

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0441

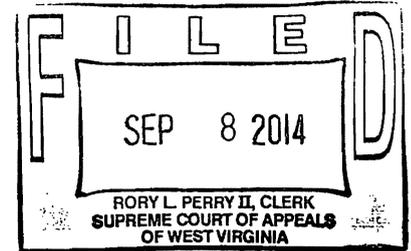
SCHUMACHER HOMES OF
CIRCLEVILLE, INC., a foreign
corporation,

Defendant Below,
Petitioner,

v.

JOHN SPENCER, AND
CAROLYN SPENCER,

Plaintiffs Below,
Respondents.



PETITIONER'S REPLY BRIEF

Don C. A. Parker (WV Bar No. 7766) (*Counsel of Record*)
Nicholas P. Mooney II (WV Bar No. 7204)
Sarah B. Smith (WV Bar No. 11700)
300 Kanawha Boulevard, East (25301)
P.O. Box 273
Charleston, WV 25321-0273
304.340.3800 (*phone*); 304.340.3801 (*facsimile*)
dparker@spilmanlaw.com
nmooney@spilmanlaw.com
ssmith@spilmanlaw.com

Counsel for Petitioner
Schumacher Homes of Circleville, Inc.

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I. STATEMENT OF THE CASE

This appeal arises from an arbitration dispute. Respondents John Spencer and Carolyn Spencer (“Respondents”) signed a Contract with Schumacher Homes of Circleville, Inc. (“Schumacher”) that contained the Arbitration Agreement at issue in this case. (A.R. 48.) Respondents initialed the page of the Contract containing the Arbitration Agreement. (A.R. 45.) Nevertheless, Respondents filed a lawsuit in the Circuit Court of Mason County, West Virginia (“Circuit Court”). Schumacher presented this evidence to the Circuit Court. (*See* A.R. 342-43) Just as they had in their response to “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”), Respondents focus their Response Brief before this Court on their factual allegations and legal claims against Schumacher that relate to their apparent dissatisfaction with Schumacher’s construction of their home. (*Compare* A.R. 259-60 *with* Resp.’s Br., at 3-5, 12-13.) Such claims, however, have not been proven and they do not affect the threshold issue of the proper forum in which to evaluate those claims. Facts central to this appeal are those relevant to the formation and effect of the Arbitration Agreement.

With regard to these types of “facts,” Respondents’ Brief contains several statements without regard to the actual Order from the Circuit Court or the record in this case. For example, Respondents’ Brief emphasizes that the “lower court found that Schumacher has a significantly higher level of sophistication when it comes to forming and negotiating contracts.” (Resp.’s Br., at 10.) Respondents’ Brief further state that Respondents “were looking for a home that catered to specific needs.” (*Id.*) It mentions “limited alternatives to meet these needs with regard to choosing a home builder made the bargaining process that much more lopsided.” (*Id.* at 10-11.) Respondents’ Brief suggests that Respondents “have no experience in dealing with complex,

complicated contracts and did not have the ability to fully understand the rights given up by arbitration.” (*Id.* at 11.)

The Circuit Court did not find any of the foregoing facts, including the one directly attributed to it, in its Order.¹ (*See* A.R. 3-10.) Indeed, it could not have. The record contains no evidence to support such findings of fact. In support of its Motion to Compel Arbitration, Schumacher submitted an affidavit authenticating a copy of the Contract that contains the parties’ Arbitration Agreement. (A.R. 37.) In their response below, however, Respondents submitted no documents, affidavit, or any evidence to support most of their factual allegations, which mirror those set forth in their Response on appeal. (*See* A.R. 258, 263-64.) Respondents merely focused on the nature of their claims against Schumacher and cited the unproven and as-yet untested allegations in their Complaint and Exhibits (including an expert report) attached thereto. (*Id.* at 258-59.) Even though Respondents’ briefs alleged that Respondents sought a home catering to “specific needs” and made representations about Respondents’ level of sophistication and other allegations, Respondents did not seek to testify at the hearing on Schumacher’s Motion to Compel Arbitration.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents did not style their response a “Summary Response,” and so they were required to respond to petitioner Schumacher Homes of Circleville, Inc.’s (“Schumacher”) request for oral argument. *See* Rev. W. Va. R. App. P. 10(d)-(e). They did not. Accordingly, Schumacher assumes that Respondents agree that oral argument is proper under Rule 19 for the reasons identified in “Petitioner’s Brief.”

¹ The Order, incidentally, was prepared and submitted by Respondents.

