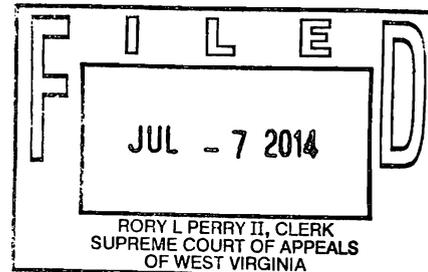


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0441

SCHUMACHER HOMES OF
CIRCLEVILLE, INC., a foreign
corporation,

Defendant Below,
Petitioner,



v.

JOHN SPENCER, AND
CAROLYN SPENCER,

Plaintiffs Below,
Respondents.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by ignoring the choice of law provision in the parties' contract and failing to apply Ohio law to the Arbitration Agreement therein.

2. The Circuit Court erred by ruling on questions of arbitrability despite the existence of a provision in the parties' Arbitration Agreement that vested the arbitrator with authority to determine all issues of arbitrability relating to the dispute.

3. The Circuit Court erred by relying on challenges to the contract as a whole, rather than challenges to the parties' Arbitration Agreement, when it determined the Arbitration Agreement is unconscionable.

4. The Circuit Court erred by concluding that the parties' Arbitration Agreement is unconscionable absent any findings of fact, or evidence in the record, to support its conclusion that the Arbitration Agreement is procedurally unconscionable.

5. The Circuit Court erred by concluding that the parties' Arbitration Agreement is substantively unconscionable because its finding that Schumacher "has effectively eliminated its need for arbitration while simultaneously requiring arbitration for the plaintiffs" is clearly erroneous.

6. The Circuit Court erroneously relied on West Virginia Code section 46A-2-121 to void the parties' Arbitration Agreement because there are no findings of fact or conclusions of law, or any evidence in the record, to indicate that Article 2 of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101, *et seq.* ("WVCCPA"), applies in this case.

7. The Circuit Court erroneously relied on West Virginia Code section 46-2A-108 to void the parties' Arbitration Agreement when there are no findings of fact, or evidence in the

record, to support the application of this, or any, section of Article 2A, titled "Leases," of the Uniform Commercial Code, W. Va. Code §§ 46-1-101, *et seq.* ("UCC") to the action below.

II. STATEMENT OF THE CASE

A. Factual Background.

On June 6, 2011, respondents John and Carolyn Spencer ("Respondents") entered into a contract with petitioner Schumacher Homes of Circleville, Inc. ("Schumacher") for the construction of a residence and improvements on the property situated at Lot 207 Pleasant Street, Milton, West Virginia 25541 ("Contract"). (A.R. 37, 40.) The Contract contains a clause in bold font under the heading "**Arbitration**" (hereinafter "Arbitration Agreement") (A.R. 38, 45.) The Arbitration Agreements provides as follows:

The Parties agree that any claim, dispute or cause of action, of any nature, including but not limited to, those arising in tort, contract, statute, equity, law, fraud, intentional tort, breach of statute, ordinance, regulation, code, or other law, or by gross or reckless negligence, arising out of or related to, the negotiations of the Contract Documents, the Home, the Property, materials or services provided to the Home or Property, the performance or non-performance of the Contract Documents or interaction of Homeowner(s) and Schumacher or its agents or subcontractors, shall be subject to final and binding arbitration by an arbitrator appointed by the American Arbitration Association in accordance with the Construction Industry Rules of the American Arbitration Association and judgment may be entered on the award in a court of appropriate venue. Further, the Emergency Measures of Protection Rules shall be applicable. Each party shall be responsible for one-half of the arbitrator's fees. The arbitration proceeding will include all parties to the construction process who have signed any document incorporating or referring to this Agreement. The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute. The powers of the arbitrator(s) shall include all legal and equitable remedies, including but not limited to, money damages, declaratory relief, and injunctive relief. Should any party refuse or neglect to appear at and participate in arbitration proceedings after due notice, the arbitrator will make an award based on evidence introduced by the parties who do appear and participate. If any state or federal law prohibits binding arbitration for any of the parties' claims, then the parties may proceed to non-binding arbitration of those claims, and all other claims will remain subject to binding arbitration as provided herein. Further, the parties must proceed with non-binding arbitration as a condition precedent to filing any claim in a court of law. The parties understand that by agreeing to binding arbitration they are agreeing to arbitrate and not

litigate their disputes and are giving up their right to a trial by jury, and to have a trial to a judge, or to seek remedies from a court. This arbitration paragraph shall not be interpreted as waiver of Schumacher's mechanic's lien rights. Either party's filing of a complaint asserting various claims and demanding arbitration of said claims, shall not constitute a waiver of this arbitration paragraph.

