

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**JEFFREY N EVANS, individually
and in his capacity as an employee,
servant, or agent of Ameriprise
Financial Services, Inc., AMERIPRISE
FINANCIAL SERVICES, INC., KRISTINA
NICHOLLS, individually and STEPHEN
BAYLES, individually,
(Defendants Below)**

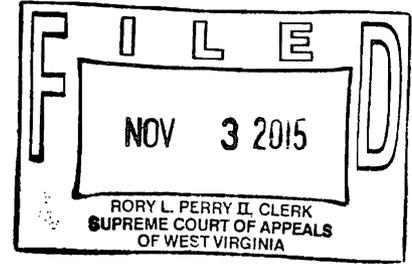
Petitioners,

vs.

CASE NO.: 15-0600

**DEBRA K. BAYLES
(Plaintiff Below),**

Respondent.



RESPONDENTS BRIEF

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Table of Contents

TABLE OF AUTHORITIESii

I. STATEMENT OF CASE.....1

II. SUMMARY OF ARGUMENT 10

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 12

IV. ARGUMENT..... 12

V. CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases

<i>Cotiga Development Co. v. United Fuel Gas Co.</i> , 147 W.Va. 484, 128 S.E.2d 626 (1962).....	16
<i>Credit Acceptance Corp. v. Front</i> , 231 W.Va. 518, 745 S.E.2d 556 (2013)	12
<i>Henson v. Lamb et al.</i> , 199 S.E. 459 (WV 1938)	14
<i>Lee v. Lee</i> , 228 W.Va. 483, 721 S.E.2d 53 (2011)	14
<i>Schumacher Homes of Circleville, Inc., v. Spencer</i> ,____W.Va. __, S.E.2d (2015).....	13
<i>State ex rel. TD Ameritrade, Inc. v. Kaufman</i> , 225 W.Va. 250, 692 S.E.2d 293 (2010).....	13

Statutes

9 U.S.C. § 2.....	15, 21
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I. STATEMENT OF CASE

1. Respondent Debra K. Bayles ("Respondent") is the widow of William N. Bayles and serves as the Administratrix of the Estate of William N. Bayles, pursuant to an Order of Appointment entered on April 8, 2013 by the Marshall County Commission, *Appendix I at 22*.

2. William N. Bayles ("decedent") died on March 26, 2013. *Appendix I at 3 and 11*. Prior to his death, the decedent rolled over his 401(K) and opened two individual retirement accounts ("IRA Accounts") through Petitioners Jeffrey N. Evans ("Evans") and Ameriprise Financial Services, Inc. ("Ameriprise"). *Appendix I at 2 and 3*.

3. Respondent filed her Complaint against the petitioners on September 5, 2014, alleging negligence on the part of Evans and Ameriprise by negligently inducing her to sign a consent regarding her husband's 401(K) and relative to the IRA accounts. *Appendix I at 2-6*.

4. The Complaint also alleges detrimental reliance upon the Defendant Evans for his actions **prior** to the establishment of any IRA account which was specific to his dealings with the Plaintiff, Debra Bayles. *Appendix I at 2-6*. (emphasis added)

5. The Complaint also alleges respondeat superior, breach of

contract by Ameriprise, and unjust enrichment against Nichols and Bayles. *Appendix I at 6-7.*

6. The IRA Accounts are **not a** predicate for Respondent's legal claims for negligence and detrimental reliance against Defendant Evans for his misrepresentations directly to Mrs. Bayles in obtaining her spousal consent **prior** to the establishment of any IRA accounts. *Appendix I at 2-8.* (emphasis added)

7. On June 20, 2012, **after obtaining the spousal consent referred to above**, the decedent rolled his 401(k) retirement into an IRA Account with Ameriprise through Evans. In so doing, the decedent completed and signed an Ameriprise Brokerage Individual Retirement Account Application ("Brokerage Application"). *Appendix I at 24-29.* The Brokerage Application was assigned an account number ending in 264133. Part 9 of it states in pertinent part:

You acknowledge that you have received and read the Ameriprise Brokerage Client Agreement ("Agreement") and agree to abide by its terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in the Agreement This brokerage account is governed by a predispute arbitration clause which is found on Section 26, page 3 of the Agreement. You acknowledge receipt of the predispute arbitration clause.

Appendix I at 28. (emphasis added).

