



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 11-0770

STATE OF WEST VIRGINIA, ex rel. RICHMOND AMERICAN HOMES OF WEST VIRGINIA, INC., and M.D.C. HOLDINGS, INC., et al.

Petitioners

v.

HONORABLE DAVID H. SANDERS, JUDGE
OF THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

Respondent.

SUPPLEMENTAL RESPONSE IN OPPOSITION TO WRIT OF PROHIBITION

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I. INTRODUCTION AND SUMMARY

In all of the subject homes, Richmond American failed to put in functioning passive radon mitigation systems as required by law. As this Court is aware, radon is an odorless, colorless, radioactive gas. Radon is the number one cause of lung cancer among non-smokers in the United States, and it is the second leading cause of lung cancer behind smoking. Both the EPA and the Surgeon General's office estimate that radon is responsible for more than 20,000 lung cancer deaths each year. Because radon poses a serious health risk in the Eastern Panhandle local building codes have required the installation of passive radon mitigation systems in all new home construction.

The only purpose of a radon mitigation system is to reduce a residents' risk of contracting lung cancer. Richmond American knew this when it was building homes in West Virginia, but it did not care. Richmond systematically failed to properly install radon mitigation systems in each of the Plaintiffs' homes, thus exposing residents to twice the level of radon that they would have been had the system been installed correctly. As a can be expected, the Plaintiffs have substantial and complicated personal injury and medical monitoring claims resulting from Richmond American's reckless, tortious, and in some instances, fraudulent conduct.

In *Brown v. Genesis Healthcare Corp.*, this Court recently held that "parties have a fundamental constitutional right to use West Virginia's court system to seek justice."

Slip op. at 21.

These constitutional rights—of open access to the courts to seek justice, and to trial by jury—are fundamental in the State of West Virginia. Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals—tribunals that involve, in the case of

the jury, members of the general citizenry. These fundamental rights do not exist just for the benefit of individuals who have disputes, but *for the benefit of all of us*. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends.

Id. at 22 (emphasis in original)(citing *State ex rel. Dunlap v. Berger*, 2121 W.Va. 549, 560, 567 S.E.2d 265, 276 (2002)).

While Richmond American would suggest that arbitration is merely a change of venue, comparable to moving a dispute from Virginia to Maryland, it is not. Arbitration proceedings are conducted in secret and the rulings are unappealable. The due process safeguards of the Rules of Civil Procedure and Evidence do not apply. Arbitrators “who may be more interested in their fees than the disputes at hand,” *Brown*, slip op. at 23, have unchecked discretion and may conduct the arbitrations as they like.

As this Court observed, quite simply, “in some areas, arbitration is not appropriate[.]” *Brown*, slip op. at 37. While mandatory arbitration clauses can be exceedingly unfair and harmful to unwitting plaintiffs, arbitration of personal injury claims raises additional and more serious concerns. As such, it is evident that the Federal Arbitration Act (FAA) was never intended to, and does not cover, personal injury or wrongful death claims. Syl. Pt. 21, *Brown v. Genesis Healthcare Corporation*.

In addition, even if the FAA did apply to the instant personal injury and medical monitoring claims, because the Plaintiffs herein *specifically challenged* the validity of the arbitration provision on the basis of both unconscionability and ambiguity, the trial court

had the authority to determine the arbitration provision's validity under standard West Virginia contract principals per the "saving clause" of the FAA.¹

Notwithstanding, Richmond American fundamentally misunderstands and misconstrues the meaning of the severability doctrine; this Court should not be so misled. As this Court explained in *Brown*, the severability doctrine "is essentially a pleading standard: only if a party explicitly challenges the enforceability of an arbitration clause within a contract is a court then permitted to consider challenges to the arbitration clause." Slip op. at 42-43. This connotes a rather low threshold for a party to overcome in order to have the Court determine the "gateway question" concerning the validity of the agreement to arbitrate.

