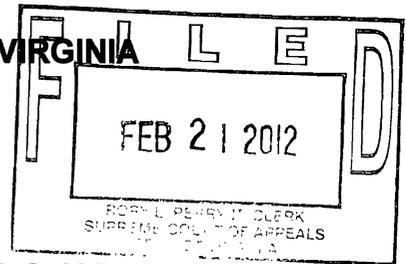


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court No. 11-1605



BRANDY PINGLEY, et al.

Plaintiffs/Appellants,

v.

PERFECTION PLUS TURBO-DRY, LLC,

Defendant/Appellee.

**Civil Action No. 08-C-135
Randolph County Circuit Court
(Honorable Judge Jaymie Wilfong)**

PETITIONER'S/APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR ONE

The court erred in failing to apply the discovery rule regarding the statute of limitations on Plaintiffs' claims for negligence.

ASSIGNMENT OF ERROR TWO

The trial Court erred in holding that the contract between the parties was not an unconscionable contract of adhesion.

ASSIGNMENT OF ERROR THREE

The trial court erred in granting Defendant, Perfection Plus Turbo-Dry LLC's motion for summary judgment as there were several genuine issues of material fact.

STATEMENT OF THE CASE

A: Procedural History

This case surrounds a sewer backup into the home of Plaintiffs and the resulting damages. The catastrophic damages included mold related damage to the Plaintiffs' home and personal injuries due to the mold exposure. This case initially began with one Defendant, Huttonsville Public Service District. As this Court may recall, Defendant Huttonsville Public Service District, was dismissed by the Randolph County Circuit Court on Summary Judgment. Plaintiff's appealed this decision and it was reversed by the West Virginia Supreme Court of Appeals. *Pingley, et al. v. Huttonsville Public Service District*, 225 W.Va.205, 691 S.E.2d 531 (2010).

Once the case was remanded, discovery began. Shortly after depositions commenced, it became clear that the mold related claims were at least partially the fault of the company that cleaned up the sewer backup. This company was identified as Perfection Plus Turbo-Dry, LLC (hereinafter referred to as "Perfection Plus"). The Court held that Perfection Plus was a party necessary to fully litigate the case. Appendix Pg. 7-8. Plaintiffs filed an amended complaint to include Perfection Plus as a defendant. Appendix 1-6. Plaintiff asserted claims of negligence and breach of contract. Appendix 1-6. Perfection Plus filed an Answer to the Amended Complaint denying breach of contract and negligence. Appendix Pg. 29-33.

Discovery proceeded and the Plaintiff named several experts, including a mold testing and analysis expert, a property value analysis expert, a medical causation expert and construction and liability experts and provided reports from the same. Appendix Pg. 9-14, 37-94, 103-108. Linda Bennett, the property evaluation expert opined that the

normal property value was \$97,500.00. Appendix Pg. 74. However, due to the mold infestation the home was a total loss and the only value was for the land in the amount of \$8,000.00. Appendix Pg. 77.

Plaintiff, Brandy Pingley's medical expert, Dr. Kevin Trangle opined that Ms. Pingley was suffering from significant health related problems due to the mold exposure. Counsel for Perfection Plus made a significant issue that one of Ms. Pingley's treating physicians, Dr. Ratnakar's records referenced that several of Plaintiff's medical conditions were psychosomatic. Because, Plaintiff presented a medical expert to validate Ms. Pingley's medical conditions, and the indications to psychosomatic injuries are substantially more prejudicial than probative, Plaintiff filed a motion in limine to exclude these records. Appendix Pg.120-121. Due to the progression of the case, including continuances of the final pretrial, said motion was never ruled upon.

Following the completion of lay witness discovery and before the conclusion of expert witness discovery, Perfection Plus filed a Motion for Summary Judgment on August 3, 2011. Appendix Pg. 139-212. Perfection Plus' motion in essence argued that Plaintiffs' negligence claim was not filed within the applicable statute of limitations and that Plaintiffs' breach of contract claim failed due to a mold and mildew claim waiver within the contract. Plaintiffs also filed a Motion for Partial Summary Judgment against Perfection Plus based upon an admission in the deposition of Perfection Plus' member, Norman Wagner, that Perfection Plus did not follow the applicable standards when cleaning the Pingley home following the black water backup. Appendix Pg. 213-252. In said Motion Plaintiffs addressed the mold and mildew waiver and set forth their

argument that due to the mold and mildew the contract was an unconscionable contract of adhesion that should not be enforced. Appendix Pg. 220-222. Perfection Plus responded to Plaintiff's Motion for Partial Summary Judgment on August 9, 2011. Appendix Pg. 253-294. Plaintiff filed a lengthy response to Perfection Plus' Motion for Summary Judgment. Appendix. Pg. 303-842. Perfection Plus filed a reply to Plaintiffs' Response. Appendix Pg. 843-863.