(*Id.* (bold font omitted).) Respondents' initials appear on the same page as the Arbitration Agreement, in close proximity to it. (A.R. 45; *see* A.R. 342-43 (alerting the Circuit Court to the same).)

The Contract further provides that "[t]he Contract documents shall be governed by and construed in accordance with the laws of the State of Ohio." (A.R. 47.) Although the Contract provides that arbitrations shall be "venued exclusively in Stark County, Ohio" (A.R. 38, 47), Schumacher waived, for purposes of this lawsuit, that clause in the Arbitration Agreement and expressly agreed to arbitrate Respondents' claims at a location in Mason County, West Virginia, where they reside. (*Id.*)

B. Procedural Background.

On July 11, 2013, Respondents filed a Complaint with the Circuit Court alleging 10 counts against Schumacher, Davis Heating & Cooling Company, Inc. ("Davis"), and GZG Construction, LLC, which has since been voluntarily dismissed from the below civil action (A.R. 315-16). Those 10 counts do not contain headings identifying the claims alleged; however, those claims may be stated as follows: (1) revocation of acceptance of the Contract; (2) breach of express and implied warranties, including the Magnuson-Moss Warranty Act, 15 U.S.C. § 2308; (3) breach of the implied warranty of merchantability; (4) breach of the implied warranty of fitness for a particular purpose; (5) breach of the duty of good faith pursuant to West Virginia Code § 46-1-203; (6) unfair and deceptive acts and practices in violation of section 6-102 of the WVCCPA; (7) unconscionable purchase price; (8) fraud (including actual, constructive, innocent

misrepresentation, and negligent misrepresentation); (9) negligence; and (10) civil conspiracy. (A.R. 21-27.)

Respondents neglected to submit their claims to arbitration in accordance with their Contract. (*See* A.R. 45-46.) On August 12, 2013, Schumacher asserted its right to enforce the Arbitration Agreement by filing “Schumacher Homes of Circleville, Inc.’s Motion to Dismiss this Proceeding and Compel Arbitration or, in the Alternative, to Stay this Proceeding Pending Arbitration” (“Motion to Compel Arbitration”) (A.R. 30-231) and an accompanying memorandum of law (A.R. 232-44.) On November 8, 2013, Respondents filed their “Response to Defendant Schumacher Homes of Circleville, Inc.’s Motion to Dismiss this Proceeding and Compel Arbitration or, in the Alternative, to Stay this Proceeding Pending Arbitration[.]” in which they opposed Schumacher’s Motion to Compel Arbitration. (A.R. 258-314.) Davis took no position with regard to the Arbitration Agreement between Respondents and Schumacher, but Davis sought to bifurcate Respondents’ claims against Davis from those against Schumacher.

The Circuit Court heard oral argument and solicited a contemporaneous exchange of competing orders on Schumacher’s Motion to Compel Arbitration and Davis’ motion to bifurcate. On March 6, 2014, the Circuit Court entered an order denying Schumacher’s Motion to Compel Arbitration. (A.R. 3-10.) It entered an order denying Davis’ motion to bifurcate. (A.R. 11-13.) Only the order denying Schumacher’s Motion to Compel Arbitration is at issue on appeal.

On March 24, 2014, Schumacher moved the Circuit Court to stay the civil action pending appeal. (A.R. 333-38.) In fact, it filed its motion to stay several days before its Notice of Appeal was due because Respondents continued to insist on conducting discovery, even though the proper forum – which is a threshold question in this lawsuit – is the central issue on appeal.

(A.R. 363-71.) On April 7, 2014, Schumacher filed its Notice of Appeal in this civil action. On May 23, 2014, the Circuit Court conducted a hearing on Schumacher's motion to stay pending appeal, but it has not yet issued a ruling on the same.

