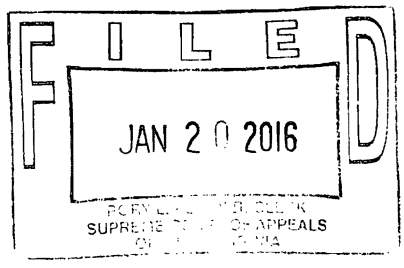
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NUMBER: 15-1237



STATE OF WEST VIRGINIA ex rel.
CREDIT ACCEPTANCE CORPORATION,

Petitioner,

v. **CIVIL ACTION NO. 14-C-2160**

THE HONORABLE JAMES C. STUCKY,
JUDGE of the Circuit Court of Kanawha County,
West Virginia, and BRANDON ADKINS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Benjamin Sheridan (# 11296)
Klein & Sheridan, LC
3566 Teays Valley Road
Hurricane, WV 25526
bsheridan@kswvlaw.com
(304) 562-7111
Fax: (304) 562-7115

Counsel for Respondent
Brandon Adkins

TABLE OF CONTENTS

TABLE OF AUTHORITIES		ii
I.	INTRODUCTION	1
II.	QUESTION PRESENTED	1
III.	STATEMENT OF THE CASE	1
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION	4
V.	ARGUMENT	4
	A. Standard With Respect To The Writ	4
	B. Argument	5
VI.	CONCLUSION	7

TABLE OF AUTHORITIES

Cases

Forrester v. Penn Lyon Homes, Inc., 553 F.3d 340 (4th Cir. 2009) 5

Maxum Founds., Inc. v, Salus Corp., 779 E.2d 974 (4th Cir. 1985) 5

McGraw v. Am. Tobacco Co., 224 W. Va. 211, 681 S.E.2d 96 (2009) 4

MicroStrategy, Inc, v. Lauricia, 268 F.3d 244 (4th Cir. 2001) 6

State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders, 228 W. Va. 125, 717 S.E.2d 909 (2011) 6

Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc., 683 F.3d 577 (4th Cir. 2012) 5, 6

Rules

W. Va. R. App. P.16(g) 1

W. Va. R. App. P. 18(a) 4

I. INTRODUCTION

Comes Now the Respondent, Brandon Adkins, and in opposition to the Petitioner's "Verified Petition for Writ of Prohibition" in the above captioned matter, and pursuant to Rule 16(g) of the West Virginia Rules of Appellate Procedure, states as follows:

II. QUESTION PRESENTED

Did the trial court exceed its legitimate powers when interpreting an order drafted by the Petitioner's own lawyers just a few months prior to the entry of the order underlying this appeal, which provided that arbitration can be compelled at any time including after invoking the discovery machinery, so long as the Respondent is not "actually prejudiced." The Petitioner cited numerous cases from the Fourth Circuit Court of Appeals in support of their reasoning in drafting their motion and order in the Circuit Court of Cabell County.

III. STATEMENT OF THE CASE

This case involves a Petitioner who drafted a binding arbitration clause to be included in their adhesion consumer contracts. The strategic reason for seeking arbitration is often irrelevant in a case in which arbitration is an issue. The Respondent presumes the reason arbitration is included in the Petitioner's adhesion contracts is because of a perceived litigation advantage afforded to the Petitioner in including the terms. The only issue is whether or not the Circuit Court of Kanawha County committed clear error when it ordered arbitration. In support the Respondent states the following:

- The Petitioner drafted and included in its adhesion contract with the Respondent, an arbitration clause containing the requirement that "If a dispute arises, the complaining party <u>shall</u> give the other party a <u>written Dispute Notice</u> and a <u>reasonable opportunity, not less than 30 days</u>, to resolve the dispute..." before compelling arbitration. (Petitioner's A.R.

103 and 67-71, more legible, language from the Petitioner's adhesion contract. Emphasis added.)

- The arbitration clause provides that "Either You or We may require any Dispute to be arbitrated and may do so before or after a lawsuit has started over the Dispute..." (*Id.* at A.R. 103 and 67-71, emphasis added.)
- The Petitioner, by counsel, argued, won, and drafted a fourteen-page order in the Circuit Court of Cabell County which provided that the Courts must look to the overarching federal law in determining what the state law on arbitration should be. (Petitioner's A.R. 85 paragraph 12.)
- In that same order, also drafted by the Petitioner, the Petitioner writes on several occasions, despite the undersigned counsel's objections, that based on Fourth Circuit Law, arbitration cannot be waived even if a party significantly invokes the discovery machinery unless the other party is "actually prejudiced." (Petitioner's A.R. 91 paragraph 25).
- The Defendants in the Cabell County case have not yet decided to appeal, despite the fact that the Plaintiff in that action (same as the Petitioner in this case), still to this day, refuses to file the arbitration they compelled nearly a year ago.
- The Respondent, upon discovery of a significant number of unknown violations by the Petitioner, including over one hundred calls to his ex-wife, who was not on the contract, and of the existence of the arbitration clause itself decides to move to compel arbitration.
- The Respondent provided the Defendant with notice and a reasonable settlement request prior to filing the arbitration as required by the arbitration agreement.