8. The Ameriprise Brokerage Client Agreement ("Brokerage Agreement") contains the predispute arbitration clause mentioned in Part 9 of the Brokerage Application. The clause appears at Paragraph 26 and reads as follows:

This agreement contains a predispute arbitration clause. By signing this Agreement the parties agree as follows:

(A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(B) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(D) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.

(E) The panel of arbitrators may include a minority of arbitrators who were or are affiliated with the securities industry.

(F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

(G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

By reading and accepting the terms of this Agreement, you acknowledge that, in accordance with this Arbitration section, you agree in advance to arbitrate any controversies that may arise with Ameriprise Financial or AEIS. You agree that all controversies that arise between us (including but not limited to those related to your brokerage account and any service or advice provided by a broker or representative), whether arising before, on or after the date you opened your Account shall be determined by arbitration in accordance with the terms of this Agreement and the rules then prevailing of the Financial Industry Regulatory Authority.

Federal and state statutes of limitation, repose, and/or other rules, laws, or regulations impose time limits for bringing claims in federal and state court actions and proceedings. The parties agree that all federal or state statutes of limitation, repose, and/or other rules, laws, or regulations imposing time limits that would apply in federal or state court, apply to any dispute, claim or controversy brought under this Agreement, and such time limits are hereby incorporated by reference. Therefore, to the extent that a dispute, claim, or controversy arises under this Agreement and would be barred by a statute of limitation, repose or other time limit, if brought in a federal or state court action or proceeding, the parties agree that such dispute, claim, or controversy shall be barred in an arbitration proceeding.

You understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction. The parties agree that venue and personal jurisdiction is proper in Minneapolis, Minnesota.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (II) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce any agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

Appendix I at 34, (emphasis added).

9. Later, on September 5, 2012, the decedent opened another IRA Account with Ameriprise through Evans. The decedent completed and signed an Active Portfolios Account **Application** ("Portfolios Application") for this account, which was assigned the account number ending in 961133. *Appendix I at 42-49.* The decedent indicated an investment objective of "growth with income" and a risk tolerance of "moderate." The second IRA Account received a sum certain from the Brokerage Account to begin, known as the Active Portfolios Account ("Portfolios Account"). *Appendix I at 43.*

10. In his Portfolios Application, the decedent acknowledged the following:

You acknowledge that you have received and read the Ameriprise Portfolios Client Agreement (version K, dated 03112), the Ameriprise Managed Accounts Client Disclosure Brochure

and the Ameriprise Brokerage Client Agreement, which is hereby incorporated by reference, and agree to abide by the terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in them. This account is governed by a predispute arbitration provision which is found in Section 25, Page 9 of the Active Portfolios Client Agreement and Section 26, Page 3 of the Brokerage Client Agreement. You acknowledge receipt of the predispute arbitration provision.

Appendix I at 48. (emphasis added).

11. The Portfolios' Agreement contains the following predispute arbitration provision at Paragraph 25:

Arbitration

This agreement contains a predispute arbitration clause. By signing this Agreement the parties agree as follows:

(A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(B) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(D) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.

(E) The panel of arbitrators may include a minority of arbitrators who were or are affiliated with the securities industry.

(F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

(G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

By reading and accepting the terms of this Agreement, you acknowledge that, in accordance with this Arbitration section, you agree in advance to arbitrate any controversies that may arise with the Sponsor or AEIS. You agree that all controversies that arise between us (including but not limited to those related to your brokerage account and any service or advice provided by a broker or representative), whether arising before, on or after the date you opened your Account shall be determined by arbitration in accordance with the terms of this Agreement and the rules then prevailing of the Financial Industry Regulatory Authority.

Federal and state statutes of limitation, repose, and/or other rules, laws, or regulations impose time limits for bringing claims in federal and state court actions and proceedings. The parties agree that all federal or state statutes of limitation, repose, and/or other rules, laws, or regulations imposing time limits that would

apply in federal or state court, apply to any dispute, claim or controversy brought under this Agreement, and such time limits are hereby incorporated by reference.

Therefore, to the extent that a dispute, claim, or controversy arises under this Agreement and would be barred by a statute of limitation, repose or other time limit, if brought in a federal or state court action or proceeding, the parties agree that such dispute, claim, or controversy shall be barred in an arbitration proceeding.

You understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction. The parties agree that venue and personal jurisdiction is proper in Minneapolis, Minnesota.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce any agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein. This paragraph does not constitute a waiver of any right of private claim or cause of action provided by the Advisers Act.

Appendix I at 59-60. (emphasis added).

