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' BRIEF

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I. ASSIGNMENTS OF ERROR

1. The circuit court erred in concluding that a valid, binding and applicable agreement does not exist requiring arbitration of the claims asserted in this action pursuant to the provisions of the West Virginia Arbitration Act, W.VA. Code 55-10-1, *et seq.* and the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*

II. STATEMENT OF THE CASE

A. Introduction

In August of 2017, the Plaintiff/Respondent, Cynthia Hoover, acting as the authorized representative of Elveria Faw, made the arrangements for her mother to become a resident at an assisted living residence, the Greystone, near Beckley, West Virginia. In so doing, Ms. Hoover executed two inter-related agreements that address various business aspects of her mother's residency, an Assisted Living Residency Agreement ("Residency Agreement") and a Residential and Community Arbitration Agreement ("Arbitration Agreement"). She signed the Residency Agreement as the "Responsible Party or Legal Representative." She signed the Arbitration Agreement as the "Responsible Party." The Residency Agreement identified the apartment which her mother was to occupy and contained a multiplicity of terms and provisions relative to the services she was to receive while a resident. It also identified the fees and costs that were to be charged for the same, and detailed many other aspects of the relationship. The first sentence of the Arbitration Agreement states that the decedent and the respondent, Ms. Hoover, understand and agree to settle by arbitration, any "dispute, controversy, demand or claim...that arises out of the Assisted or Independent Living Residency Agreement...."

The decedent became a resident at the Greystone on September 3, 2017. Five days later, on September 8, 2017, the decedent executed a durable power of attorney granting the Respondent, Ms. Hoover, broad powers to act on her behalf essentially in all matters. Despite the power of attorney having been granted, Ms. Hoover made no changes to the Residency Agreement or the Arbitration Agreement that had been entered into slightly more than a week earlier. The decedent continued to reside at the Greystone, and continued to receive services under the Residency Agreement for over seven (7) months, until April 23, 2018. She continued to receive all of the benefits of the Residency Agreement, and Ms. Hoover paid all of the charges thereunder during that period of time. In 2019, shortly before the death of Ms. Faw, the Respondent, Ms. Hoover, instituted this action against the owner/operator of the Greystone and others, alleging negligence in the care and services she received during that seven (7) month period. Thereafter, Ms. Faw passed away, and the Respondent, Ms. Hoover, was appointed administratrix of the estate.

The question before the Court is whether Ms. Hoover can avoid the Arbitration Agreement that she indisputably entered into as the "Responsible Party" on behalf of her mother.

B. Procedural Background

Respondent Cynthia Hoover, as power of attorney of Elveria Faw, filed a Complaint against the Petitioners based upon an alleged inadequacy of services provided to Respondent's mother, Elveria Faw, while she was a resident at the Greystone.[1] Petitioners responded by filing a Motion to Compel Arbitration in accordance with the terms of the Arbitration Agreement executed by Ms. Hoover as "Responsible Party" for her mother when she was admitted to

[1] After Ms. Faw's unfortunate death on October 5, 2019, the case caption was amended to reflect Plaintiff as "Cynthia Hoover, Administratrix of the Estate of Elveria M. Faw."

residency at the Greystone. Respondent filed a Response to Petitioners' Motion to Compel Arbitration arguing that there was no valid agreement to arbitrate because although Ms. Hoover had been appointed as a "medical surrogate" for her mother prior to the time when she signed the Arbitration Agreement, under the decision in *State ex rel. AMFM, LLC v. King*, 230 W.Va. 471, 740 S.E.2d 66 (2013), a medical surrogate lacks authority to bind an incapacitated person to an Arbitration Agreement. The circuit court entered an Agreed Order staying all pending deadlines and directing discovery related to arbitrability of the claims advanced by Respondent in the Complaint. Following limited discovery, the submission of briefs on Petitioners' Motion to Compel Arbitration and argument thereon, the circuit court issued an Opinion and Order dated August 27, 2020, denying Petitioners' Motion to Compel Arbitration. Petitioners have pursued a timely appeal.

C. Factual Background

In 2013, Plaintiff/Respondent, Cynthia Hoover was appointed as the healthcare surrogate of her mother, Elveria Faw, when Ms. Faw had been hospitalized. R.333-334, 375. During her mother's 2013 hospitalization, Ms. Hoover inquired with the Greystone regarding her mother's potential placement as a resident, as she contemplated at that time that her mother may need assisted living services. Ms. Hoover visited and toured the Greystone, but decided she was not yet ready to place her mother in an assisted living facility. R.309-310. In 2016, Ms. Hoover again made inquiry with the Greystone regarding her mother's potential residency, but again was undecided as to whether her mother needed assisted living services and took no further action. R.313-316. Subsequently, in late August of 2017, Ms. Hoover decided to have her mother become a resident at the Greystone. R.318-321. On August 30, 2017, Ms. Hoover made all of the

arrangements for her mother to be admitted as a resident at the Greystone. R.88-112, 113-114. Megan Wilson, formerly Megan Ward, is the residence manager of the Greystone. According to Ms. Wilson's Affidavit, she dealt with Ms. Hoover and also countersigned both agreements. Ms. Hoover represented that she was authorized to act on behalf of her mother. Ms. Hoover, admitted at her deposition that she signed the Residency Agreement and Arbitration Agreement in the presence of Ms. Wilson and in doing so, represented that she had authority to sign the agreements on behalf of her mother. R.323-25, 332-33, 335- 341-42, 349. The Wilson Affidavit states "We relied on Ms. Hoover's representation; otherwise we would not have accepted her signature...." R.86 at ¶6.

The Residency Agreement contains detailed provisions regarding the care and services to be provided by the Greystone, including health and personal care, living accommodations, meals, nursing services, and expressly sets forth the charges for such care and services. Section I.B.5 entitled "Observation and Evaluation" provides, in part, "We will regularly monitor your heath to identify and help you respond to your needs and to determine if any proposed changes are needed..." R.90. Section I.C. of the Residency Agreement entitled "Personal Assistance and Care" sets forth the health and personal care services that are to be provided to each resident, depending upon their level of care. R.91. Section I.C.3. entitled "Health and Personal Care Services," at subsection (a), provides, in pertinent part, as follows, "(a) Observation – The Community, through its staff, shall regularly observe your health status to identify any changes in your physical, mental, emotional and social functioning and will assist you in responding to your dietary and health needs and needs for special services..." R.93. Section II(E) entitled

"Monthly Rental Fee," includes a base rental fee and a separate service level fee, the latter of which depends on the resident's service level. R.96.

In addition to setting forth the services to be provided to Ms. Faw and their cost, the Residency Agreement contains the following provision requiring arbitration of all disputes of the parties in accordance with the Arbitration Agreement "This Agreement shall be construed in accordance with the laws of the State of West Virginia, and Raleigh County and 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. Section X.I. of the Residency Agreement entitled "Incorporation of Other Documents" incorporates into the Residency Agreement, "all documents that you signed or received during the admission process to the Community." R.106. Ms. Hoover admitted at her deposition that she understood that the Arbitration Agreement was incorporated into the Residency Agreement, as it was signed during the admission process for Ms. Faw. R.323-25, 335.

