IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 35740

MARK CASTLE,
Appellee,

v.

NEWTOWN ENERGY, INC.,
Appellee,

v.

ROXIE SUE BRINAGER d/b/a
BELO MINE SERVICES,
Appellant,

v.

LEXINGTON INSURANCE COMPANY,
Appellee.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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INTRODUCTION

The Circuit Court of Boone County, West Virginia erred by ordering the present insurance coverage dispute to arbitration and by upholding the award issued by the arbitrators. The insurance policy, a contract of adhesion under well-established West Virginia law, contained an unconscionable arbitration provision. Specifically, the arbitration provision deprived the appellant, Roxie Sue Brinager d/b/a Belo Mine Services ("Belo"), of important rights unique to West Virginia insureds under state law, including the right to recover attorneys' fees. As a result, Belo was subjected to a protracted and expensive arbitration process while seeking to secure insurance coverage from its insurer, appellee Lexington Insurance Company ("Lexington"). By unjustifiably delaying the issuance of a final arbitration award until four months after the initial arbitration hearing was held, the arbitrators exceeded their jurisdiction. Belo was further required under the final arbitration award to pay over $30,000 in administrative fees and arbitration costs. Since the arbitration clause was unenforceable at the outset, the proceedings and rulings of the arbitrators are void *ab initio*. Moreover, the arbitration award is void to the extent that the arbitrators exceeded their power in rendering a decision outside of mandatory jurisdictional time constraints. The submittal of the dispute to arbitration, as well as the subsequent failure of the Circuit Court to vacate the arbitration award on the basis that the insurance agreement was not a contract of adhesion, constitutes reversible error. In this appeal, Belo seeks the reversal of the Circuit Court of Boone County's March 22, 2010 Order confirming and incorporating the arbitration award.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal arises out of a Fourth-Party Complaint filed by Belo against Lexington, in the Circuit Court of Boone County, West Virginia, on July 23, 2007. (4th-Pty. Compl., R. at 20-33). The underlying civil action, *Mark Castle v. Newtown Energy, Inc.*, Civil Action No. 06-C-97 (the "underlying action"), was filed in the Circuit Court of Boone County, West Virginia, on or about July 24, 2006. (Compl., R. at 1-4). In that suit, the plaintiff, Mark Castle, sued Newtown

Energy, Inc. ("Newtown") for injuries he sustained in an underground mining accident on December 1, 2005. (Compl., R. at 1-4). At the time, Belo employed Mr. Castle. Belo provided mining labor to Kanawha Eagle, Inc. ("Kanawha Eagle") and its subsidiary, Newtown. (Agreement, Ex. B, 3d-Pty. Compl., R. at 10-13).

On January 25, 2006, Belo submitted a Notice of Claim to Lexington under Commercial General Liability Policy No. 0275284 (the "Policy") reporting Mr. Castle's injuries. (4th-Pty. Compl., R. at 20-33; Policy, Ex. B, Mot. to Vacate, R. at 277-96). Lexington issued the Policy to Belo as a named insured and Newtown as an additional insured. (Policy, Ex. B, Mot. to Vacate, R. at 277-96). By letter dated February 6, 2006, Lexington reserved its right to deny coverage to Belo claiming that the Policy did not provide coverage to Belo for claims made against it by its employees when the claims arose out of the course of their employment. (4th-Pty. Compl., R. at 24).

Approximately one year later, on January 10, 2007, Newtown filed a Third-Party Complaint against Belo, seeking indemnity under a Contract Labor Service Agreement (the "Service Agreement") between Belo and Kanawha Eagle and its various affiliate entities, including Newtown. (3d-Pty. Compl., R. at 10-13). Newtown alleged that Belo breached the Service Agreement by failing to provide Newtown with insurance coverage under the policy for the lawsuit filed by Mr. Castle. (3d-Pty. Compl., R. at 11-12).

On June 15, 2007, Belo received a second reservation of rights letter from Lexington, which included new and different grounds for denying coverage. (Ltr., June 15, 2007, Ex. A, Belo's Mot. to Stay Arb., R. at 34-38). In this letter, Lexington reserved the right to deny coverage based upon bodily injury, insured contract and subsidence exclusions in the Policy. (Ltr., June 15, 2007). In addition, the letter contained a formal demand for arbitration by Lexington, who unilaterally submitted to the American Arbitration Association ("AAA"). Lexington claimed the authority to unilaterally submit the claim under the arbitration provision in the Policy. (Ltr., June 15, 2007).

On July 23, 2007, Belo filed a Fourth-Party Complaint against Lexington seeking, among other relief, a declaration that the arbitration provision contained in a Lexington insurance policy issued to Belo was unconscionable and unenforceable under the laws of West Virginia. (4th-Pty. Compl., R. at 20-33). On September 12, 2007, Belo moved to stay arbitration pending the Circuit Court's determination as to the validity and enforceability of the Policy's arbitration provision under West Virginia law. (Belo's Mot. to Stay Arb., R. at 34-38; 39-46). On September 18, 2007, Lexington filed a motion to compel arbitration. (Lexington's Mot. to Compel. Arb., R. at 53-55; 56-70). The Circuit Court ordered limited discovery for the purposes of determining whether the arbitration provision was part of a contract of adhesion. (Order, Nov. 27, 2007, R. at 97-99). Specifically at issue was the formation and negotiation of the Policy, which would assist in determining whether Belo bargained for the arbitration provision. Belo argued that the arbitration provision contained within the Policy was unconscionable thus rendering it unenforceable. The Circuit Court ordered the insurance coverage dispute to arbitration, and Belo petitioned for a writ of prohibition. (Order, June 27, 2008, R. at 180-83). By order dated September 4, 2008, this Court, in a 3-2 vote, was of the opinion that a rule should not issue; thus, the matter continued before the Circuit Court. (Order, Sept. 4, 2009, Ex. A, Lexington's Mot. to Stay, R. at 211-15).

Thereafter, pursuant to the Circuit Court's June 27, 2008 Order, the coverage dispute was then submitted to arbitration. (Order, June 27, 2008, R. at 180-83). Ultimately, a decision was reached in favor of the insurer, Lexington. (Final Award, Ex. A, Mot. to Vacate, R. at 277-96). On February 2, 2010, Belo moved the Circuit Court to vacate the arbitration decision because the award and decision were the result of an unconscionable and unenforceable arbitration provision contained within a contract of adhesion. (Belo's Mot. to Vacate, R. at 277-96). In addition, the arbitration decision was untimely and therefore rendered outside of the jurisdictional constraints set forth in the arbitration provision. (Belo's Mot. to Vacate, R. at 277-96). On March 22, 2010, the Circuit Court denied Belo's motion to vacate the arbitration award

and entered judgment in favor of Lexington, confirming the arbitration decision. (Order, Mar. 22, 2010, R. at 356-67). On July 22, 2010, Belo filed its Petition for Appeal, challenging the Circuit Court of Boone County's June 27, 2008 Order submitting the matter to arbitration, and the Circuit Court's March 22, 2010 Order confirming and incorporating the subsequent arbitration award. (Belo's Pet. for Appeal). On November 22, 2010, this Court granted Belo's Petition for Appeal of the Circuit Court's June 27, 2008 Order submitting the matter to arbitration, and the Circuit Court's March 22, 2010 Order confirming and incorporating the subsequent arbitration award.

STATEMENT OF THE FACTS OF THE CASE

I. BACKGROUND

Belo is a West Virginia company engaged in the business of providing contract mine services to coal operators. (*See* Agreement 1, Ex. B, 3d-Pty. Compl., R. at 10-13). Belo purchased the Policy, with effective dates of coverage from April 16, 2005 to April 15, 2006, from Lexington. (Policy, Ex. B, Mot. to Vacate, R. at 277-96). On or about July 15, 2005, Belo entered into a Service Agreement with Kanawha Eagle Coal, LLC and its subsidiaries, affiliates and related entities (collectively "Kanawha Eagle"), one of which was Newtown. (Agreement, Ex. B, 3d-Pty. Compl., R. at 10-13.) Pursuant to the Service Agreement, Belo, as an independent contractor, was to supply general underground labor and security services at Kanawha Eagle mine facilities. (Agreement 1-3). The terms of the Service Agreement required Belo to provide Kanawha Eagle with insurance coverage, so on July 12, 2005, Belo requested that Lexington add Kanawha Eagle as an additional insured to the Policy. (Agreement 4-7; Kanawha Cert. of Ins., Ex. C, 4th-Pty. Compl., R. at 20-33). Lexington issued a certificate of insurance for Kanawha Eagle reflecting an effective coverage date of August 25, 2005. (Kanawha Cert. of Ins.).