III. ARGUMENT

A. Respondents have failed to respond to all of Schumacher's assignments of error.

Rule 10(d) of the Revised West Virginia Rules of Appellate Procedure required Respondents to “respond to each assignment of error, to the fullest extent possible.” Indeed, “[i]f the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.” Rev. W. Va. R. App. P. 10(d). In this appeal, Respondents failed to address most of Schumacher’s assignments of error. Rather, they claim that the real issue is “whether or not the provision in the Contract drafted by Schumacher requiring [Respondents] to arbitrate their claims while reserving to Schumacher the right to file suit is enforceable or whether the arbitration provision is unenforceable as being unconscionable.” (Resp. Br., at 7-8.)

1. Respondents do not dispute that the Circuit Court erred by failing to apply Ohio law to the parties’ arbitration dispute.

Schumacher first assigns as error the Circuit Court’s failure to apply Ohio law to the instant dispute (or even address choice of law issues). (*See* A.R. 7.) Choice of law issues are unrelated to the issues that Respondents generally claim are involved on appeal. Respondents do not address Schumacher’s first assignment of error in their Response. Accordingly, Schumacher assumes that Respondents agree with Schumacher’s view of this issue. So, too, should the Court. *See* Rev. W. Va. Rule App. 10(d). Because Respondents have failed to oppose the choice of law provision in the Contract, and for the reasons more fully explained in Petitioner’s Brief, this Court should hold that it was error for the Circuit Court to overlook choice of law issues and not apply Ohio law.²

² As Schumacher explained in Petitioner’s Brief, Ohio law is similar to West Virginia law. Accordingly, in the event that this Court disagrees that Ohio law applies, Schumacher has provided parallel citations to West Virginia law.

2. **Respondents do not dispute that the Circuit Court erred by failing to enforce the Delegation Provision in the parties' Arbitration Agreement absent a challenge to the same.**

Schumacher second assigns as error the Circuit Court's failure to enforce the Delegation Provision in the parties' Arbitration Agreement, even though Respondents did not challenge the Delegation Provision. The Contract provides that "[t]he arbitrator(s) shall determine **all issues** regarding the **arbitrability** of the dispute." (A.R. 45 (emphasis added).) Because Respondents have failed to respond to Schumacher's second assignment of error, Schumacher assumes that Respondents agree with Schumacher's view of this issue. So, too, should the Court. *See* Rev. W. Va. Rule App. 10(d).

Indeed, sustaining this assignment of error will dispose of Schumacher's entire appeal. Ohio law supports this result. Under Ohio law, delegation provisions are valid. *See Cheney v. Sears, Roebuck and Co.*, No. 04AP-1354, 2005 WL 1515388, *4 (Ohio Ct. App. June 28, 2005). Likewise, this Court has acknowledged that, "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" *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 675, 724 S.E.2d 250, 279 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201 (2012) ("*Brown I*") (emphasis added). The Circuit Court committed reversible error by failing to enforce the Delegation Provision.

3. Respondents do not dispute that the Circuit Court improperly invalidated the Arbitration Agreement based on challenges to the Contract as a whole, rather than those unique to the Arbitration Agreement.

Schumacher third assigns as error the Circuit Court's refusal to enforce the Arbitration Agreement based on challenges to the Contract as a whole, rather than those unique to arbitration. Notwithstanding the Delegation Provision, the Respondents' challenges to a contract as a whole should have been decided by the arbitrator. *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 22 (Ohio 2008).

Respondents suggest that the Circuit Court was required to consider two threshold issues: "(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." (Resp.'s Br., at 8 (quoting Syl. pt. 5, *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W. Va. 91, 736 S.E.2d 91 (2012))). Setting aside the fact that this is a West Virginia test and Ohio law should apply, *see Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 842 N.E.2d 488, 491-92 (2006) (setting forth four rules enumerating a trial court's limited inquiry when making determinations of arbitrability), Respondents do not respond to Schumacher's claim that the Circuit Court erred by invalidating the Arbitration Agreement as unconscionable based on challenges to the Contract as a whole pursuant to the Uniform Commercial Code, W. Va. Code §§ 46-1-101, *et seq.* ("UCC"), or the WVCCPA. Nor do Respondents discuss the doctrine of severability or why they failed to challenge the Arbitration Agreement in their Complaint. *See 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.") Absent a response, Schumacher assumes that Respondents agree with Schumacher's view of this issue.

So, too, should the Court. *See* Rev. W. Va. Rule App. 10(d). For these reasons, and those more fully set forth in Petitioner’s Brief, the Circuit Court committed reversible error.