The Arbitration Agreement, *inter alia*, requires arbitration of "any legal dispute, controversy, demand or claim...that arises out of or relates to the [Residency Agreement]." R.113. The Arbitration Agreement also requires arbitration of "any claim for...violations of any right granted to the Resident by law..., breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety...." R.113.[2] On September 8, 2017, nine

[2] The relevant text of the Arbitration Agreement provides as follows:

> It is understood and agreed by The Villages at Greystone (the "Community"), and Elveria Faw ("Resident") and Cindy Hoover ("Responsible Person") that **any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to the Assisted or Independent Living Residency Agreement** dated 8/30/17, (the "Lease") or any other separate agreement

days after Hoover signed the Residency and Arbitration Agreements, Ms. Faw signed a Durable Power of Attorney appointing Ms. Hoover as her attorney-in-fact. R.440-48.

Ms. Faw resided at the Greystone for seven (7) months, from September 2, 2017 through April 23, 2018. During that time, Ms. Faw was provided with care and services under the terms of the Residency Agreement. According to residence manager Wilson, services were provided under the belief that the Residency Agreement and the Arbitration Agreement were valid and binding, and that they had been signed appropriately and with authority. R.85-86. For her part, Ms. Hoover admitted at her deposition that while her mother was a resident at the Greystone, she believed that the Residency Agreement and Arbitration Agreement were in effect, and accordingly she paid for the services thereunder. R.364-65.

III. PETITIONERS' MOTION TO COMPEL ARBITRATION

Petitioners' Motion to Compel Arbitration is governed by the West Virginia Revised Uniform Arbitration Act, W.Va. Code §55-10-1, *et seq.* Section 55-10-9 entitled "Motion to compel or stay arbitration" which provides, in pertinent part; [3]

> (a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

> entered into by the Resident and the Community **or any service or health care provided by the Community to the Resident shall be resolved exclusively by binding arbitration...**
> **This Arbitration Agreement includes, but is not limited to, any claim for** payment, nonpayment or refund for services rendered to the Resident by the Community, violations of any right granted to the Resident by law or by the Lease, breach of contract, fraud or misrepresentation, **negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in to or in contract.** However, this Arbitration Agreement shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Community or any appropriate state or federal agency.

R.113 (emphasis added).

[3] The Revised Uniform Arbitration Act applies to all arbitration agreements entered into on or after July 1, 2015. *See*, W.Va. Code §55-10-5. The Arbitration Agreement in the present case was signed on August 30, 2017.

(1) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate: and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds there is no enforceable agreement to arbitrate.

* * *

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be made in that court...."

In their Motion to Compel Arbitration, the Petitioners assert the existence of a valid and binding agreement made by the Respondent to arbitrate any and all legal disputes and claims arising out of or related to the Residency Agreement, and all other claims of any kind relating to Ms. Faw's residency at the Greystone. The Petitioners also assert that all of the Plaintiff's claims against all of the Petitioners are subject to arbitration.[4] R.26-30. For the reasons set forth below, the Arbitration Agreement is valid and enforceable and the Circuit Court erred in finding

[4] Should it be determined that the Arbitration Agreement is valid and enforceable, it would also be enforceable by Petitioners Chancellor Senior Management Ltd. ("Chancellor") and Megan Wilson. This is true even though these two Petitioners are not parties to the Arbitration Agreement. Chancellor is clearly an affiliate of Beckley Health Partners, the owner and operator of the Greystone. Indeed, throughout the Complaint, Respondent goes to great extremes to allege the affiliation. *Inter alia,* the Complaint alleges that the Greystone was a wholly owned subsidiary of Chancellor and was operated, managed, and controlled by Chancellor and thus, Chancellor owned the facility or was a de facto "licensee" of the assisted living facility. Respondent alleges that Chancellor exercised extensive authority over the assisted living facility, exercised control over the Greystone, and was the alter ego of the Greystone. The Complaint further alleges that Chancellor operated the Greystone as a joint enterprise or joint venture. R.16, ¶¶8-14. Similarly, the Complaint asserts claims against Megan Wilson based upon negligent hiring, retention, training, and supervision of employees in relation to care and services provided to Ms. Faw. R.16, ¶22. The West Virginia Supreme Court of Appeals has clearly recognized the right of a non-signatory to enforce an arbitration provision contained in an agreement against an unwilling signatory under an estoppel theory "when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement." *See Bluestem Brands, Inc. v. Shade*, 239 W.Va. 694, 805 S.E.2d 805, 813 (2017). Respondent's claims alleging inadequate care and services clearly "presume the existence of" and otherwise "arise out of" the Residency Agreement which incorporates the arbitration agreement. Therefore, Respondent's claims against Petitioners Chancellor and Megan Wilson are subject to arbitration.

to the contrary. All of the Plaintiff's claims against all Defendants are encompassed by the Arbitration Agreement. Therefore, this dispute must be referred to arbitration.

IV. SUMMARY OF ARGUMENT

The dispute in the instant case involves the validity of a clear, written arbitration agreement signed by the daughter of an elderly and possibly incapacitated citizen in the process of her admission to an assisted living residence. The context and circumstances present unique problems of contract validation, and may call for the development and application of contract validation principles that are uniquely suited to the situation. Petitioners contend that the arbitration agreement, along with the associated residency agreement signed by Respondent on behalf of her mother are valid, binding, and enforceable under each of the following four theories of contract formation: (1) the express assent of Ms. Hoover, at least as to claims in which she possess a personal; interest, (2) unilateral contract, (3) estoppel, and (4) ratification. Respondents never presented counterargument to any of Petitioners' four contract validation theories asserted in their Motion to Compel Arbitration. The circuit court improperly rejected these alternate theories of contract formation and instead, determined that Ms. Hoover lacked authority to execute the Arbitration Agreement on behalf of her mother, based upon the decision in *AMFM,*, in which this Court held that a healthcare surrogate lacks authority to bind an incapacitated resident to an arbitration agreement. Respondent's status as a healthcare surrogate is inconsequential to the issue of contract formation and Petitioners do not rely upon the Respondent's status as a healthcare surrogate in support of the validity and enforceability of the arbitration agreement.

The circuit court also erred in *sua sponte* ruling on grounds to reject Petitioners' validation arguments not raised by Respondent. Further, the circuit court did not afford Petitioners notice or an opportunity to respond to those grounds, since they were first raised by the circuit court in its Order and Memorandum Opinion denying the Motion to Compel Arbitration.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable for oral argument under W.Va.R.App.P. 19(a), because the circuit court's failure to find that a valid and enforceable arbitration agreement exist is in contravention of well-established contract formation principles and thus constitutes an "error in the application of settled law."

VI. STANDARD OF REVIEW

"When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is de novo." *Certegy Check Services*, 241 W.Va. 701, 704, 828 S.E.2d 89, 92 (2019) (citing *W.Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W.Va. 465, 796 S.E.2d 574 (2017)).

VII. ARGUMENT

A. The Court Denied Defendants' Motion To Compel Arbitration Based Upon Arguments Not Advanced By Respondent And Did So Without Providing Petitioners Notice And An Opportunity To Respond

Our case law makes clear that when a litigant moves to enforce an arbitration agreement "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." *TD Auto Fin. LLC v.*

Reynolds, 842 S.E.2d 783, 785, Syl. Pt. 2 (W.Va. 2020) (citing *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010)); *Bluestem,* Syl. Pt. 2 (2017)).