II. THE PURCHASE OF THE INSURANCE POLICY

Belo purchased the subject Policy from local insurance agent, Wayne Runyon, with assurances that it would meet Belo's insurance needs. (Brinager Dep. 47-48, 50-61, Jan. 23, 2008, Ex. A, Belo's Supp. Resp. to Lexington's Mot. to Compel Arb. & Mot. to Dismiss, R. at 100-107). Mr. Runyon traveled to Belo's office to complete the application for insurance coverage. (Brinager Dep. 48). Mr. Runyon asked certain specific questions, but otherwise filled out and completed the application for insurance on Belo's behalf. (Brinager Dep. 48). At no time during the application process was an arbitration provision mentioned or discussed with Belo. (Brinager Dep. 163-64). Once the application was completed, Mr. Runyon returned to Belo with an offer of coverage from Lexington. (Brinager Dep. 51). No other coverage was offered or available. (Brinager Dep. 51). Belo was not shown a copy of the Policy or any of its parts before purchasing it. (Brinager Dep. 60). Belo purchased the Policy based upon assurances that the coverage from Lexington would meet Belo's needs. (Brinager Dep. 59).

The arbitration clause within the Policy issued by Lexington to Belo provided as follows:

> SECTION III LIMITS OF INSURANCE
>
> 16. Arbitration
>
> Notwithstanding Condition 15, Service of Suite, in the event of a disagreement as to the interpretation of this policy, it is mutually agreed that such disputer shall be submitted to binding arbitration before a panel of three (3) Arbitrators, consisting of two (2) party nominated (nonimpartial) Arbitrators and a third (impartial) arbitrator (hereinafter "umpire") as the sole an exclusive remedy. The party desiring arbitration of a dispute shall notify the other party, said notice including the name, address and occupation of the Arbitrator nominated by the demanding party. The other party shall, within 30 days of the appointment of the second Arbitrator, select an umpire. If the Arbitrators are unable to agree on an umpire, each Arbitrator shall submit to the other Arbitrator a list of three (3) proposed individuals, from which list each Arbitrator shall choose one (1) individual. The names of the two (2) individuals so chosen shall be subject to a draw, whereby the individual drawn shall serve as umpire.
>
> The parties shall submit their cases to the panel by written and oral evidence at a hearing time and place selected by the umpire.

> Said hearings shall be held within thirty (30) days of the selection of the umpire. The panel shall be relieved of all judicial formality, shall not be obligated to adhere to the strict rules of law or evidence, shall seek to enforce the intent of the parties hereto and may refer to, but are not limited to, relevant legal principles. The decision of at least two (2) of the three (3) panel members shall be binding and final and not subject to appeal except for grounds of fraud or gross misconduct by the Arbitrators. The award will be issued within 30 days of the close of the hearings. Each party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding.
>
> The arbitration proceeding shall take place in or in the vicinity of the Name Insured's address as shown in the Declarations or such other place as may be agreed to by the Named Insured and us. The procedural rules applicable to this arbitration, shall, except as provided otherwise herein, be in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

(Policy 24, Ex. B, Mot. to Vacate, R. at 277-96).

Belo was not provided the option of purchasing an arbitration provision. (Brinager Dep. 163-64). The arbitration provision at issue is a standard commercial coverage form, OCC-GL LX9641 (09/03), issued by the Insurance Services Office, Inc. (Policy 24). The provision was not a separately negotiated endorsement. Its inclusion was a condition of coverage, sold to Belo on a take-it-or-leave-it basis.

Moreover, this arbitration provision was included in the Policy without Belo's knowledge or consent. (Brinager Dep. 164). No one brought the provision to Belo's attention, explained the practical effect of the provision or informed Belo of the rights it would surrender under the provision. (Brinager Dep. 163-64). Belo did not even receive a copy of the Policy ***until after its purchase***. (Brinager Dep. 168).

III. THE ORDER COMPELLING ARBITRATION

On September 18, 2007, Lexington filed its *Motion to Compel Arbitration and to Dismiss or in the Alternative to Stay Fourth-Party Plaintiff's Declaratory Judgment Action*. (R. at 53-55, 56-70). In that motion, Lexington requested that the Circuit Court dismiss Belo's claims against Lexington and instead compel arbitration of the coverage issue under the arbitration provision of

the Policy. At the motion hearing on November 5, 2007, the Circuit Court instructed the parties to engage in discovery for a period of sixty days, focusing on Belo's involvement in the negotiation and formation of the Policy to determine whether the arbitration provision was enforceable.

Belo and Lexington submitted opposing briefs to the Circuit Court following the discovery period and attended another hearing on March 12, 2008. Belo argued, both in briefing and at the hearing, that it had not consented to the arbitration provision, had been completely unaware of the arbitration provision prior to the Policy's purchase, and had not had an opportunity to become aware of the arbitration provision prior to purchasing the Policy or during the policy period. Nevertheless, the Circuit Court granted Lexington's motion to compel arbitration and dismiss the Fourth-Party Complaint.[1]

At the March 12, 2008 hearing, Belo argued that the arbitration provision was unconscionable because it deprived Belo of its rights and remedies in compelling coverage under West Virginia law. In response, the Circuit Court stated from the bench that Belo's argument regarding its inability to recoup attorney fees and expenses at arbitration was a minor issue. (Cir. Ct. Hr'g Tra., 23, Mar. 12, 2008). The Circuit Court issued an oral ruling in favor of Lexington and compelled arbitration of the insurance dispute.[2] On June 27, 2008, the Circuit Court entered a formal order compelling the matter to arbitration, finding that Belo's argument that it would be deprived of attorney's fees and costs of arbitration "unpersuasive." The Circuit

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[1] Belo did not receive a copy of the Policy until after the policy period expired, and the Circuit Court admitted that it was odd to hold someone accountable for a contract term they did not see until the contract expired. (Cir. Ct. Hr'g Tra., 22-23, Mar. 12, 2008). However, the Circuit Court then held that it was not Lexington's duty to make sure Belo got the Policy, but rather the duty of the agent. (Hr'g Tra. 23). This is in spite of the fact that West Virginia law clearly establishes that an insurance agent is the agent *of the insurance company*. W. Va. Code § 33-12-22. The Circuit Court also ruled that there was nothing unconscionable about the arbitration provision because Belo's corporate representative could not testify to anything unconscionable about the arbitration provision. (Hr'g Tra. 23).

[2] At the June 9, 2008 hearing on Belo's motion to stay, the Circuit Court held that its March 12, 2008 oral ruling on Lexington's motion to compel arbitration and dismiss the Fourth-Party Complaint was interlocutory. As such, the Circuit Court held that the March 12, 2008 oral ruling and any subsequent written order was not appealable. The Circuit Court denied Belo's request to make any subsequent written order appealable under Rule 54(b) of the West Virginia Rules of Civil Procedure. Belo thus sought a Writ of Prohibition from this Court on June 26, 2008.

Court later reiterated and relied upon its earlier finding on this point in its March 23, 2010 Order confirming the arbitration award. In that Order, the Circuit Court rejected outright Belo's argument that the expense of arbitration could render an arbitration clause unconscionable and thus unenforceable. (R. at 356-67).

Ultimately, the Circuit Court compelled the arbitration of insurance coverage issues relating to whether or not fourth-party defendant, Lexington, had an obligation to defend and indemnify Newtown against the claims asserted by Mr. Castle in the underlying action.

IV. THE ARBITRATION

Pursuant to the provisions of the arbitration clause, the American Arbitration Association ("AAA") administered the arbitration. On June 4, 2009, after a period of limited discovery on the subsidence issues, the AAA issued a notice setting forth the timeframe that was to be followed in submitting briefs and setting a final hearing. This notice stated in pertinent part:

> Arbitration Clause/Hearing Timeframe: The parties agreed that although the clause calls for a hearing to be held within 30 days of the Chair's selection, that the case will follow the agreed upon schedule set forth by the parties and which is to be submitted to the Panel today. The parties also agreed that the hearing itself should take place as soon as possible after the final brief is due . . . sometime either in late August or September. The Association will request the Panel's hearing availability and will advise the parties once ascertained.

(AAA Notice, Jun. 8, 2009, Ex. C, Mot. to Vacate, R. at 277-96).

On July 15, 2009, the AAA issued a further notice setting forth the schedule that was to be followed for conducting the final hearings in this arbitration. This notice stated:

> The panel has reviewed the question of the parties and wishes to advise the parties that it intends to complete its review of the case by September 29th. In that regard, the panel advises the parties as follows: the hearing on September 29th is intended to address any and all remaining issues in the case that may be left at the conclusion of the hearing on September 4th including any residual facts issues concerning the subsidence exclusion as well as any other legal defenses unrelated to the exclusion that Lexington may be asserting.

(AAA Notice, Jul. 15, 2009, Ex. D, Mot. to Vacate, R. at 277-96).

On September 4, 2009, the first hearing in this arbitration was held. Mr. Jay Arceneaux, the sole appointed neutral arbitrator, presided as Umpire. Lexington and Belo appeared at such hearing by and through their counsel. At the September 4, 2009 arbitration hearing, the parties presented their respective arguments concerning the proper interpretation of the Subsidence Exclusion within the applicable Lexington policy.[3]

Arbitrator Arceneaux also advised the parties that all remaining issues in this arbitration would be addressed and resolved at the conclusion of a second hearing, which was scheduled for October 27, 2009. (Hr'g Tra. 113, Sept. 4, 2009, Ex. E, Mot. to Vacate, R. at 277-96).

