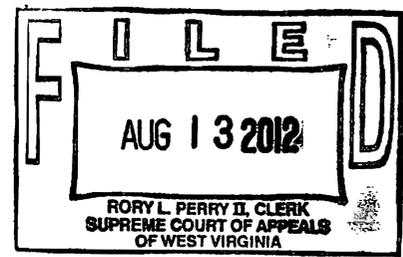


No. 12-0592



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

DAN RYAN BUILDERS, INC.,

Petitioner,

v.

NORMAN C. NELSON AND ANGELIA NELSON,

Respondents.

From the United States Court of Appeals for the Fourth Circuit
No. 11-1215

RESPONDENTS' RESPONSE TO PETITIONER'S BRIEF ON CERTIFIED QUESTION

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NATURE OF PROCEEDINGS AND RULINGS BELOW

Norman C. Nelson (Nelson) purchased a house from Dan Ryan Builders (DRB) for himself, Angelia, his spouse, and their two young children in 2008. On the day of the closing the house was represented to be ready to occupy.

In fact, on June 16, 2008, the day of the closing (as well as on May 16, 2008, the day Nelson signed the contract), DRB knew the house was both illegal and substandard. It was built with an alternative septic system on a lot of less than 2 acres, in violation of § 64 CSR 9, of the West Virginia Code of State Regulations.¹ The concrete in the basement slab failed compression tests and the results were in DRB's possession before the closing. Prior to signing the contract for the home, Nelson had asked the sales person if it had ever flooded. She said no. The answer was false. See J.A. 213 and J.A. 223, Affidavits of Norman Nelson and James Dunleavy. The house had been illegally backfilled using table-sized chunks of rubbish concrete and rock and the septic outlet had been broken off right where it exited the basement wall. After the Nelsons moved in and before this defect was discovered, thousands of gallons of raw sewage flowed through the foundation drains and under the basement slab, permeating the soils around and under the house with raw sewage. The stench of raw sewage in the house sickened the Nelsons for nearly a year until a contractor hired by Nelson finally discovered why and fixed the leak. Unaware of these defects, Nelson had paid \$385,000.00 for the house at closing.

DRB jack-hammered the crumbly, substandard concrete in the basement slab in October 2008, and removed it. Despite being reminded in writing by Nelson to properly seal the vent system and shut off the air handlers so that the concrete dust from the repair would not travel outside the basement, DRB failed to seal the vents and left the air handlers running. The results

¹ The regulations, at paragraph 8.9(a-g), are backed by Code § 16-1-9, which gives the regulations the force of law. Installing noncompliant septic systems is a misdemeanor. This house is evidence of a crime.

were predictable: concrete dust throughout the home, in carpets, walls and ceilings. Despite a half-hearted remediation effort, the dust remained.

Angelia Nelson suffers from asthma, which worsened so dramatically in the dust and sewer gas that her physician instructed her to get out in 2011. The Nelsons rented a smaller house elsewhere in Berkeley County, and have continued to make mortgage payments on the DRB house to protect the Nelsons' credit rating (Mr. Nelson's work depends upon a security clearance which will be forfeited if he defaults on his mortgage).

The Nelsons filed suit in the Circuit Court of Berkeley County in the summer of 2010 (J.A. 67). They were shocked to find that DRB was represented by the same law firm which had represented all parties at the closing under a Multiple Representation Agreement.²

DRB filed a Motion to Compel Arbitration in the Northern District. The Nelsons sought, and Magistrate Judge Seibert granted, disqualification of DRB's conflicted attorneys (J.A. 81), which was affirmed by Judge John Preston Bailey (J.A. 92), based upon L.E.I. 89-01.

DRB moved for a summary order compelling arbitration in the case (J.A. 100). The Nelsons responded (J.A. 197) with arguments regarding the unconscionable nature of the agreement, the lack of mutuality of consideration, and with a motion to dismiss Angelia Nelson since she never signed the agreement. Judge Bailey declined to rule on unconscionability and upon Angelia Nelson's separate motion to dismiss (since as a non-signatory, she could not be bound by the arbitration agreement in any event), but dismissed the Motion to Compel Arbitration on the basis of lack of mutuality of consideration, citing Howard v. King's Crossing, Inc., 264 Fed. Appx. 345 (4th cir. 2008), a *per curiam* case which upheld a district court's voiding of a one-sided arbitration clause for lack of mutuality of consideration. J.A. 284-295.

² See, West Virginia State Bar L.E.I. 89-01.

On appeal, the United States Court of Appeals for the 4th Circuit posed the following certified question:

“Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?”³

Respondent believes this court should answer this question in the affirmative on a number of different bases: First, the West Virginia Consumer Credit & Protection Act applies to this transaction, and Arnold v. United Companies Lending Corporation, 204 W.Va. 229, 511 S.E.2d 854 (1998) compels the invalidation of the arbitration clause in this instance. (DRB concedes that if the CCPA applies, mutuality of obligation is required.)

Second, even apart from the CCPA, the provision is unconscionable for lack of mutuality and not enforceable under West Virginia law. This Court’s decisions in State ex. rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 717 S.E.2d 909 (W.Va. 2011) and Brown v. Genesis Healthcare, Corp., 2012 W.Va. Lexis 311 (W.Va. 2012) (Brown II) compel this result. The American Arbitration Association follows the rule that the arbitration clause is always independent of the other terms of the contract, and will stand alone, *even if the rest of the contract of which it is a part is void*. See, infra., at 17.