What Richmond American fails to grasp is that, once the trial court determines that it has the authority to determine the validity of the subject provision (which Richmond American concedes the lower court had),² *the severability doctrine no longer has any place in the analysis*. Fundamentally, a trial court cannot *both* apply the severability doctrine *and* determine the validity of the arbitration provision because, implicitly, the severability doctrine means that the trial court *lacks* the authority to determine the "gateway question" of validity. However, because in the instant case the Plaintiffs have made a specific challenge to the arbitration provision and "not *just* the

¹ Richmond ignores the fact that the Plaintiffs' ambiguity argument specifically challenges the language in the mediation/arbitration provisions *directly*. This fact alone undermines its argument that Plaintiffs only challenged provisions outside the arbitration agreement.

² Richmond American in its original Writ conceded that "[t]he Circuit Court correctly held that the Plaintiffs' challenge to the arbitration provision of the Purchase Agreement gave it (rather than the arbitrator) the power to determine whether that provision is valid[.]" Writ, p. 5.

contract as a whole” *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 636 (4th Cir.2002)(emphasis added), the severability doctrine does not apply herein.³

In order to determine the validity of an arbitration provision, the trial court must apply state law contract principals, which in West Virginia, requires the trial court to determine the unconscionability of the challenged arbitration provision within the context of the contract as a whole. *State ex rel. AT & T v. Wilson*, 226 W.Va. 572, 579 703 S.E.2d 543, 550 (2010)(citing Syl. Pt. 3, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 604, 346 S.E.2d 749, 753 (1986) (holding that “[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.”)). The severability doctrine does not dictate how West Virginia courts may apply substantive state contract law at this step in the analysis, as long as state substantive law does not target arbitration provisions and treat them differently than other challenged terms. West Virginia’s jurisprudence derives from ordinary contract cases, and does not treat unconscionable arbitration agreements any differently than unconscionable non-arbitration contracts per *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987). Thus, when conducting its validity analysis,⁴ the trial court may consider the arbitration provision in the context of

³ The trial court’s September 3, 2010 Order denying Richmond American’s Motion to Dismiss and to Compel Arbitration included a color-coded chart that explained the trial court’s analysis versus Richmond American’s incompatible demand for the court to determine both the validity of the arbitration provision and the severability doctrine. As it appears that the Supreme Court’s copy is in black and white, Plaintiffs intend to file a Motion to Supplement the record to include a color copy of the Exhibit which will better explain Richmond American’s confused analysis.

⁴ Which, as noted before, is incompatible with the “severability doctrine” because when the severability doctrine applies, no validity analysis occurs because the Court will *presume* that the arbitration provision is valid because a party failed to specifically challenge the arbitration provision. In such cases, the court will “pluck from a potentially invalid *contract* a potentially valid *arbitration agreement*” and enforce it. *Rent-a-Center, West, Inc. v. Jackson*, ___ U.S. ___, 130 S.Ct. 2772, 2786 (2010)(Stevens, J. dissenting) (emphasis in original). If the trial court satisfies itself that a challenge to the specific provision was made, as in the instant case, the trial court is vested with the authority to apply state contract law (also applicable to non-

the greater contract per *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991) and *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 560, 567 S.E.2d 265, 276 (2002).

It should also be noted that more than half of the forty (40) plaintiffs who make up the 11 families who filed suit did not sign the arbitration provisions and are in no way in privity of contract with Richmond American. Sixteen (16) of the residents Richmond American wants to force into arbitration are children who clearly lack the ability to understand, much less consent, to arbitration. Richmond American has failed to come forward with any evidence which would suggest that its adhesion contract should fall into any exception to *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W.Va. 23, 511 S.E. 2d 134 (1998) and be enforced against these children and other non-signatories. As such, even if the FAA were applicable to the instant claims, which it is not, such agreements clearly could not be enforced against such non-consenting parties.

II. ARGUMENT

A. Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act.