A second and final hearing in this arbitration was held on October 27, 2009. At the end of that hearing, Arbitrator Arceneaux directed the parties to submit their findings of fact and

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[3] This Subsidence Exclusion reads as follows:

> This policy does not provide coverage and the Company (or Insurer or We, if applicable) will not pay any defense expenses, claim expenses, and/or any damages or losses, or any other loss, cost, or expense, including, but not limited to losses, costs, or expenses related to, arising out of, based upon, attributable to, associated with, caused directly or indirectly by, or contributed to, or aggravated by "subsidence" regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that loss, cost, or expense or to such defense expenses, claim expenses and/or damages or losses.
>
> For the purpose of this exclusion, the following definitions are added to the policy:
>
> "Subsidence" means earth movement of any kind whatsoever, including, but not limited to earthquake, landslide, "mine subsidence," "sinkhole collapse," earth sinking, rising or shifting, mudflow expansion, contraction, freezing, thawing, settling, falling away, caving in, eroding, flowing, tilting, or other movement of land, earth and mud.
>
> "Mine Subsidence" means subsidence of a man-made mine, whether or not mining activity has ceased.
>
> "Sinkhole Collapse" means loss or damage caused by the sudden sinking or collapse of land into underground empty spaces created by the action of water or limestone or dolomite.
>
> ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED

At the conclusion of the September 4, 2009 hearing, Arbitrator Arceneaux invited the parties to submit supplemental briefs to the Panel relating to the definition of the word "subsidence" in the Lexington Policy.

conclusions of law on or before November 13, 2009. Arbitrator Arceneaux stated that he intended to issue his decision relating to the interpretation of the Subsidence Exclusion by November 19, 2009. (Hr'g Tra. 72-73, Oct. 27, 2009, Ex. I, Mot. to Vacate, R. at 277-96).

On November 13, 2009, Belo and Lexington submitted their proposed findings and conclusions of law to the AAA. This was the parties' final submission in this arbitration. On the same day, the AAA issued the following notification to the parties:

> This will acknowledge receipt on November 13, 2009 of post hearing briefs from both parties. This will also acknowledge receipt of a letter and attachment on November 13, 2009, from Mr. Entsminger, a copy of which was sent to opposing counsel, wherein he requested attorney's fees. By instruction of the Panel, we have forwarded all of the aforementioned correspondence to the Arbitrator panel for consideration. The Award of the Arbitrator will be due within 30 days of the closing of hearings.

(AAA Notice, Ex. M, Mot. to Vacate, R. at 277-96). No arbitration award was issued on or before November 19, 2009. In addition, no arbitration award was issued on or before December 13, 2009, which was thirty days after the parties made their final submissions and the hearings were officially closed.[4] On January 7, 2010, the arbitrators issued a final award. (Final Award, Ex. A, Mot. to Vacate, R. at 277-96).

V. THE FINAL ARBITRATION AWARD

The Final Award indicated that "the Subsidence Exclusion in the Lexington Insurance Policy is not ambiguous and should be applied as written to deny insurance coverage in this instance." (Final Award 24, Ex. A, Mot. to Vacate, R. at 277-96).

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[4] On December 10, 2009 the AAA issued the following notice to the parties:

> The Association has received notice from the Arbitrator Chair that no further evidence is to be submitted at this time. Therefore, the hearings are declared closed as of December 9, 2009, and the Panel shall have until December 31, 2009 in which to render an executed decision, which may include retaining jurisdiction if the Panel determines to do so.

(AAA Notice, Dec. 10, 2009, Ex. N, Mot. to Vacate, R. at 277-96).

On February 2, 2010, Belo filed its *Motion to Vacate the Arbitration Award*, on the basis that the arbitration should be declared null and void upon the following grounds: (1) The arbitration clause and the resulting final award were unconscionable because they imposed an excessive and punitive financial burden upon Belo, (2) the arbitrators exceeded their jurisdiction by issuing an award outside the time limits mandated by the controlling arbitration provision; and, (3) the award, on its face, contained clear and palpable mistakes of law. (R. at 278).[5] Belo also moved to vacate the award because the dispute should never have been ordered to arbitration in the first instance. (R. at 278).

VI. ENFORCEMENT OF THE FINAL AWARD

On March 22, 2010, the Circuit Court entered an order denying Belo's motion to vacate the arbitration award and entered judgment in favor of Lexington, thus confirming the arbitration decision. The Circuit Court ruled, as a matter of law, that none of the grounds raised by Belo were valid reasons to vacate the award. (R. at 356-67).

The Circuit Court rejected Belo's assertions that the arbitration clause and resulting final award were unconscionable because they imposed an excessive and punitive financial burden upon Belo, that the arbitrators exceeded their jurisdiction by issuing an award outside the time limits mandated by the controlling arbitration provision, and that the award, on its face, contained mistakes of law. (R. at 356-67). In so finding, the Circuit Court's ruling was based in part on the fact that the contract at issue was not found to be one of adhesion.

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[5] During the course of this arbitration, Belo has been required to pay $21,200.65 in arbitration fees to the AAA and the arbitrators that have served in this matter. (Ex. A to Brinager Aff., Ex. P, Mot. to Vacate, R. at 277-96). The Final Award in this arbitration requires the three respondents, Belo, Newtown and Kanawha Eagle to reimburse Lexington in the aggregate amount of $9,341. Belo is contractually obligated to Newtown and Kanawha Eagle to pay all such fees. (Ex. A to Brinager Aff., Ex. P, Mot. to Vacate, R. at 277-96). Newtown and Kanawha Eagle were named by Lexington as respondents in the arbitration demand made in this case. However, Newtown and Kanawha Eagle did not appear at or participate in the two hearings that were held in this arbitration. Nor did Kanawha Eagle make an appearance or participate during any phase of the arbitration.

ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED BY THE LOWER TRIBUNAL

1. The Circuit Court erred as a matter of law when it ordered the coverage dispute to arbitration, even though the arbitration provision was unconscionable, and therefore unenforceable;
2. The Circuit Court erred as a matter of law when it entered judgment in favor of Lexington on the basis that the subject insurance contract was not a contract of adhesion containing an unconscionable arbitration provision;
3. The Circuit Court erred as a matter of law when it held that the Final Award did not impose an unconscionable and excessive financial burden on Belo, thus requiring the award to be vacated;
4. The Circuit Court erred as a matter of law when it held that the arbitrators did not exceed the jurisdictional limits mandated by the arbitration provision;
5. The Circuit Court erred as a matter of law when it failed to vacate the arbitration award rendered outside of jurisdictional mandates, because the decision was not "exemplary."

POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

This appeal involves the application of the West Virginia state law principles governing insurance contracts containing arbitration provisions. In West Virginia, insurance contracts, such as the Policy at issue in this case, are contracts of adhesion. An insurance contract is a contract of adhesion when its terms are to be accepted sight unseen, and when such terms are not subject to bargaining or negotiation. Contacts of adhesion that contain unconscionable provisions are unenforceable. Here, the arbitration provision contained in the Policy was unconscionable. Because the Policy, a contract of adhesion, contained an unconscionable arbitration clause, the Circuit Court should never have submitted the coverage dispute to arbitration in the first instance.

The Federal Arbitration Act ("FAA") governs the arbitrability of disputes. 9 U.S.C. § 2 (2006). However, ordinary state-law principles resolve issues regarding the formation of contracts, and the question of whether an arbitration clause is enforceable is an issue of state law. *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772; 613 S.E.2d 914, 920 (2005); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 564; 567 S.E.2d 265, 280 (2002).

In West Virginia, insurance contracts are recognized as contracts of adhesion. *See Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 492 n.14; 509 S.E.2d 1, 15 n.14 (1998); *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 741 n.6; 356 S.E.2d 488, 496 n.6 (1987) (holding that "insurance] policies are contracts of adhesion, offered on a take-it-or-leave-it basis, often sight unseen until the premium is paid and accepted, full of complicated, almost mystical, language."); *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W. Va. 623, 628-29; 207 S.E.2d 147,150-51 (1974). Moreover, "[i]t is generally recognized the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it if he does." *Murray,* 203 W. Va. at 492 at n.14; 509 S.E.2d at 15 n.14. Adhesion contracts are "form contracts submitted by one party on the basis of this or nothing." *Dunlap*, 211 W. Va. at 557; 567 S.E.2d at 273 (internal citations omitted); *Saylor*, 216 W. Va. at 773; 613 S.E.2d at 921 (stating that an adhesion contract is a "[s]tandardized contract form offered ... on essentially [a] 'take it or leave it' basis . . . [leaving the] weaker party . . . no realistic choice as to its terms.") (quoting *Black's Law Dictionary* 50 (6th ed. West 1990)).

Accordingly, provisions in insurance policies are considered unconscionable when, "if applied . . . would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or 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[.]" *Dunlap*, 211 W.Va. at 566; 567 S.E.2d at 282.

Although arbitration provisions are presumed to be bargained for, "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." *Saylor*, 216 W. Va. at 773; 613 S.E.2d at 922 (internal citations omitted).