Respondents here are stuck in a procedural eddy. Although they argued unconscionability in the district court, the Court declined to rule upon it, basing its opinion instead on the “mutuality of consideration” analysis from Cheek v. United Healthcare of the

³ The Nelsons respectfully submit that the question as framed by the 4th Circuit makes use of a presumption that the contract as a whole was supported by adequate consideration. There is simply no evidence for this proposition. The septic system was illegal, the concrete was substandard, and the house had been flooded prior to closing. DRB lied to the Nelsons. DRB knew all of these things. It either remained silent when it had a duty to speak, or lied to Nelson’s face.

Mid-Atlantic, Inc., 378 Md. 139, 835 A.2d 656 (2003) and Howard v. King's Crossing, Incorporated, 264 Fed.Appx. 345, (4th Cir., 2008). See, J.A. 295.

In the interim, this Court decided Richmond and Brown II, supra, which more clearly suggest that the lack of mutuality is a fatal defect not just in arbitration clauses, but also in cases involving exculpatory contract terms limiting remedies and other important rights.

Respondents believe the Certified Question unnecessarily preserves as a separate category a distinction which no longer matters under West Virginia Law. Because the “mutuality of obligation” and “unconscionability” arguments were presented separately in the district court, and only one was ruled upon, further proceedings in district court will be required to rule upon the unconscionability agreement. In Richmond and Brown II, the court held the provisions to be unconscionable because of lack of mutuality of obligation. By sending a strong message to the 4th Circuit that this provision is unenforceable, this Court can help the process move more quickly, and perhaps at the very least spare the Respondents a second trip to the 4th Circuit.

STATEMENT OF FACTS

This is the arbitration provision at issue in this case:⁴

(a) Any dispute arising under or pursuant to this agreement, or in any way related to the Property and/or with respect to any claims arising by virtue of any representations alleged to have been made by Us, or any agents and/or employees thereof, (with the exception of “Consumer Products” as defined by the Magnuson-Moss /warranty Federal Trade Commission Improvements Act, 15 U.S.C. Section 2301 et. seq. and the regulations promulgated thereunder) shall be settled and finally determined by arbitration and not in a court of law, irrespective of whether or not such claim arises prior to or after settlement hereunder, pursuant to the Construction Industry Arbitration Rules and the Supplementary Procedures for Residential Construction

⁴ For the record, the print was much smaller in the original. See, J.A. 15, ¶ 19.

Disputes of the American Arbitration Association (“AAA”) then in effect. Prior to commencing arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of AAA, or any other mediation service designated by Us. The parties hereto specifically acknowledge that they are and shall be bound by arbitration and are barred from initiating any proceeding or action whatsoever in connection with the Agreement. Notwithstanding anything to the contrary herein contained, in the event You default by failing to settle on the Property within the time required under this Agreement, then We may either (i) commence an arbitration proceeding under this Section 19, or (ii) bring an action for its damages, including reasonable attorneys’ fees, as a result of the default in a court having jurisdiction over the purchaser. You expressly waive your right to mediation and arbitration in such event. Each party shall be entitled to full discovery in accordance with the local rules of court in the event that arbitration is invoked under this Section 19. The provisions of this Section 19 shall survive the execution and delivery of the deed, and shall not be merged therein.

J.A. 15.

This provision was written by DRB. It specifically permitted DRB to elect judicial remedies in the event the Nelsons defaulted by failing to settle in a timely fashion. While DRB characterizes this as DRB having reserved the right to litigate “some” issues in a court, it is hard to think of an issue, once they have the Nelsons’ money, which DRB would seek to litigate against the Nelsons in court. The Nelsons, whatever their grievances, whenever they arise, are limited to one forum only – arbitration – and they cannot even get to arbitration until they have submitted to mediation with a mediator chosen by DRB.

Also note that the arbitration clause written by DRB contains a survival clause: “The provisions of this Section 19 shall survive the execution and delivery of the deed, and shall not be merged therein.” It is easy to see why a builder of bad houses would want such a clause. He is unlikely to be sued *before* the closing, and much more likely to be sued for defects and illegalities *after* the closing. Without the survival clause the arbitration agreement would be merged into the deed, and without effect after the closing. The survival clause makes this

arbitration agreement different in kind from the other terms to which the parties agreed in this case. To the undersigned's knowledge, it is the only provision which purports to survive delivery of the deed. This arbitration clause stands alone. Ever since the day of the closing, it has been the only operable agreement in effect between these parties. It is a stand-alone arbitration agreement.

During the Northern District litigation over DRB's Motion to Compel arbitration, Norman Nelson and James Dunleavy presented to the Court their affidavits (J.A. 213 and J.A. 223). For ease of reference Respondents have attached the Nelson Affidavit and the Dunleavy Affidavit to this brief as Exhibits 1 and 2. None of the allegations in these Affidavits were countered in the district court.

ARGUMENT

I. THE WEST VIRGINIA CONSUMER CREDIT & PROTECTION ACT, 46A-1-101, AND ARNOLD V. UNITED COMPANIES LENDING CORPORATION, 204 W.VA. 229, 511 S.E.2d 854 (1998) COMPEL THE INVALIDATION OF THIS ARBITRATION PROVISION

Even DRB concedes, as it must, that what it calls mutuality of obligation is required in transactions covered by the West Virginia Consumer Credit & Protection Act (CCPA), citing this Court's decision in Arnold v. United Companies Lending Corporation, 204 W.Va. 229, 511 S.E.2d 854 (1998). The instant case is such a transaction.

In Arnold, *supra*, this Court found that an arbitration clause which preserved the drafter's right to litigate in court while relegating the consumer to arbitration only was void and, pursuant to West Virginia Code § 46A-2-121(1)(b), struck the provision. DRB says, even though this rule

is in place in Arnold, that does not matter because the CCPA does not apply to the instant transaction. DRB is mistaken, according to the clear language of the Act.