C. The Circuit Court's Order Denying Schumacher's Motion to Compel Arbitration.

The Circuit Court's March 6, 2014 Order denied Schumacher's Motion to Compel Arbitration on the basis of unconscionability. (A.R. 8-9.) The Order, which contains 18 numbered paragraphs, is not divided into findings of fact and conclusions of law. However, each paragraph addresses a new point. Paragraph 1 addresses the formation of the parties' Contract, generally. (A.R. 3.) Paragraph 2 outlines the allegations in Respondents' Complaint. (A.R. 4.) Paragraphs 3 through 8 set forth general West Virginia and federal law regarding arbitration and motions to compel arbitration agreements.¹ (A.R. 6-7.) Paragraphs 9 through 14 relate to unconscionability, generally, and find that the Arbitration Agreement is procedurally and substantively unconscionable. (A.R. 8.) Paragraph 15 makes findings about Schumacher's reservation of rights to file mechanic's liens and concludes that Schumacher "effectively eliminated its need for arbitration while simultaneously requiring arbitration for the plaintiffs." (A.R. 8.) Paragraph 16 concludes that the Arbitration Agreement must be voided. (A.R. 9.) Paragraph 17 makes a finding of unconscionability based on the lease provision of the UCC, Chapter 46-2A-108. (A.R. 9.) Chapter 18 makes a finding of unconscionability based on section 2-121 of the WVCCPA. (A.R. 9.)

¹ Schumacher's Motion to Compel Arbitration cited the Federal Arbitration Act, as well as West Virginia and law applicable in Ohio because, under all three tests, the *outcome* is the same, and therefore, Ohio law is not contrary to West Virginia law or in conflict with the federal arbitration scheme. At the hearing on Schumacher's motion, it focused heavily on the applicability of Ohio law. (A.R. 346.)

III. SUMMARY OF ARGUMENT

Schumacher and Respondents entered into a Contract containing an Arbitration Agreement, as well as a choice of law provision selecting Ohio law to govern their Contract. Subsequently, Respondents became dissatisfied. Instead of filing for arbitration in accordance with their Contract requirements, Respondents filed the civil action from which this appeal arises. Schumacher moved to compel arbitration, and the Circuit Court denied its motion.

In denying Schumacher's Motion to Compel Arbitration, the Circuit Court ignored its duty to analyze the choice of law issues in this case. Then, it ignored the restrictions on its role in deciding arbitrability because the Arbitration Agreement contains a provision that delegates that responsibility to the arbitrator. Next, the Circuit Court further ignored restrictions on its role in deciding arbitrability when it failed to consider the nature of Respondents' allegations and note that none (particularly in the Complaint) challenge the Arbitration Agreement specifically, rather than the Contract as a whole.

Once the Circuit Court reached the merits of arbitrability (a topic it should never have reached), it continued to err in its analysis of unconscionability. The Circuit Court made no specific findings of fact to support its conclusions that the Arbitration Agreement is both procedurally and substantively unconscionable. It concluded that the Arbitration Agreement would not be applied equally as to Schumacher and Respondents, but it based that conclusion on a complete misreading of the Contract and misunderstanding of Ohio law.

Finally, the Circuit Court found the Arbitration Agreement unconscionable for reasons not even germane to this civil action. The Circuit Court apparently found that the sheer fact that Respondents had alleged any claims under the WVCCPA and the UCC was sufficient to employ other (unrelated) provisions within those code sections (without any facts establishing their

applicability) to find the Arbitration Agreement unconscionable. There is no justifiable reason for applying code sections that do not apply to the facts of a case, simply to arrive at the conclusion a court may desire. There is no evidence to support that the Arbitration Clause is anything but enforceable. The Circuit Court’s conclusion to the contrary is error.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule 18(a) of the West Virginia Rules of Appellate Procedure, Schumacher respectfully requests that this Court grant oral argument under Revised Rules 19(a)(1), 19(a)(2), and 19(a)(3). Rule 19(a)(1) provides for oral argument when cases involve “assignments of error in the application of settled law” The first assignment on appeal involves choice of law in applying the parties’ Arbitration Agreement, which involves the application of settled law in West Virginia. Rule 19(a)(2) provides for oral argument when cases claim “an unsustainable exercise of discretion where the law governing that discretion is settled” The second and third assignments of error concern the Circuit Court’s inquiry into arbitrability when, pursuant to settled law and the facts of this case, it had no authority to address arbitrability and should have referred that issue to arbitration. Finally, Rule 19(a)(3) provides for oral argument where cases claim “insufficient evidence or a result against the weight of the evidence” Several of the remaining assignments of error address findings of fact that are contrary to the weight of the evidence – or which are devoid of any evidence. For these reasons, oral argument is proper.

V. ARGUMENT

A. Jurisdiction.

“An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.” Syl. pt. 1, *Credit Acceptance*

Corp. v. Front, 231 W. Va. 518, 745 S.E.2d 556 (2013). Schumacher appeals the March 6, 2014 Order from the Circuit Court of Mason County, West Virginia, that denies “Schumacher Homes of Circleville, Inc.’s Motion to Dismiss this Proceeding and Compel Arbitration or, in the Alternative, to Stay this Proceeding Pending Arbitration.” An immediate appeal of this Order is proper.