The circuit court determined that a valid arbitration agreement between the parties was lacking, despite the existence of a written "Community Arbitration Agreement" signed by the Plaintiff, purportedly on behalf of her mother. In substance, the circuit court acknowledged the written agreement, but found that it was not a valid contract. The circuit court's method of arriving at that conclusion was unusual, if not unique. The circuit court essentially based its decision on arguments and reasoning not advanced by the Respondent, but instead developed by the circuit court *sua sponte*. At the threshold, this Court should consider whether the circuit court's method of decision is appropriate.

The basic dispute over the existence of a valid agreement to arbitration Respondent's claims arose by virtue of the fact that the Respondent, Ms. Hoover, did not possess general power of attorney on behalf of her mother at the time that she executed the Residency Agreement and the Arbitration Agreement on behalf of her mother. She presumably obtained authority under a Durable Power of Attorney nine (9) days later.

Ms. Hoover, however, had long served as the "medical surrogate" for her mother, having been appointed under the West Virginia Health Care Decisions Act, W.Va. Code 16-30-1, *et seq*. In *AMFM,* this Court held that a medical surrogate lacks actual authority to bind an incapacitated person to an arbitration agreement. In support of their Motion to Compel Arbitration, Petitioners did not assert that Respondent had actual authority by virtue of her appointment as a medical surrogate to bind her mother. Instead, Petitioners set forth four different contract validation mechanisms by which a valid arbitration agreement came into existence, none of which

implicated the issue of the authority of a health care surrogate addressed in *AMFM*. Petitioners asserted (1) that Ms. Hoover herself was reasonably bound by the Arbitration Agreement, having entered into personally; (2) estoppel; (3) unilateral contract; and (4) ratification by Ms. Hoover of her prior agreement, when she did receive general power of attorney for her mother nine (9) days later. Nonetheless, in response to the Motion, Respondent myopically chose to address only whether Ms. Hoover's status as healthcare surrogate conferred actual authority to bind Ms. Faw to the Arbitration Agreement. Indeed, the circuit court remarked in its Opinion that "Plaintiff...relies singularly upon *AMFM*, *supra*. R.6. Having failed to address any of the contract validation mechanisms actually asserted by Petitioners, the circuit court could have ruled that Respondent waived any counter-arguments. Instead, in its Opinion and Order denying Petitioners' Motion to Compel Arbitration, the circuit court *sua sponte* articulated multiple reasons why Petitioners' four contract validation theories failed, none of which had been advanced by Respondent, sand on that basis denied the Motion.

Exhaustive research fails to reveal a case in which this Court has directly addressed the propriety of a circuit court denying a non-dispositive motion on grounds not presented by the non-moving party. The most analogous situations addressed in the Court's cases involve rulings on dispositive motions on issues not specifically presented by the litigants. In that context, this Court has cautioned circuit courts about interjecting the court's views on issues not advanced by the litigants, at least without taking great care to insure that the parties' rights to notice and an opportunity to be fairly heard are protected. This Court has made clear that the right to notice and an opportunity to be heard on all issues is founded in the constitutional right to due process under the law. The Court recently highlighted these well-established concerns in *State ex rel. National*

Union Fire Ins. Co., v. Hummell, 2020 WL 6878307 at *3 (W.Va. Oct. 19, 2020), where this Court granted a writ of prohibition in that case precluding the circuit court from enforcing an order *sua sponte* dismissing one count of a multiple count complaint on an issue not raised by the litigants. Applying rules developed in the context of the *sua sponte* granting of summary judgment on grounds not advanced by the parties, this Court ruled that the circuit court had exceeded its legitimate power by interjecting its views on an issue into the case that was not raised by the litigants, and did so without affording notice and an opportunity for the litigants to address the issue. In granting the writ, this Court stated "It has always been the policy of this Court to protect each litigant's day in court. It is equally true, of course, that the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Id.*, quoting *In re Charleston Gazette FOIA Request*, 222 W.Va. 771, 777, 671 S.E.2d 776, 782 (2008). The cases make clear that a circuit court cannot properly bring up and decide an issue *sua sponte* at least without exercising scrupulous care to insure that the parties have fair notice of the issue, and a full opportunity to respond.

In the instant situation, various grounds were advanced by the circuit court for rejection of the contract validation theories presented by Petitioners in its Order and Memorandum Opinion denying the Motion to Compel Arbitration. Notice and an opportunity to respond to these was not afforded, because they surfaced in the circuit court's Order and Opinion. Because they were not advanced by Respondent, Petitioners had no forewarning. For example, Petitioners argued that Ms. Hoover and Ms. Faw were bound to the Arbitration Agreement based on theories of estoppel and unilateral contract. Under these theories, because Ms. Faw (and Ms. Hoover)

received benefits as a result of Ms. Faw's admission to residency at the Greystone, the terms of the incorporated Arbitration Agreement must be valid and binding. The circuit court rejected this argument, incorrectly so, on the basis that the Arbitration Agreement is a document physically separate from the Residency Agreement and that neither Ms. Hoover nor the decedent had received a direct benefit under the Arbitration Agreement and therefore are not bound to the agreement.[5] *See* R.6-8. That basis to reject estoppel was not argued by Respondent. Petitioners were not on notice of this counter-argument. Had they been on notice, they could have pointed out that the Arbitration Agreement is incorporated into the Residency Agreement. As such, the two agreements are part of the same integrated transaction. Thus, the fact that the Arbitration Agreement is a separate agreement from the Residency Agreement is of no legal consequence. Because the point was first raised by the circuit court in its decision, Petitioners were denied notice and an opportunity to address the issue.

This Court must, *inter alia,* address the issue of whether the circuit court's denial of Petitioners' Motion on grounds not presented by Respondents was proper.

B. The Context And Circumstances Of This Case Highlight The Need For Special Contract Validation Rules

Petitioners submit that it is very important that the contract validation issues presented in this appeal arise in the context of the admission of an elderly, possibly incapacitated citizen to residence in a licensed appropriate assisted living residence. As such, the circuit court's method of analysis in this case, much like the reasoning in *AMFM, supra.*, oriented as it is toward

[5] In its primary discussion on the separate and distinct nature of the Arbitration and Residency Agreements, the Court concludes that since the receipt of benefits under the Residency Agreement was not dependent upon the execution or acceptance of the Arbitration Agreement, the Arbitration Agreement could not have been part of the bargain. *See* R.6. At no point does the circuit court recite any legal authority of any kind as to the validity of this reasoning as a means to declare these documents as separate, unintegrated contracts.