Code, § 46A-2-121 states, in pertinent part:

“(1) With respect to a *transaction which...gives rise to a ...consumer loan*, if the court as a matter of law finds:

(a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or

(b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this chapter is not unconscionable.

(Emphasis added.) (Portions omitted.)

Note that 46A-2-121(1)(b) empowers the courts to examine individual terms of the agreement for unconscionability, and strike them.

A “consumer loan” is defined at Code, § 46A-1-102(15) as follows:

(15) “Consumer loan” is a loan made by a person regularly engaged in the business of making loans in which:

(a) The debtor is a person other than an organization;

(b) The debt is incurred primarily for a personal, family, household or agricultural purpose;

(c) Either the debt is payable in installments or a loan finance charge is made; and

(d) Either the principal does not exceed forty-five thousand dollars or the debt is secured by an interest in land or a factory-built home as defined in section two, article fifteen, chapter thirty-seven of this code.

Norman Nelson borrowed the money for his house from the National Bank of Kansas City (J.A. 12). Was this mortgage a “consumer loan?” National Bank of Kansas City is “regularly engaged in the business of making loans.” (15). The debtor, Norman Nelson, “is a person other than an organization.” (15)(a). The debt was incurred for a “personal, family, household... purpose.” (15)(b). The debt is “payable in installments” (15)(c) and the debt exceeds forty-five thousand dollars, but is secured by the real estate. (15)(d). However unpalatable DRB may find it, this mortgage meets every single aspect of the legal definition. This mortgage is a “consumer loan.” The Act was written to cover this loan.

The next question is, did the transaction between DRB and Nelson “give rise to” the National Bank of Kansas City consumer loan? The contract as a whole was utterly and entirely contingent upon Mr. Nelson’s obtaining the financing (presumably at Mr. Nelson’s urging). Had he not obtained financing there would be no transaction. The following is the pertinent part of the financing provision from the Agreement for Sale (it has been reproduced here to save the reader the eyestrain of reading the miniscule print of the record copy at J.A. 12-13):

FINANCING. Your obligation to settled hereunder ✓ is/ is not contingent upon You obtaining, within thirty (30) days from the date of this Agreement a commitment from a lending institution for a loan secured by a purchase money mortgage or note and deed of trust (the “Mortgage”) on the Property. Upon Your receipt of a commitment for a Mortgage, this condition is satisfied, and You must purchase the Property.

Our Lender is Monocacy Home Mortgage, LLC or its assigns (“Our Lender”)

You elect to obtain your Mortgage from the following Lender:

National Bank of Kansas City
Dan Steinbrink
10700 Nall Avenue
Suite 300
Overland Park, KS 66211
Phone: (913) 383-6403

...

You agree to use best efforts to obtain Mortgage and to apply within five (5) business days after You execute this Agreement, to a Lender and without delay to furnish such information as may be required by and to comply with all other requirements of said Lender. ***You hereby warrant that any and all financial information provide in connection with obtaining the Mortgage is accurate in all respects and if such information is not accurate or if You fail to diligently seek a commitment for a Mortgage, We, upon notice in writing to You, may terminate this Agreement and You shall forfeit the Deposit as liquidated damages, the parties hereto agreeing that actual damages for such failure are no susceptible to determination, in which event this Agreement shall be null and void s if never executed.*** In the event that You, despite your best efforts, cannot obtain a Mortgage on the terms specified herein as the Lender selected, You will make proper and diligent application to additional Lenders designated by Us, and will, without delay, furnish such information as may be required by said Lender. If You have failed to make such application, furnish such information, or otherwise fully cooperate in applying for or diligently pursuing a commitment for such Mortgage, or if You shall otherwise be in breach of this Agreement, then You shall not have the right to terminate this Agreement, and We shall be entitled to all remedies contained in Section 10 hereof. In the event that the commitment obtained by You has a contingency for the resale or rental of another house such commitment shall not be deemed "unconditioned" unless You provide Us evidence acceptable to Us in our sole discretion that the resale or rental condition is satisfied.

You will provide us notice immediately upon Your receiving a commitment or other evidence of an approval for a Mortgage. In the event a Lender has not committed to provide a Mortgage within thirty (30) days after the date You sign this Agreement, We shall have the right to terminate this Agreement at any time

thereafter until a commitment for a Mortgage is obtained. Subject to the other provisions of this Section 3, upon Our termination, We will refund to You the Deposit. You authorize Us to obtain a credit report on You from a credit reporting agency or from any other source. You agree that we may contact the Lender regarding the status of your Mortgage, and You authorize the Lender to provide us any information we request, including, without limitation the Lender's commitment letter.

If You, without fault, are unable to obtain the mortgage commitment as evidenced by a written statement from Your Lender that you fail to qualify for such mortgage, and if you have not used Our Lender, we either do not require you to attempt to obtain financing through Our Lender or Our Lender is unable to provide a commitment, You may terminate this Agreement by written notice to Us within forty-eight (48) hours of the earlier of (i) when Our Lender advises you in writing that You fail to qualify for financing, or (ii) We advise You in writing that We will not require You to attempt to obtain financing through Our Lender. In the event of such termination by You, provided you have otherwise complied with all of the terms and conditions of this Agreement, all sums paid by You to Us will be returned.

...

J.A. 12-13 (Emphasis added.)

Thus, given the contingent nature of the contract, there would have been no sale of the house had Nelson not had financing. The parties agreed that he would not have to buy the house if, through no fault of his own, he could not obtain financing. Therefore, not only did this transaction "give rise to" the loan, the transaction by its very terms would not have occurred without the loan.