4. Respondents do not dispute that the Circuit Court erred by voiding the Arbitration Agreement based on West Virginia Code section 46A-2-121.

Schumacher’s sixth assignment of error claims that the Circuit Court erred by voiding the Arbitration Agreement based on West Virginia Code section 46A-1-121, despite no evidence that the WVCCPA even applies. The WVCCPA would only apply if Respondents are consumers. W. Va. Code § 46A-1-101(1); (*see* Pet.’s Br., at 16-18.). A “consumer” is a defined term in the WVCCPA, and in turn, it depends on other defined terms. *See* W. Va. Code § 46A-1-102(12) & 2-122 (each defining “consumer”); W. Va. Code § 46A-1-102(13)(a) (defining “consumer credit sale”); W. Va. Code § 46A-1-102(15) (defining “consumer loan”); W. Va. Code § 46A-1-102(14)(a) (defining “consumer lease”). The Circuit Court made no findings to satisfy any of the foregoing definitions. And, even if the WVCCPA were to apply, Respondents have not directly challenged the Arbitration Agreement on this ground. Respondents fail to respond to Schumacher’s sixth assignment of error. Accordingly, Schumacher assumes that Respondents agree with Schumacher’s view of this issue. So, too, should the Court. *See* Rev. W. Va. Rule App. 10(d). The Circuit Court committed reversible error.

5. Respondents do not dispute that the Circuit Court erroneously relied on West Virginia Code section 46-2A-108 to void the Arbitration Agreement.

Schumacher’s seventh assignment of error claims that the Circuit Court erred by relying on West Virginia Code section 46-2A-108 to void the Arbitration Agreement. Section 2A-108 does not apply because there is no evidence that Respondents entered into a lease with Schumacher. To the contrary, the Circuit Court found that Respondents “entered into a purchase agreement with Schumacher” (A.R. 3.) Respondents fail to respond to Schumacher’s

seventh assignment of error. Accordingly, Schumacher assumes that Respondents agree with Schumacher's view of this issue. So, too, should the Court. *See* Rev. W. Va. Rule App. 10(d). The Circuit Court committed reversible error.

B. The Arbitration Agreement is not procedurally unconscionable.

Respondents contend that “[t]he lower court correctly held that Schumacher’s arbitration provisions are procedurally unconscionable.” (Resp.’s Br., at 10.) Respondents reply on *Brown I* to define procedural unconscionability. (*Id.*) The definition under Ohio law is similar to that in *Brown I*. “Procedural unconscionability considers the circumstances surrounding the contracting parties’ bargaining, such as the parties’ ‘age, education, intelligence, business acumen and experience, * * * who drafted the contract, * * * whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.’” *Taylor Bldg. Corp. of Am. v. Benfield*, 884 N.E.2d 12, 22 (2008) (quoting *Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294, 1299 (1993) (internal quotations omitted)). However, under either definition of procedural unconscionability, the Circuit Court’s conclusion is unsupported by the evidence.

Respondents bore the burden of proof to show that the Arbitration Agreement is unconscionable.³ *See Murea v. Pulte Group, Inc.*, No. 100127, 2014 WL 504848, *3 (Ohio Ct. App. Feb. 6, 2014). In *Murea*, the appellate court considered the absence of evidence submitted by the arbitration challenger and concluded that the challenger failed to satisfy the burden of proof. The appellate court, therefore, sustained an assignment that the lower court erred by finding that an arbitration clause was unconscionable. *Id.*

³ Unlike a traditional motion to dismiss, on which allegations in the Complaint are accepted in the light most favorable to a plaintiff, on a motion to compel arbitration, unconscionability is a defense for which plaintiffs have the burden of proof. *See Taylor Bldg. Corp. of Am.*, 884 N.E.2d at 359 (“The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable.” (citations omitted)).

In this case, Respondents failed to meet their burden of proof. Respondents claim that the “lower court found that Schumacher has a significantly higher level of sophistication when it comes to forming and negotiating contracts.” (Resp.’s Br., at 10.) The Circuit Court did not make this finding in its Order. (See A.R. 3-10.) Nor did the Circuit Court make this finding from the bench at the hearing on Schumacher’s Motion to Compel Arbitration. (A.R. 341-60.) In fact, the Circuit Court made no findings of fact to support its conclusion that the Arbitration Agreement is procedurally unconscionable.

