No. 20-0680

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BECKLEY HEALTH PARTNERS, LTD D/B/A THE VILLAGES AT GREYSTONE, CHANCELLOR SENIOR MANAGEMENT, LTD and MEGAN WARD WILSON, RESIDENCE MANAGER,

Petitioners (Defendants below)

v.

CYNTHIA F. HOOVER, DURABLE POWER OF ATTORNEY OF ELVERIA M. FAW,

Respondent (Plaintiff below),

(On Appeal from the Order of August 27, 2020 of Circuit Court of Raleigh County, West Virginia, The Honorable Harry Kirkpatrick, CC-41-2019-C-159)

PETITIONERS' REPLY BRIEF

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I. Enforcement Of The Arbitration Agreement Would Advance Federal And West Virginia Policy Favoring Arbitration

We have long had a clear articulation of federal statutory policy, and nearly 100 years of federal jurisprudence favoring the resolution of disputes through contractual arbitration. Recent decisions of this Court evince a no less poignant statement of West Virginia policy favoring arbitration. This case presents the question of whether this Court is going remain faithful to federal and West Virginia policy favoring arbitration and forthrightly enforce private agreements to arbitrate, or ratify nuanced methods of avoiding enforcement of private agreements to arbitrate. Recent decisions of this Court suggest the former, rather than the latter.

Most recently, in *Home Inspections of VA and WV, LLC v. Hardin*, 852 S.E.2d 240 (W.Va. Nov. 19, 2020), this Court enforced an arbitration provision contained within a home inspection contract which consisted of one sentence, "ARBITRATION: Any dispute concerning the interpretation of this agreement or arising from this inspection report, except for inspection fee payment, shall be resolved informally between the parties." This Court determined that the arbitration provision was valid and enforceable, stating that "[w]hen the requirement to informally resolve a dispute is contained in a provision with the heading 'ARBITRATION' and there are no other methods mentioned, the plain meaning of the provision requires the parties to arbitrate." *Id.* at 245.

In another recent decision, *State ex rel. Troy Group, Inc. v Sims*, 852 S.E.2d 270 (W.Va. Nov. 20, 2020), this Court determined that an arbitration agreement was valid and enforceable where plaintiff contested the authority of her signature on the arbitration agreement. The circuit court determined that the plaintiff's signature on the arbitration agreement was of questionable authenticity and denied the defendant's motion to compel arbitration. This Court reversed,

finding that the record did not contain any evidence to support that plaintiff did not execute the arbitration agreement, despite plaintiff's claim that her signature had been copied from other documents that she signed as part of the hiring process with the defendant. As there was no evidence of record to support such a denial, this Court reversed the circuit court's denial of defendant's motion to compel arbitration.[1] These recent, well-reasoned decisions demonstrate this Court's ongoing commitment to federal and state policy favoring the enforcement of private agreements to arbitrate disputes. The present case illustrates yet another refusal of a circuit court to enforce an arbitration agreement based upon an improper analysis of contract formation which warrants a careful examination by this Court, given that the circuit court's reasoning is indubitably erroneous for the reasons set forth below.

II. The Circuit Court's Determination That The Arbitration Agreement is Not Valid And Enforceable Conflicts With This Court's Decision in *AMFM, LLC v. Shanklin*

In the context of an arbitration agreement executed as part of the admissions process to a nursing home, this Court in *AMFM, LLC v. Shanklin*, 241 W.Va. 56, 818 S.E.2d 882 (2018) held that a successor agent designated in a durable power of attorney executed by a nursing home resident had actual authority to execute a binding arbitration agreement on behalf of the resident. In *Shanklin*, a nursing home sought to enforce an arbitration agreement executed by the daughter of a former resident which encompassed claims of negligence brought against the nursing home pertaining to her mother's care and treatment. Years before her admission to the nursing home,