DRB is also in the mortgage business and writes mortgages through its subsidiary, Monocacy Home Mortgage, LLC, referred to by DRB in the Agreement of Sale as "Our Lender." Some (at least) of the houses sold by DRB in West Virginia are financed by this wholly-owned subsidiary. Clearly, those homes financed by DRB would be transactions which

not only “give rise to” consumer loans, but are themselves “transactions” which are “consumer loans.”

In the cases where DRB’s subsidiary finances the house, the one-way arbitration in the contract is void for want of mutuality of obligation under both Arnold, supra and State ex. rel. Dunlap v. Berger, 567 S.E.2d 265, 211 W.Va. 549 (2002). The Dunlap case involved a jeweler, Friedman’s, Inc. Friedman’s “purchase and finance” agreement contained an arbitration clause which was struck for unconscionability based on Code, § 46A-2-121. Friedman’s was the *seller* of the jewelry, just as DRB is the seller here. The Dunlap court also recognized the lack of “even-handedness” in Friedman’s one-way arbitration clause. See, Dunlap, footnote 12. Under DRB’s argument the arbitration clause at issue here would be facially unconscionable if Monocacy loaned the money, but not if another lender did. Such a construction renders the “gives rise to” of § 46A-2-121 language nugatory. If it only applied to loans and lenders, presumably it would say so.

DRB complains that finding this transaction subject to the CCPA would draw the seller in every credit card purchase under the purview of the Act. The difference between those situations and this one is clear: when a person buys clothing or food with a credit card, nothing in the transaction is dependent upon the buyer obtaining credit in advance of the purchase. Indeed, there is no contract of sale, and neither party is harmed if the sale does not occur. If his credit card is declined, he can use another one or use a debit card or pay by cash or check, or simply refuse to buy the item with no penalty whatsoever.

This transaction “gives rise to” the consumer loan because without a consumer loan there is no transaction. (Since the loan was secured by the real estate, it is worth noting that without the transaction there would not have been a loan, either.) Recall that under FINANCING p. 13,

supra, if Nelson had not used his best efforts to find financing, DRB could have seized his \$3,000.00 deposit. The transaction gave rise to the consumer loan by including a \$3,000.00 forfeiture for failing to attempt to get it. It *requires* the consumer loan on pain of a \$3,000.00 penalty. It makes no sense to say that a transaction which requires a consumer loan does not “give rise to” a consumer loan.

Finally, it should be noted that the predictable complaint about Respondent’s argument will be that it places ordinary residential real estate purchases under the purview of § 46A-2-121. Respondent says unconscionable provisions in consumer real estate transactions *should* be invalidated, whether they are one-sided arbitration clauses, or un-bargained for limits on a buyer’s fundamental rights, or exculpatory provisions. Houses are by far the most expensive consumer goods West Virginians ever buy. In Dunlap, this Court invalidated a host of limits in the arbitration provision which attempted to restrict not only the forum the buyer could use, but the remedies available to him. This demonstrates that unconscionable arbitration clauses are treated no differently or more harshly than limiting or other exculpatory clauses by our courts.

The CCPA applies, and pursuant to Arnold there is insufficient mutual consideration to support the arbitration provision. Given this, DRB would likely agree the clause should be stricken. Respondents respectfully urge this Honorable Court to answer the question in the affirmative, with respect to CCPA transactions. DRB agrees that CCPA transactions require mutuality of obligation within the arbitration provision.

**II. THIS PROVISION IS BOTH PROCEDURALLY
AND SUBSTANTIVELY UNCONSCIONABLE
SUCH THAT WEST VIRGINIA LAW WILL
DECLARE IT INVALID AND UNENFORCEABLE.**

In State ex. rel. Richmond American Homes of West Virginia Inc., v. Sanders, 717 S.E.2d 909 (2011) and Brown v. Genesis Healthcare, Corp., 2012 W.Va. Lexis 311 (2012)

(Brown II) this Court more fully explicated the law applicable to cases like the instant case.

Both of these decisions came down after the district court made its ruling in this case; Brown II came down since the U. S. Court of Appeals drafted its certified question. Prior to the Brown II decision reaffirming most of Brown I, the legal analysis of both Brown I and Richmond was in doubt since the U.S. Supreme Court had vacated Brown I.

Both cases dealt with arbitration provisions claimed to be unconscionable by Plaintiffs, and in both cases the Court notes that “arbitration agreements must contain at least a ‘modicum of bilaterality’ to avoid unconscionability.” Brown II, supra.

Respondents are subject to a contract term which according to Richmond and Brown II is likely unenforceable. Because the precise legal category selected by the district court may or may not be one this Court has spoken to directly in isolation, Respondents could still be subject to this unconscionable term when the instant appeal ends. Respondents believe the distinction between Cheek and Howard (flat rule against provisions lacking mutuality) and Richmond and Brown II (provisions lacking “modicum of bilaterality” are unconscionable) is, in this instance, no longer a distinction which make any difference.⁵

A. The Arbitration Provision is Procedurally Unconscionable.

In State ex. rel. Dunlap v. Berger, 211 W.Va. 549 (2002), the court said:

Adhesion contracts include all form contracts submitted by the party on the basis of this or nothing.

Dunlap, at 557, quoting American Food Management, Inc. v. Henson, 1 434

N.E.2d 59, 62-63 (Ill. Ap. 1982).

This contract (See, J.A. 11-66, Agreement of Sale, and J.A.213-219, Affidavit of Nelson) is a standard form, fill-in-the-blanks document used by DRB whether the house being sold has

⁵ Respondents are well aware that this imbroglio is not the fault of this Court, but so long as we are here, we ask that the Court send a strong signal to the Federal Courts regarding the West Virginia law.

been completed, as was the case here, or not even begun. Norman Nelson initialed page after page of specifications and cabinetry choices that had long since been made by DRB. The house was built before he ever saw it. The affidavit of Nelson is clear on the point that all of the standard language including the arbitration clause was presented on a “take it or leave it” basis. Agree to the standard form or do not buy the house.

