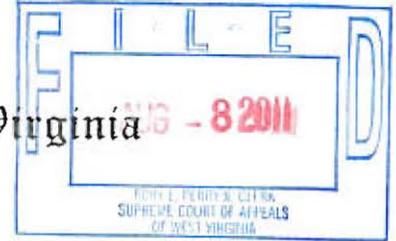


In the Supreme Court of Appeals of West Virginia

Docket No. 11-0371



GEORGE A. GRAYIEL, JR.,

Plaintiff Below / Petitioner,

v.

APPALACHIAN ENERGY PARTNERS 2001-D, LLP,
APPALACHIAN ENERGY PARTNERS 2001-S, LLP,
APPALACHIAN ENERGY PARTNERS 2001 II, LLP,
APPALACHIAN ENERGY PARTNERS 2003 S-II, LLP,
BURNING SPRINGS ENERGY PARTNERS 1999, LLP,
BURNING SPRINGS ENERGY PARTNERS 2000, LLP,
BURNING SPRINGS ENERGY PARTNERS 2001-S, LLP,
CHEROKEE ENERGY COMPANY, HAYNES #2 ENERGY
PARTNERS 2001, LLP, MARTWIN TWIST ENERGY
COMPANY, LLC, MARTIN R. TWIST, DREW THOMAS,
TAMMY CURRY TWIST *and* TODD PILCHER,

Appeal from a final order
of the Circuit Court of
Putnam County (08-C-378)

Defendants Below / Respondents.

PETITIONER'S REPLY BRIEF

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ANALYSIS

A. Respondents' claims notwithstanding, Petitioner will not have adequate "judicial remedies" if forced to arbitrate his claims in Indiana.

Respondents assert that "[i]n any arbitration that is subject to a forum selection clause, judicial remedies are available, and in this instance they will be available in the forum set for the arbitration, Indiana." (Resps.' Br. at 9.) It is unclear what Respondents mean by this. Do they mean that if the costs of arbitration are too expensive for George to afford, or if the rules for arbitration do not allow for adequate discovery into Twist's relevant misconduct or compulsory attendance of recalcitrant and evasive witnesses or sanctions like those available to judges, then Petitioner can sue Twist in a court in Indiana to get more affordable fees or more discovery or the other "remedies"? Obviously, they do not.

Do Respondents mean that if they behave the same way here that he did in *Arbusto*, George can go back to an Indiana court, like the Arbustos tried to do? Perhaps, but at what cost? Twist and his then attorney made abundantly clear in their egregious misbehavior in *Arbusto* that Twist's goal was to punish the Arbustos for suing him by forcing them into arbitration, and then punish them for arbitrating against him by forcing them back into court.

If this is what Respondents mean by "judicial remedies," Petitioner respectfully declines the offer. An arbitration clause with a forum selection clause provides only one thing: arbitration in the specified forum. It does not provide any "judicial remedies" beyond enforcement of the arbitrator's decision. As demonstrated, in this case, for a number of reasons, that would be unconscionable.

B. What are the two pieces of paper at A.R. 429 and 430?

Respondents assert that the Petitioner's argument that the circuit court should have applied state law over the Federal Arbitration Act ("FAA") is "totally specious" because the

FAA preempts all state law to the contrary: “[T]he Federal Arbitration Act, as federal law trumps any state laws that are in conflict with its terms.” (Resp. Br. at 11.) As Petitioner demonstrated in his brief, this argument is incorrect where, as here, the parties have voluntarily chosen *not* to apply the FAA. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *Tortoriello v. Gerald Nissan of N. Aurora, Inc.*, 882 N.E.2d 157, 168-69 (Ill. Ct. App. 2008) (“Normally, ‘[w]here a contract involving interstate commerce contains an arbitration clause, federal law preempts state statutes even in state courts.’ However, ‘in circumstances where parties to a contract have agreed to arbitrate in accordance with state law, the FAA does not apply, even where interstate commerce is involved.’”) (alterations in original); *Rhodes v. Consumers’ Buyline, Inc.*, 868 F. Supp. 368, 373 (D. Mass. 1993) (“Where . . . parties to a contract containing an arbitration clause have specified that the contract is governed by the law of a particular jurisdiction, a federal court generally may apply the law of the specified jurisdiction, not federal law, to determine the applicability of the arbitration provision.”).