When a contract of adhesion contains unfair terms, it renders the contract unconscionable and, hence, unenforceable. The Policy at issue is a contract of adhesion containing an arbitration provision that severely limits the rights and remedies enjoyed by Belo, as a West Virginia insured, in ways entirely inconsistent with the jurisprudence of this State. Belo asserts that the arbitration clause is legally unenforceable since it deprives Belo, as a West Virginia insured, of important substantive rights under West Virginia law, including the right to seek and recover damages for an insurer's wrongful denial of coverage.

I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT IMPLICITLY RULED THAT THE SUBJECT INSURANCE POLICY WAS NOT A CONTRACT OF ADHESION.

The Circuit Court implicitly and wrongly concluded that, as a matter of law, the subject Policy was not a contract of adhesion. This error contravenes well-established West Virginia law that recognizes the exact opposite premise – that insurance policies are contracts of adhesion. *See e.g.*, *Murray*, 203 W.Va. at 491; 509 S.E.2d at 15. When a contract consists of boilerplate language that was not subject to negotiation, it is a contract of adhesion. *See Clites v. Clawges*, 224 W. Va. 299, 306; 685 S.E.2d 693, 700 (2009). "Adhesion contracts include all 'form contracts' submitted by one party on the basis of this or nothing . . . the bulk of contracts signed in this country . . . are adhesion contracts[.]" *Id.*

In its March 22, 2010 Order confirming the arbitration award, the Circuit Court relied upon *State ex rel. Wells v. Matish*, 215 W. Va. 686; 600 S.E.2d 583 (2004), in support of the proposition that the subject Policy was not a contract of adhesion. In the *Wells* case, the Court found that $8,500 in arbitration fees, to be paid by the appellant, were not excessive because

the parties in that case had mutually negotiated the employment agreement at issue. Because the parties extensively negotiated the terms of the employment contract, the Court held that the agreement was not a contract of adhesion. The Court expressly held:

> Although the contract was prepared by [the employer], it is clear that the terms were negotiated, and the agreement was customized to accommodate [the plaintiff employee's] unique circumstances including his naval reserve duty . . . . ***In light of these facts, we are unable to find that the employment contract in this case was one of adhesion like the one in Dunlap.***

Id. at 692; 589 (emphasis added).

The *Wells* court distinguished the contract before it from that at issue in *State ex rel. Dunlap v. Berger*, which was "a pre-printed form contract prepared by one of the parties. . . . The contract involved in [*Wells*] was substantially different. *Id.* In *State ex rel. Dunlap v. Berger*, the plaintiff alleged that a jewelry store added unrequested insurance charges to the cost of consumers' purchases pursuant to a purchase and financing agreement provided by the store; an agreement that also contained an arbitration provision. 211 W. Va. 549; 567 S.E.2d 265 (2002). Reviewing the contract, the Court held that it was a contract of adhesion. The Court recognized that "'[a]dhesion contracts' include all 'form contracts' submitted by one party on the basis of this or nothing[.]" *Id.* at 557; 273. Indeed, "[o]ne of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms." *Id.* at 558; 274.

Like the contract in the *Dunlap* case, the arbitration clause in this case is unquestionably part of a boilerplate, pre-printed form prepared by Lexington – an insurance policy and contract of adhesion. There was no negotiation regarding its terms – it was like any other insurance policy, "offered on a take-it-or-leave-it basis . . . sight unseen until the premium [was] paid and accepted, full of complicated, almost mystical, language." *Nat'l Mut. Ins. Co.*, 177 W. Va. at 741 n. 6; 356 S.E.2d at 495 n. 6. Belo, as an insured, was not in the same position as an insurance

agent or attorney to understand the effect of various provisions of an insurance policy on its rights in the event that it was to make a claim for coverage. Here, the arbitration provision was a condition of coverage – the Policy was offered on a take-it-or-leave-it basis with no opportunity for negotiation or bargaining. Therefore, the Circuit Court erred as a matter of law when it held that the subject Policy was not a contract of adhesion.

II. THE CIRCUIT COURT ERRED IN COMPELLING ARBITRATION BECAUSE THE INSURANCE POLICY CONTAINED AN ARBITRATION PROVISION THAT WAS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE AND UNENFORCEABLE, THUS RENDERING THE ARBITRATION VOID *AB INITIO*.

The Circuit Court ordered arbitration after ruling that there was nothing unconscionable about the arbitration provision contained in the Policy. However, the arbitration provision was both procedurally and substantively unconscionable under West Virginia law. Thus, the Circuit Court committed clear error when it ordered arbitration of the coverage dispute.

West Virginia courts have defined "unconscionability" as an "overall and gross imbalance, one-sidedness or lop-sidedness that justifies a court's refusal to enforce a contract as written." *Drake v. W. Va. Self-Storage, Inc.*, 203 W. Va. 497, 500; 509 S.E.2d 21, 24 (1998) (quoting *McGinnis v. Cayton*, 173 W. Va. 102, 113; 312 S.E.2d 765, 776 (1984)). "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." *Drake*, 203 W. Va. at 500; 509 S.E.2d at 24.

West Virginia law presumes that arbitration provisions are intended as the sole and exclusive means of resolving disputes, but with recognized exceptions:

> It is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the sole and 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. 3, *Bd. of Educ. v. W. Harley Miller, Inc.,* 160 W. Va. 473; 236 S.E.2d 439 (1977). The West Virginia Supreme Court further explained that an arbitration provision in a contract of adhesion, like an insurance policy, is "unconscionable" if when:

> [A]pplied . . . [the provision] would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or 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 exceptional circumstances exist that make the provisions conscionable.

Syl. Pt. 4, *Dunlap*, 211 W. Va. at 549; 567 S.E.2d at 266.

Similarly, the FAA provides that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, ***save upon such ground as exist at law or in equity for the revocation of any contract.***" 9 U.S.C. § 2 (2006) (emphasis added). "A pre-dispute agreement to use arbitration as an alternative to litigation in court may be enforced pursuant to the FAA only when arbitration, although a different forum with somewhat different and simplified rules, is nonetheless one in which the arbitral mechanisms for obtaining justice permit a party to fully and effectively vindicate their rights." *Dunlap*, 211 W. Va. at 556; 567 S.E.2d at 272.

The FAA promotes the enforcement of arbitration agreements only when such agreements constitute valid contracts under state law. *Saylor*, 216 W. Va. at 772; 613 S.E.2d at 920. Ordinary state-law principles resolve issues regarding the formation of contracts. *Hill v. PeopleSoft USA, Inc.,* 412 F.3d 540, 543 (4th Cir. 2005). "Thus, generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

A. The arbitration provision was procedurally unconscionable because neither the Policy nor the inclusion of the arbitration provision were bargained for.

The lack of bargaining between the parties demonstrates that the inclusion of the unfair arbitration policy rendered that provision procedurally unconscionable. A contract and its contents, like the subject arbitration provision in this matter, is procedurally unconscionable when there are "inequities and unfairness in the bargaining process." *Drake*, 203 W. Va. at 500; 509 S.E.2d at 24. "A determination of unconscionability must focus on the relative position 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." *Clites v. Clawges*, 224 W. Va. 299, 306; 685 S.E.2d 693; 700 (2009) (citing Syl. Pt. 4, *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W. Va., Inc.*, 186 W. Va. 613; 413 S.E.2d 670 (1991)). Because "[t]he most likely abuse in the law of arbitration is in contracts of adhesion . . . . [an] agreement to arbitrate[] must have been 'bargained for.'" *W. Harley-Miller*, 160 W. Va. at 486; 236 S.E.2d at 447. But, "[w]hen arbitration is wholly inappropriate given the nature of the contract, and could only have been intended to defeat just claims, the provision cannot be considered to have been bargained for." *Id.* "[A]rbitration clauses that were abusively included in contracts of adhesion, that were unconscionable, that were wholly inappropriate given the nature of the contract and could only have been intended to defeat just claims, or were oppressive under the circumstances, could not be held to have been truly 'bargained for' and therefore should not be enforced." *Dunlap*, 211 W. Va. at 569 n. 17; 567 S.E.2d at 285 n. 17.

The Policy at issue in this case, like the vast majority of insurance policies, was purchased sight unseen by Belo with assurances that it would meet Belo's insurance needs. Also like most insurance policies, the Policy at issue was offered on a take-it-or-leave-it basis. Belo was not informed of the arbitration provision or given the option to decline the arbitration provision. Belo was not a sophisticated commercial entity with bargaining power equal to that of Lexington. (R. at 334-43, 335). Rather, Belo was a family-run West Virginia business with little

experience regarding insurance, other than that associated with the purchase of an insurance policy through a local agent. (R. at 335). The process by which Belo purchased its insurance evidences that Lexington and Belo were not of equal bargaining power, and that the arbitration provision was not bargained for. Accordingly, the arbitration provision was not bargained for and, as such, should not be enforced.

Belo purchased the subject Policy through a local agent. The local agent traveled to Belo's office and completed an application for insurance. Belo was not given the option of purchasing an arbitration provision. Rather, the arbitration provision was included without Belo's knowledge or consent. No one showed Belo the arbitration provision that was included in the Policy, explained the effect of the arbitration provision or informed Belo of the rights is would give up by the arbitration provision. Moreover, Belo was not given the option of purchasing, for an additional premium, an endorsement to override the arbitration provision. Belo did not even receive a copy of the Policy until after the Policy was purchased. The first time Belo became aware of the arbitration provision was when Lexington, after having initially accepting coverage for the underlying case, unilaterally instigated arbitration to reserve its rights.