It is undeniable that this is a contract of adhesion.

Dunlap, says that this is only the “beginning point for analysis,” 211 W.Va. 549, at 557.

This contract of adhesion must be analyzed for unconscionability.

Richmond, says, unconscionability has two component parts, procedural and substantive.

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

Considering factors such as these, courts are more likely to find unconscionability in consumer transactions and employment agreements than in contracts arising in purely commercial settings involving experienced parties.

Richmond, 717 S.E.2d at 920,921.

The Affidavit of Nelson, which was not denied or countered in the district court, established that he had never purchased a new home before, and that the Agreement is one for construction of a house and he was buying a finished house. See J.A. 11, ¶ 1 “The house will be constructed on the lot by us.” ... “We reserve the right to make changes in plans and

specifications...” The contract is larded with this sort of *non-sequitur* – cabinet choices which had already been made (J.A. 26), roofing materials “agreed to” by Nelson long after the roof was on the house (J.A. 20), etc.

At the contract signing, Nelson was told only some of the contract provisions would apply to him since the house was already constructed, and he could *ignore* other parts of the contract. See Exhibit 1, ¶ 29.

Nelson was directed to a series of terms in the contract where blanks had already been filled in. He was never directed to the arbitration clause. See Exhibit 1, ¶ 33.

He read almost nothing in the contract. See Exhibit 1, ¶ 35.

Nelson was lied to by the DRB representative and she covered her lies by urging the neighbor Dunleavy not to speak ill of DRB. See Exhibit 1, ¶ 18-20. See Exhibit 2, ¶ 5-11.

This unwary consumer was presented an adhesion contract in which many of the terms *could not* apply. He was guided past the arbitration clause, which he likely would not have understood anyway. He had never heard of “arbitration” before. See Exhibit 1, ¶ 33. He was required to sign his name to “order forms” for choices he did not make (J.A. 26).

Nelson was the weaker party. He was not permitted to bargain any term of the 55 page contract except the price; a substantial portion of the contract did not even reflect the reality that the home had already been built. There was no chance that even a thorough review could help an average consumer understand the problem. This provision in this setting was procedurally unconscionable.

B. The Provision is Substantively Unconscionable.

Richmond and Brown II, *supra*, hold that:

“Substantive unconscionability involves unfairness the contract itself and whether a contract term is one-sided and will have an

overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.”

Syllabus Point 19, Brown I, supra, affirmed in Brown II, supra. Richmond, 717 S.E.2d, at 921.

In Richmond, this Court found unconscionability in the shifting of costs to the consumer. The same problem exists here, since all filing fees with the AAA must be paid by the claimant. As noted infra, filing fees in a case of this magnitude will total \$11,450.00. Thereafter, the Nelsons would split the arbitrator’s fees with DRB.

This Court said in Dunlap, supra:

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

Syllabus Point 4, Dunlap, supra.

This is a case in which Nelson is paying a mortgage on a house in which he cannot live, and renting another house to live in. It is a complex matter in which the Nelsons’ portion of the arbitrator’s fee will be a very substantial cash outlay as well – cash the Nelsons simply do not have.

The one-sidedness of the forum selection as well as the cost allocation renders this provision substantively unconscionable.

The notion, in this case, that the parties will spare scarce judicial resources by resort to arbitration is laughable. The Nelsons have made claims in the litigation filed in state court, including against the contractor who constructed the illegal septic system. Moreover, DRB has filed third party complaints or cross claims against both the septic contractor and a number of others. None of these parties are bound to arbitrate. Thus, regardless of the outcome in any arbitration proceedings ordered by the federal courts, there will still be a state court trial. The West Virginia judicial system will not be spared a trial. Instead, a trial will occur regardless. Moreover, no judgment in an arbitral forum will bind those not party to it.

The Construction Rules of the AAA declare,⁶ at Rule 9, that:

Rule 9. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. **Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.**

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

See, AAA Construction Industry Rules and Mediation Procedures, http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004219&revision=latestreleased, at p. 32.

It is ironic, to say the least, that DRB is before this court arguing that the arbitration agreement is not an independent contract so that it can drag this matter to a forum where it *is* an independent contract. Apparently, the AAA treats it as an independent contract *except* for the

⁶ These rules apply to any arbitration under the arbitration agreement at issue here. See, p. 4-5, supra.

purpose of determining whether it is supported by consideration. These procedural rules also permit the arbitrator to decide, for example, that the contract is void for want of consideration or fraud or duress, and strike all its provisions, *yet retain the arbitration clause intact*. After all, the arbitration *fee* depends on the validity of the arbitration clause.