Despite Richmond American's attempt to distinguish the *Brown* case from the case at bar, there is nothing equivocal about Syllabus Point 21. As this Court explained, the FAA was not intended to be, "in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a

arbitration cases) to determine the validity of that provision. At this point in the analysis, the severability doctrine cannot apply.

transaction affecting interstate commerce [.]” *Brown* slip op. at 71-72. As noted, West Virginia’s Supreme Court of Appeals is not alone in this belief:

Various arbitration groups—including the American Arbitration Association—refuse to arbitrate certain personal injury and wrongful death claims where the arbitration agreement was signed *before* negligence occurred. Many groups now only arbitrate personal injury and wrongful death claims where the agreement was signed *after* the negligence occurred, and the parameters of the liability and damages could be clearly understood by the parties.

Id. at 72. As this Court observed, “[o]nly by having to publicly account for their misfeasance or malfeasance is a defendant likely to mend his, her, or its ways.” *Id.* As such, regardless of whether the arbitration provisions are unconscionable (which in this case they are), the FAA does not require the plaintiffs, who are victims of negligence, gross negligence, and intentional torts, to forfeit their Constitutional right to a trial by jury. *Id.*

The purchase agreements that some (but not all) plaintiffs signed were signed *prior* to the improper and grossly negligent installation of radon mitigation systems which resulted in plaintiffs’ increased radon exposure and resulting personal injury and medical monitoring claims. Pursuant to Syllabus Point 21 of *Brown*, pre-negligence arbitration provisions should not be enforced to cover tort claims resulting in personal injury and wrongful death, such as in the instant case. Richmond American’s attempt to constrain this Court’s ruling to only pre-admission nursing home agreements is unavailing. Indeed, if this Court were to accept Richmond’s invitation, it would be inviting error by singling out a particular type of arbitration agreement and treating it differently than others, which was the very reason this Court struck down W.Va. Code § 16-5C-15(c) in *Brown*.

Richmond American's obsessive focus on the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* ___ U.S. ___, 131 S.Ct. 1740 (2011) also ignores the fact that this Court was well aware of this ruling prior to this Court's decision in *Brown*. As this Court explained, notwithstanding the *Concepcion* decision, this Court could not "locate an instance where the United States Supreme Court has addressed the application of the FAA to an arbitration agreement *in the context of a personal injury or wrongful death claim.*" *Brown*, slip op. at 50-51. Thus, because *Brown* was decided prior to and with the full understanding of the *Concepcion* decision, *Brown* is the law in West Virginia and controls this Court's decision herein. The Court's reasoning in *Brown* applies with equal force here and Richmond American's request that this Court abandon, or "step back," its holding in Syllabus Point 21 must be rejected.

B. The lower court was correct in finding that Richmond American's arbitration provision is both procedurally and substantively unconscionable.

Richmond American suggests that the arbitration provision that its attorneys drafted should be enforced, regardless of whether the plaintiffs in this case understood that the provisions were one-sided or would strip them of fundamental rights. Richmond suggests that even adhesive contracts containing unconscionable provisions must be enforced because of the FAA's presumption favoring arbitration. (See Supplemental Writ, p. 1).⁵ However, Richmond greatly overstates the federal presumption favoring arbitration.

⁵ Richmond notes that many of the unconscionable provisions in its adhesive contract were not within the arbitration provision itself. However, West Virginia jurisprudence has long been that in order to determine whether any provision is unconscionable (whether it is arbitration or not), the trial court must examine *the contract as a whole*. See *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W.Va. 572, 579, 703 S.E.2d 543, 550 (2010)(decided *after Rent-A-Center* and citing with approval in *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 604, 346 S.E.2d 749, 753 (1986)). As noted in the Plaintiffs' original response, under