traditional concepts of contract formation, focuses heavily on the actual authority of a representative family member who undertakes to make the residency arrangements for an incapacitated family member. The exigencies of this situation may require a different type of analysis. This case well illustrates the fundamental dilemma. Plainly, for very good reasons, the Respondent, Ms. Hoover, sought the admission of her mother to residency at the Greystone. Presumably, Ms. Faw was incapacitated at the time; therefore, her daughter necessarily made the arrangements for her admission. At the time, Ms. Hoover had been appointed as a "medical surrogate", pursuant to the provisions of the West Virginia Health Care Decisions Act, W.Va. Code 16-30-1, *et seq*. But, *AMFM* holds that a medical surrogate has authority only to make "medical decisions", and lacks authority to make other decisions on behalf of an incapacitated person, even a close relative. Under that decision, therefore, Ms. Hoover lacked actual authority to enter into the Arbitration Agreement on her mother's behalf. She presumably also lacked authority to enter into the Residency Agreement on her mother's behalf, since that contract, too, contains terms and provisions that are no more "medical decisions" than the decision to settle claims in arbitration. Indeed, it would seem that Ms. Hoover lacked the basic authority to decide that her mother should enter residency at the Greystone, and she plainly lacked the authority to commit her mother's resources to pay for it. Ms. Hoover may have secured the authority to make those non-medical decisions a week later, when she was appointed general power of attorney on behalf of Ms. Faw under a Durable Power of Attorney. But if Ms. Faw was indeed incapacitated, the bona fides of even that grant of authority raises issues.[6]

[6] The granting of the Durable Power of Attorney to Ms. Hoover on September 8, 2017 underscores that dilemma. If Ms. Faw was incapacitated when she entered the Greystone on September 3, 2017, then presumably she was equally incapacitated a week later when she presumably executed the Durable Power of Attorney in favor of her daughter. That would make the granting of the power of attorney void or

The circuit court relied upon West Virginia principles to suggest that the assisted living residence has the burden to ascertain the authority of the responsible party seeking to execute the residency agreement and arbitration agreement. However, had the Greystone been charged with investigating Ms. Hoover's authority and discovered, contrary to Ms. Hoover's representations, that she was did not have authority to execute the agreements, Ms. Faw would not been admitted as a resident. *See* Wilson Affidavit, R.86. Ms. Hoover's only option, if Ms. Faw was incompetent, would have been to initiate proceedings for the court appointment of a guardian, a time consuming process which would be incompatible with Ms. Faw's immediate need to establish residency at the Greystone. If Ms. Faw was in fact competent, she could have executed a durable power of attorney such that Ms. Hoover would have authority to execute the admissions agreements, however Ms. Faw's competency, and thus the validity of the power of attorney, could later be questioned in an attempt to disavow the validity of the arbitration agreement. This raises the question of whether the assisted living residence has a responsibility to ascertain the validity of a power of attorney presented by a responsible party prior to the execution of the admissions documents. Such a burden would arguably be onerous and impracticable.

Given the circumstances, and in light of *AMFM's* limitations on the decision making authority of a medical surrogate, the dilemma is: How would arrangements for Ms. Faw's admission to the Greystone be handled, when no one evidently had the actual authority to make the necessary business arrangements as a "a responsible party"?

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voidable, and it would certainly call into question the legitimacy of any action that Ms. Hoover has taken on her mother's behalf thereunder, including presumably the initial filing of this law suit. *AMFM* recognizes a similar conundrum in a footnote, 230 W.Va. 481, n.10, 740 S.E.2d 76, n.10., but that decision gives no guidance as to how to deal with the problem.

Correspondingly, it is unreasonable to suggest that licensed owner/operators of assisted living residences should accept elderly, and often times incapacitated residents without a valid residency agreement or valid ancillary agreements, such as the straight forward arbitration agreement at issue in this case. Nor certainly is it reasonable for such licensed owner/operators to accept the assent to an agreement of a family member, such as Ms. Hoover, if the agreement is subject to invalidation at some later point, as Ms. Hoover has sought to invalidate the Arbitration Agreement she assented to in this case. One solution would be court appointment of a guardian. Certainly, there is statutory authority for that approach under the West Virginia Guardianship and Conservatorship Act, W.Va. Code 44A-1-1, *et seq.*, but Article 2 of the Act 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.[7] And, as Ms. Hoover clearly testified in her deposition, there was urgency in having her mother admitted to the Greystone. R.317-319, 343.

Our legislature has enacted an Assisted Living Residence statute, West Virginia Code 16-5D-1, *et seq.*, and a series of regulations have been promulgated pursuant thereto. *See* W.Va.C.S.R. §64-14-1, *et seq*. The regulations expressly require a residency agreement. *See* 64 C.S.R. §14-4.7.2 ("The Licensee shall enter into a written contract with the resident on admission to the residence...."). But the regulations do not address the issue of who is authorized to enter into such an agreement on behalf of a prospective resident, when the resident is

[7] The Health Care Decisions Act contains provisions for a truncated medical determination of incapacity. *See* W.Va. Code §16-30-7 (2010) (Supp. 2012). Indeed, the Act authorizes an attending physician or a nurse practitioner to select a medical surrogate. *See* W.Va. Code §16-30-8. There is no similar statutory provision for an expedited determination of incompetency necessary for the court appointment of a guardian.

incapacitated, as is frequently the case.[8] Nor does the statute or the regulations otherwise address contract validation issues that frequently must arise in connection with the admission of elderly and perhaps incapacitated citizens to residency in assisted living residences. Petitioners respectfully suggest that this Court should make a thoughtful analysis of the practical realities of the problem, and formulate appropriate rules of contract validation that makes sense and balance the rights and interests of the parties in this unique context.

Despite the unique dilemma which arises where an incapacitate elderly resident is admitted to an assisted living facility and there is no individual with authority to execute the admissions agreement and ancillary admissions documents, there are a multitude of contract formation principles recognized under West Virginia law which arguably operate to legally bind a signatory to the admission agreements of an assisted living facility. These contract formation devices include (1) mutual assent, (2) unilateral contract theory, (3) estoppel, and (4) ratification. Each of these contract formation mechanisms are applicable to bind Ms. Hoover to the Residency Agreement and Arbitration Agreement which she executed, as detailed below.

C. A Binding Arbitration Agreement Was Formed

1. West Virginia Contract Law Governs Whether A Valid and Enforceable Arbitration Agreement Exists

This Court has addressed the proper analysis of the issue of whether a valid arbitration agreement exists between the parties. "The threshold issue -- "whether a valid arbitration agreement exists" -- is really two intertwined issues. First, is there an agreement? Second, if

[8] As stated, in connection with the admission of her mother to residency at the Greystone, Ms. Hoover represented herself as the "Responsible Party" on behalf of her mother, and executed the Residency Agreement and the Arbitration Agreement in that capacity. The regulations promulgated pursuant to the Assisted Living statute utilize the term "responsible party" in 64 C.S.R. §64-14-6.5.34; but do not delineate what is necessary to confer that status. Nor do the regulations establish legal authority that a "responsible party" may exercise on behalf of a resident.

there is an agreement, is it valid (i.e., in the sense of being enforceable)?" *Certegy Check*, 241 W.Va. 701, 704, 828 S.E.2d 89, 92 (2019). "[T]he issue of whether an arbitration agreement is a *valid* contract is a matter of state contract law and capable of state judicial review." *TD Auto Fin.*, 842 S.E.2d at 787. *See also Atl. Credit & Finance Special Finance Unit, LLC v. Stacy*, 2018 WL 5310172 at *5 (Oct. 26, 2018) ("The determination of whether there is a valid arbitration agreement between the parties is to be determined by applicable state contract law") (citing *State ex rel. Clites v. Clawges*, 224 W.Va. 299, 305, 685 S.E.2d 693, 699 (2009)). "The FAA 'places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms.'" *New v. GameStop, Inc.*, 232 W.Va. 564, 753 S.E.62 (W.Va. 2013) (quoting *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486 at 494, 729 S.E.2d 808 at 816 (2012)) (quoting *Rent-A-Center, West, Inc. v. Jackson*, 558 U.S. 1142, 130 S.Ct. 1133, 175 L.Ed.2d 941 (2010)).