Notwithstanding the absence of findings of fact, Respondents contend that the Circuit Court properly concluded that the Arbitration Agreement is procedurally unconscionable based on several unproven (and indeed, unsupported) factual *allegations*. Specifically, Respondents contend that Respondents “were looking for a home that catered to specific needs.” (*Id.*) Respondents’ Brief mentions “limited alternatives to meet these needs with regard to choosing a home builder made the bargaining process that much more lopsided.” (*Id.* at 10-11.) Respondents’ Brief suggests that Respondents “have no experience in dealing with complex, complicated contracts and did not have the ability to fully understand the rights given up by arbitration.”⁴ (A.R. 11.)

The problem is that Respondents have not testified to any of the foregoing. There is no evidence in the record to support any of these factual contentions in Respondents’ Brief. Yet, this is not a situation in which the parties and the Court neglected to address unconscionability altogether. Schumacher, Respondents, and the Court all touched upon unconscionability in their briefs and at the hearing on Schumacher’s Motion to Compel Arbitration.

⁴ Respondents allege that the Arbitration Agreement is a “maze of language” (Resp.’s Br., at 11), but the Arbitration Agreement is just a contract that contains contractual terms. When one sits down and reads it, it makes sense.

Respondents alleged these same facts in their response to Schumacher's Motion to Compel Arbitration. (*Id.* at 259-60, 263-64.) So, Respondents knew (or should have known) that they wanted to rely on these allegations. And, discovery would have been unnecessary because Respondents' unsupported factual allegations are precisely the sort for which Respondents would have been best positioned to offer evidence. Respondents could have testified as to their personal experience with negotiating contracts and the alleged "special needs" for which they sought their home. They did not. (*See* A.R. 348-53.) Perhaps because they could not. But in any event, Respondents chose not to put forth any evidence, even though it was their burden to do so. The Circuit Court committed reversible error by concluding that the Arbitration Agreement is procedurally unconscionable.

C. The Arbitration Agreement is not substantively unconscionable.

Rather than responding to Schumacher's argument in support of its fifth assignment of error, Respondents essentially restate the substantive unconscionability argument that they presented to the Circuit Court, which the Circuit Court adopted in its Order. (*Compare* Resp.'s Br., at 12-13 with A.R. 265-66; *see* A.R. 8.) They also put forward new allegations of substantive unconscionability that were not previously raised in the Circuit Court.

1. A sole exclusion in the Arbitration Agreement for mechanic's liens does not render the Arbitration Agreement substantively unconscionable.

Respondents contend that, by excluding mechanic's liens from arbitration, "Schumacher reserves its ability to go through the process of collecting unpaid debt" and that "Schumacher would not take another route to resolve any indebtedness by [Respondents]." (Resp.'s Br., at 12.) Respondents claim that the Arbitration Agreement is therefore substantively unconscionable. (*Id.* at 11.)

Respondents have not addressed the fact – raised by Schumacher in its Brief – that, under Ohio law, mechanic’s liens cannot be arbitrated. (Pet.’s Br., at 16 (discussing Ohio Rev. Code § 2711.02, which prohibits arbitrating mechanic’s liens involving title to real estate).) Neither party had a choice on whether Schumacher could agree to arbitrate mechanic’s liens. Ohio law governs the Contract (A.R. 7), and Ohio law prohibits arbitrating mechanic’s liens, Ohio Rev. Code § 2711.02.

Moreover, Respondents (and the Circuit Court) incorrectly suggest that the Arbitration Agreement excludes “the collection of money” (A.R. 8) or “collecting unpaid debt” (Resp.’s Br., at 12.) It is apparent from the face of the Contract that this is not true. Nothing in the Arbitration Agreement or the Contract suggests that Schumacher can avoid arbitration for debt collection apart from a mechanic’s lien. (A.R. 40-48.) In other words, Schumacher has to arbitrate any dispute other than a mechanic’s lien. Those disputes could include the collection of money from a homeowner (as opposed to filing a lien), as well as “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) Schumacher explained this to the Circuit Court. (*See* A.R. 351-352.) But, just as the Circuit Court failed to consider all of these circumstances in which the Arbitration Agreement would apply to Schumacher, so, too, do Respondents. Excluding mechanic’s liens from the parties’ Arbitration Agreement does not render it substantively unconscionable.

2. Respondents' venue objections, raised for the first time on appeal, are misplaced and result from an attenuated reading of *Kirby v. Lion Enterprises, Inc.*, 233 W. Va. 159, 756 S.E.2d 493 (2014).