B. Standard of Review.

On appeal to this Court, “review of whether [an] [arbitration] [a]greement represents a valid and enforceable contract is *de novo*.” *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, n.12, 724 S.E.2d 250, 267 n.12 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201 (2012) (“*Brown P*”) (quoting *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005)). Likewise, “[i]nterpreting a statute . . . presents a purely legal question subject to *de novo* review.” Syl. pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011). “Generally, findings of fact are reviewed for clear error” Syl. pt. 1, in part, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 210, 470 S.E.2d 162, 164 (1996). “However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*. *Id.*, in part.

C. Because the Contract contains a choice of law provision, the Circuit Court was required to apply the Arbitration Agreement contained therein pursuant to Ohio law.

The Circuit Court failed to consider the parties’ choice of law governing their contract documents, including their Arbitration Agreement. In West Virginia, a choice of law provision is presumptively valid “(1) unless the provision bears no substantial relationship to the chosen jurisdiction or (2) the application of the laws of the chosen jurisdiction would offend the public

policy of this State.” *Manville Pers. Injury Settlement Trust v. Blankenship*, 231 W. Va. 637, 749 S.E.2d 329, 336 (2013) (citations omitted); see *Landis v. Jarden Corp.*, No. 2:11-cv-101, 2014 WV 790917, *3 (N.D.W. Va. Feb. 26, 2014).

Because Schumacher is an Ohio corporation that contracted with Respondents, the relationship between the Contract and the State of Ohio is not insubstantial. Further, Ohio’s law regarding the enforceability of arbitration agreements is similar to West Virginia law, as well as the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (“FAA”), on which West Virginia’s arbitration law is based. See Ohio Rev. Code § 2711.01(A) (codifying section 2 of the FAA by providing that arbitration agreements “shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.”); see *Norman v. Schumacher Homes of Circleville, Inc.*, 994 N.E.2d 865, 872 (Ohio Ct. App. 2013); 9 U.S.C. § 2; Syl. pt. 6, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250 (incorporating and acknowledging 9 U.S.C. § 2).

Indeed, defenses to contracts are similar in Ohio as in West Virginia. In both jurisdictions, “[u]nconscionability is a ground for revocation of a contract.” *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 20 (Ohio 2008); Syl. pt. 9, in part, *Brown*, 228 W. Va. 646, 724 S.E.2d 250 (“Generally applicable contract defenses – such as laches, estoppel, waiver, fraud, duress, or unconscionability – may be applied to invalidate an arbitration agreement”); see *Jones v. U-Haul Co. of MA and OH Inc.*, No. 2:13-cv-1265, 2014 WL 1670099, *6 (S.D. Ohio Apr. 23, 2014). “Unconscionability includes both ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’” *Id.* (quoting *Lake Ridge Acad. v. Carney*, 613 N.E.2d 183 (Ohio 1993) (citations omitted)); Syl. pt. 12, in part, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250 (“The doctrine of unconscionability means that because of an overall and gross imbalance, one-sidedness or lop-

sidedness in a contract, a court may be justified in refusing to enforce the contract as written.”). “The party asserting unconscionability of a contract bears the burden of providing that the agreement is both procedurally and substantively unconscionable.” *Id.*; Syl. pt. 20, in part, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250 (“A contract term is unenforceable if it is both procedurally and substantively unconscionable.”); *see Rembert v. J.C. Penney Corporation*, No. 2:13-cv-1074, 2014 WL 790785 (S.D. Ohio Feb. 26, 2014).

In this case, the contract defense that Respondents have attempted to raise against the Arbitration Agreement is unconscionability. As shown and demonstrated to the Circuit Court, Ohio’s laws on arbitration and the unconscionability defense are similar to those in West Virginia. (A.R. 346-47.) Because Ohio law enforces arbitration agreements consistently with West Virginia’s (and the federal) approach to the same, West Virginia’s public policy would not have been offended by applying Ohio law to the instant arbitration agreement.

At oral argument, Schumacher advised the Court that Ohio law controlled and it advised the Court that Ohio law aligned with West Virginia law, thereby simplifying the Circuit Court’s application of the proper law. (A.R. 346.) Nonetheless, the Circuit Court’s order does not even make a ruling on which law applies. It does not mention Ohio law at all. (A.R. 3-10.)

