No. 11-394

In The Supreme Court of the United States

CLARKSBURG NURSING HOME & REHABILITATION CENTER, INC., d/b/a Clarksburg Continuous Care Center; SHEILA JONES; and JENNIFER MCWHORTER,

Petitioners,

v.

SHARON A. MARCHIO, Executrix of the Estate of Pauline Virginia Willett,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION

FRANK E. SIMMERMAN, JR.
Counsel of Record
CHAD L. TAYLOR
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
Email: fes@simmermanlaw.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition when independent and adequate grounds render the arbitration agreement at issue unenforceable, and the decision below is founded upon general state-law principles governing the formation of contracts.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Sharon A. Marchio is the duly qualified Executrix of the Estate of her mother, Pauline Virginia Willett. Ms. Willett was a resident of the Clarksburg Continuous Care Center owned and/or operated by the Petitioners, from May 27, 2006, through July 3, 2006. Included as part of the nursing home's seventy-three (73) page Admissions Agreement, was the subject Resident and Facility Arbitration Agreement which Plaintiff executed on May 25, 2006, in preparation for her mother's transfer to the nursing home. *See* Pet. App. at 102a. During her five (5) weeks at Clarksburg Continuous Care, Ms. Willett's condition dramatically declined, ultimately leading to her death, on July 6, 2006. The underlying action, filed on July 2, 2008, concerns deficiencies and negligence of Petitioners in the care and treatment of Ms. Willett which caused and/or contributed to her injuries, suffering, and death. *See also* Pet. App. at 20a-23a.

In response to Respondent's Complaint, on or about July 24, 2008, the Petitioners filed a *Motion to Dismiss Plaintiff's Complaint and to Compel Arbitration*. The trial court held a hearing of Petitioners' Motion to Dismiss and to Compel Arbitration on October 3, 2008, but reserved ruling on the same. Ultimately, the Circuit Court of Harrison County, West Virginia, certified a question to the Supreme Court of Appeals

of West Virginia (hereafter "West Virginia Supreme Court"), on February 24, 2010, concerning whether the Federal Arbitration Act (FAA) preempted the anti-waiver provision of the West Virginia Nursing Home Act (W.Va. Code § 16-5C-15(c) [1997]).[1]

For purposes of argument before the West Virginia Supreme Court, the instant matter was consolidated with two cases which raised similar questions of law.[2] Following argument, the West Virginia Supreme Court issued its decision on June 29, 2011. *See* Pet. App. at 1a. Specifically, the West Virginia Supreme Court held that the FAA preempted the anti-waiver provision of the West Virginia Nursing Home Act, but found that the subject arbitration agreement failed to satisfy general contract law principles, and thus, was unenforceable. From the West Virginia Supreme Court's consolidated opinion of June 29, 2011,

---

[1] "Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy."

[2] The matters of *Marmet Health Care Center, Inc., et al., Petitioners v. Clayton* ***Brown****, Respondent*, and *Marmet Health Care Center, Inc., Petitioner v. Jeffrey* ***Taylor****, Respondent*, are similarly before this Court by way of a pending Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia, No. 11-391. While the instant matter (*Marchio*) came before the West Virginia Supreme Court by way of certified question, the *Brown* and *Taylor* matters were appeals of dismissal orders from the Circuit Court of Kanawha County, West Virginia.

Petitioners filed their Petition for a Writ of Certiorari with this Court on September 27, 2011.

SUMMARY OF THE ARGUMENT

Contrary to Petitioners' belief, the lower court's decision will not spark a wildfire of judicial hostility to arbitration across the nation. Quite the opposite, the instant matter represents one state's application of its general contract law principles to an arbitration agreement in the unique context of a nursing home's admission agreement. Insofar as the FAA and this Court's precedents subject arbitration agreements to ordinary state-law principles governing the formation of contracts, the decision below does not present compelling reasons upon which to grant the Petition.

Further, any attention devoted by this Court to this matter would be ill-spent insofar as independent and adequate grounds exist for the invalidation of the subject arbitration agreement. Most notably, the arbitration agreement at issue is unenforceable because the exclusive forum selected to arbitrate the parties' claims is unavailable. Moreover, while this matter was submitted to the West Virginia Supreme Court on a limited certified question, further discovery and development of the facts upon remand will demonstrate the unconscionability, and attendant unenforceability, of the arbitration agreement at issue.

Therefore, because the issues presented by the Petition do not rise to the level of importance necessary to warrant this Court's attention, the Petition should be denied.