writing for the majority explained that the U.S. Supreme Court has

never held that [a presumption favoring arbitration] overrides the principle that a court may submit to arbitration "only those disputes ... that the parties have agreed to submit." *First Options [of Chicago, Inc. v. Kaplan]* 514 U.S., 938, 943, 115 S.Ct. 1920 (1995)]; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contract parties"); *AT & T Technologies, Inc. [v. Communications Workers of America]* 475 U.S. 643, 650- 651, 106 S.Ct. 1415 (1986)] (applying the same rule to the "presumption of arbitrability for labor disputes"). Nor have we held that courts may use policy considerations as a substitute for party agreement. See, e.g., *id.*, at 648-651, 106 S.Ct. 1415; [*Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)]. We have applied the presumption favoring arbitration, in FAA and in labor cases, *only* where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was *validly formed* and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute. See *First Options, supra*, at 944-945, 115 S.Ct. 1920 (citing *Mitsubishi [Motors Corp. v. Soler Chrysler-Plymouth, Inc.]*, 473 U.S. 614, 626, 105 S.Ct. 3346 (1985); *Howsam [v. Dean Witter Reynolds, Inc.]*, 537 U.S. 79, 83-84, 123 S.Ct. 588 (2002); *AT & T Technologies, supra*, at 650, 106 S.Ct. 1415 (citing [*United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-583, 80 S.Ct. 1347 (1960)]; *Drake Bakeries, [Inc. v. Local 50, Am. Bakery and Confectionery]*, 370 U.S. 254, 259-260, 82 S.Ct. 1346 (1962)].

___ U.S. ___, 130 S.Ct. 2847, 2859-60 (2010)(emphasis added). Thus, if a court finds an arbitration provision to be unenforceable, then clearly, no presumption favoring arbitration will ever arise. *Id.*

§ 2 of the FAA, the trial court may determine the unconscionability of an arbitration provision as long as its review would be the same for a non-arbitration contract term.

As this Court noted, the FAA was designed “to make arbitration agreements as enforceable as other contracts, but not more so.” *Brown*, slip op. at 34 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 1806, n.12 (1967)). The United States Supreme Court cautioned in *Gilmer v. Interstate/Johnson Lane Corp.*, that “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’” 500 U.S. 20, 32, 111 S.Ct. 1647 (1991)(citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346 (1985)); *see also, Volt*, 489 U.S. at 479, 109 S.Ct. 1248, (1989) (noting that arbitration “is a matter of consent, not coercion”).

Richmond American also misguides the Court by stating that “[plaintiffs] had available to them legal counsel and other consultants, experts and brokers to advise them; in each instance, legal counsel was involved in the closing.” (Supplemental Writ, p. 18). As Richmond American well knows, none of the plaintiffs were represented at the time that they signed the purchase agreements and the only person with whom they discussed the sales agreement (with its fine-print arbitration provision) was Richmond American’s sales agent, whose job it was to get customers to sign the agreement. In addition, despite Richmond’s implication to the contrary, the only attorneys involved at the closings were *Richmond American’s* preferred counsel; the homebuyers would have been penalized with greater closing costs if they wished to use independent counsel. Indeed, Richmond American’s “incentive” offered to the homebuyers to use its selected legal counsel could very well have been intended to avoid independent analysis of the arbitration provision. In any event, these facts make little difference because, as noted above, the purchase

agreements were all signed *before* the negligence, intentional conduct, and personal injuries occurred and thus, under the *Brown* decision, such agreements cannot bar the Plaintiffs' constitutional right to access the courts.

The subject arbitration provisions are both procedurally and substantively unconscionable and were properly rejected by the circuit court. As this Court explained in *Brown*, “[t]he 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.” Slip op. at Syl. Pt. 12. Also, “[a] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and ‘the existence of unfair terms in the contract.’” Syllabus Point 4, *Art’s Flower Shop*, *supra*. The question of whether the arbitration provisions in the subject purchase agreements were unconscionable is a question of law to be decided by the court. *Brown*, slip op. at 54.

As this Court explained

[A] contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a “sliding scale” in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.

Id. at 65.

Under West Virginia law, form contracts and standardized contracts offered on a take-it-or-leave-it basis are adhesion contracts by definition. *Dunlap*, 567 S.E.2d at 273-274; *Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914, 921 (2002). The contract at issue here is, by its very nature, an adhesion contract. It is a standardized, pre-printed form

contract. There are no individualized terms relating to the plaintiffs or any other individual consumers. Richmond did not offer plaintiffs an opportunity to negotiate the terms of the agreements. It simply presented its customers with a non-negotiable, take-it-or-leave-it standardized contract.