The arbitration provision is a standard commercial coverage form, not a separately negotiated endorsement. Insurance policies, notably coverage forms, are generally sold on a take-it-or-leave-it-basis. Requesting certain types of coverage or requesting the inclusion of additional insureds does not constitute "negotiation" and override the fact that an insurance policy is a contract of adhesion. Further, it is not reasonable to expect an insured to read and understand the terms of an insurance policy. *Murray*, 203 W. Va. at 491; 509 S.E.2d at 15. An insured is not in the same position as an insurance agent or attorney to understand the effect of various provisions of an insurance policy on the insured's rights in the event the insured ever makes a claim for coverage.

In concluding that the subject Policy was bargained for and thus conscionable, the Circuit Court specifically failed to take into account the nature of the contract, the lack of

bargaining power between the parties, the lack of negotiation over the terms of the contract, and the take-it-or-leave it nature of the transaction. In so holding, the Circuit Court has committed a clearly reversible error.

B. The arbitration provision was substantively unconscionable and unenforceable because it deprived Belo of the protections afforded by West Virginia law.

The arbitration provision was substantively unconscionable and, hence, unenforceable because the arbitration panel was not obligated to adhere to strict rules of law or evidence and could refer to, but was not limited to, relevant legal principles. In pertinent part, the arbitration provision provides that:

> The panel shall be relieved of all judicial formality, shall not be obligated to adhere to the strict rules of law or evidence, shall seek to enforce the intent of the parties hereto and may refer to, but are not limited to, relevant legal principles.

(Policy 24, Ex. B, Mot. to Vacate, R. at 277-96). Accordingly, there was no requirement to apply West Virginia substantive law, evidentiary rules or procedural rules during arbitration. In addition, there was no applicable standard regarding contract application or interpretation. The panel was also not obligated to follow well-established West Virginia law resolving ambiguities in favor of an insured. *See* Syl. Pt. 2, *State v. Janicki*, 188 W. Va. 100; 422 S.E.2d 822 (1992). Nor was the panel obligated to follow West Virginia law protecting the reasonable expectations of an insured. *See* Syl. Pt. 8, *Nat'l Mut. Ins. Co.*, 177 W.Va. 734, 356 S.E.2d 488. The panel was not obligated to explore any argument that Lexington did not provide the coverage requested. Furthermore, there was no requirement that Belo be able to engage in discovery and, if discovery was allowed, compel information if withheld by Lexington. *Contra* W. Va. R. Civ. P. 26-37 (2008). In fact, Belo was stripped of all rights and protections afforded insureds by West Virginia law unless the arbitration panel elected, at its option, to enforce these rights and protections.

The arbitration provision was thus entirely inconsistent with West Virginia law and public policy enunciated to protect insureds, which, in and of itself, makes the arbitration provision unconscionable and, hence, unenforceable. As previously discussed, provisions in a contract of adhesion are unconscionable if they deter a person from enforcing and vindicating rights and protection or from seeking common law or statutory relief. *See* Syl. Pt. 4, *State ex rel. Dunlap*, 211 W.Va. 549; 567 S.E.2d 265. The arbitration panel's option to decide a coverage action pertaining to the coverage provided by an insurance policy solicited and issued in West Virginia as applied to an accident occurring in West Virginia and involving a West Virginia insured does just that.

Similarly, the arbitration provision was clearly unconscionable because arbitration was the binding and "sole and exclusive remedy" in the event of a disagreement as to the interpretation of the Policy. (Policy 24, Ex. B, Mot. to Vacate, R. at 277-96). The arbitration provision also limits appeal to fraud or gross misconduct of the arbitrators. (Policy 24, Ex. B, Mot. to Vacate, R. at 277-96). The arbitration provision provided Belo no meaningful right of review or even an option to seek review of a binding decision. Furthermore, the arbitration decision acted as Belo's sole and exclusive remedy, thus allowing no further right to pursue any cause of action arising out of a disagreement as to the interpretation of the Policy. As previously discussed, a provision in a contract of adhesion is enforceable only when the arbitral mechanisms for obtaining justice permit a party to fully and effectively vindicate its rights. *Dunlap*, 211 W.Va. at 556; 567 S.E.2d at 272. Here, the Final Award, purporting to serve as the "sole and exclusive remedy," with review limited only to instances of fraud or gross misconduct on behalf of the arbitrators, does not permit Belo to fully and effectively vindicate its rights. Accordingly, the arbitration provision is unconscionable and, hence, unenforceable.

C. The arbitration provision was substantively unconscionable and unenforceable because it wrongfully deprived Belo of the right to seek attorney fees, costs and other remedies in compelling coverage.

The arbitration provision deprived Belo of its substantive right, under West Virginia law, to obtain certain damages from Lexington in the event that coverage would have been found under the Policy. Under the arbitration provision, regardless of the outcome, Belo was forced to bear its own attorneys' fees and costs incurred while seeking to compel coverage on top of the premiums already paid, as well as half of the costs of the arbitration proceedings. In relevant part, the arbitration clause states:

> Each party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding.

(Policy 24, Ex. B, Mot. to Vacate, R. at 277-96). This interpretation of the provision was confirmed by the fact that Lexington itself argued that Belo would not be entitled to attorneys' fees under the policy. (Cir. Ct. Hr'g Tra. 15, Nov. 5, 2007).

A contract is unconscionable if, by signing, it prevents a party from utilizing remedies otherwise available to it and the contract defeats the purpose of laws intended to protect consumers. *Dunlap*, 211 W. Va. 549; 567 S.E.2d 265. Under the provision, Belo is forced to pay its own attorneys' fees and costs as well as the costs of the arbitrator, no matter the outcome of the arbitration. By its very terms, the arbitration provision *could not* apply West Virginia law because West Virginia insureds are entitled, by law, to recover reasonable attorneys' fees arising from declaratory judgment actions in which a court finds coverage in favor of the insured. "[A] provision in a contract of adhesion that would operate to restrict the availability of an award of attorney fees to less than that provided for in applicable law would . . . be presumptively unconscionable." *Dunlap*, 211 W. Va. at 567 n. 15; 567 S.E.2d at 283 n. 15. Moreover, provisions in a contract of adhesion "that if applied . . . would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or obtain . . . 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." *Id.* at 560; 276. Well-established West Virginia law explicitly provides that an insured is entitled to reasonable attorney fees and costs, along with any other relief including the costs of a declaratory judgment action, damages for annoyance and inconvenience, and, in some situations, punitive damages, if successful in compelling coverage. *See, e.g., Jones v. Sanger*, 217 W. Va. 564; 618 S.E.2d 573 (2005); *Allstate Ins. Co. v. State Auto. Mut. Ins. Co.*, 178 W. Va. 704; 364 S.E.2d 30 (1987); *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190; 342 S.E.2d 156 (1986). This principle is consistent with the ruling in *Hayseeds, Inc. v. State Farm Fire & Casualty Co.*, which stated that "when an insured purchases a contract of insurance, he buys insurance – not a lot of vexatious, time-consuming, expensive litigation with his insurer." 177 W. Va. 323, 328; 352 S.E.2d 73, 79 (1986).

"The general reason stated for allowing recovery of attorneys' fees in this situation is that where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action." *Aetna Cas. & Sur. Co.,*, 176 W. Va. at 194; 342 S.E.2d at 160. When Belo was forced to submit to arbitration, it was deprived of a remedy essential to the enforcement and effective vindication of the public purposes and protections of West Virginia laws, no matter the outcome of the arbitration. The arbitration provision in the Policy is unquestionably a contract of adhesion, and thus unenforceable. Despite this fundamental right at issue, the Circuit Court found the fact that Belo would be unable to recover attorney's fees "unpersuasive" in rendering the arbitration provision unconscionable.

Forcing an insured to bear the expense of compelling coverage owed under an insurance policy is completely contrary to well-established West Virginia law. *See, e.g., Jones*, 217 W. Va. 564; 618 S.E.2d 573; *Allstate Ins. Co.*, 178 W. Va. 704; 364 S.E.2d 30; *Aetna Cas. & Sur. Co.*, 176 W. Va. 190; 342 S.E.2d 156. Additionally, under the arbitration provision, Belo

is deprived of any right to seek additional relief against Lexington, including damages resulting from Lexington's bad faith denial of coverage, annoyance, inconvenience and punitive damages. An arbitration provision is unconscionable when it severely limits an insured's right to appeal, to recover attorney's fees, costs, and other relief in compelling coverage. Ultimately, Belo should not have been forced to submit to binding arbitration concerning the insurance coverage issue in dispute.