REASONS FOR DENYING THE PETITION

I. Independent And Adequate Legal Grounds Render The Arbitration Agreement At Issue Unenforceable.

Compelling reasons are not present to merit this Court's review of the West Virginia Supreme Court's decision because the subject arbitration agreement is unenforceable based upon grounds independent from those relied upon by the Court below. As recognized by the West Virginia Supreme Court, the instant matter came before it by way of a limited certified question regarding only the "preemption of Section 15(c) of the [West Virginia] Nursing Home Act by the FAA." Pet. App. at 87a. Therefore, unlike the two matters with which this matter was consolidated for purposes of argument before the West Virginia Supreme Court (*Brown* and *Taylor*) the unconscionability of the arbitration agreement was not considered at the trial court level. *Id.* The West Virginia Supreme Court, however, reserved for the parties the issue of whether the subject arbitration agreement was unconscionable, or invalid on some other ground, for consideration on remand. *Id.* at 12a ("In the [Marchio] case, the issue of unconscionability was not considered by the trial court, but may be raised by

the parties on remand."); *id.* at 98a, n.170 ("On remand, we leave it to the parties to determine whether the [arbitration] clause may be challenged on some other ground.").

By way of illustration, such a remand with subsequent finding that a nursing home arbitration agreement was unenforceable on independent grounds was recently experienced in the matter of *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207 (Ill. 2010), a case cited by Petitioners. *See* Pet. at 22. More particularly, following a finding by the Illinois Supreme Court that the FAA preempted an anti-waiver provision embodied within the Illinois Nursing Home Care Act, (210 ILCS 45/3-606, 3-607 (West 2006)), the Illinois Supreme Court remanded the case back to the Appellate Court of Illinois, Fifth Circuit. On remand, the Illinois Appellate Court considered other issues impacting the validity of the arbitration agreement at issue, and ultimately found the agreement unenforceable because of a lack of mutuality, and because plaintiff's signature of the arbitration agreement as the resident's legal representative did not bind the plaintiff with respect to her subsequent wrongful death claim. *Carter v. SSC Odin Operating Co.*, 2011 Ill. App. LEXIS 890 pp. 21, 23 (Ill. App. Ct. 5th Dist. Aug. 18, 2011).

In like manner, even if the arbitration agreement at issue in the instant matter were valid, on remand, the agreement would be deemed unenforceable on independent grounds. Very simply, regardless of this

Court's resolution of the question presented by the Petition, the arbitration agreement at issue is invalid.

A. The Arbitration Forum Selected In The Agreement Is Unavailable.

The arbitration agreement giving rise to the Petition requires arbitration be conducted, exclusively, by the National Arbitration Forum (NAF). This forum designation renders the arbitration agreement unenforceable because as of July 24, 2009, the NAF stopped accepting consumer claims for arbitration. Therefore, even if the subject arbitration agreement were deemed valid, the agreement's very own terms render it unenforceable.

The Resident and Facility Arbitration Agreement in the instant case provides:

> that any legal dispute, controversy, demand or claim . . . that arises out of or relates to the Resident Admission Agreement or any service or health care provided by the Facility to the Resident, *shall be resolved* ***exclusively*** by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, *in accordance with the Code of Procedure of the National Arbitration Forum ("NAF")* which is hereby incorporated into this Agreement, and not by lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial

> review of arbitration proceedings or the judicial enforcement of arbitration awards.

Emphasis added, Pet. App. 102a. The arbitration agreement then directs the resident to the NAF for "[i]nformation regarding . . . its arbitration services, fees for services and Code of Procedure." *Id.* at 104a. Thus, the arbitration agreement designates the NAF as the exclusive arbitration forum in which the Respondent may assert her claims in this matter.

The problem, however, as alluded to above, is that "the designated arbitration forum, the NAF, can no longer accept [consumer] arbitration cases pursuant to a consent decree it entered with the Attorney General of Minnesota." *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 217 (Pa. Super. Ct. 2010), *see also* http://www.adrforum.com/newsroom.aspx?itemID=1528. Accordingly, the parties are without an arbitrator, and the agreement is unenforceable.

1. The Choice Of Forum Provision Is Integral To The Subject Arbitration Agreement.

Courts have held that "an arbitration agreement will not fail because of the unavailability of a chosen arbitrator unless the parties' choice of forum is an 'integral part' of the agreement to arbitrate, rather than 'an ancillary logistical concern.'" *Stewart*, 9 A.3d at 218, 219, citing *Reddam v. KPMG L.L.P.*, 457 F.3d 1054, 1061 (9th Cir. 2006); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir.