[1] In *Troy Group* this Court reaffirmed the burden of proof on a motion to compel arbitration as set forth in its earlier decisions of *Employee Resource Group, LLC v. Collins*, No. 18-0007, 2019 WL 2338500 (W.Va. June 3, 2019), where this Court observed that a party seeking to enforce an arbitration agreement has the burden of establishing prima facie evidence of the agreement which is met "by providing copies of a written and signed agreement to arbitrate." *Id.* at 276. "[O]nce prima facie evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement." *Id.* at 277, citing *Employee Resource Group, LLC,, supra.* at *5.

the resident had executed a durable power of attorney appointing her son as her attorney-in-fact and her daughter as a successor attorney-in-fact. The resident's daughter subsequently made the arrangements for her mother's admission to the nursing home and executed all of the admissions documents, including a separate arbitration agreement. The daughter executed the nursing home admissions paperwork, including the arbitration agreement, as "DPOA," despite her status as a successor attorney-in-fact. She also provided a copy of the durable power of attorney to the nursing home.

Plaintiff sought to avoid the arbitration agreement, claiming that she did not have authority to act on behalf of her mother pursuant to the power attorney, as her brother had been designated power of attorney for her mother and that she only had authority in the event that he was not willing or able to act on behalf of their mother. In support of her opposition to arbitration, she submitted an affidavit from her brother which stated that he was at all times willing and able to perform duties as durable power of attorney for his mother. This Court reversed the circuit court's denial of the nursing home's motion to compel arbitration on the basis that the nursing home was entitled to rely upon the durable power of attorney unless it had actual knowledge that it was void or invalid or that the daughter was exceeding or improperly exercising her authority. This Court rejected the plaintiff's contention that the nursing home had possession of the DPOA and was aware that she could only have authority to act under the durable power of attorney if her brother was unable or unwilling to fulfill his duties thereunder. Instead, this Court observed that the record was devoid of any instance in which the brother exercised any rights or duties granted to him under the durable power of attorney and that the record reflected that the daughter, despite her designation as a successor agent to her brother on

the power of attorney, had exercised her mother's rights pursuant to the power of attorney in various financial matters and consented to medical treatment for her mother. Following her mother's admission to the nursing home, the plaintiff continued to exercise her mother's rights under the durable power of attorney and continued to do so until her mother left the nursing home and was admitted a second care facility, where she again identified herself as her mother's attorney-in-fact pursuant to the DPOA.

This Court concluded that plaintiff had actual authority to bind her mother to the arbitration agreement as the alternate attorney-in-fact, stating that "because Stephen Nelson declined to serve, and because Kimberly acted as her mother's DPOA from 2011-2016, we conclude that Kimberly had the authority to enter into the arbitration agreement with the nursing home." *Id.* at 891. The *Shanklin* decision demonstrates that the Court is not enthusiastic about sustaining nuanced methods of avoiding arbitration. This is further evidenced by this Court's suggestion that the arbitration agreement was also binding upon the plaintiff under the doctrines of apparent authority and estoppel. This Court noted that the plaintiff may have had apparent authority to bind her mother to the arbitration agreement, stating, "One 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." *See*, *Shanklin, supra.* at 889, n.5, citing Syl. pt. 1 of *GE Credit Corp. v. Fields,* 148 W.Va. 176, 133 S.E.2d 780 (1963). The doctrines of apparent authority and estoppel, which are also similar to the doctrine of formation of a unilateral contract, each provide that an individual with purported authority to act on behalf of another is estopped from avoiding the agency relationship and any actions by the apparent

agent on behalf of the principle, including the execution of an arbitration agreement, are binding upon the principal under the doctrine of estoppel. The contract formation theories of apparent authority and estoppel referenced by this Court in *Shanklin* are clearly applicable to the circumstances in the case *sub judice*.