Regardless of the outcome of the decision, the arbitration provision forced Belo to bear the expense of its designated arbitrator, while jointly and equally sharing with Lexington the expense of the umpire and the arbitration proceeding. Belo clearly has a right to seek reimbursement for fees and costs in compelling coverage. The arbitration provision unfairly shields Lexington from any risk of reimbursing its insureds for the fees and costs associated with compelling coverage. In addition, on top of the premium that Belo paid to buy the coverage it sought to compel, the arbitration provision required Belo to pay its own way to resolve disagreements under the Policy. Such a result is entirely inconsistent with the relief and remedies afforded insureds under West Virginia law. In fact, the arbitration provision unfairly shields Lexington from the risk that it may have to reimburse its insureds for the fees and costs of compelling coverage as well as other damages. This portion of the arbitration provision is thus contrary to West Virginia law and public policy and consequently had the effect of infringing upon Belo's ability to obtain common law relief, thereby rendering the arbitration provision unconscionable.

D. The arbitration provision was substantively unconscionable and unenforceable because it did, in fact, impose unconscionable costs on the insured.

When the Circuit Court compelled arbitration of the underlying matter, it could not foresee the excessive financial burden that would result to Belo. Over the course of this protracted arbitration, Belo was required to pay excessive fees and expenses in the amount if $21,200.65 to the AAA and to the arbitrators. (Ex. A to Brinager Aff., Ex. P, Mot. to Vacate, R.

at 277-96). With the issuance of the Final Award, Belo is being required to pay an additional $9,341.00 to Lexington on behalf of the collective respondents. (Ex. A to Brinager Aff.). This means that, if this award is enforced, Belo will ultimately be required to pay $30,541.65, including a portion that is tantamount to the payment of punitive damages to Lexington.

In West Virginia, a provision in a contract of adhesion is unconscionable when, if applied, it would impose unreasonably burdensome costs upon a party. *Dunlap*, 211 W. Va. at 567; 567 S.E.2d at 283. "The existence of large arbitration costs could preclude a litigant . . . from effectively vindicating . . . rights in the arbitral forum." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000). "It is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." *Dunlap*, 211 W. Va. at 567; 567 S.E.2d at 281 (quoting *Armendariz v. Found. Health Psychcare Serv's, Inc.*, 6 P.3d 669, 687 (Cal. 2000) (holding that in the employment contract context, when an employer imposes mandatory arbitration as a condition of employment, the arbitration process generally cannot impose expenses on an employee that the employee would not have to bear in court)).

As unconscionable as it is that Belo has already been required to pay excessive arbitration costs exceeding $21,000, the imposition of further costs in the Final Award is both punitive and plainly contrary to the controlling arbitration clause. The arbitration clause in question clearly contemplates a two-party arbitration proceeding with both Lexington and the insured involved sharing expenses equally:

> Each party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding.

(Policy 24, Ex. B, Mot. to Vacate, R. at 277-96).

Belo is the named insured under the policy seeking to enforce the rights of its additional insureds. Newtown and Kanawha Eagle are parties to this arbitration because of their interest in the outcome. Kanawha Eagle never directly participated in this arbitration. Newtown

participated for only a limited time and in a limited manner. Neither Newtown nor Kanawha Eagle was allowed to designate its own arbitrators. Based upon this posture, Belo and Lexington were required by the AAA to share 50% of the arbitration expenses after Newtown announced it would no longer participate in the arbitration.

Nevertheless, according to the Final Award, the three named respondents must together pay 75% of the arbitrator expenses, while Lexington is to be reimbursed, effectively responsible for paying only 25% of the expenses. This reallocation imposes a punitive and unjustified financial burden upon Belo. As has been repeatedly made known both to the AAA and to the arbitrators, Belo is contractually obligated to pay all expenses incurred by the other named respondents in connection with the underlying *Castle* litigation and the associated arbitration.

Belo paid Lexington over $200,000 in annual premiums for insurance that resulted in no coverage in this case. Belo was required to pay excessive arbitration fees of over $21,000 as an undue price to pay for its efforts to enforce its coverage rights as an insured. (Ex. A to Brinager Aff., Ex. P, Mot. to Vacate, R. at 277-96). Certainly, Belo should not be required to pay Lexington an additional $9,341.60 as a penalty for pursuing these coverage rights.

In the *Dunlap* case, the Court cited to cases from other jurisdictions in which the anticipated arbitration fees were excessive. *See Dunlap*, 211 W. Va. at 565-565; 567 S.E.2d at 281-282. In one such case, anticipated arbitration fees of $1,875 to $5,000 were deemed excessive. *Id.* In another case, the anticipated payment of $2,000 in administrative fees plus a share of the arbitrator costs was deemed excessive. *Id.* In yet another case, the payment of an initial fee of $1,250 and a later fee of $750 was deemed excessive. *Id.* Based upon these and the other examples cited in *Dunlap*, the ***actual*** imposition of nearly $31,000 in arbitration fees upon Belo cannot be found under any set of circumstances to be conscionable.

Furthermore, the fee provision at issue here is easily distinguishable from those that have been upheld as conscionable. For example, in *Clites v. Clawges*, 224 W. Va. 299; 685 S.E.2d 693 (2009), the Court upheld an arbitration provision when the conscionability of that

provision was challenged based upon cost. The Court determined that the provision was conscionable because there was "no proof in the record . . . that the Petitioner [was] exposed to exorbitant costs as a result of the Agreement and [the party seeking arbitration] *is paying all costs associated with the Arbitration in excess of what the Petitioner would have been required to pay to maintain her civil action in circuit court.*" *Id.* at 307; 701 (emphasis added). It is worth noting that in the underlying civil suit on appeal in the *Clites* case, the original arbitration provision required that the plaintiff pay for the costs incurred because of arbitration. The provision originally provided that:

> [E]ach party shall bear its own fees and costs incurred in connection with the arbitration . . . [and the arbitrator] shall have the discretion to award fees and costs to the prevailing party in accordance with prevailing law.

As written, this provision provides the arbitrator discretion regarding the award, unlike the provision at issue in the instant matter. In addition, the party compelling arbitration ***stipulated to modify the terms of the provision, during the course of the civil litigation, in order to shift the cost burden to the party compelling arbitration***. As a result, the Court did not find that the costs of compelling arbitration rendered the contract unenforceable. Implicit in this holding was the fact that had the party compelling arbitration not unilaterally modified the provision in order to shift the costs of the arbitration process to itself, the provision would have been declared unconscionable.

Also implicit in the *Clites* holding is that a fee arrangement in an arbitration provision is conscionable if it provides the arbitrator with discretion regarding the award, and if the party seeking arbitration is required to pay the costs in excess of that which would be incurred in court. When comparing the provision in the *Clites* case with that in the present matter, the instant provision does not allow the arbitrator discretion to "award fees and costs to the prevailing party in accordance with prevailing law." Moreover, Lexington explicitly stated that it would not provide for costs or fees associated with the arbitration.

Because the costs actually imposed on Belo in this matter are clearly unconscionable, the arbitration provision is unenforceable, thus the arbitration proceedings must be declared void *ab initio*.

III. THE CIRCUIT COURT ERRED IN UPHOLDING THE ARBITRATION AWARD BECAUSE THE ARBITRATORS EXCEEDED THEIR JURISDICTION BY ISSUING AN AWARD OUTSIDE THE TIME LIMITS MANDATED BY THE CONTROLLING ARBITRATION AGREEMENT.

The arbitration clause in the Policy required that the award be rendered within thirty (30) days of the close of hearings. The hearings were officially closed in this arbitration as of November 13, 2009. That date was when the parties submitted their final briefs in the form of proposed findings and conclusions. Also on that date, the AAA issued a notice to the parties stating that the final award would be rendered within thirty days after the close of such hearings.[6]

The award was thereby due on or before December 13, 2009. However, the final award was not issued until January 7, 2010. Therefore, the arbitration award in this case is null and void as it was rendered substantially outside the jurisdictional time limits prescribed by the arbitration clause.

The well-established common-law rule is that a time limitation specified in an arbitration agreement is mandatory. The authority of the arbitrators terminates upon expiration of the time limitation and an award made after termination of such authority is invalid. *See* Allan E. Korpela, LL.B., Annotation, *Construction and Effect of Contractual or Statutory Provisions Fixing Time Within Which Arbitration Award Must be Made,* 56 A.L.R. 3d 815. The Court has recognized the common-law rule that an award not rendered with the time limit established by the parties must be declared void. *See Anderson v. Nichols*, 178 W. Va. 284, 288 n.2; 359 S.E.2d 117,121 n.2 (1987). West Virginia, however, has adopted a modified version of this rule

[6] Rule R-35 of the AAA Rules of Commercial Arbitration states in pertinent part that "[i]f briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs."

that allows an exception to be made only when the delay in issuing the arbitration award is *di minimis* and no prejudice results to the parties. *Id.*

In the *Anderson* case, the Court ruled that a six-day delay that resulted in no harm to the parties would not nullify an otherwise exemplary award. In elaborating on its willingness to recognize a limited exception to the strict common law rule, the Court stated:

> However, a short *di minimis* delay by which no one is harmed should not be permitted to void the prolonged efforts of the arbitrators. The delay must not be too long, must not be the fault of the parties, and the work done by the arbitrators preceding the making of the award must be substantial.

Id. at 288 n.2; 121 n.2 (internal citations omitted). This limited exception recognized in the *Anderson* case, however, does not apply here because the delay in issuing the arbitration award in this case was neither *di minimis* nor harmless.