2000).[3] For a choice of forum provision to be "deemed integral, the arbitration clause must include an express statement designating a specific arbitrator." *Stewart*, 9 A.3d at 219 (internal quotations and citations omitted). Further, "whether the NAF is integral to the parties' agreement to arbitrate is a matter of contract interpretation." *Rivera v. American General Financial Services, Inc.*, 259 P.3d 803, 812 (N.M. 2011).

This Court has held that "interpretation of arbitration agreements is generally a matter of state law, and "as with any other contract, the parties' intentions control." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773-74 (2010) (internal citations and quotations omitted). In the instant case, the subject arbitration agreement's choice of forum provision contains mandatory, plain language which

---

[3] Authority for the proposition that a court may appoint an alternative arbitrator if a choice of forum provision is not integral to the arbitration agreement at issue stems from Section 5 of the FAA, which provides in pertinent part that:

> If in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed . . . or if for any other reason there shall be a lapse in the meaning of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein. 9 U.S.C.A. § 5.

evinces a specific intent of the parties to arbitrate before the NAF. *See Ranzy v. Tijerina*, 393 Fed. Appx. 174, 175 (5th Cir. 2010). As cited above, the arbitration agreement at issue declares that claims *shall* be resolved *exclusively* by binding arbitration in accordance with the Code of Procedure of the National Arbitration Forum.

In addition, the arbitration agreement unequivocally mandates that the NAF is the exclusive arbitrator, the NAF's rules are explicitly incorporated therein, and the agreement provides for no alternative. Thus, the selection of the NAF was "not merely an implicit choice, but rather an express one." *Carideo v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 104600 at 16 (W.D. Wash. Oct. 26, 2009); *see also Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 334 (5th Cir. 1987) ("[W]here the parties' agreement specifies that the laws and procedures of a particular forum shall govern any arbitration between them, that forum-selection clause is an "important" part of the arbitration agreement.").

Further, the "NAF has a very specific set of rules and procedures that has implication for every aspect of the arbitration process," and the "designation of a [specific arbitral] forum such as the [NAF] 'has wide-ranging substantive implication that may affect, *inter alia*, the arbitrator-selection process, the law, procedures and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.'" *Grant v. Magnolia Manor-Greenwood,*

Inc., 678 S.E.2d 435, 439 (S.C. 2009) (quoting *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 340 (D.Conn. 2009)). Accordingly, "the selection of the NAF is neither logistical nor ancillary and is thus an integral part of the agreement to arbitrate in this case." *Carr v. Gateway, Inc.*, 918 N.E.2d 598, 603 (Ill. App. Ct. 5th Dist. 2009).

Because the choice of forum provision embodied within the instant arbitration agreement is integral to the agreement, § 5 of the FAA will not sustain the agreement. *See id.* ("[I]f the chosen forum is an integral part of the agreement to arbitrate . . . then the failure of the chosen forum will preclude arbitration because courts may not use *section 5* to circumvent the parties' designation of an exclusive arbitral forum." citing *Grant*, 678 S.E.2d at 438 (quoting *Brown*, 211 F.3d at 1222, and *In re Salomon Inc. Shareholders Derivative Litigation*, 68 F.3d 554, 561 (2d Cir. 1995))).

Furthermore, when presented with an arbitration agreement in the nursing home context which mirrors the precise choice of forum language of the instant arbitration agreement, the Superior Court of Pennsylvania held that the NAF's unavailability rendered the agreement unenforceable. *Stewart*, 9 A.3d at 219 (recognizing that the "legal conclusion that the [arbitration] Agreement [is] unenforceable due to the NAF's unavailability is supported by a majority of the decisions that have analyzed language similar to that in the Agreement.").

The *Stewart* holding is supported by many state and federal courts across the country which considered arbitration agreement language similar to that present in the case at bar. *See, e.g., Carideo*, 2009 U.S. Dist. LEXIS 104600 at 19 (finding that: the NAF's unavailability "presents compounding problems that threaten to eviscerate the core of the parties' agreement", "[t]o appoint a substitute arbitrator would constitute a wholesale revision of the arbitration clause", and concluding that the arbitration agreement is not enforceable); *Carr*, 918 N.E.2d 598; *Khan v. Dell, Inc.*, 2010 U.S. Dist. LEXIS 85042 at 12-13 (D.N.J. Aug. 18, 2010) (finding that the arbitration agreement's plain language illustrates the parties intent to arbitrate before the NAF, not simply a general intent to arbitrate, and because the language is mandatory, not permissive, "the unavailability of the NAF precludes arbitration [and] the Court cannot appoint a substitute arbitrator and compel the parties to submit to an arbitration proceeding to which they have not agreed."); *Ranzy*, 393 Fed. Appx. 174; *Rivera*, 259 P.3d at 815 (holding that "arbitration before the NAF was integral to the agreement to arbitrate and that § 5 of the FAA does not allow a court to select and impose on the contracting parties a substitute arbitrator inconsistent with the plain terms of their contract."); *Klima v. The Evangelical Lutheran Good Samaritan Society*, 2011 U.S. Dist. LEXIS 129486 (D. Kan. Nov. 8, 2011).

