

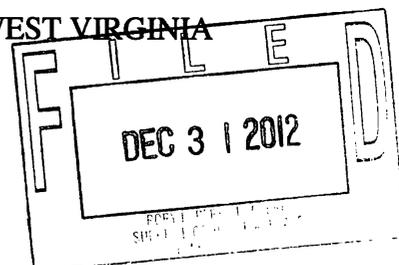
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BOARD OF TRUSTEES
OF THE WEIRTON POLICEMEN'S
PENSION AND RELIEF FUND**

Petitioner,

v.

No. 12-0959



THE HONORABLE ARTHUR M. RECHT,
Judge of the 1st Judicial Circuit, and
**THE JONES FINANCIAL COMPANIES,
LLLP, EDJ HOLDING COMPANY, INC.,
EDWARD D. JONES & CO., L.P., AND
CURT RANDY GROSSMAN,**

Respondents.

PETITIONER'S REPLY BRIEF

FROM THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA
Civil Action No. 10-C-123R

**BOARD OF TRUSTEES OF THE
WEIRTON POLICEMEN'S PENSION
AND RELIEF FUND**

By counsel:

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Petitioner the Weirton Police Pension Fund files this Reply brief in conjunction with its previously filed Brief.

I. ADDITIONAL SUMMARY OF ARGUMENT IN LIMITED RESPONSE TO RESPONDENTS BRIEF

The trial judge did not properly analyze procedural or substantive unconscionability, or whether the contract terms were ambiguous, or whether other contract law would serve to render invalid this contract or this agreement.

Judge Recht clearly and unequivocally read *Marmet* to reach further than it did.

Marmet v. Brown, 132 S.Ct. 1201; 182 L.Ed. 2d 42 (Feb. 2012).

I have read all of the papers, and most importantly, of course, I have read the United States Supreme Court's opinion in *Marmet Health Care Center, Inc. versus Brown*. **That is dispositive of this case. Period. There's no getting around it.** AR 145 (emphasis added)

But they [the US Supreme Court] came back with a rather terse opinion, and said "now you people down in West Virginia, you're not getting it." Most judges, if you took a poll, think that these Arbitration Clauses are repugnant, and that they're unconstitutional, basically, because it denies a group of people the right to a jury trial, but that has been decided. AR 146

So I am following the United States Supreme court opinion, and I feel that the Federal Arbitration Act, as odious as it is, and I believe that, believe it with all my heart, I believe that it is a denial of a person's right to access to a jury trial, and it is a way that the insurance companies and the Chamber of Commerce, and all those other big shots, are trying to get rid of the jury system. That's all it is. But the powers that be say that's okie dokie. AR 147 (emphasis added)

The only thing that's going to change it is a change in the composition of the United States Supreme Court, a composition of Congress, the Presidency. I mean, a lot of folks are going to have to come to – I

think the pendulum is going the other way. I think I'm glad I'm retiring. I have no choice here, so the Motion is granted. AR 147-148

And you are – again, it is the way that you continually try to get around these things. I don't blame you. I'm not critical of those efforts, but it just can't be done. It cannot be done. AR 149 (Emphasis added).

What the Trial Judge's ruling does, is almost to have created a *per se* rule in favor of arbitration agreements by suggesting that they simply cannot be attacked until Congress amends the Federal Arbitration Act or the Supreme Court changes composition and reverses itself. It is abundantly clear that the Trial Court's thinking was affected more by the fact that the West Virginia Supreme Court had been reversed and less by the actual analysis that must be undertaken when certain defenses are raised to any contract terms, including the arbitration agreement here. The Weirton Police Pension Fund is entitled to develop and present evidence that the arbitration agreement, as alleged by the Weirton Police Pension Fund, is unconscionable, ambiguous, and otherwise legally problematic as a contract term under West Virginia Law.

In *Brown II*, which was handed down in June 2012, within days of Judge Recht's written order here and within one month of his oral order from the bench, this West Virginia Supreme Court ordered the exact relief that should be ordered here. This Court reversed and remanded for development of evidence on issues of unconscionability to allow trial courts to have the clear directives. Likewise, Judge Recht did not have those same directives because of timing:

After a thorough re-examination of the record, we reverse the Circuit Courts' orders in Brown's case and Taylor's case. The Circuit Court's order in Brown's case is devoid of any Findings of Fact or Conclusions of Law on the question of unconscionability. The Circuit Court's order in Taylor's case has some Findings of Fact, but the

Circuit Court has not had the opportunity to comprehensively analyze the question of unconscionability under the guidelines we developed in *Brown I*. **We conclude the correct course is to remand these cases to the Circuit Courts for the taking of evidence, the full development of a record, and proper consideration of whether the clauses are unconscionable.** *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217; 2012 W.Va. LEXIS 311 (Submitted following remand, June 13, 2012).

The same ruling should be made here upon reversal and remand. While Judge Recht's written order, which was prepared by counsel for Edward Jones, does contain the statement that "The Court finds that the Arbitration Agreement is no procedurally or substantively unconscionable," (AR 125) the entire transcript of this hearing (AR 155-163), and Judge Recht's detailed and descriptive oral ruling, makes clear that he did not perform the *Brown I* analysis of unconscionability because of the doubt created in his mind by the United States Supreme Court partial reversal of *Brown I* in *Marmet*. Stated simply, Judge Recht did not have the benefit of *Brown II* on remand from *Marmet*.

II. CONCLUSION

If Judge Recht had the benefit of *Brown II*, his ruling would have been one of allowing Plaintiff to conduct discovery and to develop their arguments under West Virginia contract law about why this contract term which happens to be an arbitration provision is invalid. Plaintiff seeks remand for discovery and an opportunity to develop proper evidence and argument as to whether this arbitration clause is "unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Marmet* at 1204.

Respectfully submitted,

**BOARD OF TRUSTEES OF THE
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By counsel


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CERTIFICATE OF SERVICE

I, Teresa C. Toriseva, Esquire, counsel for Petitioner, Board of Trustees of the Weirton Policemen's Pension and Relief Fund, hereby certify that I have served the foregoing *Petitioner's Reply Brief* upon all counsel of record by facsimile as follows:

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on the 31st day of December, 2012.


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