Similar to the evidence in *Shanklin*, Respondent Cynthia Hoover made all of the arrangements for her mother to be admitted as a resident at the Greystone. R.88-112, 113-114. Ms. Hoover held herself out as having authority to execute the Greystone's admissions paperwork, including the arbitration agreement, on behalf of her mother. Ms. Hoover testified that in executing the Arbitration Agreement, she represented to The Greystone's residence manager that she had authority to sign the agreement on behalf of her mother, Ms. Faw. R.341-42, 349. While her mother was a resident at The Greystone, Ms. Hoover believed that the Residency Agreement and Arbitration Agreement were in effect, and accordingly she paid for the services thereunder. R.364-65. Ms. Hoover's mother executed a durable power of attorney appointing Ms. Hoover as her attorney-in-fact nine days after Ms. Hoover executed the Arbitration Agreement. Before she was given durable power of attorney, Ms. Hoover had acted on behalf of her mother in various financial matters and consented to medical treatment as her mother's health care surrogate. Ms. Hoover had been joint owner of her mother's bank account since 2014 and paid her mother's financial obligations through this account. Similarly, Ms. Hoover became representative payee on a second account as fiduciary for Veteran's Affairs benefits received by her mother. Prior to and after Ms. Faw's admission to The Greystone, Ms. Hoover utilized her mother's funds from the joint bank account and the VA bank account to pay

for her mother's living expenses and the fees for services received at The Greystone. R.367-369, 372, 375.

This Court's reasoning in *Shanklin* should compel this Court to find that the arbitration agreement is valid and enforceable, given Ms. Hoover's representation that she had authority to execute the Arbitration Agreement and that she had been engaging in a course of conduct for a number of years whereby she acted on behalf of her mother in financial affairs and consented to medical treatment, in advance of being appointed attorney-in-fact.[2] Under these circumstances, Ms. Hoover should be estopped from avoiding the validity and enforceability of the Arbitration Agreement.

III. The Doctrine Of *Stare Decisis* Is Not Applicable As This Court's Decision In *State ex rel. AMFM, LLC v. King* Is Not Controlling Authority As To Whether A Valid And Enforceable Arbitration Agreement Exists

The center of the dispute concerning the existence of a valid agreement to arbitrate Respondent's claims arises from the fact that Respondent, Ms. Hoover, did not possess a Durable Power of Attorney on behalf of her mother, Ms. Faw, at the time Ms. Hoover executed the Residency Agreement and Arbitration Agreement. Ms. Hoover had long served as her mother's health care surrogate, having been appointed under the West Virginia Health Care Decisions Act.[3] Approximately nine days after Ms. Hoover executed the residency and arbitration agreements, Ms. Faw gave Ms. Hoover a Durable Power of Attorney.

The sole basis upon which Respondent opposed Petitioners' Motion to Compel Arbitration in the lower court, and in its briefing before this Court, is that Ms. Hoover lacked authority to execute the Arbitration Agreement according to this Court's decision in *State ex rel.*

[2] The multiple contract formation devices advanced by Petitioners alone support the existence of a valid Arbitration Agreement.

[3] W.Va. Code 16-30-1, *et seq.*

AMFM, LCC v. King, 230 W.Va. 471, 740 S.E.2d 66 (2013) wherein this Court held that a medical surrogate lacks authority to bind an incapacitated individual to an arbitration agreement. ("[A] decision to arbitrate disputes regarding care provided by a nursing home to an incapacitated person is not within the ambit of a health care surrogate's authority....[A]n agreement to submit future disputes to arbitration, which is optional and not required for the receipt of nursing home services, is not a health care decision under the West Virginia Health Care Decisions Act..." *Id.* at 480.) However, the *King* decision does not have precedential value, as Petitioners do not assert that Respondent had actual authority by virtue of her appointment as a medical surrogate to bind her mother to the Arbitration Agreement. Instead, Petitioners advanced four different contract formation mechanisms by which a valid arbitration agreement came into existence, none of which implicate the issue of authority of a health care surrogate addressed in *King*. These contract formation devices include: (1) that Ms. Hoover herself was bound by the arbitration agreement, having entered into it personally; (2) estoppel; (3) unilateral contract; and (4) ratification by Ms. Hoover of the Arbitration Agreement, once she did receive general power of attorney for her mother nine days later.