12. Respondent claims that but for defendant Evans inducement and misrepresentation, she would not have consented to rollover her husband's 401(K) and as such she would have received

said monies upon his death and in consenting to the rollover she relied to her detriment on the negligent representations of Defendant Evans. *Appendix I at 6.*

13. Respondent filed her Complaint in the Circuit Court of Marshall County on September 5, 2014 naming Evans, Ameriprise, Nicholls and Bayles as defendants, *Appendix I at 2-8.* In response, Petitioners filed a Motion to Dismiss and Compel Mandatory Arbitration on November 17, 2014. *Appendix I at 10-20.*

14. The Circuit Court heard oral argument on the petitioners' motion on February 27, 2015. Focusing on the Brokerage Application and Brokerage Agreement, the Circuit Court found that the signed Brokerage Application incorporated the predispute arbitration clause found in the Brokerage Agreement by reference. *Appendix II at 22.* The Circuit Court also found that there was no signature of the decedent in the Brokerage Agreement. *Appendix II at 23.* Therefore, the Circuit Court denied the motion under the rule of *contra proferentem.* *Appendix at 23.*

15. On May 19, 2015, the Circuit Court entered an Order denying the Motion to Dismiss and to Compel Mandatory Arbitration. *Appendix I at 132-136.* The Order does not contain a finding of incorporation by reference. This appeal follows.

II. SUMMARY OF ARGUMENT

Respondent's claim herein began **prior** to the establishment of any IRA account, beginning with her relying to her detriment on the negligent representation of Jeffrey N. Evans that if she consented to the rollover of her husband's 401(K) to an IRA with Ameriprise, she would remain the beneficiary thereof and the same would not be able to be changed without her consent. Because of the negligent representation of Defendant Evans (Agent for Ameriprise), Respondent, Debra Bayles did sign a consent permitting her husband to rollover his 401(k) into the IRA accounts established herein.

The negligence and detrimental reliance claims are clearly the Respondent's individual claims; separate, distinct and **prior** to any application or agreement and completely void of any claim to binding arbitration.

The Circuit Court made no finding upon the respondent's claims prior to the IRA accounts because the same was unnecessary for the ruling. In fact, there were no findings on mutual assent, procedural unconscionability or substantive unconscionability, but instead the Court found that this matter could be ruled upon simply because the documents in question were ambiguous and therefore, should be construed against the drafter of those documents.

When the Circuit Judge read the documents together, he made a finding that the application does reference the Ameriprise Brokerage Client Agreement ("agreement"), but when you read the agreement, it states "by signing **this agreement**, the parties agree as follows." (**emphasis added.**) It does **not** say by signing the **application** you agree as follows. (**emphasis added**)

It is undisputed that the decedent Mr. Bayles signed the application but did not sign "this agreement". Your respondent submits that when you read the documents together, accept the clear meaning of the words together with the decedent having not signed "this agreement" (neither party did) then the parties never agreed to the language that followed namely the arbitration provision. As such, there never was an agreement to arbitrate.

The petitioner wishes to argue "that is what it says but that is not what it means" or that "what they meant to say is by signing the application, you agree to everything that follows" or "the petitioner wishes the court to ignore the language "by signing this agreement".

Even giving the petitioner the benefit of the doubt and assuming the court could read the documents and reasonably interpret them as petitioner's counsel asserts rather than as respondent's counsel does (and the Circuit Court does) the documents are then by definition

ambiguous. As such, they should be construed against the drafter under the doctrine of *contra proferentem*.

Wherefore, the Circuit Court did not err in denying Defendant's Motion to Dismiss as outlined in petitioners' assignments of error, because there was no valid predispute arbitration clause agreed to by the parties because of either the clear meaning of the language in the documents or because those documents create an ambiguity which must be construed against the drafter, Ameriprise. Therefore, the Circuit Court's ruling should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not waive oral argument; however, Respondent recognizes that this court may find it unnecessary given the limited and straight forward findings of the Circuit Court that the documents on their face are ambiguous and as such should be construed against the drafter.

IV. ARGUMENT

A. Standard of Review

An Order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine. *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013). Since the Circuit Court's Order of May 19,

2015 denied Petitioners Motion to Dismiss and Compel Arbitration, this Court shall review said Order *do novo*. *Schumacher Homes of Circleville, Inc., v. Spencer*, ___ W.Va. ___, S.E.2d (2015).