The clause in DRB's Agreement is silent regarding who gets to choose the arbitrator, but the American Arbitration Association (AAA) is selected by DRB as the organization whose rules will govern the dispute. The AAA is only one of a number of different organizations which provide administrative support for arbitrators. For this, AAA receives a fee from the claimant, in this case the Nelsons. DRB chose AAA rather than some other organization. Why? We shall never know. What we do know is that if AAA's name was not in the clause, some other organization might get the fees. Thus, we have a for-profit system of dispute resolution in which one of the interested parties gets to choose the "judge" and/or the system of rules under which the dispute is decided. If DRB's clause remained silent as to which Arbitration service would be used, then perhaps we could say that DRB was not picking the "judge," and the system of rules, but DRB is picking them. Moreover, the US Supreme Court has said that the question of arbitrability is in the first instance a question for the arbitrator. AAA's filing fees⁷ are dependent in part, upon its name being included in the arbitration provision. DRB does that. The "independent" arbitrators chosen by AAA, who are associated with AAA, benefit directly from the inclusion of AAA's name in the clause. They are *for – fee* judges with at least an indirect business relationship with one of the parties, and an incentive to please one of the parties. In the event of a question, the arbitrator gets to decide his own jurisdiction, and therefore his entitlement to a fee. This would seem to be nice work if one could get it. Any arbitration clause

⁷ The *filing fee* which would be incurred by the Nelsons is \$11,450.00. This in addition to the arbitrator's fees, some or all of which must be paid by the Nelsons.
http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004219&revision=latestreleased, at p. 72.

set up this way in any adhesion contract between parties of unequal bargaining power ought to be treated with skepticism, if not scorn.⁸

Norman Nelson was unaware that he was losing his right to a state court remedy under the West Virginia Constitution when he signed his real estate contract. Moreover, he was surely unaware that DRB would be permitted to argue that the clause was integrated into the whole contract when it benefitted them in court and rely upon the opposite rule in arbitration. When it is for the purpose of *promoting* arbitration, one rule applies. When it is for the purpose of *conducting* arbitration, however, the opposite rule applies. This is far beyond a policy preference for arbitration. This is a legal house of mirrors. It is substantively unconscionable.

If this arbitration clause is an “agreement independent of the other terms of the contract,” then it must have its own consideration. The clause must fail.

In Richmond, *supra*, this court said:

4. Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause. However, the trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.

Syl. Pt. 4, Richmond, *supra*.

⁸ This arbitration provision and the mandate that AAA be used creates a situation in which the company which makes the procedural (and sometimes substantive) rules for arbitrations sees its sales go up as a result of its inclusion in mandatory arbitration clauses drafted by corporations which litigate before it, *and* a situation in which a for-fee arbitrator gets to rule on his own jurisdiction and therefore rule on his own fee.

Such a pecuniary interest in the case would be abhorrent in a West Virginia Justice, Circuit Judge, or Magistrate. See, e.g., *State ex. rel. Osborne v. Chinn*, 146 W.Va. 610, 121 S.E. 610 (1961); *Williams v. Brannen*, 115 W.Va. 1, 178 S.E. 67 (1935).

Richmond American argued that it was error for the trial court to look beyond the provisions of arbitration clause itself in the analysis of unconscionability, since Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), mandates that “an arbitration provision is severable from the remainder of the contract,” 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

This Court properly rejected that analysis in Richmond, saying that a court “*may* rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the content of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.” Syl. Pt. 4, Richmond, supra. (Emphasis added.)

Here the question is narrower. The U. S. Supreme Court in Buckeye, supra, and the AAA in its rules demand that the arbitration agreement be viewed as “severable” (Buckeye) and “an agreement independent of the other terms of the contract.” (AAA Rule 9 – Jurisdiction.)

The Court of Appeals of Maryland, considering this concept, found that if the agreement to arbitrate is separate, there must be consideration for it. Where it lacks consideration, when viewed separately, it must fail. Cheek, supra, (cited in Howard, supra.) This is the basis for the district court’s decision in the instant case.

DRB seeks to demonstrate an irremediable conflict between Richmond (court may look to the contract as a whole in an unconscionability analysis), and Cheek (court searches for consideration within the clause itself if it is a severed, separate agreement). The argument is misplaced. Unconscionability is a “whole contract,” analysis, and the requirement of consideration for an agreement of provision which is severed and viewed as independent is not.

In the instant case, severability would only be an issue up to the time of the deed, after which most terms of the agreement would not survive. In DRB's agreement, however, is a survival clause. J.A. 15. (It only makes sense for it to be there, because arbitration will likely occur when they *buyer* brings his claims, after closing. *After* closing is when DRB needs it to limit the Nelsons' rights.)

This is another aspect of the arbitration clause which augurs for independent treatment – it is the only clause remaining after the others are merged with the deed.

In Gonzalez v. West Suburban Imports, 411 F. Supp. 970 (N.D. Ill 2006) and Vassilrovska v. Woodfield Nissan, Inc., 358 Ill. App. 3d 20, 830 N.E.2d 49 (Ill. App. Ct. 2005), Illinois state and federal courts invalidated arbitration agreements for lack of mutual consideration, citing the existence of the same survival language in each provision: “This arbitration agreement shall, with respect to such dispute, survive the termination or expiration of any purchase order and/or bill of sale or any retail installment contract executed at the time the vehicle is purchased.”

The district court in Gonzalez, *supra*, said:

This language clearly indicates an intention to bind the parties to arbitration notwithstanding the longevity of any separate agreements pertaining to the vehicle purchase. As such, the Agreement is a separate contract in its own right and must be reviewed independently to ensure that it contains the elements necessary for contract formation. In sum, without imposing mutual obligations to submit claims to arbitration, the Agreement lacks consideration and is unenforceable.

Gonzalez, 411 F. Supp. 970 (N.D. Ill 2006).

Finally, in Brown II, this Court cited with approval a large number of cases from other jurisdictions in which courts have found that mutuality of obligation is a crucial part of the analysis whether considering unconscionability or consideration. See, Brown II, fn 38-40.

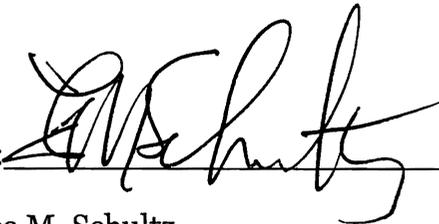
DRB fully expected this agreement to live on and pay it dividends long after the closing here. (Indeed, given the dependence of the arbitration fee on the validity of the provision and the jurisdictional rules of the AAA, the provision can be predicted to survive intact in the vast majority of cases judges by the arbitrators whose fees depend upon it.)