"The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.'" *Certegy Checks* 241 W.Va. at 704 (citing *Virginian Exp. Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253, Syl. Pt. 5, (1926); *see also Atl. Credit & Fin.*, 2018 WL 5310172 at *5 (quoting *Virginian Exp., supra.*, and stating that these fundamentals are "well-established").

For the reasons below, the Circuit Court erred in failing to determine that a valid and enforceable arbitration agreement exists under the following doctrines of contract formation recognized under West Virginia Law (1) mutual assent, (2) unilateral contract theory, (3) estoppel, and (4) ratification.

2. Respondent Cynthia Hoover Assented To Be Bound By the Arbitration Agreement

Indisputably, Ms. Hoover knowingly executed the Arbitration Agreement and agreed that any disputes arising out of the Residency Agreement would be subject to arbitration. Thereafter, Ms. Hoover and her mother continued to act in accordance with the terms of these Agreements, receiving various services in exchange for an agreed-upon rate. Ms. Hoover demonstrated her assent to be bound by the Residency Agreement and Arbitration Agreement by executing the agreements. Ms. Hoover reaffirmed her assent to be bound to the agreements when she admitted at her deposition that she believed that the agreements were in effect after she signed them. R.364-65.

This Court has defined mutual assent as follows:

> [I]t is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other. Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement or by indirect evidence through facts from which an agreement may be implied.

Ways v. Imation Enterprises Corp., 214 W.Va. 305, 313, 589 S.E.2d 36, 44 (2003) (quoting *Bailey v. Sewell Coal Co.*, 190 W.Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993)).

Regardless of any authority to bind Ms. Faw to the Arbitration Agreement, Ms. Hoover herself is both a party to the Arbitration Agreement as signatory and party to this action as Administratrix of the Estate of Ms. Faw. In its discussion regarding Ms. Hoover's authority to execute the Arbitration Agreements, the Circuit Court stated that "Although the plaintiff, Cynthia F. Hoover, did in fact sign the Arbitration Agreement and is named as a party to this civil action, it is clear that she is pursing the lawsuit, not in her own right, but as Administratrix of the

Estate...it is clear that when she signed the Arbitration Agreement, she did so, not on her own behalf, but under purported authority on behalf of her mother, Ms. Faw." R.6.

The circuit court's rationale fails to acknowledge the practical reality that Ms. Hoover is the real party in interest seeking recovery in this matter. Ms. Faw died intestate and Letters of Administration were issued to Cynthia Hoover on November 5, 2019. *See* Letter of Administration, R.453. Ms. Faw did not have a surviving spouse at the time of her death. *See Hoover deposition*, R335. Under the West Virginal intestate succession statute, Ms. Hoover is a beneficiary of the Estate of Elveria Faw. *See*, W.Va. Code §42-1-3a, which provides in pertinent part, "[T]he entire intestate estate if there is no surviving spouse, passes in the following order to the individuals below who survive the decedent: (a) To the decedent's descendants by representation;.." As a beneficiary of the Estate of Elveria Faw, Ms. Hoover *is* a real party in interest and is clearly pursing the action on her own behalf, as Ms. Hoover has a financial interest in any recovery by the estate. In executing the Residency Agreement and Arbitration Agreement, Ms. Hoover, at least on her own behalf, assented to and agreed to be bound by the terms and provisions of the agreements.

3. The Circuit Court Erred in Determining That Respondent's Status As A Health Care Surrogate When She Executed the Residency Agreement and Arbitration Agreement Renders the Arbitration Agreement Unenforceable

The only opposition to the Petitioners' Motion to Compel Arbitration proffered by the Respondent is that Ms. Hoover, in her capacity as Ms. Hoover's health care surrogate, lacked authority to execute the Arbitration Agreement under the rubric of this Court's decision in *AMFM,*. In *AMFM*, this Court held that "it is clear that 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" and that "an 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, W.Va. Code §16–30–1, *et seq.*" *Id.* at 31. This Court concluded that the Plaintiff health care surrogate "was not a 'competent party' to the [Arbitration] Agreement because she did not have authority to sign..." *Id.* at 481, citing, Syl. Pt. 3, *Dan Ryan Builders, Inc. v Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012).[9] In reliance upon *AMFM*, the circuit court erroneously concluded "...Ms. Hoover possessed only the requisite authority to make strictly health care decisions on behalf of Ms. Faw, and was not a 'competent party' to sign the Arbitration Agreement on her behalf." R.12.

The circuit court's reliance upon *AMFM* as a basis for denying Petitioners' Motion to Compel Arbitration is erroneous in several respects. First, the circuit court's finding that Ms. Hoover was not competent to execute the agreements is not akin to a lack of authority. "Competency" is defined as "The mental ability to understand problems and make decisions." *Black's Law Dictionary* (11th ed. 2019). It is undisputed that Ms. Hoover clearly had the mental capacity to make decisions and was competent to execute the agreements. Respectfully, the circuit court mistakenly failed to recognize the difference between the legal terms "competency" and "authority." Second, Petitioners do not rely on Ms. Hoover's status as a health care surrogate as providing her authority to execute the Arbitration Agreement. Instead, Petitioners advance multiple contract formation theories as a basis for Ms. Hoover to be bound to the Arbitration Agreement, none of which are dependent upon Ms. Hoover having authority to execute the agreement. Therefore, the Circuit Court erred in determining that based Cynthia Hoover's lack of

[9] Notably, although this Court in *AMFM* cited *Dan Ryan Builders* for the proposition that a party is not competent to execute an arbitration agreement absent authority to do so, there was no issue in *Dan Ryan Builders* regarding the competency of a party to enter into a contract.

authority as a health care surrogate to execute the Residency Agreement and Arbitration Agreement, the Arbitration Agreement is not valid and enforceable.

4. The Respondent Is Estopped From Avoiding Arbitration

Ms. Faw, following the execution of the Residency Agreement by Ms. Hoover, indisputably received the benefits and services designated in the Residency Agreement. Ms. Hoover agreed that her mother received benefits and services as a resident at the Greystone. R.362-365. Once Ms. Hoover was appointed as her mother's attorney-in-fact, she likewise continued to receive these benefits and services. As a result, Respondent is estopped from avoiding arbitration under the Arbitration Agreement, which is incorporated by the Residency Agreement.