B. No Valid Arbitration Agreement Exists

Although the petitioner has stated four assignments of error, each assignment of error hinges upon whether a valid arbitration clause exists between the parties. When ruling upon a motion to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. §1 *et seq.*, the circuit court is to determine the threshold issues of (1) whether a valid arbitration agreement exists between the parties, and (2) whether the claims asserted by the plaintiff fall within the substantive scope of the subject arbitration agreement. *Schumacher Homes, supra; State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

As previously stated, the Circuit Court never addressed issues of procedural or substantive unconscionability, nor the issues regarding the Plaintiff's individual claims that existed prior to the establishment of the IRA accounts.

Irrespective of the above issues, all this court needs to do is read the documents to come to the exact same reasonable conclusion as the Circuit Court. "An *ex parte* paper, written and prepared by one

party, which is contradictory in its parts and clearly ambiguous, is open to explanation by extraneous evidence, and is to be construed most strongly against said party" *Henson v. Lamb et al.*, 199 S.E. 459 (WV 1938).

So for the purposes of this appeal and without waiving any argument that Plaintiff only makes claims as a third party beneficiary and/or incorporation by reference let us just assume the petitioner is correct, that Plaintiff has no individual claims and only those as a third party beneficiary and that the application incorporates the agreement language. It is when you read the two documents together on their face, the phraseology can support reasonable differences of opinion. "Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." See *Lee v. Lee*, 228 W.Va. 483, 721 S.E.2d 53 (2011)

The applicable part of the signed brokerage application reads as follows:

You acknowledge that you have received and read the Ameriprise Brokerage Client Agreement ("Agreement") and agree to abide by its terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in the Agreement This brokerage account is governed by a predispute arbitration clause which is found on Section 26, page 3 of the Agreement. You

acknowledge receipt of the predispute arbitration clause.

The applicable part of the Brokerage Agreement reads as follows:

This agreement contains a predispute arbitration clause. By signing this Agreement the parties agree as follows:

(Followed by the arbitration clause)

By signing the application the decedent is referred (for our purposes) to Section 26, page 3 of the agreement. When you go to that section it says "by signing this **agreement** the parties agree as follows." This phraseology can lead to the reasonable conclusion that unless the parties sign the agreement, then the terms of the arbitration that follow do not apply. If instead the drafter (Ameriprise) intended the signature on the application to trigger the arbitration clause terms that followed, they could have clearly stated "by signing the brokerage application, the parties agree as follows" or by deleting the sentence all together; however, the drafter did not.

It appears to the respondent that the petitioner's strained argument is that's what we meant to say. They are essentially asking this court to change the language of the Agreement to read "by signing the application"; however, "it is not the right or province of a court to alter, pervert, or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them. *See: Cotiga Development*

Co. v. United Fuel Gas Co., 147 W.Va. 484, 128 S.E.2d 626 (1962) (Syl. Pt. 3).

The second set of documents titled Portfolio Application and Portfolio Agreement contain essentially the same language and hence same result.¹

If we apply the language contained in the documents as written, they say by signing the agreement and the agreement is not signed and as such this court should affirm the Circuit Court's ruling. If the court accepts the petitioner's argument of "what we meant to say" is by signing the application and not the agreement then the documents when read together are ambiguous and as such should be interpreted against the drafter under the doctrine of contra proferentum and this court should affirm the Circuit Court's ruling.

If this court concludes the Circuit Court's finding of contra proferentum is in error then the matter should be remanded to allow for discovery on the issues of substantive and procedural unconscionability.

V. CONCLUSION

WHEREFORE, for reasons heretofore stated, Respondent respectfully requests entry of an Order denying the predispute

¹ Except that the Portfolio Application actually contains the words "which is hereby incorporated by reference" and identifies the version and date of the Portfolios Client Agreement and those items are absent from the Brokerage Application furthering the argument that the Brokerage agreement was not intended to be incorporated by reference and create further ambiguity.

arbitration clause and affirming the May 19, 2015 Order entered by the Circuit Court of Marshall County.

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By Counsel



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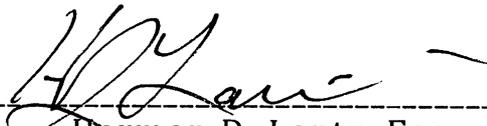
Respondent.

CERTIFICATE OF SERVICE

Service of the foregoing **RESPONDENTS ANSWER TO
PETITIONER BRIEF** by mailing a true and correct copy thereof by U.S.
Mail postage prepaid, this 2nd day of November, 2015, to:

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