A. The Circuit Court erred in upholding the untimely award because the delay in issuing the award in this arbitration matter was not *di minimis*.

In the *Anderson* case, a six-day delay in issuing a final award was deemed *di minimis.* The facts in *Anderson* and the present case are very different. In the *Anderson* case, the total time that elapsed between the initial arbitration hearing and the issuance of a final decision was thirty-four days. By contrast, in the instant situation, the time that elapsed between the initial arbitration hearing of September 4, 2009 until the final award was ***one hundred twenty-five days***.

The long delay that occurred in concluding this arbitration was unnecessary and unjustified. At both hearings, held respectively on September 4, 2009 and October 27, 2009, Arbitrator Arceneaux advised the parties that he had completed an extensive review of applicable law and was generally prepared to issue a decision. (Hr'g Tra. 91-93, Sept. 4, 2009, Ex. E, Mot. to Vacate, R. at 277-96; Hr'g Tra. 72-73, Oct. 27, 2009, Ex. I, Mot. to Vacate, R. at 277-96). He specifically advised the parties on October 27, 2009 that he planned to issue his award within just a few days after the parties' submission of their proposed findings and

conclusions on November 13, 2009. (Hr'g Tra. 72-73, Oct. 27, 2009). Instead, it took him fifty-five days.

Much, if not all, of this long delay in issuing a final award could have been avoided if Arbitrator Arceneaux had exercised his discretion to issue a shorter reasoned decision as opposed to issuing more extensive findings of facts and conclusions of law. Belo had specifically requested that a reasoned decision be issued asserting that the Panel could do this "much more economically and expeditiously." (Belo Ltr. to AAA, July 22, 2009, Ex. G, Mot. to Vacate, R. at 277-96). Instead, Arbitrator Arceneaux accepted Lexington's request to issue an award that set forth detailed findings and conclusions. (Lexington Ltr. to AAA, July 28, 2009, Ex. H, Mot. to Vacate, R. at 277-96).

No legal effect should be given to the December 10, 2009 notice from the AAA reciting that Arbitrator Arceneaux had deemed the hearings closed as of December 9, 2009. This notice was a transparent and fictional device aimed by Arbitrator Arceneaux to give the Panel more time to issue its award outside the contractually required time limits. This dubious notice stated that Arbitrator Arceneaux had declared "no further evidence is to be submitted at this time." However, as of December 9, 2009, there were no hearings scheduled or other ongoing proceedings that would have allowed for the submission of additional evidence. Furthermore, by November 13, the final hearing had been held, the final briefs had been submitted and the hearings had been declared closed by the AAA.

Moreover, even if it were somehow determined that Arbitrator Arceneaux had successfully extended the close of hearings from November 13, 2009 until December 9, 2009, this extension would still be violative of Belo's contractual rights to have both the close of hearings and the issuance of the award concluded within certain specified time limits.

B. The Circuit Court erred in upholding the untimely award because the delay in issuing the award resulted in undue prejudice to Belo.

In the *Anderson* case, the court held that a threshold question for excusing a short delay was whether the party raising the delay had been prejudiced. 178 W. Va. at 288; 359 S.E.2d at 121. In *Anderson*, there was no showing that the six-day delay caused any harm to the complaining party. Here, Belo as well as all of the parties to the *Castle* litigation were substantially prejudiced by this unduly protracted arbitration.

The reason Belo sought a declaration of its coverage rights in this case was to ensure that its obligation to defend and indemnify Newtown in this case would be fulfilled by the insurance coverage it purchased from Lexington. Belo obviously desired a prompt resolution that would affirm these coverage rights. The unnecessary prolonging of the arbitration while the underlying civil case moved forward created substantial prejudice to Belo. Belo remained uncertain of its rights and liabilities. Belo's arbitration fees and expenses continued to grow. Any realistic opportunity to settle the *Castle* case hinged on the outcome of the arbitration. The unnecessary delay in concluding the arbitration resulted in the postponement of mediations and trial dates. (*See* Belo's Response in Opp. To Unjustified Ext. & Delay of Arb., Ex K, Mot. to Vacate, R. at 277-96; *see also* Mot. to Vacate, R. at 282-83). This prejudiced Belo as well as all of the parties to the underlying litigation.

Arbitrator Arceneaux was clearly aware that time was of the essence to the parties and to this Court. Because he recognized that time was of the essence, on September 4, 2009, Arbitrator Arceneaux promised to "shut down" the arbitration by October 27, 2009. (Hr'g Tra. 110-11, Sept. 4, 2009). That is also why he promised on October 27, 2009 to render his decision no later than November 19, 2009 so that this Court would be able to review it. (Hr'g Tra. 72-73, Oct. 27, 2009). Inexplicably, he delayed for nearly two more months before issuing the Final Award. (Final Award, Ex. A, Mot. to Vacate, R. at 277-96).

C. The Circuit Court erred by upholding the untimely award because the arbitration panel failed to appropriately apply West Virginia law when deciding the dispute.

Generally, arbitration awards are not subject to attack because they are wrongly decided. *W. Harley-Miller*, 160 W. Va. 473; 236 S.E.2d 439. However, the merits of the award in this arbitration may at least be considered in determining whether the delay in issuing the award should be excused. *Anderson*, 178 W. Va. 284; 359 S.E.2d 117. Moreover, West Virginia courts have held that "if the award shows, or it be shown that the arbitrators intended to decide the controversy according to the rules of law, and have made a clear and palpable mistake of the law, then their award will be set aside[.]" *Mathews v. Miller*, 25 W. Va. 817 (1885); *See also Brodhead-Garrett Co. v. Davis Lumber Co.*, 97 W. Va. 165, 170 (1924) (citing *Mathews*).

Here, the Final Award contains multiple rulings that rise to the level of clear and palpable mistakes of law. Although the arbitration panel purported to apply West Virginia law, it failed to apply the leading case addressing the issues that were before it. West Virginia follows the majority rule holding that earth movement exclusions, such as the one in the underlying case, generally apply only to naturally occurring events. *Murray*, 203 W. Va. 477; 509 S.E.2d 1.[7]

The holding and rationale of *Murray* clearly applied in this case.[8] Nevertheless, Arbitrator Arceneaux inexplicably concluded that the subsidence exclusion should be read to clearly and unambiguously apply to underground losses as well as to surface losses. He stated:

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[7] Relying on the doctrine of *ejusdem generis*, the Court in *Murray* held as follows:

> When an earth movement exclusion in an insurance policy contains terms not otherwise defined in the policy, and the terms of the exclusion relate to natural events (such as earthquakes or volcanic eruptions), which events, in some instances, may also be attributed to a combination of natural and man-made causes (such as landslides, subsidence or erosion), the terms of the exclusion must be read together and limited to exclude naturally-occurring events rather than man-made events.

Syl. Pt. 7, *Murray*, 203 W. Va. 477; 509 S.E.2d 1.

[8] In defining the types of earth movement that are to be encompassed within the Subsidence Exclusion, Lexington used the general phrase "earth movement" followed by a list of more specific types

> In this arbitration, Lexington has argued that one need not look to an external definition of subsidence as the term "mine subsidence" is a defined term in the Insurance Policy. While it is true that the Insurance Policy does not delineate whether the exclusion applies for earth movement only on the surface or below the surface, it appears that such a distinction is unneeded.

(Final Award 25, Ex. A, Mot. to Vacate, R. at 277-96). Arbitrator Arceneaux therefore concluded that any reliance that Belo or Belo's agent may have placed upon the common meaning of the word "subsidence" in interpreting its policy was improper. (Final Award 39).

The *Anderson* decision indicates that the Circuit Court may properly take into account the merits of the arbitration award to determine whether it should be set aside as untimely. One of the reasons the *Anderson* court was reluctant to set aside the arbitration award for a *di minimis* delay was because it found that it was otherwise "exemplary." Instead of being exemplary, the arbitration award in this case contained numerous clear and palpable mistakes of law.

i. The Policy was ambiguous regarding the application of the subsidence exclusion to underground losses.

At the conclusion of the September 4, 2009 hearing, Arbitrator Arceneaux advised the parties that his own research and analysis had led him to tentatively conclude that Belo should prevail in this arbitration. He emphasized that the applicable subsidence exclusion did not state specifically whether it applied to damages and losses occurring underground. (Hr'g Tra. 82, Sept. 5, 2010, Ex. E, Mot. to Vacate, R. at 277-96). Arbitrator Arceneaux advised the parties

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of earth movement. This qualifying list of examples is limited to types of earth movement that occur totally or predominantly from natural phenomenon:

> [E]arthquake, landslide, 'mine subsidence', 'sinkhole collapse', earth sinking, rising or shifting, mud flow, expansion, contraction, consolidation, freezing, thawing, settling, falling away, caving in, eroding, flowing, tilting, or other movement of earth land or mud.