The trial court acknowledged the *Arts' Flower Shop* factors and found the Purchase Agreements were presented "on a take-it-or-leave-it basis and the mediation/arbitration provisions were non-negotiable." See Order Denying Motion to Compel Arbitration, at 16-17. The trial court found that "Richmond American was solely responsible for preparing and providing the signatory Plaintiffs the adhesion contract" and the "signatory Plaintiffs were not entitled to 'opt out' of the arbitration provision." *Id.*

Finally, the trial court found

that it is not credible for Richmond American to suggest that the signatory Plaintiffs had the same level of sophistication or understanding about the legal terms in the Purchase Agreement as Richmond American and its attorneys who drafted the language. The homeowners' comparative bargaining power as against the multi-million dollar national corporation was negligible.

Id. at 17.

In addition to procedural unconscionability, the trial court also found that Richmond American's arbitration provisions were substantively unconscionable. This Court has repeatedly held that

Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

Dunlap, 567 S.E.2d 265. Further, “exculpatory provisions in contracts of adhesion are given close scrutiny, with respect to both their construction and their potential for unconscionability, particularly where rights, remedies and protections that exist for the public benefit are involved.” *Id.* at 274.

“Unconscionability is a general contract law principle, based in equity, which is deeply ingrained in both the statutory and decisional law of West Virginia.” *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 234, 511 S.E.2d 854, 859 (1998).

In *Perry v. Thomas*, 482 U.S. at 492-93, n. 9, the United States Supreme Court noted that state law contract principals, such as unconscionability, may invalidate an arbitration provision under § 2 of the FAA, as long as a court does not “construe the agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law.”

As noted in Plaintiffs’ prior brief, West Virginia’s jurisprudence concerning arbitration derives from ordinary contract cases per *Perry v. Thomas, supra*. In Syl. Pt. 3, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986), which was a non-arbitration case, this Court held that “[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.” This Court reiterated its position that unconscionability must be determined by examining a term in the context of the whole contract in another non-arbitration case, *Drake v. West Virginia Self-Storage, Inc.*, 203 W.Va. 497, 498, 509 S.E.2d 21, 22 (1998):

Unconscionability may be divided into two categories: procedural and substantive. Procedural unconscionability is concerned with the inequities and unfairness in the bargaining process. Substantive unconscionability is

involved with determining unfairness in the contract itself. *Id.*, 173 W.Va. at 114, 312 S.E.2d at 777. We have held that “[u]nconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court.” Syl. pt. 1, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986). In *Ashland Oil, Inc. v. Donahue*, 159 W.Va. 463, 474, 223 S.E.2d 433, 440 (1976), this Court held that “[i]n most commercial transactions it may be assumed that there is some inequality of bargaining power, and this Court cannot undertake to write a special rule of such general application as to remove bargaining advantages or disadvantages in the commercial area, nor do we think it necessary that we undertake to do so.” *See also Barn-Chestnut, Inc. v. CFM Development Corp.*, 193 W.Va. 565, 570, 457 S.E.2d 502, 507 (1995). Undertaking “[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.” Syl. pt. 3, *Troy*. We said in syllabus point 4 of *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991), that “[a] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and ‘the existence of unfair terms in the contract.’ ”

Syllabus Point 2, *Drake* (emphasis added).

In *Dunlap*, the Supreme Court merely reiterated its holding from prior non-arbitration cases:

Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exist for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

Syl.Pt. 2, *Dunlap*, 211 W.Va. at 550, 567 S.E.2d at 266. Similarly, the holding in *Board*

of *Education of Berkeley County v. W. Harley Miller, Inc.*, 160 W.Va. 473, 473-74, 236 S.E.2d 440-41 (1977) that arbitration provisions should be considered in the context of the contract as a whole merely reiterates Syllabus Point 3 of the non-arbitration case, *Troy Mining Corp*, 176 W.Va. at 601, 346 S.E.2d at 750 (the “analysis of whether a contract term is unconscionable necessarily involves an inquiry into . . . the fairness of the contract as a whole”). Recently, the West Virginia Supreme Court of Appeals reiterated well-established state substantive law, which was originally derived from non-arbitration cases:

It is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

Syl.Pt. 2, *Ruckdeschel v. Falcon Drilling Co., LLC*, ___ W.Va. ___, 693 S.E.2d 815, 820 (2010)(emphasis added, citations omitted).