Respondents’ then ignore the fact that the parties here expressly and voluntarily rejected application of the FAA in the underlying agreements in favor of state law. Arbitration, and invocation of the FAA, are matters of choice. And here, the parties chose not to invoke the FAA. “Allowing the question of the underlying validity of an arbitration agreement to be submitted to arbitration without the consent of all parties is contrary to governing law. It is also contrary to fundamental notions of fairness and basic principles of contract formation.” *Brown v. Genesis Healthcare Corp.*, Nos. 35494, 35546 & 35635, --- S.E.2d ---, 2011 WL 2611327, slip op. at 36 (W. Va. June 29, 2011) (citation and quotations omitted).¹

¹ Respondents’ reliance on *Brown* is curious. They cite the case, but then feel compelled to include a nearly page-long footnote explaining how inapposite it is. Petitioner agrees that in the end, *Brown* is

As they did below, Respondents rely on two pages, appearing at A.R. 429 and 430 in the record. But what are A.R. 429 and 430? Nobody knows. Petitioner does not know, as he has stated on the record. As noted before, Petitioner sought the complete document from which A.R. 429 and 430 were extracted, but to date has received nothing. Respondents *still* do not say in their brief exactly what A.R. 429 and 430 are. Petitioner infers that Respondents believe that those two pages represent the mashed-up language of (one of) the underlying Subscription Agreements after the December 18, 2003, “amendment” (*see* A.R. 41-42) was “merged” into it.

But that is absurd. Twist cannot simply re-draft a written, executed document to fit the language as he now (wrongly) thinks it to be interpreted and then offer the designer re-draft as the original document. Respondents represented before the circuit court and before this Court that A.R. 429 and 430 are “[t]he pertinent portions *of the Subscription Agreements.*” (A.R. 424 (emphasis added).) They said nothing about those pages being “the pertinent portions of the Subscription Agreements as Twist now understands them to have been amended.” Respondents represented—and continue to represent—these “documents” as something that they are not.

In addition to the fact that A.R. 429 and 430 are *not* the “pertinent portions [or for that matter any portion] of the Subscription Agreements,” they cannot even purport to represent the “as-modified” language of the Subscription Agreements. First, as discussed in detail in Petitioner’s brief, Respondents only proffered one such “amendment” into the record (the one amending the Appalachian Energy Partners 2001-D L.L.P. Partnership Agreement). (A.R. at 41-42.) This leaves the other nineteen or so Subscription Agreements “unamended.”

inapposite, but for a different reason: *Brown* was an FAA case. This case is not. This Court’s discussion of the Supreme Court of the United States’ modern expansion of the scope of the FAA to well beyond Congress’s initial and clear intentions, and the Court’s decision to prevent that expansion from elevating arbitration clauses over other contracts, show in this case that application of the FAA here would be inappropriate. Here there is no “clear and unmistakable writing [that the parties] have agreed to arbitrate” under the FAA, syl. pt. 10, but rather the opposite: a clear and unmistakable *rejection* of the FAA in favor of state (and, as required by this Court’s choice-of-law jurisprudence, West Virginia) law.

Second, Respondents wholly failed to even so much as address, much less explain, why or how the “amendment” was enforceable in light of the fact that the Subscription Agreements all had clauses allowing amendment only by a writing signed by *both* parties (George never signed any amendment, and Twist refused to testify to who had the authority to do so on Respondents’ behalf), and that no separate consideration was exchanged for the alleged “amendment.”² Twist’s motivation in unilaterally seeking to amend the arbitration clauses in light of *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265, *cert. denied sub nom., Friedman’s, Inc. v. W. Va. ex rel. Dunlap*, 537 U.S. 1087 (2002), is certainly apparent. But that does not make it effective. Respondents say only that because George “was aware of” the putative amendment, it should be enforced. But George’s “awareness” of the December 18, 2003, document also cannot turn it into a legally enforceable agreement.

And finally, the December 18, 2003, would-be amendment says absolutely nothing about the applicability of the FAA. (A.R. 41-42.) Pages A.R. 429 and 430, however, certainly do. So even if Respondents were offering A.R. 429-30 as their “version” of what (one of) the Subscription Agreement “ought” to look like as modified by the December 18, 2003, amendment, they nevertheless offer no explanation for where the *FAA language* at A.R. 429 is supposed to have come from. In fact, Respondents themselves quite adamantly insist that “the sole purpose” (Resps.’ Br. at 12 (emphasis in original)) of the December 18, 2003, amendment:

² Respondents appear to suggest that the fact that the proposed “amendment” purports to allow George to claim punitive damages in arbitration means that he did not have to sign it. (Resps.’ Br. at 13.) While it is true that under *general contract principles*, the relevant question in a breach of contract claim typically is whether the party against whom the contract is being pressed signed it, *see, e.g.*, syl. pt. 4, *Creigh’s Adm’r v. Boggs*, 19 W. Va. 240 (1881), that doctrine has no application where an express term of an agreement plainly imposes the specific requirement that *all* subsequent amendments be made in a writing signed by both parties before being effective, *see, e.g.*, *New Holland Credit Co., LLC v. Madison Creek LLC*, 191 F. Supp. 2d 695, 700 (S.D. W. Va. 2002) (“The Court concludes the Contract’s unambiguous language requires any and all modifications be in writing and signed by both parties. Defendants’ claimed modification was oral, and hence not effective under the Contract.”). In this regard, Petitioner does not argue that the amendment is invalid under general contract law; it is invalid because the Subscription Agreement says it is invalid.

was to modify the arbitration agreements to the degree required under West Virginia law after this Court made its decision in [*Berger*], **which prohibited arbitration agreements from disallowing punitive damages.**

(Resps.' Br. at 12 (emphasis added). Respondents assert that "in an amendment to the arbitration clause at issue specifies [*sic*] that, '[t]he Federal Arbitration Act... not state law, shall govern the arbitrability of all disputes.'" (*Id.*) What amendment? Respondents, again, do not say. Certainly not the December 18, 2003, amendment—the only "amendment" in the record, as even by Respondents' own acknowledgment, that would-be "amendment" did not address the parties' original, express rejection of the FAA in favor of state law. Why they think they can just insert that language as they did on A.R. 429 defies comprehension. (It does, however, quite effectively demonstrate the efficacy of the "discovery" that Petitioner was able to have.)

The two pages at A.R. 429 and 430 in the record, on which Respondents relied below and again rely now entirely for their arguments that the FAA, not state law, applies and that the arbitration clauses do not unconscionably preclude punitive or other damages required by West Virginia law (*see* Resps.' Br. 12 (quoting A.R. 429)) are not part of anything that George Grayiel has ever seen or ever signed, and he has absolutely no idea what those two pages represent. While Petitioner is reluctant to take a position on the propriety of Respondents' conduct in offering the two pages below and again here, this much is undeniable: A.R. 429 and 430 had, and still have, absolutely nothing whatsoever to do with the proper resolution of this case (except perhaps as a demonstration of what Respondents are capable of and the lengths that they are willing to go to in their campaign to avoid facing a jury). Respondents' indignant protestations of "outrage" aside, they have offered absolutely nothing to rebut the fact that it appears those two pages were crafted *post hoc* solely for the benefit of the circuit court, and now

this Court. The only “misdirection” going on is in Respondents’ attempt to misdirect the Court’s scrutiny from their conduct in attaching and twice relying on a “document” that is pure fiction.

C. Respondents’ argument that Petitioner never raised the unenforceability of the December 18, 2003, “amendment” is both disingenuous and false.

Respondents assert that “the Petitioner never presented his allegations regarding some alleged impropriety regarding the existence and/or nature of the amendment before the lower court.” (Resps. Br. at 14.) First, this assertion is disingenuous. Respondents did not raise the amendment in their motion to dismiss, but instead only in their *reply* to Petitioner’s supplemental response to Respondents’ motion to dismiss. The circuit court’s scheduling order provided Petitioner no surreply. Thus, Petitioner was afforded no opportunity to directly address the issue. And second, it is false. Petitioner *did* indirectly raise it before the circuit court. As discussed in his supplemental response, Petitioner *attempted* to explore the topic of the December 18, 2003, “amendment” during Twist’s “deposition,” but Twist steadfastly refused to discuss it. (*See, e.g.*, A.R. 62.) Respondents cannot be heard to complain that Petitioner did not raise the amendment’s unenforceability after only raising it themselves in the last brief allowed by the circuit court and after Twist improperly refused to discuss it in his deposition.

D. Simply quoting the circuit court’s conclusion that “all remedies available in [Court] are available in arbitration” does not make it so.

Respondents quote the circuit court’s conclusion that “all remedies available in [Court] are available in arbitration.” As discussed, here and in Petitioner’s brief, that conclusion was, with all due respect, incorrect. Perhaps it is less incorrect if the faux arbitration clause at A.R. 429-30 were to be believed. But as discussed, the *real* arbitration clauses still preclude a number of important statutory and common-law damages.

E. *Arnold* is relevant to this case.

Respondents argue that Petitioner’s citation to *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 511 S.E.2d 854 (1998), is inapposite because that case involved a one-sided arbitration clause. Respondents fail to acknowledge that that is precisely the case here: As Petitioner demonstrated in his brief, having taken all of George’s money up front, he had no more obligation to Respondents that he could possibly breach, so there is nothing Respondents could ever sue him for. It is Respondents alone who can possibly benefit from the clauses.