Even though Petitioners do not rely on Ms. Hoover's status as a health care surrogate to support the evidence of a valid and enforceable Arbitration Agreement, Respondent contends that under the doctrine of *stare decisis* this Court must follow its decision in *King* and affirm the circuit court's denial of Petitioners' Motion to Compel Arbitration, on the sole basis that Ms. Hoover did not have actual authority to enter into the Residency Agreement and Arbitration Agreement. The doctrine of *stare decisis* provides that "[a]n appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial

error in interpretation sufficient to compel deviation from the basic policy of the doctrine of *stare decisis*, which is to promote certainty, stability, and uniformity in the law." *State ex rel. W.Va. Dept. of Transp., Div. of Highways v. Reed*, 228 W.Va. 716, 724 S.E.2d 320, 323 (2012), citing *Dailey v. Bechtel Corp.*, 157 W.Va. 1023, 207 S.E.2d 169 (1974).

The doctrine of *stare decisis* is not applicable, as Petitioners do not allege that Ms. Hoover's status as her mother's health care surrogate empowered her to execute the Arbitration Agreement. In *King* this Court was not presented with and did not address the issue of whether a valid arbitration agreement was formed based upon the contract validation devices advanced by Petitioners herein. Although this Court rejected the plaintiff's argument that the incapacitated resident ratified the Arbitration Agreement by failing to rescind the agreement, Petitioners do not assert that Ms. Faw ratified the Arbitration Agreement. Instead, Petitioners allege that Ms. Hoover ratified the Arbitration Agreement by failing to rescind or disavow the Arbitration Agreement, in her capacity as power of attorney for Ms. Faw, which she obtained shortly after executing the Arbitration Agreement. This Court in *King*, was not presented with and did not address the argument that the health care surrogate, who also obtained power of attorney months after executing the arbitration agreement, failed to rescind the agreement and thus ratified it.

At the time the *King* decision was issued in 2013, this Court did not have the benefit of its more recent decisions concerning the contract formation principles advanced by Petitioners, particularly with regard to estoppel and unilateral contract. For instance, Petitioner's argument that Respondent is estopped from avoiding arbitration due to Ms. Hoover's and Ms. Faw's receipt of benefits and services under the Residency Agreement, is clearly supported by this Court's decision in *Bayles v. Evans*, 243 W.Va. 31, 842 S.E.2d 235 (2020). In *Bayles*, this Court

announced two alternative theories under which a non-signatory to a contract is bound by the contract's arbitration provision under an estoppel theory; "(1) by obtaining direct benefits from the contract, or (2) by seeking to enforce the terms of the contract or asserting claims that must be determined by reference to the contract. *Id.* at 245-246. Petitioners likewise rely upon *Chesapeake Appalachia, LLC v. Hickman*, 236 W.Va. 421, 781 S.E.2d 198 (2015) in support of its estoppel argument where this Court applied direct benefit estoppel so as to preclude plaintiff from avoiding arbitration where benefits were accepted under the contract." *Id.* at 222. Petitioners' argument that a unilateral contract was formed is based upon this Court's decisions in *Citizens Telecomm. Co. of W.Va. v. Sheridan*, 239 W.Va. 67, 799 S.E.2d 144 (2017) and *Bluestem Brands, Inc. v. Shade*, 239 W.Va. 694, 805 S.E.2d 805 (2017). When this Court issued the *King* decision in 2013, it did not have the benefit of its subsequent decisions in *Bayles, supra.*, *Chesapeake Appalachia, supra.*, *Citizens Telecomm., supra.*, or *Bluestem, supra.*, and thus contract formation theories premised upon estoppel and unilateral contract were not raised, nor considered by this Court.