Thus, this Court’s prior decisions are predicated upon ordinary West Virginia contract cases, which is fully in compliance with the “saving clause” of the FAA. *Dunlap* and *Harley Miller* do not treat arbitration clauses any differently than other challenged contract provisions in non-arbitration settings. That is all the United States Supreme Court requires pursuant to *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87, 116 S.Ct. 1652 (1996)(“state law may be applied ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally’”).

In the instant case, as in *Dunlap*, all of the subject provisions either implicitly or explicitly limited the homeowners' ability to seek compensatory damages for property damage and bodily injury; limited the homeowners' ability to seek punitive damages to redress and punish misconduct; and improperly relieve the Defendant from liability for the breach of the implied warranty of habitability. When considering these exculpatory provisions in the contract as a whole, as permitted by § 2 of the FAA and West Virginia state law precedent, they collectively waive any and all meaningful claims and damages on behalf of the signatory plaintiffs. Syllabus point 2 of *Dunlap* plainly prohibits the enforcement of these exculpatory provisions that "would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public." 567 S.E.2d at Syl. Pt. 2.

In addition, as this Court also held in *Dunlap*, "[p]rovisions in a contract of adhesion that would operate to restrict the availability of an award of attorneys' fees to less than that provided for in applicable law would, under our decision today, be presumptively unconscionable." *Id.* at 283 n.15. In the instant case, each plaintiff sought attorney fees in their Complaints against Richmond to the extent provided for by law. However, Richmond's mediation/arbitration provision provides that "if any party commences an arbitration or court action based on a dispute or claim to which this paragraph applies without first attempting to resolve the matter through mediation, then in the discretion of the arbitrator(s) or judge, the party shall not be entitled to recover attorney's fees even if they would otherwise be available to that party in any such

arbitration or court action.” See Paragraph 21(a) of Purchase Agreements.⁶ This provision limits Richmond American’s liability under at least two West Virginia statutes (W. Va. Code, § 36B-4-117 provides for attorney fees for violations of the Uniform Common Interest Ownership Act, and W.Va. Code § 46A-5-104 provides for fee shifting when a consumer is subject to “illegal, fraudulent or unconscionable conduct”).⁷ Under *Dunlap*, these restrictions on remedies are presumptively unconscionable; Richmond can offer nothing with which to overcome the presumption. Likewise, attorney fees are available in cases of fraud.

Lastly, in Syllabus Point 4 of *Dunlap*, this Court addressed unreasonably burdensome costs which may be imposed upon the adhered party and it is still good law:

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

567 S.E.2d at syl. pt. 4. Despite Richmond American’s assertion to the contrary, the costs incurred in mediation and arbitration in these cases are a much greater burden on an

⁶ While Section 2 of the FAA allows the trial court to determine unconscionability by applying West Virginia contract law and examining the contract as a whole, it should be noted that *this* exculpatory provision is included in the arbitration section itself.

⁷ West Virginia Code § 46A-6-104 provides that “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” While not expressly pled, the conduct alleged by plaintiffs against Richmond American plainly falls under this provision of Chapter 46A and, therefore, would allow for attorney fees under West Virginia Code § 46A-5-104.

individual and even prohibitive, in comparison to a court action. Rather than restate Plaintiffs' arguments previously made, Plaintiffs rely upon their prior legal papers submitted. However, it is plain that by requiring both mediation and arbitration, Richmond's contracts have a chilling effect on most any homeowner considering litigation. Because these administrative costs are unreasonably burdensome, pursuant to *Dunlap*, the arbitration clause is unenforceable.