2. The Arbitration Agreement At Issue Does Not Contain A Severability Clause.

Some courts have relied on the presence of a severance provision[4] in the arbitration agreement at issue to infer that the parties' designation of the NAF as the arbitrator was not integral to the agreement, and thus, the provision prescribing the NAF does not invalidate an entire arbitration agreement. *See, e.g., Jones*, 684 F. Supp. 2d 1161, 1167; *Levy v. Cain*, 2010 U.S. Dist. LEXIS 9537 at 15-16 (S.D. Ohio Jan. 15, 2010). While at least one court has held that the presence of a severance provision alone is not determinative of this issue,[5] in the case at bar, *no severance provision* is contained in the arbitration agreement. Accordingly, the subject agreement fails as a whole because of the unavailability of the chosen forum, the NAF.

---

[4] By way of illustration, such a severance provision may state: "[i]n the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall be effective." *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161 at 1167 (D.S.D. 2010).

[5] *Stewart*, 9 A.3d at 221 ("In light of the plain language of the Agreement, and the importance of the unenforceable, essential provisions of the Agreement, we conclude that the severability clause cannot save the Agreement or override the fact that the NAF and the NAF Code were an integral part of the Agreement.").

It is evident that the arbitration agreement at issue contemplates the NAF as the sole and exclusive forum in which to arbitrate claims asserted by the parties. As this Court has held, arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1988) (internal citations omitted).

Therefore, because the subject arbitration agreement prescribes the NAF as the sole arbitrator, the agreement is invalid regardless of how this Court may address the question presented by the Petition. Thus, it follows that compelling reasons do not exist to warrant this Court's review of the decision below, because upon remand, the end result will be the same for the parties to this action – arbitration will be denied.

B. The Arbitration Agreement Is Unconscionable As A Matter Of Law.

In addition to the NAF's unavailability discussed above, adequate discovery and development of the circumstances surrounding the arbitration agreement will substantiate a finding that the arbitration agreement at issue is unconscionable as a matter of law, and thus unenforceable, just as in *Brown* and

Taylor. Pet. App. at 12a. As an initial matter, the West Virginia Supreme Court noted that with respect to all three cases (*Marchio, Brown* and *Taylor*), the subject residents

> were admitted to the defendants' nursing home facilities, not because they wanted to be, but because they needed to be admitted as a result of physical and mental impairments. As a general matter, it was a stressful and confusing time for each resident's family. And buried in each admission agreement was an arbitration clause compelling each resident to give up their constitutional right to access to the courts to air their grievances.

Pet. App. at 86a. With respect to the instant matter in particular, the Court recognized that the arbitration agreement was indeed "buried" in the 73-page admission agreement, being found at pages 35 and 36. *Id.* at 20a. Additional facts developed on remand will further demonstrate the "overall and gross imbalance, one-sidedness, or lop-sidedness" in the subject arbitration agreement – thus justifying a court's refusal to enforce the same pursuant to state contract law principles. *Id.* at 64a, citing *McGinnis v. Cayton*, 312 S.E.2d 765, 776 (W.Va. 1984).

A finding of unconscionability is a fundamental, nondiscriminatory ground for the revocation of any contract, consistent with the "savings clause" of Section 2 of the FAA. 9 U.S.C. § 2 (arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity

for the revocation of any contract."). The West Virginia Supreme Court made such an unconscionability determination by invalidating an arbitration agreement in 2005 in its decision in *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914 (W.Va. 2005), *cert. denied*, 546 U.S. 958 (2005) (The arbitration agreement "must fail under general contract law principles in this state as it is an unconscionable contract of adhesion and it lacks consideration.").

Insofar as the subject arbitration agreement is invalid and unenforceable on sufficient bases independent from those relied upon by the West Virginia Supreme Court, there are no compelling reasons which necessitate this Court's review. Thus, the Petition should be denied.