By ignoring Ohio law, the Circuit Court failed to give full force and effect to the Contract. Considering the wrong law and the wrong precedent, even if such law is similar, is an error. Not long ago, this Court remanded *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91, 736 S.E.2d 91 (2012), in part to determine the proper law to apply in light of varying choice of law provisions in the contracts at issue in that case. Because choice of law is a threshold issue, the Circuit Court should have decided it and it was error for it not to.

D. The Circuit Court exceeded its authority by ruling on the validity of the parties' Arbitration Agreement despite the existence of a provision in the parties' Arbitration Agreement that vested the arbitrator with authority to determine all issues of arbitrability relating to the dispute.

The Circuit Court erred by ignoring the parties' agreement that the arbitrator should determine issues of arbitrability. Specifically, the Contract provides that “[t]he arbitrator(s) shall determine **all issues** regarding the **arbitrability** of the dispute.” (A.R. 45 (emphasis added).) This provision, commonly known as a “Delegation Clause,” is valid and enforceable under Ohio law. *Cheney v. Sears, Roebuck and Co.*, No. 04AP-1354, 2005 WL 1515388, *4 (Ohio Ct. App. June 28, 2005) (“When the parties ‘have clearly and unmistakably vested the arbitrator with the authority to decide the issue of arbitrability, the question of whether a matter is arbitrable is to be decided by the arbitrator.’” (quoting *Von Arras v. Columbus Radiology Corp.*, No. 04AP-934, 2005 WL 1220735, *4 (Ohio Ct. App. May 24, 2005))). Ohio law comports with the Supreme Court of the United States, which in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777-78 (2010), acknowledged the validity of such clause. *See also Brown I*, 228 W. Va. at 675, 724 S.E.2d at 279 (acknowledging that under federal the doctrine of severability, “if a contract is written with a ‘delegation provision’ that delegates to an arbitrator the authority to resolve *any* dispute about the enforceability of the contract, then . . . the arbitrator alone will have the authority to determine if the arbitration clause is valid – unless, of course, a party specifically challenges the delegation provision . . .”).

Schumacher advised the Court of the Delegation Provision and the effect thereof at oral argument on its Motion. (A.R. 344-45.) Respondents did not challenge the Delegation Provision in their Complaint or offer any contract defense specifically to the Delegation Provision. In fact, Respondents offered no evidence or argument to refute the enforceability of the clause. (A.R. 14-29.) Absent a challenge to the Delegation Provision itself, the Circuit Court should have

enforced the parties' Arbitration Agreement according to its terms, just like it would enforce any other contract, and refer the civil action to arbitration. *See Norman v. Schumacher Homes of Circleville, Inc.*, 994 N.E.2d 865, 877 (Ohio Ct. App. 2013). It did not. Because the Circuit Court should never have decided arbitrability and its ultimate decision on that issue has prejudiced Schumacher's rights under the Contract, reversal is proper. An arbitrator, not the Circuit Court, should have determined the threshold questions of arbitrability.

E. The Circuit Court improperly considered threshold issues of arbitrability when it relied on challenges to the contract as a whole, rather than challenges to the parties' Arbitration Agreement, to invalidate the same.

The Circuit Court next erred by considering challenges to the parties' contract as a whole as bases for invalidating the parties' Arbitration Agreement. Independent of the operation of a Delegation Provision, challenges to a contract as a whole, rather than challenges to the arbitration agreement, should be decided by the arbitrator. *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 22 (Ohio 2008); *see Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 1209 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S. Ct. 1801, 1805-06 (1967).

Again, this implicates the doctrine of severability, which "serves to save an arbitration clause from being rescinded when a claimant attempts to rescind an entire contract." *Household Realty Corp. v. Rutherford*, No. 20183, 2004 WL 1077369, *8 (Ohio Ct. App. May 14, 2004). In *Norman v. Schumacher Homes of Circleville, Inc.*, 994 N.E.2d 865, 876 (Ohio Ct. App. 2013), the court explained that, "[b]ecause the arbitration clause is a separate entity, it only follows that an alleged failure of the contract in which it is contained does not affect the provision itself." *Id.* (quoting *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574, 577 (1998) (also stating that "R.C. Chapter 2711 mirrors the federal jurisprudence in its acknowledgment of the severability of the

arbitration clause from the remainder of the contract.”)). Indeed, failure to challenge an arbitration agreement in the Complaint can result in waiver of the right to challenge the arbitration agreement. *Garber v. Buckeye Chrysler-Jeep-Dodge of Shelby, L.L.C.*, No. 2007-CA-0121, 2008 WL 2789074, *3 (Ohio Ct. App. July 14, 2008) (“We find because appellants’ complaint did not challenge the arbitration clause, appellants have waived any such challenge.”)