C. The lower court was correct in finding that Richmond American's adhesive arbitration provision is ambiguous and should be construed against Richmond American

Under § 2 of the FAA, arbitration provisions like other contracts may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88, 116 S.Ct. 1652 (1996). Ambiguity is a contract defense, which clearly applies in the instant case.

Under the "saving clause," the ambiguity in the adhesion contract is construed pursuant to West Virginia contract law against Richmond American. Richmond concedes that "[t]he mediation provisions in the Purchase Agreements are part and parcel of the arbitration provisions and, as such, the two provisions should be considered as one." (See Motion to Compel Arbitration, n. 16 at App. 100). However, because the mediation and arbitration provisions are contradictory, and thus ambiguous, they are invalid under West Virginia contract law.

As noted by the Defendant, Paragraph 21(a) of the Purchase Agreement provides as follows:

- (a) Mediation of Disputes. Purchaser and Seller agree to mediate any disputes, claims and/or controversies in law or equity between Purchaser and Seller arising out of, related to or in any way connected with the Property, this Agreement, or any resulting transaction, before

resorting to arbitration, or court action. Mediation is a process in which parties attempt to resolve a dispute by submitting it to an impartial, neutral mediator who is authorized to facilitate the resolution of the disputes but who is not empowered to impose a settlement on the parties. Mediation fees, if any, shall be divided equally among the parties involved. Before the mediation begins, the parties agree to sign a document limiting the admissibility in arbitration or any civil action of anything said, any admission made, and any documents prepared, in the course of the mediation, consistent with West Virginia law. Seller shall submit to Purchaser the names of three (3) certified mediators and Purchaser shall designate one (1) to be the mediator. If Purchaser fails to designate a mediator within five (5) days after notice to do so, Seller may designate the mediator. If any party commences an arbitration or court action based on a dispute or claim to which this paragraph applies without first attempting to resolve the matter through mediation, then in the discretion of the arbitrator(s) or judge, the party shall not be entitled to recover attorney's fees even if they would otherwise be available to that party in any such arbitration or court action.

Reference to court action five (5) times in a section that Richmond concedes is “part and parcel” of the arbitration agreement (see Motion to Compel Arbitration, n. 16 at App. 100), creates an irreconcilable conflict. Paragraph 21(a) clearly suggests that the homeowners may still retain the ability to vindicate their claims in court. Such language creates an ambiguity in the arbitration provision that, pursuant to well-settled West Virginia contract law, must be construed against the drafting party, Richmond. *Auber v. Jellen*, 196 W.Va. 168, 469 S.E.2d 104 (1996)(holding that ambiguous contract provisions, especially those having the qualities of contracts of adhesion, are to be construed against the drafter).

D. The lower court was correct to find that the non-signatories in this matter are not bound by arbitration provisions to which they did not assent

In *Brown*, this Court also addressed whether the proponent of an arbitration provision can force non-signatories to arbitrate their claims. This Court noted that it

previously addressed a similar question where the non-signatory's claim derived from contract. *Brown*, slip op. at 83n. 168, (citing *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W.Va. 23, 511 S.E. 2d 134 (1998)). In Syllabus Point 3 of *United Asphalt*, the Court held that

a court *may not* direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring express assent to arbitration should be invoked.

Id. (emphasis added). This Court also cited with approval *Thompson v. Witherspoon*, 197 Md.App. 69, 87-88, 12 A.3d 685, 696 (2011), wherein that court held that

[w]here a non-signatory benefits from the contractual relation of parties to an agreement but not the agreement itself, the non-signatory has not 'directly benefited;' hence, an arbitration clause will not have binding effect. Similarly, an abstract advantage gained from a contract, intangible or indefinite, will not compel a non-signatory to arbitrate.

Brown, slip op. at 83n. 168.

