHLA administration, but the court noted that AHLA would administer if ordered); *Blue Cross Blue Shield v. Rigas*, 923 So. 2d 1077 (Ala. 2005) (enforced agreement that required AAA rules, but not AAA administration)).

Thus, because an integral part of the agreement, the forum itself, is no longer available, arbitration should not be enforced and the Circuit Court did not abuse its discretion in denying Defendants' Motion to Compel Arbitration. Defendants' request for a Petition for Writ of Prohibition should be denied.

**iii. The FAA does not require Courts to force arbitration on parties who have not agreed to arbitrate.**

Again, although the Circuit Court of Kanawha County did not base its ruling on this issue, Plaintiff submits that it is sufficient on its own merit to justify the denial of arbitration in this matter. This matter includes claims for wrongful death. Pursuant to statute, these claims do not belong to the decedent who is the claimed party to the arbitration clauses at issue. Instead, they belong to family members that cannot even be determined until the decedent has died and that never agreed or otherwise contracted to arbitrate their claims. See W. Va. Code § 55-7-6. Specifically, these damages belong to the "surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death or would otherwise be equitably

entitled to share in such distribution after making provision for those expenditures.” W.

Va. Code § 55-7-6(b). Further, damages may be awarded for the following:

(A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses

W. Va. Code § 55-7-6(c)(1).

Contracts do not become super contracts and include non-parties simply because of the presence of an arbitration clause. Nothing in the FAA overrides normal rules of contract formation; the Act's goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920 (1995); *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49, 106 S. Ct. 1415 (1986), and this Court has repeatedly stated that “when deciding whether the parties agreed to arbitrate a certain matter ... courts generally should apply ordinary state-law principles that govern the formation of contracts.” *First Options*, 514 U.S. at 944; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-63 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (“the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review”); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (the contractual interpretation question of whether an arbitration clause permitted class actions in arbitration was “a matter of state law....”)

It is axiomatic that a party to a contract cannot bargain away a right he or she

does not have. There has not been any contention that, for example, Beulah Wyatt's other wrongful death beneficiaries, specifically her son Randy Wyatt or her daughter, Lelia Gresham Baker, the Administrator of Beulah's Wyatt's estate, ever entered into any agreement to arbitrate any claim. Thus, there is no denying in this case that their wrongful death claims are not subject to an arbitration agreement, and Defendants have not asserted otherwise.

Other states have agreed with this reasoning. In *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), the Ohio Supreme Court examined a case in which an employee entered into a contract with his employer that required him to arbitrate any legal claims "regarding [his] employment." *Id.* at ¶2. By its express terms, the arbitration provision in *Peters* purported to apply to the employee's "heirs, beneficiaries, successors, and assigns." *Id.* The employee was fatally injured at work and his estate brought a survival action as well as a wrongful-death action. *Id.* at ¶3. The employer sought to compel arbitration of both claims and in response, the estate dismissed the survival claim and proceeded solely on the wrongful-death claim. *Id.* at ¶4. The Ohio court of appeals affirmed the trial court's denial of the motion to dismiss for arbitration, and the Ohio Supreme Court upheld that decision. *Id.* at ¶6.

In so holding, the Ohio Supreme Court explained that even though the claims were brought by the same "nominal party", a survival action is brought to compensate for injuries a decedent sustained before death but a wrongful-death action is brought on behalf of the decedent's beneficiaries for their damages arising from that death. *Id.* at ¶11. The Court noted that that there is no common-law wrongful-death action—only statutory rights that spring to life after a wrongful death. *Id.* at ¶9. Thus, "only signatories to an arbitration agreement are bound by its terms" and further, "[i]njured

persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves.” *Id.* at ¶¶7 and 15 (quoting *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994)). The employee, therefore, “could not restrict his beneficiaries to arbitration of their wrongful-death claims, because he held no right to those claims; they accrued independent to his beneficiaries for the injuries they personally suffered as a result of the death. *Id.* at ¶19. See also *Oahn Nguyen Chung v. StudentCity.com, Inc.*, Slip Copy, 2011 WL 4074297 at \*2 (D..Mass. 2011) (“Because wrongful death is not derivative of the decedent's claim, it would be inconsistent with fundamental tenets of contract law to nonetheless hold that those beneficiaries, who did not sign an arbitration agreement, are bound by the decision of the decedent, whose estate holds no interest in this claim, to sign an arbitration clause.”) See *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527–29 (Mo. 2009) (holding that a wrongful death lawsuit was not barred by an agreement to arbitrate the decedent's claims and claims derivative therefrom); *Sennett v. National Healthcare Corp.*, 272 S.W.3d 237 (Mo.App. 2008) (in wrongful death action, beneficiaries were not bound by arbitration agreement signed by patient); *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wash.App. 919, 231 P.3d 1252 (Wash.App. Div. 1 2010) (“Heirs not required to arbitrate under agreement they did not sign.); *Grady v. Winchester Place Nursing & Rehab. Ctr.*, Slip Copy, 2009 WL 2217733 (Ohio App. 5 Dist. 2009).

Defendants’ request for relief should be denied.

**iv. Numerous other reasons support the denial of Defendants’ motion.**

There are numerous other reasons for denying Defendants’ request for relief.

For example, from a plain reading of the agreement, not all of the Defendants were parties to the arbitration agreement. Further, the agreement fails for lack of consideration. Defendants also breached their fiduciary duty to Beulah Wyatt. Plaintiff submits that even if this Court should determine that the Circuit Court abused its discretion in its findings of fact and conclusions of law, rather than enforcing arbitration, this Court should stay the underlying proceeding pending completion of discovery and depositions pertinent to the arbitration issue.

### CONCLUSION

One of the most important tenets of this country's system of justice is that all persons should have equal access to the courts. The importance of this principle must not be undermined by allowing arbitration agreements in nursing home admission contracts to strip the most vulnerable segment of our society, our nation's elderly, of their constitutional rights. It is unjust to enforce the arbitration clause at issue against Beulah Wyatt because there is insufficient evidence that a valid contract exists, an integral part of the agreement is impossible to enforce, as well as numerous other reasons discussed herein..

When the founders of this great nation listed their grievances against "the present King of Great Britain" in the Declaration of Independence, they included among them "depriving us in many cases, of the benefit of Trial by Jury." The Bill of Rights and state constitutions, including West Virginia's, of course, expressly include the right to trial by jury. See W. Va. Const. Art. 3, § 13. Ms. Wyatt entered Defendants' facility because she could no longer care for herself and required twenty-four hour nursing care. She and her family relied upon Defendants to provide that care. They did not. Now Defendants are attempting to improperly restrict the one avenue of relief left for Ms.

Wyatt's family. Plaintiff respectfully requests that this Court deny Defendants' Petition for Writ of Prohibition.

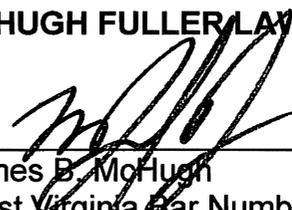
WHEREFORE, Plaintiff requests that this Court deny Defendants' Petition for Writ of Prohibition and for all additional relief to which she is entitled.

Respectfully submitted, this the 5<sup>th</sup> day of July, 2012,

Lelia Gresham Baker, Individually and  
on behalf of the Estate and Wrongful  
Death Beneficiaries of Beulah Wyatt

**McHUGH FULLER LAW GROUP, PLLC**

By:

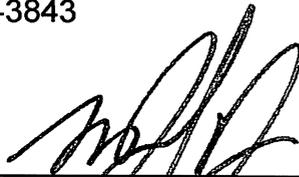
  
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**CERTIFICATE OF SERVICE**

Counsel for Plaintiff, does hereby certify that a true copy of the foregoing was this day served upon the following, via facsimile (without exhibits) and U. S. mail, this the 5<sup>th</sup> day of July, 2012:

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