This is a separate contract, and must have separate consideration. Since it does not, it must fail. There is no irremediable conflict between Richmond and Cheek. The Court should answer the question in the affirmative.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court answer the question in the affirmative.

Signed: _____



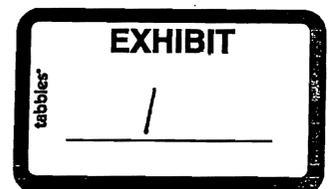
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WVSB No. 4293
Counsel of Record for Respondents

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF BERKELEY, to-wit:

1. My name is Norman C. Nelson and I reside at 453 Ploughman Way, Hedgesville, West Virginia.
2. I am one of the Plaintiffs in Norman C. Nelson and Angelia Nelson v. Dan Ryan Builders, Inc., and Joe Eagle, d/b/a Eagle Excavating and Contracting LLC, Berkeley County Civil Action No. 10-C-432.
3. I am one of the defendants in Dan Ryan Builders, Inc. v. Nelson, Case No. 3:10-cv-76.
4. Angelia Nelson is my wife.
5. I own a house at 453 Ploughman Way, Hedgesville, Berkeley County, West Virginia, built by Dan Ryan Builders (DRB). I paid DRB \$385,000 for the house.
6. My wife and two children reside in this home with me.
7. This was the first new home that I have ever purchased.
8. The house construction was mostly complete the first time I saw it in May, 2008. My wife, Angelia, was with me that day.
9. The first time I ever saw this home and before ever signing an agreement with DRB to purchase this home, I noticed a neighbor was standing near the corner of the home just outside the window.



10. I asked the Dan Ryan Builders salesperson if she knew the neighbor and she replied yes.
11. I told her that I was going to step out and speak with him as I wanted to consult with another DRB homeowner about DRB's homes; ask about the neighborhood in general; and inquire about the quality of the local schools.
12. The DRB salesperson told me to continue looking at the home and she would go over and get permission from the neighbor for me to come and speak with him.
13. Upon her return, she indicated the neighbor agreed to speak with me so I went outside and asked him a few questions and she followed me.
14. When I returned inside the home, we went downstairs to see the finished basement.
15. Upon entering the unfinished utility room in the basement, I noticed a puddle of standing water near the hot water heater.
16. I confronted DRB about the area of standing water and I was told the water was from a small leak and was confined to the one unfinished room of the basement.
17. The DRB salesperson indicated the water heater was installed recently and the water could have come from there since it was in close proximity.
18. I inquired if the complete finished basement had flooded and the DRB salesperson told me absolutely not.
19. I made it very clear to the salesperson that I would not be interested in purchasing the home if the finished basement had flooded as there could be multiple problems that were not necessarily visible.

20. The salesperson assured me that she was in and out of the homes Dan Ryan Builders sells daily and she would without a doubt know if one of her homes had flooded.
21. I also noticed that a piece of carpet had been rolled up in one of the finished rooms of the basement.
22. When I asked about why the carpet was rolled up, the DRB salesperson told me that there was confusion as to if the entire basement was going to be finished or not so the carpet was taken up by mistake but they would have it placed back down if we were willing to execute a contract on the home.
23. I was told that there were a lot of people interested in this home and it was the last one constructed in this sought after neighborhood and had been seriously discounted, so if I liked it I should proceed with a written agreement because it could be gone by the end of the day.
24. After being assured the basement never flooded, I went to the DRB offices in Martinsburg, WV to execute an agreement to purchase the home.
25. While the contract was being prepared, my wife and four-year-old daughter left the room and went outside. I was told I could not negotiate any term except the price.
26. The DRB salesperson came back in to the room with a large stack of papers and said all the appropriate information had been entered on the forms. The contract was given to me in a "take it or leave it" basis.

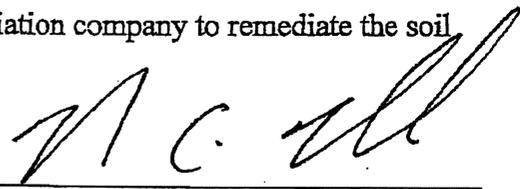
27. She started off by stating that the contract was going to be very confusing as DRB was using a form contract they normally used when they were selling a home that had not yet been constructed on a lot.
28. I was told that only portions of the contract would actually apply to me and other parts could be ignored since the house I was purchasing was not being constructed and was already built.
29. There were approximately sixty pages to the document placed in front of me.
30. When I glanced at the first page of the contract, I noticed that in the very first section it explained that DRB was going to build a house on a lot for me and many other things that had already happened or would never happen.
31. At that point, my attention was focused on what the DRB salesperson specifically pointed out as she flipped through the contract.
32. I was directed to areas where DRB had actually typed or written in blanks on the agreement form such as: sales price; purchase credits; deposits; the lender; hand-written addendums; and so on.
33. At no point during the process was I directed to the arbitration agreement nor did I read it. The arbitration provision was thrust upon me. I was unwary and taken advantage of. I had never heard of arbitration before, and did not know what it was.
34. It was clear to me that those things which applied or were important were being specifically pointed out.
35. After a brief review and having specific things pointed out to me, I signed the contract and addendums. I read almost nothing in the contract.