As noted in Plaintiffs' original Response in Opposition, non-signatory plaintiffs are not pursuing breach of contract claims nor are they seeking contractual damages. Each and every cause of action asserted by the non-signatory plaintiffs arises from legal duties, which are either based in tort or are statutory in nature, opposed to arising from contractual duties. Richmond American cannot show that it relied to its disadvantage or detriment upon any representation by the non-signatory plaintiffs. Syl. Pt. 4, *Cleaver v. Big Arm Bar & Grill, Inc.*, 202 W.Va. 122, 502 S.E.2d 438 (1998) ("It is essential to the application of the principles of equitable estoppel that the one claiming the benefit thereof establish that he relied, to his disadvantage or detriment, on the acts, conduct or

representation of the one alleged to be estopped”). Accordingly, grounds for equitable estoppel do not exist here.

As the United State Supreme Court recently stated in *Granite Rock Co. vs. International Brotherhood of Teamsters*, 130 S. Ct. 2847, 2857, “[a]rbitration is strictly a matter of consent.” Thus, arbitration should be compelled only when it is consistent with the intent of the contracting parties. *Id.* Because the non-signatories never intended to arbitrate, and their claims arise out of tort and not contract, they should not be bound by Richmond American’s adhesive and unconscionable arbitration provisions either. Several other courts that have addressed this issue apparently agree. *See e.g., Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002) (children were not bound by the arbitration agreement); *Scharf v. Kogan*, 285 S.W.3d 362, 369-371 (Mo. Ct. App. 2009) (husband’s signature did not bind wife in the absence of evidence that the husband was acting as the wife’s agent); *Slusher v. Ohio Valley Propane Services*, 896 N.E.2d 715 (Ohio Ct. App. Jan. 7, 2008) (children were not required to arbitrate negligence claims against mobile home company because the contract containing the arbitration provision was signed only by their parent); *Flores v. Evergreen at San Diego, Inc.*, 148 Cal. App. 4th 581, 587, 55 Cal. Rptr. 3d 823 (2007) (signature of husband did not bind wife); *Finney v. Nat’l Health Care Corp.*, 193 S.W.3d 393 (Mo. Ct. App. 2006) (daughter who signed nursing home agreement on behalf of her mother was not required to arbitrate wrongful death claims because only claims on behalf of her mother, rather than her own personal claims, were subject to arbitration); *Snyder v. Belmont Homes, Inc.*, 899 So. 2d 57, 64 (La. Ct. App. 2005) (refusing to compel arbitration of child’s claim on the basis of arbitration clause signed by parents because under state law, a child is not bound by

parent's contract); *In re Kepka*, 178 S.W.3d 279 (Tex. App. 2005) (overruled on other grounds) (wife who signed arbitration agreement with nursing home as legal representative of her husband was not required to arbitrate wrongful death claim that was personal to her and was not brought in her representative capacity); *Accomazzo v. CEDU Educ. Services, Inc.*, 15 P.3d 1153, 1156 (Idaho 2000)(child not bound to arbitrate); *Ex parte Dickinson*, 711 So. 2d 984 (Ala. 1998) (signature of husband did not bind wife). As this Court noted in *State ex rel. City Holding Co. vs. Kaufman*, 216 W.Va. 594, 609 S.E.2d 855 (2004), “[p]arties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.” Accordingly, even in the absence of this Court’s recent ruling in *Brown*, Richmond American should not be permitted to enforce its arbitration agreements against non-consenting parties.

III. CONCLUSION

WHEREFORE, in view of the foregoing, Plaintiffs below respectfully suggest that the Petition for Writ of Prohibition be DENIED.

Respectfully Submitted,

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 11-0770**

**STATE OF WEST VIRGINIA ex rel. RICHMOND
AMERICAN HOMES OF WEST VIRGINIA, INC.
And M.D.C. HOLDINGS, INC., et. al.**

Petitioners,

V.

**HONORABLE DAVID H. SANDERS,
JUDGE OF THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA,**

Respondent.

CERTIFICATE OF SERVICE

I, Laura C. Davis, counsel for Plaintiffs, do hereby certify that I have served a true copy of the foregoing **SUPPLEMENTAL RESPONSE IN OPPOSITION TO WRIT OF PROHIBITION** upon the following counsel and party at their respective mailing addresses by mailing a true copy thereof by United States first Class Mail, Postage Prepaid, this 11th day of August, 2011, as follows:

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