In a recent decision, this Court applied "direct benefit" estoppel in determining that a non-signatory to a contract was bound by the contract's arbitration provision. In *Bayles v. Evans*, 243 W.Va. 31, 842 S.E.2d 235 (2020), Plaintiff asserted that she was the beneficiary of two investment accounts that were owned by her deceased husband. The plaintiff, despite demanding payment of the proceeds of the two accounts, disputed that she was bound by the arbitration provisions contained within the applications for the agreements on the basis that she was a non-signatory to the applications and the investment account agreements. In determining that the plaintiff was estopped from avoiding arbitration, this Court initially observed that the doctrine of equitable estoppel "allows a Court to prevent a non-signatory from embracing a contract, but then turning his, her or its back on the portions of the contract (such as an arbitration clause) that the non-signatory finds 'distasteful.'" *Id.* at 245 (citing *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)). This Court also

relied upon the Fourth Circuit Court of Appeal's decision in *Int'l Paper Co. v. Schwabedssen Maschien & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000), where the Court held that a party was precluded from asserting lack of signature on a written contract to avoid arbitration while at the same time maintaining that other provisions of the same contract should be enforced to his benefit. "To allow [a nonsignatory] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying the enactment of the [Federal Arbitration Act]." *Bayles,* 842 S.E.2d at 245 (citing *Int'l Paper,* 206 F.3d at 418. "Simply stated, a nonsignatory who seeks to reap the benefits of a contract must bear its burdens as well." *Id.* at 245.

In *Bayles*, this Court announced two alternative theories under either of which a non-signatory to a contract is bound by the contract's arbitration provision under an estoppel theory; "A non-signatory can "embrace" a contract containing an arbitration clause in two ways; (1) by knowingly seeking and obtaining 'direct benefits' from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract." *Id.* at 245-246 (citing *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010)). "When the nonsignatory knowingly exploits the contract containing the arbitration clause and obtains a direct benefit from that contract, '[c]ourts have applied direct benefits estoppel to bind a non-signatory to an arbitration agreement[.]'" *Id.* at 246 (citing *Noble Drilling Servs.,* 620 F.3d at 473). This Court went on to hold that under either of the above theories, plaintiff was precluded from avoiding arbitration stating, "Despite her attempts to recover the benefits of the contracts, the plaintiff is 'cherry-picking' the terms beneficial to her while disavowing the terms she would prefer not to be governed by, namely the arbitration

clauses in both contracts. Under these facts, the circuit court was within its discretion to find the plaintiff bound by all the terms of the contracts, including the arbitration clauses." *Id.* at 246. Similarly, and as mentioned in *Bayles*, this Court in *Chesapeake Appalachia, LLC v. Hickman*, 236 W.Va. 421, 781 S.E.2d 198 (2015) also ruled that a non-signatory to a contract was estopped from avoiding arbitration where it accepted the benefits of an agreement containing an arbitration clause. Specifically, in *Chesapeake Appalachia,* the Court stated:

> It is accepted law that "a nonsignatory may be estopped from avoiding arbitration where [he] knowingly accepted the benefits of an agreement with an arbitration clause...The benefits must be direct--that is to say, flowing directly from the agreement. *Id.* at 222, *citing, Life Technologies Corp. v. AB Sciex Pte. Ltd.*, 803 F.Supp.2d 270, 273–74 (S.D.N.Y. 2011).

Id. at 222.

Notwithstanding that Respondent did not assert any opposition to a finding that she is estopped from avoiding arbitration, the circuit court erroneously determined, on its own accord, that the Arbitration Agreement is "separate and distinct" from the Residency Agreement and therefore rejected estoppel as a validation device, because "Greystone would have provided her the care and services to Ms. Faw whether or not the Arbitration Agreement was in place...." R.7. The circuit court observed that the Arbitration Agreement "expressly states that its execution is not a precondition to the furnishing of services to the Resident by [Greystone]".[10] R.7. That

[10] Despite Respondents' never having argued that the arbitration agreement is unconscionable, in a footnote, the circuit court *sua sponte*, and without citation to any legal authority, stated that, "[t]o state otherwise and provide that the Arbitration Agreement was, in fact, a precondition to the furnishing of services would be strictly violative of law as being unconscionable." R.7. However, this Court has held that execution of an arbitration agreement as a precondition to the furnishing of services does not alone render an arbitration agreement unconscionable. *See Rent-A-Center, Inc. v. Ellis*, 241 W.Va. 660, 673, 827 S.E.2d 605, 618 (2019) ("[t]he omission of an "opt out" provision is not in itself sufficient evidence that an arbitration agreement is grossly unfair and thus unenforceable on grounds of procedural unconscionability." quoting Syl.Pt. 2, *Nationstar Mortg., LLC v. West*, 237 W. Va. 84, 785 S.E.2d 634 (2016).

execution of the Arbitration Agreement is not a precondition to the furnishing of services by the Greystone does not impact the applicability of estoppel as a contract validation device. Respondent did in fact execute the arbitration agreement and remained bound by it as she did not rescind the agreement within 30 days as permitted by the agreement. The Arbitration Agreement provides, in pertinent part, that "If not rescinded within 30 days this Arbitration Agreement shall remain in effect for all care and services subsequently rendered by the Community." R.61. By virtue of Ms. Faw's and Respondent's receipt of services and benefits under the Residency Agreement, Respondent is estopped from avoiding arbitration, as the Residency Agreement incorporates the Arbitration Agreement, as more fully detailed below. The circuit court evidently thought that in order for an estoppel to apply, the entry into the Arbitration Agreement had to constitute an inducement for the Respondent's agreement to admit Ms. Faw as a resident. This reasoning is flawed, and misapprehends the elements that must be shown in order for a valid arbitration agreement to emerge through estoppel. As this Court's recent analysis in *Bayles* makes clear, inducement of the other contracting party to enter into the contract is not an element of estoppel. Rather, what must be shown is that the party seeking to disavow the arbitration agreement received benefits under the arrangement, part of which included agreement to arbitrate disputes.

Respectfully, the circuit court's rationale in rejecting estoppel as a contract validation device is completely flawed, as it is predicated upon an inaccurate factual finding that the agreements are separate and distinct. The Court erroneously concluded that "the Arbitration Agreement is not a clause or provision contained within the Residency Agreement." R.7. The circuit court further, albeit incorrectly, observed,

> As heretofore discussed, our Arbitration Agreement is not a part of a multi-clause contract between parties who both made certain promises regarding arbitration and other substantive rights. Instead, such Agreement is a separate instrument that stands on its own two hind legs, and is independent of promissory offers and heath care duties provided by Greystone as outline in the Residency Agreement or elsewhere.

R.10. and that "[t]his is not a circumstance here where the plaintiff has embraced parts of either of the subject contracts, but turned her back on those portions that the nonsignatory finds distasteful." R.8. However, contrary to the circuit court's determination, two provisions contained within the Residency Agreement clearly reflect that the Arbitration Agreement is not a separate stand-alone document, but *is* contained within and incorporated into the Residency Agreement.

Specifically, Section X.G. of the Residency Agreement, entitled "GOVERNING LAW/DISPUTES/PARTIAL ILLEGALITY" states "This Agreement shall be construed in accordance with the laws of the State of West Virginia, and Raleigh County and the parties agree that the Residential and Community Arbitration Agreement of *even* date herewith shall govern any and all disputes of the parties" (emphasis added). R.106.

Section X.I. of the Residency Agreement entitled "INCORPORATION OF OTHER DOCUMENTS" identifies documents that are incorporated into the Residency Agreement, which includes "all documents that you signed or received during the admission process to the Community." R.106. The Arbitration Agreement was incorporated into the Residency Agreement as it was signed during the admissions process. R.323-25, 335.

The above provisions of the Residency Agreement clearly demonstrate, contrary to the Circuit Court's determination, that the Residency Agreement and Arbitration Agreements are not separate and distinct agreements that are independent of one another. Instead, they are integral to

one another, as they were executed on the same date, at the same time, during the process of admission of Ms. Faw to the Greystone. The Residency Agreement clearly requires that all disputes be governed by the Residential and Community Arbitration Agreement "*of even date*" and incorporates the Arbitration Agreement.