- The Petitioner, by counsel, attached this contractually required settlement demand[1] improperly to a court filing and argued that the Respondent was threatening arbitration, when, in fact, the Respondent has a contractual right to arbitration under the arbitration clause both before and after the lawsuit was filed and the Petitioner wrote the arbitration agreement. (Petitioner's A.R. 68).
- Respondent has conducted some minor written discovery about the account, including obtaining the card agreement with the arbitration clause.
- Respondent made himself available for deposition by the Petitioner, but that does not prejudice the Petitioner.
- Respondent has requested a deposition of the Defendant's corporate representative, but the Defendant has not yet made one available. This is only fair either in litigation or Arbitration and would not actually prejudice the Defendant.

The Petitioner's argument is essentially that where it is in the Petitioner's best interest to compel arbitration, as it is to defeat a class action petition in Cabell County, then arbitration is fair. However, when the consumer asserts the arbitration clause for their own perceived advantage, under the Defendant's own adhesion contract, even when it says in the contract that it can be invoked both before and after a lawsuit is filed, that is unfair. This is a double standard.

The reality is there is only one question that matters under the order drafted by the Petitioner, by counsel, in Cabell County, and that is, simply, is the Petitioner *actually prejudiced* by referring the case to arbitration. (Petitioner's A.R. 91, paragraph 25). The Petitioner is judicially estopped from making any other argument because they argued and won a huge relief

[1]"If a dispute arises, the complaining party shall give the other party written Dispute Notice and a reasonable opportunity, not less than 30 days, to resolve the dispute..." (Petitioner's A.R. 68).

from an entire class action based on this argument in the Circuit Court of Cabell County (which would have covered the case at hand) and they cannot have it another way in Kanawha County. The Circuit Court of Kanawha County says the case must go to arbitration and that is, in fact, correct if the consumer is not disputing it.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, the Respondent does not believe that oral argument is necessary and that this case can be decided on the writ and the response.

V. ARGUMENT

A. STANDARD WITH RESPECT TO THE WRIT

A Circuit Court order compelling arbitration is not subject to immediate appeal absent the issuance of a writ of prohibition. *See McGraw v. Am. Tobacco Co.*, 224 W. Va. 211, 221, 681 S.E.2d 96, 106 (2009). When determining whether to grant such a writ, this Court considers whether there is a "substantial" and "clear-cut" legal error and a high probability the trial court will be reversed. *Id.* (citation omitted). This Court will also consider the following five factors: (1) whether the party seeking the writ has no other, adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower court's order is clearly erroneous as a matter of law; (4) whether the lower court's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower court's order raises new and important problems or issues of law of first impression. *Id.* at 106-07 (citation omitted).

An order compelling arbitration will be reversed after a *de novo* review when "the circuit court clearly erred as a matter of law, in directing that a matter be arbitrated or that the circuit

court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional or common law mandate." *Id.* at 107.

B. ARGUMENT

Everything necessary to determine the outcome of this case is in the Cabell County Circuit Court order drafted by the Petitioner, with the services of the same counsel representing the Petitioner in this case, and contained in the Defendant's copy of the record. (Petitioner A.R. 80-94). In this fourteen-page order, the entire recipe for how to apply the law in the Kanawha County action is found because the argument contained in the order is essentially the Petitioner's own argument from Cabell County just a few months prior. It even cites the Petitioner's argument. *Id.* The Petitioner, obtained this order to avoid a class action suit, and cannot come to Kanawha County and now argue that the order their counsel argued for and drafted is no longer fair. They are estopped from making such a polar opposite argument.