Given that in *King*, the contract formation mechanisms advanced by Petitioner were not raised or addressed by this Court and more importantly, given that Petitioner does not assert that Ms. Hoover had actual authority to execute the Arbitration Agreement by virtue of her status as Ms. Faw's health care surrogate, the *King* decision is not controlling authority. The doctrine of *stare decisis* does not apply, as the underlying policy of *stare decisis*, of promoting "certainty, stability, and uniformity in the law" would not be advanced, as Respondent's have advanced

theories of contract formation in support of the existence of a valid and enforceable Arbitration Agreement, which are beyond the scope of this Court's decision in *King*. [4]

[4] In *King*, this Court engaged in a strict, narrow and borderline myopic analysis of the authority of a health care surrogate appointed pursuant to the West Virginia Health Care Decisions Act ("Act") to make decisions related to the admission of an incapacitated individual to a nursing home. The Court's determination of the limited scope of a health care surrogate's authority fails to consider the practical implications, reality and difficulties encountered by families in having an incompetent, elderly relative admitted to a nursing home or assisted living facility where there is no individual possessing a valid durable power of attorney for the relative. Such difficulties arise when an elderly individual with impaired cognitive capacity, unable to manage their own medical and financial affairs, becomes in imminent need of nursing or assisted living services and had not appointed anyone as their durable power of attorney prior to becoming incompetent. The execution of a Durable Power of Attorney by an incompetent, elderly individual for the purpose of admission to a care facility would not be an option, as such an instrument would likely be void or voidable, as one must be mentally competent in order for a DPOA to be legally valid. The only possible solution would be court appointment of a guardian under the West Virginia Guardianship and Conservatorship Act, W.Va. Code 44A-1-1, *et seq.*, however this statute establishes the necessity for a cumbersome proceeding to determine incompetency, such that appointment of a guardian by the circuit court could be quite time consuming. Typically, where a mentally incompetent elderly individual is in need of institutional care, there is an immediate and urgent need for the admission, which is incompatible with protracted court proceedings for the appointment of a guardian. In *King* this Court failed to consider the above difficulties and practical realities of admission of an elderly person of dubious cognitive functioning into an institutional care facility where there is no one with legal authority to execute the admissions documents, which often encompass matters beyond the scope of health care, including an arbitration agreement. In *King*, this Court did not discuss or attempt to develop a solution to this problem, nor recognize the paradox created by the above situation. It is curious as to whether this Court, at the time *King* was decided in 2013, was more interested in finding nuances to justify the avoidance of arbitration rather than providing a solution to the problem.

In the case *sub judice*, one solution to this conundrum would be for this Court to embrace the contract formation mechanisms advanced by the Petitioners and determine that a valid and enforceable arbitration was formed by Ms. Hoover's execution of the arbitration agreement. Not only do the above four contract validation mechanisms clearly bind Ms. Hoover to the arbitration agreement under the circumstances of this case, a pronouncement by this Court of the enforceability of arbitration agreements based upon on or more of these contract formation mechanisms would be useful to rectify this socially important problem that is prevalent in the realm of institutional residential facility admissions. Alternatively, this Court should reconsider its decision in *King* and fashion a common law rule based upon principles of equity or contract, to provide a health care surrogate with authority to execute complete admissions documentation, including that which is beyond the scope of health related services, including residency contracts containing arbitration provisions, or separate arbitration agreements. Fashioning such an

IV. Respondents Have Waived Any Argument In Opposition To The Formation Of A Valid And Enforceable Arbitration Agreement Based Upon The Contract Formation Mechanisms Advanced By Petitioners