F. Respondents’ claim that George does not face significant fees is false.

Respondents assert that if George prevails in arbitration, he would be “entitled to his attorneys fees and costs, making Petitioner’s claim that the arbitration fee is too costly a moot issue.” (Resps.’ Br. at 13 (citation omitted).) First, it is unclear why Respondents believe this. They (again) fail to say, and they do not refer the Court or Petitioner to anything in the record to support their assertion. Indeed, it is clear that the assertion is false, as all of the underlying Subscription Agreements contain a *fee-splitting*, not a *fee-shifting*, provision. (*See, e.g.*, Appalachian Energy Partners 2001-D L.L.P. Partnership Agreement ¶ 9, A.R. Supp. (“The direct expense of any arbitration proceeding shall be divided among the parties involved in the dispute or controversy.”).)

Second, the assertion also misses the point: Even if there were a *fee-shifting* provision in the Subscription Agreements, exposing George to the potential to lose the nearly \$10,000 fee (or even worse, the possibility of twenty times that (one for each agreement)) if he were to lose is enough to effectively dissuade him from even attempting arbitration—exactly what Twist had in mind in imposing it in the first place. (A.R. 143.)

G. Thankfully, Martin Twist did not draft “millions of contracts that exist in the United States.”

Respondents argue that Petitioner has made no allegation that the clauses are any different from “those found in millions of contracts that exist in the United States.” This is false. As Petitioner pointed out, in several ways the arbitration clauses at issue here are undoubtedly quite different from those in the other “millions of contracts”: (1) they expressly reject application of the FAA; (2) they are entirely one-sided; (3) they were inserted for the sole purpose of *discouraging* the just vindication of George’s efforts to untwist Twist’s scam; (4) they preclude important statutory and common-law causes of action; (5) they force George to bear enormous costs that he would not bear in court; (6) they force George’s claims to be resolved in a forum with no connection to this case other than Twist’s having fled there to evade Kentucky securities enforcement action; and (7) they were independently fraudulently induced.

Fortunately for the parties to those other “millions of contracts that exist in the United States,” Martin Twist did not draft their arbitration clauses.

H. Respondents’ classic argument that the arbitration clauses are not procedurally unconscionable because George “could have chosen not to invest with the Respondents” is disingenuous and irrelevant.

Respondents assert that “most importantly, Petitioner could have chosen not to invest with the Respondents.” (Resps. Br. at 15; *see also id.* 18 (“The other ‘meaningful choice’ available to Petitioner? Not to invest with the Respondents at all.”).) If court’s ever assigned this tired argument any weight, it would require finding every, single contract conscionable, because in every, single contract, the party claiming that the agreement is conscionable could always say this. After all, when does anyone ever *have* to enter into a contract? This assertion has nothing to do with anything.

I. The fact that George had (used to have, thanks to Respondents) “nearly a million dollars in capital” is no evidence that he was a sophisticated businessman on par with Martin Twist.

Respondents assert that because George toiled his whole life as a frugal, hardworking postal worker (A.R. 390) and managed to save up “nearly a million dollars” to invest makes him a sophisticated businessman, able to defend himself from Respondents’ Ponzi scheme. Generously, this argument is false. Saving a million dollars after a long career as a thrifty postal worker hardly prepares one to deal with sophisticated and determined criminal enterprise. Nor would hiring a lawyer necessarily even have shielded George from Respondents, who lied about their previous criminal and administrative history. Even an attorney might easily have reasonably relied on Respondents’ misrepresentations and not fully appreciated the perils of entering into an agreement to arbitrate with Twist. Even an attorney could not have foreseen that Twist would likely conduct himself in arbitration here no better than he did in *Arbusto*.

J. Respondents’ assertion that “Petitioner had two years to conduct discovery” is disingenuous.

Respondents assert that because George has had more than a year to try to conduct discovery, the circuit court and this Court should ignore Respondents’ discovery misbehavior. (Resps. Br. at 19.) Petitioner’s response to this assertion is simple: Due to space limitations in the initial brief, Petitioner was able to include only a fraction of the evasive conduct that took place at Martin Twist’s deposition, so Petitioner encourages the Court to read the transcript in its entirety to understand how effective Respondents made sure Petitioner’s time to conduct discovery really was.