First, in paragraph twenty-four of the order, the Circuit Court states, "Rather the Court looks to Fourth Circuit case law cited by Credit Acceptance, which holds that a party waives arbitration only "if it 'so substantially utliz[es] the litigation machinery that to substantially permit arbitration would prejudice the party opposing the stay.'" *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 343 (4th Cir. 2009) (quoting *Maxum Founds., Inc. v, Salus Corp.*, 779 E.2d 974, 981 (4th Cir. 1985)). (Petitioner A.R. 90). The order goes on to say, "However, 'delay and participation in litigation will not alone constitute default.'' *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 586 (4th Cir. 2012) (quoting Forrester, 553 F,3d at 343). ((Petitioner A.R. 90-91). Next the order states in paragraph twenty-five, "As the Fourth Circuit recently clarified, 'even in cases where a party seeking arbitration has invoked the 'litigation machinery' to some degree, 'the dispositive question is whether the party objecting to

arbitration has suffered *actual prejudice*.'" *Wheeling Hosp., Inc, v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.34 577, 587 (4th Cir. 2012) (quoting *MicroStrategy, Inc, v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001)). Actual prejudice focuses primarily on two factors: (1) delay and (2) 'the extent of the moving party's trial-oriented activity.' *Id.* (quoting *MicroStrategy, Inc.*, 268 F.3d at 249) (Petitioner's A.R. at 91, emphasis in original).

Respondent has conducted almost no trial-oriented activity aside from some written discovery and sending out a deposition notice. The Respondent has not taken any depositions. The Respondent did allow his deposition to be taken, but that was (1) reasonable, and (2) would have happened in arbitration as would some written discovery. The Petitioner has attempted a lot of discovery including sending out numerous subpoenas, but that is not the Respondent invoking the litigation machinery; it is the Petitioner and must not be considered.

Respondent has scoured the Petitioner's writ, and it appears Petitioner is arguing that the order they received in Cabell County was inappropriate. The Petitioner is arguing that in fact, filing and conducting some discovery IS waiver. Further, the Petitioner's argument ignores the fact that the arbitration clause in the Petitioner's adhesion contract allows the Respondent to compel arbitration after a lawsuit has been filed.

Petitioner's adhesion contract clearly states "Either You or We may require any Dispute to be arbitrated and may do so before or after a lawsuit has started over the Dispute or with respect to other Disputes or counterclaims brought later in the lawsuit." (Petitioner's A.R. 68). Pursuant to long settled West Virginia contract law, ambiguous contract provisions, especially those having the qualities of a contract of adhesion, are to be construed against the drafter. *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders,* 228 W. Va. 125, 140 n.61, 717 S.E.2d 909, 924 (2011). Here, Petitioner chose the language "after a lawsuit has started;" any ambiguity

surrounding that phrase involving the length of time, commencement of discovery, depositions, or otherwise, should be construed in favor of the Respondent. Although Petitioner argues that a few months of litigation somehow prevents the Respondent from invoking his right to arbitrate, interpretation of its own arbitration clause concludes otherwise.

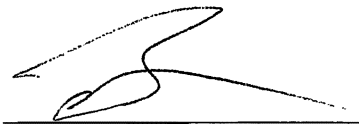
The Petitioner's arguments, while Respondent's counsel sympathizes, as he raised similar concerns in Cabell County, cannot be used in this case, as the question before the Court is not when waiver of arbitration takes place. But, as the Petitioner's own argument and order states, whether or not the Petitioner is *actually prejudiced* by compelling arbitration, and more specifically, whether or not the Circuit Court of Kanawha County actually erred in sending the case to arbitration. The Petitioner has presented various things that it cannot do in arbitration that it can do in Circuit Court as its basis for why arbitration is unfair, but that is par for the course in arbitration. The reality is, the Petitioner cannot logically argue the unconscionability of their arbitration clause because they drafted it, and forced it on the Respondent in the bottom back of their adhesion contract.

The Respondent cannot find the substantial and clear cut legal error that the Circuit Court of Kanawha County supposedly made in compelling the Petitioner to honor their own arbitration clause pursuant to the Circuit Court of Cabell County Order that the Petitioner drafted. The Petitioner's argument that arbitration is unfair is the same argument consumers have been making for years and largely losing. Because the Circuit Court did not clearly err, as a matter of law, in compelling arbitration, the Circuit Court's order should not be overturned.

VI. CONCLUSION

Wherefore, for the forgoing reasons, Respondent respectfully requests that the Court deny Petitioner's Writ of Prohibition and uphold the decision of the Circuit Court.

BRANDON ADKINS,
BY COUNSEL

BY: 

Benjamin Sheridan (WV Bar #11296)
Counsel for Respondent
Klein & Sheridan, LC
3566 Teays Valley Road
Hurricane, WV 25526
bsheridan@kswvlaw.com
(304) 562-7111