Specifically, the Circuit Court considered, in part, that “[t]he plaintiffs’ Complaint includes claims under the Uniform Commercial Code” as a basis for invalidating the parties’ arbitration agreement pursuant to West Virginia Code section 46-2A-108. Section 46-2A-108, which applies to leases (and is not at issue here, as discussed, *infra*), provides that a “lease contract or any clause of a leased contract may be voided if it is either procedurally or substantively unconscionable.” (A.R. 9.) The Court’s conclusion in Paragraph 17 of the Order is solely based on Respondents’ allegations in the Complaint, which relate to the Contract as a whole and not the Arbitration Agreement. Specifically, the Circuit Court considered and invalidated, in part, the Arbitration Agreement based on the fact that “[t]he plaintiffs’ claims against Schumacher include claims under the West Virginia Consumer Credit and Protection Act.” (A.R. 9.) Challenges to the contract (or performance thereof) as a whole, rather than tailored to the arbitration agreement, are properly within the province of the arbitrator instead of the court. *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d at 22.

Once again, the Circuit Court exercised jurisdiction to decide questions of arbitrability where it had none. Under Ohio law (and indeed prevailing federal and West Virginia law), such threshold questions are properly within the province of an arbitrator unless a party specifically challenges the contract clause referring disputes to arbitration. That is not to say that Arbitration Agreements cannot be challenged, but rather that they must be challenged in the right place.

Schumacher explained this to the Circuit Court. (A.R. 345.) Yet, the Circuit Court did not consider the scope of Respondents' claims in the Complaint. Because Respondents did not specifically challenge the Arbitration Agreement in this case, the Circuit Court should have enforced the Contract pursuant to its terms and referred the matter to arbitration.

F. Because the record is devoid of any evidence to support the Circuit Court's conclusion that the Arbitration Agreement is procedurally unconscionable, the Circuit Court erred when it invalidated the Arbitration Agreement as unconscionable.

The Circuit Court, relying on West Virginia's (rather than Ohio's) test for unconscionability, acknowledged the need for some degree of both procedural and substantive unconscionability in order to find the parties' Arbitration Agreement unconscionable. (A.R. 7 (citing Syl. pt. 20, *Brown I*, 268 W. Va. 646, 724 S.E.2d 250).) Although Ohio law should have been applied in this case, the test for unconscionability in Ohio is similar to that in West Virginia. Both states look to the formation of the contract and the fairness of the contract as a whole. *Compare Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 20 (Ohio 2008) and *Murea v. Pulte Group, Inc.*, No. 100127, 2014 WL 504848, *2-3 (Ct. App Ohio Feb. 6, 2014) with *Brown I*, 228 W. Va. 646, 724 S.E.2d 250.

Even under West Virginia law, the findings of fact in this case do not support the Circuit Court's conclusion of law that the Arbitration Agreement is procedurally unconscionable. The Circuit Court merely concluded that "Schumacher's arbitration provision in the Contract with the plaintiffs is procedurally unconscionable." (A.R. 7.) The Circuit Court made no findings of fact to support its conclusory statement that the arbitration provision is procedurally unconscionable. (See A.R. 7.) In fact, the only finding of fact made by the Circuit Court that relates to the formation of the parties' Arbitration Agreement is in footnote 1 of the Order, wherein the Circuit Court acknowledged Schumacher's agreement to arbitrate Respondents' claims at a location in

Mason County, West Virginia, instead of enforcing the venue provision contained within the Arbitration Agreement. (A.R. 4.) The record contains no basis for the Circuit Court’s finding of procedural unconscionability, either. Accordingly, the Circuit Court should not have invalidated the parties’ Arbitration Agreement as “unconscionable.”

G. The Circuit Court erred by concluding that the Arbitration Agreement was so one-sided as to be substantively unconscionable solely because the Arbitration Agreement carved out the filing of mechanic’s liens from arbitration.