Before the circuit court, Respondent's sole basis for opposing Petitioners' Motion to Compel Arbitration was that Ms. Hoover, as Ms. Faw's health care surrogate, lacked authority to bind Ms. Faw to the Arbitration Agreement. In her briefing in the circuit court, nor on appeal, has Respondent opposed any of the contract formation principles advanced by Petitioners. The circuit court improperly rejected Petitioners' contract formation arguments, despite Respondent's failure to raise any opposition thereto. The circuit court rejected Petitioners' argument that Respondent assented to be bound to the Arbitration Agreement, as she knowingly executed the agreement and reaffirmed during her deposition that she believed the Arbitration Agreement to be in effect after she signed them. R.364-65. The Court failed to recognize that Ms. Hoover is actually the real party in interest seeking recovery in this matter, as she is a direct beneficiary of Ms. Faw's estate under the West Virginia intestate succession statute. *See* W.Va. Code §42-1-3a. Respondent does not offer any counterargument on appeal, nor before the circuit court, that Respondent is bound to the Arbitration Agreement because she assented to it, at least on her own behalf. As such, Respondent has waived any argument in opposition to the enforceability of the Arbitration Agreement based upon Respondent's assent to the Arbitration Agreement.

The circuit court rejected Petitioners' argument that Respondent is estopped from avoiding arbitration because she and her mother accepted the benefits and services under the

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equitable remedy would allow the needs of the incompetent resident to be immediately met by admission to a care facility. In the absence of any pronouncement by this Court that a health care surrogate has the authority to act in a representative capacity for the prospective care facility resident, the practical difficulties of having a mentally incompetent elderly individual admitted to a facility will remain and this socially important problem will not be resolved.

Residency Agreement. The circuit court's determination was based upon the circuit court's inaccurate observation that the Residency Agreement and Arbitration Agreement are two separate and distinct agreements. On the basis that the circuit court believed the agreements to be separate, the circuit court reasoned that Respondent and her mother, Ms. Faw, would have received benefits and services regardless of whether the Arbitration Agreement was executed. As more fully set forth in Petitioners' primary brief, the Residency Agreement and Arbitration Agreement are not separate and agreements, as the arbitration agreement is incorporated into the Residency Agreement as set forth in Section X.I. of the Residency Agreement, R.106, and the Residency Agreement specifically sets forth that "the parties agree that the Residential and Community Arbitration Agreement of even date herewith shall govern any and all disputes of the parties." R.106. The Residency and Arbitration Agreements are integral to one another and thus principles of equitable estoppel apply so as to preclude Respondent from avoiding arbitration where she and her mother accepted benefits and services under the Residency Agreement.

Respondent has not contested that the Arbitration Agreement and Residency Agreement are integrated documents and are not separate and distinct. Additionally, the fact that the Arbitration Agreement states that it voluntary and is not a precondition to the furnishing of services, does not impact the applicability of estoppel as a contract validation device, as once Respondent did in fact execute the Arbitration Agreement, she remained bound by it. Respondent has offered any opposition to this argument on appeal, nor does Respondent oppose Petitioners' argument that Respondent is estopped from avoiding arbitration. Respondent has also failed to raise any argument in opposition to Petitioners' argument that the circuit court erred in failing to determine that a unilateral contract was formed as Ms. Faw and Respondent

continued to receive benefits and services under the Residency Agreement after the Arbitration Agreement was executed.

In her brief on appeal, Respondent makes a passing reference to this Court's determination in *King* that the resident did not ratify the Arbitration Agreement by failing to rescind it. Petitioner recites a footnote from the *King* opinion, where this Court rejected Defendant's argument that the incompetent resident failed to rescind the Arbitration Agreement and thus ratified it. Specifically, this Court stated, "[i]t is miraculous to suppose that Ms. Wyatt suddenly could have regained her faculties within thirty days of her nursing home admission such that she then could have rescinded the Arbitration Agreement." See *King*, supra. at 76, n.10. Other than citing the above passage in *King*, Respondent fails to set forth any argument that the subject Arbitration Agreement was not ratified. Contrary to the circumstances in *King*, Petitioners do not allege that Ms. Faw ratified the Arbitration Agreement, but instead allege that the Respondent, once appointed as Ms. Faw's DPOA, failed to rescind or disavow the agreement and therefore ratified it. The *King* decision focused upon whether the incompetent resident ratified the arbitration agreement, but did not address the issue of whether the resident's daughter, once appointed as DPOA of her mother, ratified the agreement by failing to rescind it. Thus Respondent's passing reference to this Court's discussion in *King* with regard to whether the incompetent resident can ratify the Arbitration Agreement is irrelevant to the issue of whether *Respondent* ratified the agreement. Additionally, before the circuit court, Respondent failed to oppose Petitioners' argument that Respondent ratified the Arbitration Agreement. Thus Respondent should be deemed to have waived any argument in opposition to Respondent's ratification of the Arbitration Agreement.