K. Respondents' allegation that George denied asking Twist and Thomas about their history is false.

George attached a sworn statement below stating that he asked Martin Twist and Drew Thomas whether either of them had had any previous legal problems, and they both answered no. (A.R. 268 & 391.) Twist's and Thomas's answers reasonably informed George's decision to enter into an agreement purportedly stripping him of his right to access the courts. (*Id.*) George has never asserted when that conversation took place. In their response, Respondents allege that George "denied having had this discussion during his deposition testimony." (Resps.' Br. at 20 (citing A.R. 268 & 44).) Petitioner assumes that this is a dangling modifier, and that Respondents really meant that during his deposition testimony, George denied having had this discussion. It is still false.

During George's deposition, counsel for Respondents asked him whether he discussed *the arbitration clauses* specifically "[d]uring [his] initial hour to hour and a half meeting with Mr. Twist and Mr. Thomas" or "[d]uring any of th[e] opportunities to visit the [work] sites." (A.R. 44.) George answered no. (*Id.*) But George has never asserted that his conversation took place at either of those times, nor did he say anything specific about discussing the *arbitration clauses* at all. He said only that he asked Martin and Drew if that had ever had any prior legal problems, and that they both lied to him. Respondents' allegation is false.

L. Respondents' Rule 37 argument is incorrect.

Respondents make the following argument in an effort to excuse Twist's deposition misconduct:

Petitioner did not avail himself of the protection under the *Rules*, therefore raising the issue, for the first time, in his supplemental memorandum regarding the Respondents' Motion to Dismiss/Motion for Summary Judgment was untimely and unfair to the Respondents in that they have had no opportunity to respond

to these allegations until they were improperly brought before this Court.

(Resps. Br. at 21-22.) This makes absolutely no sense. At the risk of attempting to interject lucidity into it, Petitioner believes that Respondents might be saying that Twist's egregious deposition misconduct should be excused because Petitioner chose not to waste his time filing a Rule 37(a)(2) motion ("If a deponent fails to answer a question propounded . . . , the discovering party *may* move for an order compelling an answer") (emphasis added), and that even though Petitioner timely raised the issue below—very loudly—in his supplemental response to their motion to dismiss (*i.e.*, his very first filing in the circuit court after the deposition), Respondents somehow have not had any chance to respond.

Respondents filed a reply to Petitioner's supplemental response brief in the circuit court. Why they think that this did not constitute their "opportunity to respond to these allegations" is unknown. Respondents have directed the Court to no rule that requires a party to file a W. VA. R. CIV. P. 37(a)(2) motion before raising a deponent's refusal to answer questions—honestly or at all—in a memorandum based on such deposition conduct.

CONCLUSION

Respondents say that the crux of Petitioner's argument is that "Petitioner thinks that Martin Twist is a bad man" and that this is irrelevant to the questions presented. (Resps.' Br. at 23.) Martin Twist is a bad man, something Respondents do not deny in their brief. And in the typical case, that might be irrelevant.

Here, however, it *is* relevant. It is relevant because Martin Twist told George Grayiel that he was not a bad man when George asked him, and George based giving up his right to access to courts on his—naive, we now know—belief in Twist's assertion that he could be trusted. It is relevant because good men do not call something "[t]he pertinent portions of the

Subscription Agreements” when they know it not to be the pertinent portions of the Subscription Agreements. It is relevant because Twist evaded George’s attempts to conduct discovery by refusing to answer valid, proper, relevant questions during his deposition and by lying—something bad men do. It is relevant because Twist’s conduct in *Arbusto*—something no good person would have done—demonstrates what George can expect out of arbitration here: *i.e.*, more expense and more sorrow. And it is relevant because it demonstrates what George can expect *even if* he were afforded meaningful, fundamentally fair access to arbitration: *i.e.*, Twist’s continued efforts to fraudulently convey and otherwise tie up his assets to avoid perfection of George’s judgment.

Accordingly, Petitioner respectfully requests that the Court **FIND** that the arbitration clauses in question are unenforceable, **VACATE** the order of the Circuit Court of Putnam County, and **REMAND** the case with instructions either to order that Twist specifically perform his offer to reimburse Mr. Grayiel or in the alternative to allow Mr. Grayiel’s claims to proceed to full discovery and trial.³

GEORGE A. GRAYIEL,
By Counsel

STEPTOE & JOHNSON PLLC
Of Counsel

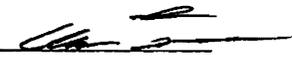
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³ There is no need to remand to the circuit court with orders not to apply the FAA, to ignore A.R. 429-30, or to reevaluate the factors relevant to determining when an arbitration clause is unconscionable. All of the relevant facts and law are before the Court, which can proceed to rule on the question.

CERTIFICATE OF SERVICE

I hereby certify that on August 8th, 2011, true and accurate copies of the foregoing *Petitioner's Reply Brief* were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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