

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 35740

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**MARK CASTLE,**  
Appellee,

v.

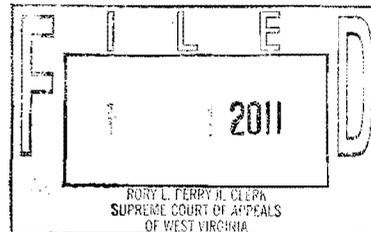
**NEWTOWN ENERGY, INC.,**  
Appellee,

v.

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

v.

**LEXINGTON INSURANCE COMPANY,**  
Appellee.



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**APPELLANT'S REPLY TO APPELLEE'S BRIEF**

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## Introduction

In this appeal, Roxie Sue Brinager d/b/a Belo Mine Services ("Belo"), a West Virginia business, asserts that the Circuit Court of Boone County, West Virginia, erred by ordering the underlying insurance coverage dispute with its insurer, Lexington Insurance Company ("Lexington"), to arbitration. By ordering the coverage dispute to arbitration in spite of the unconscionable terms of the arbitration provision, and subsequently upholding the untimely and fundamentally flawed final award of that panel, the court below has clearly committed reversible error.

### **I. THE LEXINGTON POLICY WAS A CLEARLY A CONTRACT OF ADHESION UNDER WEST VIRGINIA LAW.**

Lexington has erroneously argued that the insurance policy in question was not a contract of adhesion. (Lex. Brief 15, 18). This assertion plainly ignores well-established West Virginia law. 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. *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 492 n.14; 509 S.E.2d 1, 15 n.14 (1998). This describes, to the letter, the policy as it was issued to Belo. As set forth in the recent *State ex rel. Clites v. Clawges* decision:

"Adhesion contracts" include all "form contracts" submitted by one party on the basis of this or nothing[.] Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable. Instead courts engage in a process of judicial review[.] Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.

224 W. Va. 299, 306; 685 S.E.2d 693, 700 (2009) (quoting *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 557; 567 S.E.2d 265, 273 (2002), citing *Am. Food Mgmt'n, Inc. v. Henson*, 434 N.E.2d 59, 62-63, 61 (Ill. App. 1982)).

In this case, the entire Lexington policy consists of boiler-plate language that was not subject to negotiation. There is no contention in the record that Belo had any role or part in negotiating the relevant terms of the policy. The arbitration clause that is at issue was just one of many provisions contained in a standard 24-page form. There is no evidence to show, or any reasonable basis to believe, that Belo had any practical ability to cause Lexington to change any of these boilerplate provisions.

Lexington cites only one case, *Supertane Gas Corp. v. Aetna Cas. & Sur. Co.*, 1994 U.S. Dist. LEXIS 21602 (N.D.W. Va. Sept 27, 1994), to support the assertion that “insurance policies are not contracts of adhesion.” (Lex. Brief 18). *Supertane* was decided by Judge Keeley in 1994 prior to this Court’s decisions in *Murray v. State Farm Fire & Casualty Co.* (1998), *State ex rel. Dunlap v. Berger* (2002), *State ex rel. Wells v. Matish* (2004), *State ex. rel Saylor v. Wilkes* (2005) and *State ex rel. Clites v. Clawges* (2009). Judge Keeley provided no significant analysis and cited no West Virginia cases to support her conclusion that the insurance policy in the *Supertane* case was not a contract of adhesion. Instead, her conclusion was based upon a finding that the insurance contract was entered into between “parties with relatively equal bargaining power” and the endorsement was subject to negotiation. Unlike the exclusionary endorsement at issue in *Supertane*, the relevant portion of the insurance policy at issue in this appeal was contained in the body of the policy itself, and non-negotiable.

It is not, as claimed by Lexington, that the inclusion of any arbitration provision into any insurance policy renders that policy unenforceable. Rather, it is Belo's position that the insertion of an unbargained for, patently unconscionable arbitration provision in an insurance policy renders that provision unenforceable. The facts surrounding this dispute clearly reveal an arbitration provision that is unconscionable under West Virginia law.