Further, Respondent does not address on appeal the Petitioners' argument that the circuit court inappropriately *sua sponte,* articulated multiple reasons why Petitioners' four contract validation theories failed, none of which had been advanced by Respondent. In its Reply Brief, Respondent does not set forth any opposition to Petitioners' argument that Petitioners were denied notice and an opportunity to be heard with regard to these counterarguments raised by the circuit court.[5]

"This Court has 'long held that theories raised for the first time on appeal are not considered.'" *Zaleski v. W.Va. Mut. Ins. Co.*, 224 W.Va. 544, 550, 687 S.E.2d 123, 129 (2009), citing *Clint Hurt & Assoc. v. Rare Earth Energy, Inc.,* 198 W.Va. 320, 329, 480 S.E.2d 529, 538 (1996). (Appellant waived for appellate review its claim that trial court judge should be removed from case where claim was not raised in trial court). "We have repeatedly found that inadequately briefed arguments are waived and need not be addressed on appeal." *Casdorph-McNeil v. Casdorph*, No. 18-0497, 2019 WL 4257186, at *6 (W.Va. Sept. 9, 2019), citing *Tiernan v. Charleston Area Med. Ctr.*, 203 W.Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998) ("Issues not raised on appeal or merely mentioned in passing are deemed waived."); *See also Unser v. Prepared Ins. Co.*, No. 15-1085, 2017 WL 1347701 (W.Va. Apr. 7, 2017) ("However, this argument was not presented to the circuit court and is raised for the first time in petitioners' brief; as such, it is not properly before this Court."); *In re Edward B.,* 210 W.Va. 621, 625 n.2, 558 S.E.2d 620, 624 n.2 (2001) ("Because the errors...were neither assigned nor argued in the Appellant's brief, they are hereby waived") citing, *Riggs v. W.Va. Univ. Hosps.,*

[5] As Petitioners have pointed out on appeal, the circuit court improperly rejected Petitioners' contract formation arguments based upon the circuit court's own counterarguments, none of which were advanced by Respondent. *See W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751, 757 (2014) ("Courts can concoct or resurrect arguments neither made nor advanced by the parties.").

Inc., 221 W.Va. 646, 670, 656 S.E.2d 91, 115 (2007); *McComas v. Mercer Cnty. Bd. of Educ.*, No. 16-0734, 2017 WL 3866787, at *2 (W.Va. Sept. 5, 2017); citing, *State v. Jessie*, 225 W.Va. 21, 27, 689 S.E.2d 21, 27 (2009) ("This Court's general rule is that nonjurisdictional questions not raised at the circuit court level will not be considered to the first time on appeal").

Respondent has therefore waived any opposition to Petitioners' argument that a valid and enforceable arbitration agreement exists by virtue of the application of the four contract formation mechanisms advanced by Petitioners. Likewise, Respondent should be deemed to have waived any argument that the circuit court did not exceed its legitimate authority in *sua sponte* rejecting the contract formation principles advanced by Petitioners.

V. Conclusion

For the foregoing reasons, this Court should reverse the circuit court's order denying Petitioners' Motion to Compel Arbitration and order that Respondent's claims be referred to arbitration.

Respectfully submitted,

Date: March 8, 2021

By: _____

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Petitioners (Defendants below)

v.

CYNTHIA F. HOOVER, DURABLE POWER OF ATTORNEY OF ELVERIA M. FAW,

Respondent (Plaintiff below),

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, a true and correct copy of the foregoing ***Petitioners' Reply Brief*** has been served upon the following counsel of record via electronic mail:

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