The Circuit Court found that the parties’ Arbitration Agreement reserves for Schumacher the right to file suit to enforce a mechanic’s lien. (A.R. 8.) It further determined that “[r]ealistically, Schumacher would not need judicial intervention for anything other than the collection of money under a contract of this nature.” (*Id.*) Accordingly, it posited that, “[w]ith mechanic’s liens being the most effective action to take on this matter, Schumacher understands that it has effectively eliminated its need for arbitration while simultaneously requiring arbitration for the plaintiffs.” (*Id.*)

The foregoing findings of fact and application of fact to law are clearly erroneous. The contract at issue, which was in the record before the Circuit Court, provides in the Arbitration Agreement that “any claim, dispute or cause of action, of any nature, including but not limited to, those arising in tort, contract, statute, equity, law, fraud, intentional tort, breach of statute, ordinance, regulation, code, or other law, or by gross or reckless negligence, arising out of or related to, the negotiations of the Contract Documents, the Home, the Property, materials or services provided to the Home or Property, the performance or non-performance of the Contract Documents or interaction of Homeowner(s) and Schumacher or its agents or subcontractors, shall be subject to final and binding arbitration” (A.R. 45.) This provision applies equally to Schumacher and Respondents. Schumacher presented to the Circuit Court a variety of claims

that Schumacher could have against Respondents, other than demands for payment and enforcement of its lien, which would be arbitrated under the contract, including breach of various provisions of the parties' contract. (A.R. 351-52.) The Circuit Court considered none of these.

The fact that the Arbitration Agreement contains an exception to preserve Schumacher's mechanic's lien rights does not render the Arbitration Agreement substantively unconscionable. Although the contract provides that the Arbitration Agreement does not waive Schumacher's rights to file a mechanic's lien, (*id.*), the Contract also evidences the parties' agreement that "[t]he filing of [a mechanic's] lien shall not affect the parties' right and ability to arbitrate" (A.R. 47.) This makes sense because Ohio Revised Code § 2711.02 prescribes that mechanic's liens involving title to real estate cannot be arbitrated (they have to be filed in court).² Further, Schumacher has not obtained a mechanic's lien on Respondents' home, so this issue is immaterial in this case. Because the Circuit Court's finding and subsequent conclusion as to substantive unconscionability are based on a complete misunderstanding of the Contract, the Circuit Court erred in concluding that the Arbitration Agreement is unconscionable.

H. The Circuit Court erroneously relied on West Virginia Code section 46A-2-121 to void the parties' Arbitration Agreement because there are no findings of fact or conclusions of law, or any evidence in the record, to indicate that Article 2 of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101, *et seq.* ("WVCCPA") applies in this case.

The Circuit Court concluded that "[t]he plaintiffs' claims against Schumacher include claims under the West Virginia Consumer Credit and Protection Act, Chapter 46A of the West Virginia Code. Section 46A-2-121 thereof provides that a contract may be voided if it was 'induced by unconscionable conduct' or if the agreement or transaction was 'unconscionable at

² In *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372, 396 (2013), this Court acknowledged a variety of acceptable exclusions to arbitration regarding security interests and other mechanisms that are heavily regulated by statute.

the time it was made.” (A.R. 9.) Although it is true that Respondents have alleged claims under the WVCCPA in their Complaint, such allegations have not yet been proven.

The Circuit Court did not make any findings of fact to support the application of the WVCCPA, generally. In order for the WVCCPA to apply, Respondents would need to be deemed consumers. W. Va. Code § 46A-1-101(1). The WVCCPA defines “consumer” as “a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan, or debt or other obligations pursuant to a consumer lease.” W. Va. Code § 46A-1-102(12). A “consumer credit sale” is defined as

a sale of goods, services or an interest in land in which: (i) Credit is granted by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a seller credit card; (ii) The buyer is a person other than an organization; (iii) The goods, services or interest in land are purchased primarily for a personal, family, household or agricultural purpose; (iv) Either the debt is payable in installments or a sales finance charge is made; and (v) With respect to a sale of goods or services, the amount financed does not exceed forty-five thousand dollars or the sale is of a factory-built home as defined in [W. Va. Code § 37-15-2]

W. Va. Code § 46A-1-102(13)(a). A “consumer loan” is defined as

a loan made by a person regularly engaged in the business of making loans in which: (a) The debtor is a person other than an organization; (b) The debt is incurred primarily for a personal, family, household or agricultural purpose; (c) Either the debt is payable in installments or a loan finance charge is made; and (d) Either the principal does not exceed forty-five thousand dollars or the debt is secured by an interest in land or a factory-built home as defined in [W. Va. Code § 37-15-2]

W. Va. Code § 46A-1-102(15). A “consumer lease” is defined as

a lease of goods: (i) Which a lessor regularly engaged in the business of leasing makes to a person, other than an organization, who takes under the lease primarily for a personal, family, household or agricultural purpose; (ii) In which the total of payments under the lease, excluding payments for a personal, family, household or agricultural purpose; (iii) In which the total of payments under the lease, excluding payments for options to renew or buy, do not exceed forty-five thousand dollars or in which the lease is of a factory-built home as defined in [W. Va. Code § 37-15-2]

W. Va. Code § 46A-1-102(14)(a). The Circuit Court made no findings to satisfy any one of the three types of financial transactions necessary for Respondents to qualify as a consumer. The record does not disclose any such findings of fact, either.