**II. BELO WAS NOT A SOPHISTICATED ENTITY ON RELATIVE EQUAL FOOTING AND COMPARABLE BARGAINING POWER WITH LEXINGTON INSURANCE.**

Lexington relies upon the testimony of former Belo managing consultant, Gene Brinager, who stated that “[u]sually when you are successful you know what you are doing” as evidence that Belo was sophisticated in the reading and understanding of complicated commercial general liability policies – indeed, that Belo was entity on equal footing with a large insurance company in the negotiation and procurement of the policy. (Lex. Brief 18-19).

Belo was family-business that supplied contract labor from an office located in a single-wide trailer – this Court should not be misled into believing that Belo was a sophisticated commercial entity with ample financial means to pay the \$31,000.00 in arbitration fees imposed in the underlying arbitration. (R. at 335; Brinager Aff., Ex. P, Mot. to Vacate, R. at 277-96). Belo no longer exists – that entity was a sole proprietorship owned by Mr. Brinager's wife, Mrs. Roxie Sue Brinager. Belo went out of business in 2006, and Mrs. Brinager is now personally and individually liable to pay the past debts and obligations of Belo.

A large payroll and relative success in the coal mining industry does not equate to sophistication with regard to the interpretation of complicated insurance policies. Regional Mine Service, LLC (“RMS”) is the Brinager family business that took the place of Belo. RMS, like Belo, is not a sophisticated entity. Four family members, each possessing a high school education, run RMS. Also in the business of providing temporary workers to coal mines, RMS’s current payroll is approximately \$1,000,000.00.

Lexington further argues that Belo should not be able to avail itself of policy coverage because Belo disputes the conscionability of the arbitration provision in that policy. (Lex. Brief 19). It is hard to imagine a more unreasonable and inequitable position, or one more at odds with how courts across jurisdictions treat unconscionable arbitration clauses. Following this logic, it would behoove insurers like Lexington to insert unconscionable provisions in their insurance policies so as to escape liability to their insureds – who have paid policy premiums for the insurance – at every instance by rendering the policy and the coverage it provides void should the insured challenge its terms. Should this Court adopt this approach, insurance companies would have no disincentive to draft unfair and unconscionable terms in their policies, and would in fact be encouraged to include them.

Lexington cites *Joslin v. Mitchell*, 213 W. Va. 771; 584 S.E.2d 913 (2009), for the proposition that there is no “legal requirement that every single provision of an insurance policy be separately negotiated.” (Lex. Brief 16). Lexington then states that “there is no case law or statutory authority prohibiting an insurer from unilaterally inserting policy language into an insurance policy.” *Id.* This is, of course, self-evident.

The insurance company drafts the policy and then sells it to the consumer. But that does not mean that the contents of that policy are then immune from scrutiny just because an insured signs on the dotted line and purchases the policy. The implication of the argument forwarded by Lexington is that an insurance company can insert anything it likes into a policy, bargained for or not, without consequence. That is, of course, not true, as *Joslin* itself demonstrates.

In *Joslin*, there was a dispute over underinsured motorist coverage between the plaintiffs and their insurer. The plaintiffs demanded that the insurer “stack” several underinsured motorist policies, and provide “per person” limits of coverage under each policy. The insurer refused, pointing to “anti-stacking” language in each policy, and further argued that it gave a multi-car discount for underinsured motorist coverage on each policy at issue. This Court held that “anti-stacking language in an insurance policy is enforceable where the insurance company gives the policy holder a multi-car discount.” *Id.* at 774, 916. When a “multi-car discount [is] given, it is obvious that the insured appellee bargained for only one policy and only one underinsurance motorist coverage endorsement.”<sup>1</sup>

The Court found that the insurance policy itself was “bargained for” under West Virginia Code section 33-6-31(b) because “[w]hen a multi-car discount is given, *it is obvious that the insured bargained for only one policy and only one underinsurance*

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<sup>1</sup> A primary holding in *Joslin*, as set forth in syllabus point 4 of the opinion, was:

The phrase “bargained for discount” in W. Va. Code, 33-6-31(b) [1998] allows an insurance company to unilaterally give an insured a multi-car discount as consideration for the enforcement of anti-stacking language in an automobile insurance policy.

In *Joslin* there were five separate policies for five separate vehicles issued by one carrier, and the issue was the enforceability of the anti-stacking provisions.

*motorist coverage endorsement.*” Ultimately, this Court ruled “the phrase ‘bargained for discount’ in . . . 33-6-31(b) allows an insurance company to unilaterally give an insured a multi-car discount as consideration for the enforcement of anti-stacking language in an automobile insurance policy.” *Id.* at 778.