Notably this list does not include any commonly recognized man-made activities that cause the earth to move such as excavating, blasting, hauling, drilling, dumping, digging, spilling, and coal mining. Therefore, since Belo's policy defines "subsidence" by referring to examples of earth movement that are all attributable to natural phenomenon, this exclusion cannot be properly interpreted to apply to earth movement that results from man-made activities such as coal mining.

that he had consulted various outside sources to determine the proper definition of the word "subsidence." (Hr'g Tra. 90-93, Sept. 5, 2010). Based upon this analysis, Arbitrator Arceneaux noted that all of these common and legally accepted meanings confirm that the word "subsidence" should be construed to relate to losses and damages occurring above ground, not to those occurring inside an operating coal mine. (Hr'g Tra. 90-93, Sept. 5, 2010).

With little explanation, Mr. Arceneaux completely reversed himself in the Final Award. One hundred twenty-five days after saying he was tentatively prepared to rule for Belo, he concluded that the subsidence exclusion should be read to clearly and unambiguously apply to underground losses as well as to surface losses. He stated:

> In this arbitration, Lexington has argued that one need not look to an external definition of subsidence as the term "mine subsidence" is a defined term in the Insurance Policy. While it is true that the Insurance Policy does not delineate whether the exclusion applies for earth movement only on the surface or below the surface, it appears that such a distinction is unneeded.

(Final Award 25, Ex. A, Mot. to Vacate, R. at 277-96). Arbitrator Arceneaux therefore concluded that any reliance that Belo or Belo's agent may have placed upon the common meaning of the word "subsidence" in interpreting its policy was improper.

This conclusion plainly and palpably contradicts the Court's holding that the common meaning of words must be taken into account in interpreting an insurance policy. *Payne v. Weston*, 195 W. Va. 502; 466 S.E.2d 161 (1995). In the *Payne* case, Justice Cleckley explained:

> Words, terms, phrases, and clauses in insurance contracts are to be given their everyday meanings, not hypertechnical or esoteric definitions, but their plain and common meaning. This follows because insureds are not expected to be wordsmiths, schooled in the craft of lexicology and, further, because the law disfavors the employment of arcane, subtle definitions of common words which but promise to confuse even the educated and frustrate the unlearned.

Id. at 168 n.7; 509, n.7.

Throughout the arbitration, Belo argued that the applicable subsidence exclusion was ambiguous upon its face because it did not specifically state that it applied to claims arising from "bodily injuries." The Final Award cites verbatim some of proposed conclusions of law that Belo offered relating to this argument:

> 92. The *Subsidence Exclusion* makes repeated references to its application to "damages" and "losses." The *Subsidence Exclusion* states in pertinent part:
>
> *This policy does not provide coverage and the Company ....will not pay any defense expenses, claim expenses, and/or any* ***damages*** *or* ***losses****, or any other* ***loss****, cost or expense, including, but not limited to* ***losses****, costs, or expenses related to, arising out of, based upon, attributable to, associated with, caused directly or indirectly by, or contributed to, or aggravated by 'subsidence' regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that* ***loss****, cost, or expense or to such defense expenses, claim expenses and/or* ***damages*** *or* ***losses****."*
>
> 93. This exclusionary language, however, is notable because it contains no reference whatsoever to "bodily injury," "injury," "sickness," "disease," "death," "persons" or other terms ordinarily used within other parts of the Policy when Lexington is describing claims relating to personal injuries.
>
> 94. The consistent and limited use by Lexington of the terms "damages" and "losses" in the *Subsidence Exclusion* and the complete omission of any reference to "bodily injury" within that same exclusion support a reasonable interpretation that the *Subsidence Exclusion* only applies to claims for property losses.

(Final Award, Ex. A, Mot. to Vacate, R. at 277-96) (emphasis added). Belo pointed out that the omission within the applicable subsidence exclusion of any mention of "bodily injury" differentiated that exclusion from most of all of the other exclusions within the Policy. When its intent was to preclude coverage for occurrences involving personal injury within these other exclusions, Lexington had consistently inserted express language stating that there is no coverage for "bodily injury." Within the exclusions listed within the main body of the policy, the phrase "bodily injury" appeared thirty-five times. (Policy 24, Ex. B, Mot. to Vacate, R. at 277-96).

Nevertheless, Arbitrator Arceneaux improperly rejected these arguments out of hand. (Final Award 27-28, Ex. A, Mot. to Vacate, R. at 277-96).

ii. Lexington was improperly permitted to prevail even though it offered no proof that the exclusion in question applied.

The final arbitration award ruled that Lexington had sustained its burden of proving the operation of the subsidence exclusion in this case although Lexington never offered any evidence on that issue. The Final Award states these two conclusions of law:

> 8. As the insurer seeking to avoid liability under the Policy, Lexington has the burden of proving sufficient facts as are necessary to the operation of the exclusion. *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 484, 509 S. E. 1, 8 (1998); Syl. Pt. 7, *Nat'l Mut. Insurance Co. v. McMahon & Sons, Inc.* 177 W.Va. 734, 356 S.E. 2d. 488 (1987) *overruled on other grounds by Potesta v. U.S. Fidelity & Guaranty Co.* 202 W.Va. 308, 504 S.E. 2d 135 (1998).
>
> 9. Lexington has carried that burden by producing a copy of the Amended Complaint in the Underlying Action to review in regard to the Insurance Policy at issue in this case.

(Final Award 34-35, Ex. A, Mot. to Vacate, R. at 277-96).

Here, Lexington sought a declaration that its subsidence exclusion operated to bar coverage of the claims asserted by Mr. Castle. Lexington claimed that the injuries to Mr. Castle resulted from "subsidence" as defined by the applicable policy. Such a determination necessarily depended upon some affirmative evidentiary showing that the actual cause or causes of Mr. Castle's injuries were somehow related to "subsidence." Lexington, however, offered no proof as to the actual cause or causes of Mr. Castle's injuries; instead, Lexington relied solely upon the unverified and unsubstantiated allegations of Mr. Castle's amended complaint.

Arbitrator Arceneaux wrongly concluded that this case was analogous to a declaratory judgment action in which the duty of an insurer to defend is determined simply by looking at the four corners of the complaint. (Final Award 13-15, Ex. A, Mot. to Vacate, R. at 277-96). The Court has held that when the applicability of an exclusionary provision turns upon a question of

fact, the insurer seeking to invoke that exclusion must offer sufficient evidence to show that the exclusion operates under such facts. *Smith v. Sears & Roebuck & Co.*, 191 W. Va. 563; 447 S.E.2d 255 (1994).

In the *Smith* case, the insurer filed for summary judgment in a declaratory judgment action asserting the applicability of an exclusion that precluded coverage for injuries arising out of business pursuits. The Court agreed with the lower court that summary judgment was not warranted since factual questions remained to be resolved. The Court stated:

> The circuit court found that the circumstances presented a material question of fact as to when the business pursuits exclusion applied and reserved it for resolution by the jury. Given that Nationwide who is "seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of the exclusion," we find proper the circuit court's denial of Nationwide's motion for summary judgment.

Id. at 566-67; 258-59. Similarly, Belo cannot be denied coverage based upon the purported application of a subsidence exclusion without Lexington offering some minimal proof to show that the subsidence exclusion actually operates under the facts of this case.

Finally, it must be noted that it took Arbitrator Arceneaux months of research, prolonged deliberations, and a one-hundred-and-eighty-degree reversal of his earlier thinking to finally land on what he declared to be the "clear and unambiguous" meaning of this two-paragraph subsidence exclusion. (Final Award 23, 36, Ex. A, Mot. to Vacate, R. at 277-96). The very fact that it took an experienced lawyer and arbitrator months of tortured deliberations to glean the meaning of this two paragraph provision should be ample proof in of itself that the subsidence exclusion cannot be found to be "clear and unambiguous" in excluding coverage.

PRAYER FOR RELIEF

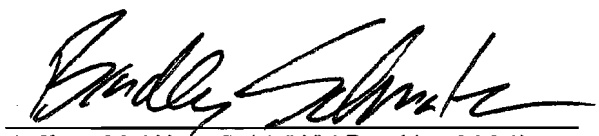
THEREFORE, Roxie Sue Brinager d/b/a Belo Mine Services respectfully requests that this Honorable Court reverse the Circuit Court of Boone County's March 22, 2010 Order confirming and incorporating the arbitration award, declare the underlying arbitration

proceedings void *ab initio*, remand this matter for further proceedings before that court, and grant any other such relief that this Honorable Court deems fair and just.

RESPECTFULLY SUBMITTED,

ROXIE SUE BRINAGER d/b/a BELO MINE SERVICES

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARK CASTLE,

Appellee, **Docket No.: 35740**

v.

NEWTOWN ENERGY, INC.,

Appellee,

v.

ROXIE SUE BRINAGER d/b/a
BELO MINE SERVICES,

Appellant,

v.

LEXINGTON INSURANCE COMPANY,

Appellee.

CERTIFICATE OF SERVICE

I, Bradley J. Schmalzer, counsel for defendants, do hereby certify that I have serviced the **Appellant's Brief** foregoing upon counsel of record the 21st day of March, 2011, by depositing true copies in the United States Mail, postage prepaid, addressed as follows:

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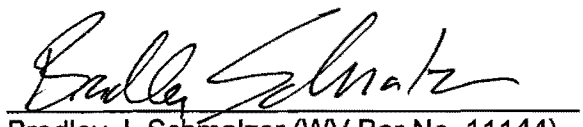

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