Ms. Hoover and Ms. Faw received benefits as a consequence of a single integrated transaction, *viz* the admission of Ms. Faw to residency at the Greystone. Both the Residency Agreement and Arbitration Agreement were part and parcel of a single integrated transaction. That is clear from the language of the agreements themselves and from the temporal circumstances, as both agreements were signed at the same time as part of the admissions process and is totally consistent with the understanding and intent of the parties. Both Megan Wilson, in her Affidavit, and Ms. Hoover during her deposition described the execution of both agreements as part and parcel of the admissions process. The circuit court's treatment of these documents as though they constitute an entirely separate transaction represents little more than an effort to avoid validation of the Arbitration Agreement through estoppel.

As this Court recently poignantly pointed out, validation of a contractual arrangement is an equitable concept. It should be applied "[w]here the interests of justice, morality, and common fairness clearly dictate that course." *Bayles*, at 245, quoting *IBS Fin. Corp. v. Seidman & Associates, L.L.C.* 136 F.3d 940, 948 (3d Cir. 1998). The applicability of equitable estoppel cannot be made to turn on a circumstance so mundane as the number of pieces of paper that make up a transaction. Ms. Hoover executed two agreements in connection with the admission of her mother to the Greystone, a Residency Agreement and an Arbitration Agreement. They

received substantial benefits of the bargain. The terms and provisions of both agreements must be enforceable against them.

5. The Arbitration Agreement Was Formed Under The Theory Of Unilateral Contract

Even if Cynthia Hoover did not possess the legal authority to execute the Residency Agreement and Arbitration Agreement, the receipt of services and benefits by Ms. Faw and Respondent pursuant to the terms and conditions of the Residency Agreement created a unilateral contract. A unilateral contract is established "where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise." *Citizens Telecommunications Company of West Virginia v. Sheridan*, 239 W.Va. 67, 73, 799 S.E.2d 144, 150 (2017) (quoting *Cook v. Heck's Inc.*, 176 W.Va. 368, 373, 342 S.E.2d 453, 458 (1986)). This Court has recognized "[t]hat an acceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror." *Id.* at 150 (citing *First Nat'l Bank v. Marietta Mfg. Co.,* 151 W.Va. 636, 641-42, 153 S.E.2d 172, 176 (1967)). Under a "unilateral contract" theory, a party cannot avoid an arbitration provision contained in an unsigned contract by asserting that it did not agree to arbitration where the party continues to use services provided for under the contract that contained the arbitration provision. *Id.* at 149.

In *Citizens Telecomms*, *supra.*, customers of an internet service provider brought a putative class action against an internet service provider alleging that the internet service was inadequate. The provider moved to compel arbitration pursuant to an arbitration provision which was subsequently added to the internet service contract. Plaintiffs were provided notice of the

addition of the arbitration provision.[11] The plaintiffs denied that they had agreed to arbitrate any claims arising from the defendant's service. This Court concluded the plaintiffs could not avoid arbitration, as a unilateral contract had been formed because plaintiffs continued to use the internet services after receiving notice of the addition of the arbitration provision to the service contract. In finding that the arbitration provision was valid and enforceable, this Court stated, "Frontier presented its Terms and Conditions as a condition of providing Internet service to customers, and Frontier's customers accepted those Terms and Condition by using and paying for that Internet service, forming a unilateral contract." *Id.* at 150.

The circuit court erroneously failed to determine that a unilateral contract was formed as a result of the continued use of the benefits and services under the Residency Agreement by Ms. Faw and Respondent. The circuit court disagreed that a unilateral contract was formed on the same inaccurate basis that the circuit court relied upon in refusing to find that Respondent was estopped from avoiding the arbitration, namely, the circuit court's belief that the Residency Agreement and Arbitration Agreement are separate and distinct agreements and that the Arbitration Agreement is "independent of promissory offers and health care duties provided by the Graystone [sic] as outlined in the Residency Agreement..." R.10. However, for the reasons stated above, the Court's finding in this regard is erroneous, given that the Residency Agreement contains provisions which state that all of the parties' disputes are governed by the Arbitration Agreement and incorporate the Arbitration Agreement. *See* Residency Agreement, Section X.G. and X.I., R.106. The agreements are integrated and were executed as part of a single transaction

[11] The terms of the service contracts allowed the provider to change the service terms and conditions with notice to its customers.

and therefore, the unilateral contract which was formed as a result of Ms. Faw's and Respondent's acceptance of benefits and services includes an agreement to arbitrate disputes.

The Court also found the *Citizens Telecomms* decision to be factually distinguishable from the case *sub judice* on the basis that there was no dispute in *Citizens Telecomms* that the parties assented to be bound by the internet service agreement, but that the issue in that case was whether the customers assented to be bound by an arbitration provision which was subsequently added to the service agreement. The Circuit Court pointed out that, "In the present case, there is no dispute over altered terms, and there is no language in the subject Arbitration Agreement [sic] pertaining to the deemed acceptance of additional conditions under certain circumstances." R.10. This distinction, however, was not relevant to this Court's ultimate holding in *Citizens Telecomms* that the customers' conduct, through their continued acceptance of the contractual benefits after receiving notice of the addition of the arbitration provision, was sufficient to form a unilateral contract. Likewise, the receipt of benefits and services by Ms. Faw and Respondent under the Residency Agreement is sufficient to bind Respondent to the concurrently executed and incorporated Arbitration Agreement under principles of unilateral contract formation.

A similar analysis concerning contract formation in the context of an unsigned agreement was applied by this Court in *Atl. Credit & Fin., supra.* In *Atl. Credit & Fin.,* the defendant filled out an online application for a credit card account agreement with a bank which she did not sign. The credit card agreement issued in response to the application contained an arbitration provision that applied to any disputes between defendant and the bank. The defendant subsequently used the credit card account, but failed to pay as agreed. Plaintiff, a successor owner of the credit account, filed an action against the defendant and the defendant filed a counterclaim. Plaintiff

moved to compel arbitration under the terms of the credit agreement. The circuit court refused to compel arbitration, finding that a valid and enforceable arbitration agreement did not exist because the account agreement was *not signed* by the defendant. This Court reversed.

Applying basic contract law, this Court held that the absence of a signature was of no consequence. *Atl. Credit & Fin.*, 2018 WL 5310172 at * 5 (citing *Clites, supra.*, at 405). The defendant's use of the credit card account was sufficient to create a binding [unilateral] contract, irrespective of signature. Recognizing that "both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract..." this Court held that "the defendant manifested acceptance of the credit agreement by her admitted use of the credit account." This Court thus held that a binding contract was formed and the arbitration clause was enforceable. *Id.* at 8 (citing *Bluestem, supra.*).