This situation examined by this Court in *Joslin* is far afield from the issues presented in this appeal – whether an “un-bargained for” and unconscionable arbitration provision in the body of a commercial general liability policy and sold sight unseen is enforceable. This is not a case where Lexington, like the insurer in *Joslin*, unilaterally inserted a term into a policy in order to meet the statutory mandates requiring that the term to be present in order to give effect to other provisions in the policy. This is not a situation where the “bargained for” aspect of the policy is subject to statutory interpretation, as mandated by the West Virginia Legislature in the context of underinsured motorist insurance. The term “bargained for” in *Joslin* is not even examined in the context of illegal unconscionability. Above all, *Joslin* does not stand for the proposition, as asserted by Lexington, that nothing prohibits an insurer from unilaterally inserting any policy language it likes into an insurance policy.<sup>2</sup>

Instead, the policy and arbitration provision at issue is like that considered by this Court in *Dunlap* – a “pre-printed form contract prepared by one of the parties” containing an arbitration provision. *State ex rel. Dunlap v. Berger*, 211 W. Va. 549; 567 S.E.2d 265

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<sup>2</sup> Similarly distinguishable is the Memorandum Opinion in *Schultz v. AT&T Wireless Services, Inc.*, 376 F. Supp. 2d 685, 686-87 (N.D.W. Va. 2005). *Schultz* involved a situation in which the contract at issue was one for mobile telephone services, and an arbitration provision was deemed included after the fact by an affirmative act taken by the consumer. Under the terms of the contract, the customer accepted the arbitration provision by either using the mobile telephone or service, or accepting that benefit in exchange for the inclusion of the arbitration clause, or by paying any amount billed to the customer’s account. Among other reasons, the court deemed the contents of the contract to be bargained for because the plaintiff “was a sophisticated, educated consumer in a reasonable bargaining position, *given the meaningful alternatives that he had in obtaining phone service.*” As explained herein, Belo had no such meaningful alternatives.

(2002). The arbitration provision at issue was not included in an endorsement, it was part of the body of the policy itself. Lexington has offered no evidence that there were alternative policies or endorsement available to modify the terms of the arbitration provision. There is no reason to believe that Belo could have done anything to modify the terms of the arbitration provision. In addition, the policy at issue was the only one available – Belo could not simply choose to purchase a different policy from Lexington's competitors. (Brinager Dep. 51). Belo had two options – to proceed to do business without insurance, a risky proposition, or it could buy the only policy available to it – Lexington's.

Finally, Lexington erroneously asserts that the arbitration provision was “not oppressive and not intended to prevent Belo from bringing claims under the Policy; rather it provides an efficient and often less expensive alternative means of resolving claims.” (Lex. Brief, 17). In a footnote, Lexington supports this contention by stating that it “recognizes in this particular case that arbitration was neither quick nor inexpensive, but posits that 100% of the reason for this is Belo's numerous challenges to the arbitration, in the Circuit Court, this Court, and even to the arbitration panel itself.” *Id.* at 17 n.3. Lexington flatly admits that *the arbitration process itself was neither quick nor inexpensive*, and then conflates Belo's challenges to the arbitration as evidence that the arbitration *itself* was inexpensive and quick. This is, of course, not true. The initial arbitration planning conference was held on October 6, 2008. (R. at 5, ¶ 9). On December 9, 2009, the arbitration panel declared the arbitration closed. The panel then issued its award on January 7, 2010. From the start of arbitration on October 6, 2008 to

the day the panel issued its opinion on January 7, 2010, approximately one year and three months had elapsed.

In addition to being time consuming, the arbitration was expensive. In total, it cost Belo \$30,541.65. (Ex. A to Brinager Aff., Ex. P, Mot. to Vacate, R. at 277-96). As Belo has demonstrated, the time and expense *of the arbitration itself* was more than adequate to prove that the arbitration provision, as born out according to its terms, was unconscionable.