In apparent support of Respondents' arguments for a conclusion of procedural unconscionability, Respondents lodge, for the first time, an attack on Schumacher's stipulation to arbitrate in Mason County, West Virginia, rather than Stark County, Ohio. (Resp.'s Br., at 13.) Although it is difficult to discern Respondents' argument, it appears that they rely on Justice Ketchum's concurrence in *Kirby v. Lion Enterprises, Inc.*, 233 W. Va. 159, 756 S.E.2d 493 (2014) for the proposition that it is unconscionable to require arbitration somewhere other than the Respondents' hometown. (Resp.'s Br., at 13.) They argue further that "[t]he enforcement of arbitration would further impose unreasonably burdensome costs upon and would have a substantial deterrent effect upon [Respondents] from seeking to enforce and vindicate their rights" (Resp.'s Br., at 13.)

Notwithstanding the fact that *Kirby* is a West Virginia decision and Ohio law should apply, Respondents have not previously contended that arbitration in Stark County, Ohio, would have been unconscionable. The Circuit Court was silent as to whether arbitration in Stark County, Ohio, would have been problematic. In fact, the Circuit Court acknowledged Schumacher's stipulation. (A.R. 4.) Respondent never before claimed that arbitration would be cost prohibitive, and even in Respondents' Brief, they do not specify what, if anything, would make it so. (Resp.'s Br., at 13.) Respondents' statement is nothing more than a boilerplate objection made long after the time for making objections expired.

Moreover, Justice Ketchum's concurrence did not conclude that arbitration in a venue other than a purported consumer's hometown is per se unconscionable. *Kirby*, 758 S.E.2d at 502. Rather, the concurrence suggests that it was one of several factors for the circuit court to

weigh on remand in that case.⁵ (*Id.* at 501-02) The primary concern in Justice Ketchum's concurrence is the cost that could arise from a geographically distant arbitration. However, the entire issue has been rendered moot in this case because, at the outset, Schumacher agreed to arbitrate in Respondents' hometown. The record contains no basis for the Circuit Court's conclusion that the Arbitration Agreement was substantively unconscionable. The Circuit Court should not have invalidated the parties' Arbitration Agreement.

IV. CONCLUSION

Respondents oversimplify the issues in this appeal. They fail to respond to the majority of Schumacher's assignments of error. To the extent that Respondents failed to respond to any assignment of error in Petitioner's Brief, this Court may assume that Respondents agree with Schumacher's position. Most notably, this means that Respondents do not contest that Ohio law should have applied to this arbitration dispute, nor do they disagree that the Delegation Provision should have applied such that an arbitrator should have determined issues of arbitrability. These issues dispose of this entire appeal. But, to the extent this Court considers the remaining assignments of error, Schumacher should still prevail because Respondents have either failed to respond or because Respondents' arguments ignore dispositive points of fact and law. This case should have been referred to arbitration.

Based on the foregoing, Schumacher respectfully requests that this Honorable Court:

1. reverse the decision of the Circuit Court and direct it to refer this case to arbitration;
- and
2. grant such other and further relief as this Court deems just and proper.

⁵ Schumacher notes that the arbitration clause at issue in *Kirby* appears to be distinguishable, for many reasons, from the parties' Arbitration Agreement in this case. However, for the sake of brevity, Schumacher only addresses those parts of *Kirby* relied on by Respondents in their Brief.

SCHUMACHER HOMES OF CIRCLEVILLE, INC.

BY: SPILMAN THOMAS & BATTLE, PLLC



Don C. A. Parker (WV Bar No. 7766) (*Counsel of Record*)

Nicholas P. Mooney II (WV Bar No. 7204)

Sarah B. Smith (WV Bar No. 11700)

300 Kanawha Boulevard, East (25301)

P.O. Box 273

Charleston, WV 25321-0273

304.340.3800 (*phone*); 304.340.3801 (*facsimile*)

dparker@spilmanlaw.com

nmooney@spilmanlaw.com

ssmith@spilmanlaw.com

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**Defendant Below,
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v.

**JOHN SPENCER, AND
CAROLYN SPENCER,**

**Plaintiffs Below,
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CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Petitioner's Reply Brief** has been made via U.S. Mail, on this 8th day of September, 2014, addressed as follows:

Randall L. Trautwein, Esq.
Michael L. Powell, Esq.
Lamp Bartram Levy Trautwein & Perry, PLLC
720 Fourth Avenue
P.O. Box 2488
Huntington, WV 25725
Counsel for Plaintiffs

John P. Fuller, Esq.
Michael W. Taylor, Esq.
Bailey & Wyant, PLLC
500 Virginia Street, East, Suite 600
P.O. Box 3710
Charleston, WV 25337-3710
*Counsel for Davis Heating & Cooling
Company, Inc.*



Don C. A. Parker (WV Bar No. 7766)