II. The West Virginia Supreme Court's Holding Was Based Upon *Grounds As Exist At Law Or In Equity For The Revocation Of Any Contract.*

In rendering the decision below, the West Virginia Supreme Court ruled in accordance with the "savings clause" of Section 2 of the FAA. Contrary to Petitioners' assertion, the lower Court's decision was not a whimsical act of hostility towards arbitration agreements (Pet. at 29), but rather the result of the application of established contract law principles to the unique circumstance of nursing home residents. While Petitioners would utilize the lower Court's decision as evidence that the West Virginia Supreme

Court has a bias against arbitration, the West Virginia Supreme Court has enforced arbitration agreements when based upon valid contracts. *See, e.g., Berkeley v. Miller*, 236 S.E.2d 439 (W.Va. 1977) (holding that when an arbitration agreement is fair, bargained for, and provides a reasonable method of conflict resolution it shall be upheld); *State ex rel. Wells v. Matish*, 600 S.E.2d 686 (W.Va. 2004) (enforcing an arbitration clause in an employment contract); *State ex rel. Clites v. Clawges*, 685 S.E.2d 693 (W.Va. 2009) (enforcing an arbitration clause in an employment contract).

A. This Court's Precedents Create The Framework For The Revocation Of Arbitration Agreements Premised Upon General State Law Contract Defenses.

Recognizing that Congress did not intend to occupy the entire field of arbitration (*Volt*, 489 U.S. at 477), this Court has held that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Moreover, "arbitration is simply a matter of contract between the parties", *id.* at 943, and as the savings clause of Section 2 of the FAA indicates, "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more

so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967).

Accordingly, this Court has repeatedly held that state laws may apply to arbitration agreements "*if* that [state] law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally", *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996), quoting *Perry v. Thomas*, 482 U.S. 483, 492, n.9 (1987), and "generally applicable contract defenses . . . may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]". *Id. See also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Rodriquez de Quijas v. Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

B. The West Virginia Supreme Court's Decision Is Consistent With Its Decisions Concerning Pre-Injury Exculpatory Agreements.

The West Virginia Supreme Court examined the line of cases which it deemed most on-point – those involving "pre-injury contracts immunizing one party from liability for negligence toward another party." Pet. App. at 79a. In such cases, the West Virginia Supreme Court has held that pre-injury exculpatory agreements are unenforceable on public policy grounds if the agreement protects a party with a duty of public service. *Murphy v. N. Am. River Runners, Inc.*, 412 S.E.2d 504 (W.Va. 1991); *Kyriazis v. Univ. of W. Va.*, 450 S.E.2d 649 (W.Va. 1994); *accord Tunkl v.*

Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963); *Schutkowski v. Carey*, 725 P.2d 1057 (Wyo. 1986). The West Virginia Supreme Court further noted that consistent with the aforementioned cases, it would carefully examine *any* pre-dispute contract by which a party tried to avoid liability for its negligent conduct. Pet. App. at 84a.

With respect to the case at bar, the West Virginia Supreme Court concluded that "the arbitration clauses at issue plainly involve a public service" as evidenced by the fact that the nursing home industry is subject to stringent governmental regulations, and because nursing homes are of importance and practical necessity to the public. Pet. App. at 85a. Therefore, the West Virginia Supreme Court held that, as a matter of public policy, "an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." *Id.* at 85a-86a. Importantly, however, the West Virginia Supreme Court held that no law or public policy prohibited a nursing home resident from voluntarily entering into a *post*-negligence/injury arbitration agreement. Pet. App. at 85a, n.157.[6]

---

[6] "There is nothing in the law or public policy, however, that stops a resident, *after negligence has occurred*, and after the parameters of risk are better defined, from voluntarily entering into a contract separate and apart from the admission agreement to arbitrate any claims arising from the negligence."

The consideration of public policy is a nondiscriminatory justification for revoking contracts generally, entirely consistent with § 2 of the FAA. Further, this Court has recognized the appropriateness of public policy invalidating contracts (*e.g., W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) ("As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy."); *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948) ("Where the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial power."); *see also* Restatement (Second) of Contracts § 178 (1981) ("A . . . term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."). Also, the field of contract law is an area "traditionally occupied" by the states, *United States v. Locke*, 529 U.S. 89, 108 (2000); citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and this Court has recognized that it is appropriately reluctant to second-guess a state court's articulation of its own law. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *see also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

In the instant matter, the West Virginia Supreme Court properly applied the precedents of this Court and properly applied general contract principles when issuing the decision below. Accordingly, there are no compelling reasons to constitute a basis for the

review of the decision of the West Virginia Supreme Court, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, Petitioners have not established compelling reasons for this Court to grant their Petition, nor for summary reversal. Accordingly, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FRANK E. SIMMERMAN, JR.
Counsel of Record
CHAD L. TAYLOR
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
Email: fes@simmermanlaw.com

Counsel for Respondent

November 2011