### **III. THE ARBITRATION DECISION WAS UNTIMELY, AND THEREFORE, SUBJECT TO CHALLENGE.**

Contrary to the assertions made by Lexington, once the underlying coverage dispute was submitted to arbitration, Belo did not impede the arbitration process. Pursuant to Rule R-35 of the AAA Rules of Commercial Arbitration, it was required that the award be rendered within thirty (30) days of the close of hearings. Hearings were officially closed as of November 13, 2009 – the date that the parties submitted their final briefs to the panel. Therefore, under the AAA Rules, the award was due on or before December 13, 2009. One month later, on January 7, 2010, the award was finally issued.

Arbitrator Arceneaux was aware of the fact that Belo sought a quick and timely resolution of the matter before him, and on September 4, 2009, promised to “shut down” the arbitration by October 27, 2009, and to render a decision by November 19, 2009. (Hr’g Tra. 110-11, Sept. 4, 2009). Nevertheless, Arbitrator Arceneaux extended the close of hearings in order to avoid rendering an untimely decision. The panel did finally issue a decision – two months late. From the initial arbitration conference on October 6,

2008 to the day the panel issued its opinion on January 7, 2010, approximately one year and three months had elapsed.

The undue delay in issuing a final award contributed to the burdensome and time-consuming nature of this arbitration. When the fruit of this protracted arbitration hearing was a decision that is less than exemplary on numerous grounds, it is the province of the court to review the propriety and substance of that decision. In this case, the court failed to do so, committing reversible error. One of the most glaring errors made on the part of the arbitrator in that decision was the failure to hold Lexington to its burden of proving the facts underlying the application of the subsidence exclusion.

**IV. THE UNTIMELY FINAL AWARD WAS PLAINLY WRONG AND IN DIRECT CONTRAVENTION OF WEST VIRGINIA LAW.**

Lexington weakly addresses the decision of Arbitrator Arceneax to disregard Lexington's failure to meet its burden of proving the application of the subsidence exclusion to the facts underlying this case. As correctly noted by Lexington, "[t]he permissible common law grounds for vacating an award include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law." *Patten v. Signator Ins. Agency, Inc.*, 411 F.3d 230, 234 (4th Cir. 2006).

The abject failure of the arbitration panel to hold Lexington, the claimant in the arbitration, to its legal burden of proof and require it to set forth facts proving the application of an exclusion in an insurance policy is, without a doubt "a manifest disregard of the law." It is settled that an insurer seeking to avoid liability under a policy has the burden of proving sufficient facts as are necessary to the operation of the

exclusion. Both the panel and the court below have ignored well-established West Virginia law that requires insurers to prove the *facts* upon which exclusionary provisions are alleged to operate. “When a policyholder shows that a loss occurred while an insurance policy was in force, but the insurance company seeks to avoid liability through the operation of an exclusion, the insurance company has the burden of proving the exclusion applies to the facts in the case.” *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 484; 509 S.E.2d 1, 8 (1998); *see also Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308, 314; 504 S.E.2d 135, 141 (1998); syl. pt. 7, *Nat’l Mut. Ins. Co. v. McMahan & Sons, Inc.*, 177 W. Va. 734; 356 S.E.2d 488 (1987).

In the final award, Arbitrator Arceneaux stated, “Lexington has carried that burden [of proving the application of the subsidence exclusion] by producing a copy of the Amended Complaint in the Underlying Action to review in regard to the Insurance Policy as issued in this case.” (Final Award 34-35, Ex. A, Mot. to Vacate, R. at 277-96). This is in spite of the fact that Lexington presented no proof as to the actual cause of Mr. Castle’s injuries, and instead relied upon the unverified and unsubstantiated allegation in Mr. Castle’s Amended Complaint. At the same time, Lexington had ample time and opportunity to obtain and produce competent evidence showing what actually occurred in connection with Mr. Castle’s accident.