In *Bluestem*, defendant applied for credit by telephone through plaintiff's credit partner after which she began making purchases utilizing credit extended through a written credit agreement sent to her which she had not signed. The credit agreement contained a provision allowing for future amendments and was subsequently amended to include an arbitration provision. The amended credit agreement was sent to the defendant after which she continued to make purchases through her account. Plaintiff subsequently brought an action against the defendant once she became delinquent on her credit card payments. The defendant filed a counterclaim and Bluestem then moved to compel arbitration pursuant to the arbitration provision contained in the credit agreement. Initially, the Court observed that, "The challenge to the instant arbitration agreement rests on general contract formation principals." *Id.* at 698. In determining that a contract had been formed, the Court stated "Ms. Shade's continued use of the

credit after receiving the 2007 and 2010 credit agreements containing the arbitration agreements, per the language of the agreement and as held by this Court, plainly constitutes mutual assent." *Id.* at 699.

Ms. Faw clearly and obviously received the benefits and services designated in the Residency Agreement in exchange for the monetary consideration set forth therein. Once Ms. Faw appointed Ms. Hoover as her attorney-in-fact days after the Residency and Arbitration Agreement were executed, Ms. Hoover, and her mother, accepted and continued to receive the services and benefits provided by the Greystone. Their actions in doing so evinced an intent to be bound by the Residency Agreement and the incorporated Arbitration Agreement. This intent was confirmed by Ms. Hoover when she testified that she understood the Arbitration Agreement and Residency Agreement to be in effect during her mother's residency at The Greystone and that she conducted herself accordingly by paying the charges for the services received. R.364-65. As such, a unilateral contract was formed and the Arbitration Agreement incorporated therein is valid and enforceable. *See Citizens Telecomms,* 799 S.E.2d at 150 (citing *Cook,* 342 S.E.2d at 458)

6. The Circuit Court Erred in Failing to Determine that The Residency Agreement and Arbitration Agreement Were Formed By Ratification

Whether or not the agreements were binding on Ms. Faw at the time of execution by Ms. Hoover is irrelevant, as Ms. Hoover subsequently ratified the agreements after she was appointed as her Ms. Faw's attorney-in-fact just nine (9) days later. By thereafter continuing to accept the

benefits and services provided by the Greystone, without objecting to or repudiating the agreements when she had the authority to do so, Ms. Hoover ratified the agreements.[12]

"Ratification has generally been defined as the adoption or confirmation of a prior act performed on the principal's behalf by an agent lacking authority to bind the principal." *CNA Ins. Grp. v. Nationwide Mut. Ins. Co.*, No. CIV. A. 98-1962, 2000 WL 288241 at *4 (E.D. Pa. Mar. 8, 2000) (citing 12 Richard A. Lord, *Williston on Contracts* §35:22, at 268 (4th ed 1999)). Subsequent affirmance by a principal of a contract made on its behalf "by one who had at the time neither actual nor apparent authority constitutes a ratification, and such ratification relates back and supplies original authority to execute the contract." *CNA Ins. Grp,* 2000 WL 288241 at *4 (quoting *Williston on Contracts* § 35:22, at 270).

This Court has reiterated and applied these well-settled principles to bind a lessor to a lease entered into by its agent for an unauthorized term where the lessor repeatedly accepted rents throughout the entire term of the unauthorized lease. *See Payne Realty Co. v. Lindsey*, 91 W.Va. 127, 112 S.E. 306 (1922). In binding the lessor to the unauthorized lease, this Court in *Payne* relied upon the following principles on ratification:

> If the principal, either by his conduct, by his words, or by his silence, has led others to believe that he has sanctioned an unauthorized act, performed in his behalf by his agent or by an assumed agent, he will be held to have ratified such act, whether it was his actual intention to do so or not. Although ratification is presumed to be based upon the intention of the parties, yet it may in some cases be effected contrary to the principal's real intention, for if, by his acts, he has induced others to believe that it was his intention to ratify the unauthorized acts,

[12] Ms. Hoover became Ms. Faw's healthcare surrogate in 2013 and made inquiry with the Greystone regarding her mother's admission at that time. R. 309-310, 334-335, 375. She clearly anticipated that her mother would require assisted living services as early as 2013, however she took no steps to be appointed as her mother's attorney-in-fact until after she was admitted to the Greystone. Surely Ms. Hoover was aware as early as 2013 or before that it would be necessary for her mother to appoint Ms. Hoover or another responsible party as attorney-in-fact. This is certainly true as Ms. Hoover's husband is an attorney. R.303.

> and such others have acted accordingly, the law will conclusively presume that such was his intention, and he will not be permitted to deny it.

Id. at 308. The Court held that the lease was therefore binding upon the lessor, as it acquiesced in the act of the agent. "By accepting and retaining the rent, which was the fruit of its agent's acts, for two years without question or objection, with the written contract in its possession, plaintiff is presumed to have had knowledge of its contents and ratified the contract under which these rents arose." *Id.* at 308 (citing *Hoyt v. Thompson's Ex'r,* 19 N.Y. 207 (1859); *Alexander v. Jones*, 64 Iowa 207, 19 N.W. 913 (1884); *Heyn v. O'Hagen*, 60 Mich. 150, 26 N.W. 861 (1886)).

Like the lessor in *Payne*, Ms. Hoover, as DPOA of Ms. Faw, continued to receive the benefits of the Residency Agreements. Even if Ms. Hoover did not have authority to bind Ms. Faw to the Residency and Arbitration Agreements, Ms. Hoover ratified those Agreements by continuing to reap their benefits after becoming her mother's principle pursuant to the DPOA. Having full knowledge that she executed the Agreements just days earlier, Ms. Hoover took no steps to object to or repudiate those Agreements. Rather, Ms. Hoover and her mother continued to receive services from the Greystone in exchange for a determined cost in accordance with the explicit terms of those Agreements. In failing to disavow or replicate the Residency and Arbitration Agreements, Ms. Hoover ratified the Agreements.

The circuit court misapprehended Petitioners' argument that Ms. Hoover ratified the agreements as Ms. Faw's attorney-in-fact. In fact, the Circuit Court engaged in no discussion or analysis of whether Ms. Hoover ratified the agreements. The circuit court acknowledged Petitioners' ratification argument, but then went on to erroneously focus on whether Ms. Hoover had authority to bind her mother to the Agreements in her capacity as her mother's healthcare surrogate at the time of execution. The purported absence of authority to execute the agreements

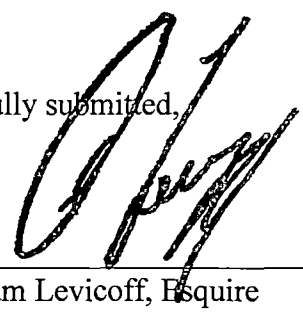
is irrelevant to the issue of whether the agreements were subsequently ratified. *See Payne, supra.* at 308.

The circuit court erred in failing to determine that once Plaintiff became her mother's attorney-in-fact, she ratified both the Residency Agreement and the incorporated Arbitration Agreement by accepting the benefits and services on behalf of her mother.

VIII. CONCLUSION

The circuit court erroneously failed to find that a valid and binding arbitration agreement exists based upon well-settled West Virginia contract formation principles. Petitioners respectfully request that this Court enter an order reversing the circuit court's order denying Defendants' Motion to Compel Arbitration and direct that Respondent's claims be referred to arbitration.

Respectfully submitted,



Date: December 28, 2020

By: _____

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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),

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, a true and correct copy of the foregoing ***Appendix Record*** has been served upon the following counsel of record via U.S. mail:

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Date: December 28, 2020

By: _____

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