Further, the Circuit Court did not make any findings of fact to support the application of Article 2 of the WVCCPA, which pertains to “Consumer Credit Protection.” Under Article 2 of the WVCCPA, a “consumer” is “any natural person obligated or allegedly obligated to pay any debt.” W. Va. Code § 46A-2-122. Indeed, the Circuit Court could not have made a finding that Respondents are consumers under Article 2 because there is no allegation anywhere in the record that Respondents are indebted to Schumacher.

Absent findings of fact, or even evidence in the record, that Respondents are, at the very least, “consumers” within the definition of West Virginia Code section 46A-1-102(12), which depends on the definitions of “consumer credit sale” in section 1-102(13), “consumer loan” in section 1-102(15), and “consumer lease” in section 1-102(14), it is error to apply any article or section of the WVCCPA relying on those definitions. Indeed, West Virginia Code section 46A-2-121 even begins: “(1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan” There are not facts in the record, let alone findings of fact made by the Court, to justify the Court’s reliance on section 2-121 of the WVCCPA to void the parties’ Arbitration Agreement.

I. The Circuit Court erroneously relied on West Virginia Code section 46-2A-108 to void the parties’ Arbitration Agreement when there are no findings of fact, or evidence in the record, to support the application of this, or any, section of Article 2A, titled “Leases,” of the UCC.

The Circuit Court concluded that “[t]he Uniform Commercial Code, adopted as Chapter 46 of the West Virginia Code, provides that a lease contract or any clause of a lease contract may

be voided if it is either procedurally or substantively unconscionable. *West Virginia Code* § 46-2A-108. The plaintiffs' Complaint includes claims under the Uniform Commercial Code." (A.R. 9.) Although Respondents have alleged claims under the UCC in their Complaint, such allegations have not yet been proven. The Circuit Court did not make any findings of fact to support the application of the UCC, generally.

Moreover, reliance on section 2A of the UCC is not only misplaced, but contradictory to findings of fact that were made by the Circuit Court. Specifically, the Circuit Court correctly determined from the record that Respondents "entered into a purchase agreement with Schumacher" (A.R. 3.) A purchase agreement is not a lease. There is no evidence in the record to support that the transaction underlying this dispute was a lease contract. Accordingly, the Circuit Court's reliance on section 2A-108 of the UCC to void the parties' Arbitration Agreement is error that must be corrected.

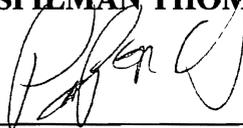
VI. CONCLUSION

This dispute should have been resolved without reaching the Circuit Court. The parties entered into a valid, binding Arbitration Agreement. Respondents' claims should have been compelled to arbitration. Instead, the Circuit Court denied Schumacher's Motion to Compel Arbitration and in so doing committed seven errors. It failed to apply Ohio law pursuant to the parties' choice of law provision. It usurped jurisdiction to address arbitrability by ignoring the Delegation Provision in the Arbitration Agreement, and then ignoring the nature of Respondents' Complaints, none of which targeted arbitration. Then, when the Circuit Court (improperly) undertook its analysis of arbitrability in this case, it erred in making the findings of fact and conclusions of law that lead it to void the Arbitration Agreement on unconscionability grounds. Based on the foregoing, Schumacher respectfully requests that this Honorable Court:

1. reverse the decision of the Circuit Court; and
2. grant such other and further relief as this Court deems just and proper.

SCHUMACHER HOMES OF CIRCLEVILLE, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0441

SCHUMACHER HOMES OF
CIRCLEVILLE, INC., a foreign
corporation,

Defendant Below,
Petitioner,

v.

JOHN SPENCER, AND
CAROLYN SPENCER,

Plaintiffs Below,
Respondents.

CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Petitioner's Brief and Appendix Record** have been made via U.S. Mail, on this 7th day of July, 2014, addressed as follows:

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