Instead, Lexington deliberately and stubbornly staked its right to prevail on these issues by citing solely to the unverified allegations of Mr. Castle’s amended complaint. The arbitration panel mistakenly attempted to equate Lexington’s burden for proving the operation of a policy exclusion to the less stringent burden required to establish an insurer’s duty to defend, which may be determined by looking at the four corners of the

complaint. *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 27; 602 S.E.2d 483, 490 (2004) (“[A]n insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers.”).<sup>3</sup>

However, proving the operation of a policy exclusion requires much more. When the applicability of an exclusionary provision turns upon a question of fact, the insurer that seeks to invoke that exclusion must offer sufficient evidence to show that the exclusion operates under such facts.<sup>4</sup>

In *National Mutual Insurance Co. v. McMahon & Sons*, the insurance company asserted that certain property damages claims were barred by a care, custody and control exclusion found in its general liability policy. 177 W. Va. 734; 356 S.E.2d 488 (1987). The circuit court ruled that there was no coverage obligation due to this exclusion. However, the Supreme Court reversed and remanded upon appeal. Finding that the insurer had “the burden of proving the facts necessary to the operation of that exclusion,” the Supreme Court held that there was insufficient evidence in the record from which any such determinations could be made. The Supreme Court therefore remanded the case and instructed the lower court to “develop a sufficiently detailed

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<sup>3</sup> See also syl. pt 3, *Bruceton Bank v. U.S. Fid. & Guar. Ins.*, 199 W. Va. 548; 486 S.E.2d 19 (1997) (“[I]ncluded in the consideration of whether [an] insurer has a duty to defend is whether the allegations in the complaint . . . are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy.”); *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194; 342 S.E.2d 156, 160 (1986) (“an insurer’s duty to defend is tested by whether the allegations in the plaintiff’s complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy.” (citations omitted.)); *Corder v. William W. Smith Excavating Co.*, 210 W. Va. 110, 113; 556 S.E.2d 77, 80 (2001) (“in determining whether an insurer has a duty to defend, the determination is made based upon the allegations of the complaint.”).

<sup>4</sup> See *Smith v. Sears & Roebuck & Co.*, 191 W. Va. 563; 447 S.E.2d 255 (1994); syl. pt. 7, *Nat’l Mut. Ins. Co. v. McMahon & Sons*, 177 W. Va. 734; 356 S.E.2d 488 (1987); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477; 509 S.E.2d 1 (1998); *Farmers & Mechanics Mut. Fire Ins. Co. v. Hutzler*, 191 W. Va. 559; 447 S.E.2d 22 (1994); *Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308; 504 S.E.2d 135 (1998).

record to allow it to decide whether the care, custody, and control exclusion may equitably be allowed to operate under all the facts of this case.”

Like the insurer in *National Mutual Insurance*, Lexington could not obtain a legally conclusive ruling that its subsidence exclusion applies in the underlying case without first proving the necessary facts regarding how Mr. Castle’s accident actually occurred. The decision of the panel to disregard Lexington’s burden of proof, and then render a decision based upon the application of the very exclusion Lexington relied upon, is, as previously stated, a “manifest disregard of the law” that should not have been upheld by the Circuit Court.

### Conclusion

There is a universe of case law in which courts have struck down arbitration clauses that strip consumers of substantive remedies or impose upon them prohibitive costs. Nevertheless, insurers such as Lexington continue to include arbitration provisions that contain unconscionable terms, forcing West Virginia insureds to submit to unfair arbitrations and jump through a myriad of legal hoops in order to enforce their rights under the law. Lexington purports to have the right to unilaterally insert any type of provision it likes into its policies, and then force its insured to expend inordinate amounts of time, money and effort to vindicate their rights. Clearly, there are arbitration provisions that are conscionable and enforceable, for instance, those that grant an insured all the rights and remedies afforded to them under West Virginia law. The arbitration provision in the policy at issue in this appeal is not one of those.

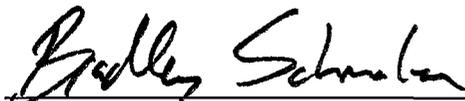
THEREFORE, Roxie Sue Brinager d/b/a Belo Mine services respectfully requests that this Honorable Court reverse the Circuit Court of Boone County’s March

22, 2010 Order confirming and incorporating the arbitration award, declare the underlying arbitration proceedings void *ab initio*, and 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**

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**CERTIFICATE OF SERVICE**

I, Bradley J. Schmalzer, counsel for defendants, do hereby certify that I have served the **Appellant's Reply to Appellee's Brief** upon counsel of record the 11<sup>th</sup> day of May, 2011, by depositing true copies in the United States Mail, postage prepaid, addressed as follows:

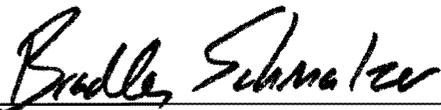
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