36. I had no role or input in formulating the Agreement of Sale which was handed to me for signing by a representative of DRB after we agreed to a sales price.
37. After everything was signed, the salesperson quickly flipped back through each page of the contract and told me that it was protocol that I initial at pre-determined locations on each of the forms.
38. During the signing of the contract, there was no mention of a warranty or how disputes would be handled should I later find something major wrong with the home.
39. The DRB salesperson had told me previously when walking through the home that DRB provided the best warranty plan in the industry for their homes and they were backed by a national insurer, so if there was ever a major problem with the home I would not have to worry.
40. I was directed to an addendum in the contract which stated DRB would provide a warranty for the home and I would receive a signed warranty approximately sixty days after closing on the home.
41. I was told that DRB would provide me a booklet later in the process that explained the entire warranty and dispute process, even though I had just acknowledged by signing the agreement of sale that a copy of that process was already provided.
42. The salesperson explained that DRB fully warranted the home for the first two years and would make repairs at no cost and then the warranty company would warrant structural items after that two year period and up to ten years.

43. I was told that I would receive a hotline number at the final closing on the home to report issues.
44. At no point during this discussion was I directed to or told that disputes over the home or property would be handled by binding arbitration. I didn't know what arbitration was nor how it was different from going to court.
45. Instead, I was told a booklet would be provided to me at a later date which would fully outline the dispute process, despite the agreement of sale stating I acknowledged receiving the booklet with the agreement.
46. I was misled concerning the dispute process with DRB.
47. Had I not been lied to concerning the fully finished basement of the home flooding causing hidden damage and mold in the home, there would have never been an agreement of sale with DRB as it was these lies which induced me to sign the agreement in the first place.
48. I made it very clear that I would never purchase a home with potential flooding or hidden water damage issues.
49. Had I not been misled concerning the dispute process involving major issues with the home, I would have never signed the agreement with DRB.
50. I was told that I would later be provided documentation concerning how to handle disputes even though the agreement provided that I receive one at the time the agreement was signed.
51. If DRB, had disclosed to me that my entire septic system was illegal under the laws of the State of West Virginia on the day it was installed and well before I ever saw the home for the first time or signed an agreement with DRB to

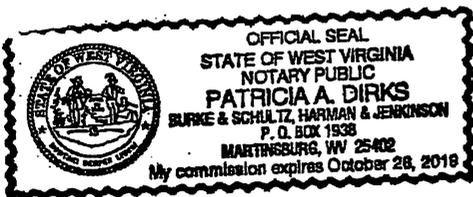
purchase it, I would have never purchased the home and there would be no agreement at all with DRB.

- 52. Rather than tell me the septic system was illegal, DRB told me that my septic system was unique and maintenance free making me believe I was getting a better septic system than those traditionally installed at a home.
- 53. If I had known or if DRB had disclosed to me that the septic system was failing the day I agreed to purchase the home, causing my family to live in an unreasonably unsanitary, unhealthy and dangerous environment for over two years, I would have never entered in to any agreement with DRB.
- 54. If DRB had disclosed to me prior to my final closing on the home information it had in its possession concerning the substandard concrete used during the construction of the home, I would have defaulted on the agreement with DRB and never closed on the home.
- 55. As a result, DRB could have pursued legal action against me.
- 56. DRB threatened to take legal action against me prior to closing on the home when I threatened not to close on the house.
- 57. The estimate I have received from a remediation company to remediate the soil around my house exceeds \$400,000.



SIGNATURE

Subscribed and sworn before me this 15th day of November, 2010.



OFFICIAL SIGNATURE / SEAL OF NOTARY

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF BERKELEY, to-wit:

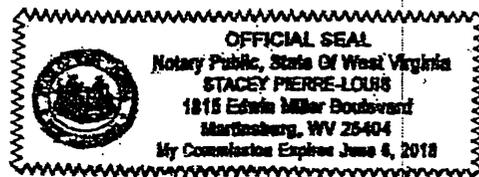
1. My name is James Dunleavy and I reside at 417 Ploughman Way, Hedgesville, West Virginia.
2. On May 16, 2008 I was in my yard and noticed that someone was looking at the new home next to me that was being sold by Dan Ryan Builders.
3. Shortly afterwards, I was approached by Mrs. Cathy Ho who I know as a salesperson for Dan Ryan Builders.
4. Mrs. Ho told me that a family was considering putting a contract on the home that day and they wanted to come over and meet me.
5. Mrs. Ho indicated that she would bring the family over and introduce them but that I should not say anything bad about Dan Ryan Builders or issues with their homes.
6. Mrs. Ho was aware that I knew of previous issues Dan Ryan Builders had with unhappy homeowners in another Berkeley County subdivision that resulted in law suits.
7. Mrs. Ho brought Mr. Norman Nelson and his family over to my yard and introduced them.
8. Mr. Nelson asked me about our experience with Dan Ryan Builders, the neighborhood and the school system.

9. I did not say anything bad about Dan Ryan Builders as Mrs. Ho stood by and monitored our conversation.
10. I was also a fairly new homeowner and feared repercussions that may have occurred should I have said something derogatory about Dan Ryan Builders and then face a situation where I was dependent of Dan Ryan Builders to fix issues with my home.
11. At the time I spoke with Mr. Nelson and his family on May 16 2008, I knew that the fully finished basement of the home he was about to purchase had completely flooded just a couple of weeks prior and the water remained in the basement for an unrecalled period of time.
12. I personally entered the basement of the home and the water was approximately four inches deep throughout the finished basement.
13. Two other people also witnessed the basement in its completely flooded state.

James Thomas Purdy
SIGNATURE

Subscribed and sworn before me this 12th day of NOVEMBER, 20 10.

Stacey Pierre-Louis
OFFICIAL SIGNATURE / SEAL OF NOTARY



CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2012, true and accurate copies of the foregoing **Respondents' Brief** were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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Signed:

A handwritten signature in black ink, appearing to read "L. M. Schultz", is written over a horizontal line.

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