The Court held a hearing on August 15, 2011, in order to address the pending Motions For Summary Judgment. The Court denied Plaintiffs' Motion for Partial Summary Judgment and granted Perfection Plus' Motion for Summary Judgment holding the negligence claim was time barred pursuant to the statute of limitations and the mold and mildew waiver in the contract was neither unconscionable nor against public policy. Appendix 864-867. The Randolph County Circuit Court entered an order memorializing these findings on September 15, 2011. Appendix Pg. 864-867. Subsequently, Plaintiffs entered into a settlement agreement with Defendant Huttonsville Public Service District and a final appealable dismissal order was entered by the Court on October 6, 2011. Appendix Pg. 871-873. It is from this decision that Plaintiffs appeal.

B: Factual History

This Court was previously provided with a lengthy recitation of the factual history regarding the sewer backup some facts of which were incorporated into the Court's previous appellate ruling in this case's first appeal. Thus Plaintiff will not waste the

Court's time with a recitation of those facts and will begin with the facts relative to Defendant/Appellant, Perfection Plus.

Plaintiff, Brandy Pingley, wanted to get a cleanup crew to clean her home and get rid of the bacteria and diseases that run through black water. Appendix Pg. 359. Following the sewer backup, Appellant, Brandy Pingley, entered into a written contract with Perfection Plus on April 16, 2007, to clean the black water back up from her residence. Appendix Pg. 319-320. Said contract contained a waiver excusing Perfection Plus from any liability regarding mold or mildew. Appendix Pg. 319-320. The contract also contained an arbitration provision.¹ The contract Plaintiff signed was a form contract. Appendix Pg. 722. The terms and conditions of the same were non-negotiable. Appendix Pg. 722-723.

Plaintiff, Brandy Pingley and Jonathan Pingley were residing with their three children in a three bedroom trailer which already housed four residents. Appendix Pg. 325. Plaintiff, Brandy Pingley, was under a great deal of stress at this time because of the crowded home and actually had increased panic attacks. Appendix Pg. 328. Additionally, the Pingleys were aware that their daughter needed a spinal fusion in a few months and would need to have a bed to sleep on and not a floor or a couch, which was the circumstance at the temporary housing. Appendix Pg. 367.

While Perfection Plus was working at the Appellant's home, its employees and representatives informed Plaintiffs they could not be in the home as the black water contained illnesses. Appendix Pg. 333. The work was completed and Plaintiffs moved

¹ Perfection Plus Turbo Dry, LLC initially responded to the Amended Complaint with a Motion to Dismiss based upon the arbitration provision. However, at the hearing on said Motion to Dismiss, the same was withdrawn by counsel for Perfection Plus.

back into the home in July 2007. Appendix Pg. 334. At no time while Perfection Plus was onsite did they observe any evidence of a mold contamination. Appendix Pg. 727.

Plaintiff, Brandy Pingley, first began experiencing medical symptoms related to the backup in 2009 when she was diagnosed with a fungal infection in her lungs. Appendix Pg. 332. It was then the winter of 2009 going into 2010 that Plaintiff, Brandy Pingley, began to suspect there was mold growth in her home. Appendix. Pg. 373. However, it was not until mold inspector, Roland Jones, conducted testing on February 28, 2011, that Plaintiffs suspicions were confirmed. Appendix Pg. 765-815.

On April 21, 2011, Plaintiff, Brandy Pingley, was examined by Dr. Kevin Trangle. Dr. Trangle opined and confirmed for the first time that indeed Plaintiff, Brandy Pingley, was suffering for illness related to an exposure to mold. Appendix Pg. 817-835.

SUMMARY OF THE ARGUMENT

West Virginia law requires that the Court utilize the discovery rule, unless specifically prohibited, in evaluating whether a claim is time barred by the statute of limitations. The Circuit Court of Randolph County failed to conduct a discovery rule analysis or an analysis regarding other applicable tolling mechanisms and thus erred.

Form contracts which are not negotiable are generally considered contracts of adhesion. Contracts which substantially limit legal rights and are contrary to public policy are generally held to be unconscionable. In the instant case, Plaintiff was under a severe amount of stress to get her home cleaned after a sewer back up. She contacted the only company in her county that could provide such services. She signed a form "contract" which terms were not negotiable. Said "contract" contained a waiver from liability from any mold or mildew. In that the prevention of mold or mildew is exactly what Plaintiff was trying to prevent and what the public expects when hiring a company to clean a sewer backup, the contract is an unconscionable contract of adhesion.

For the previously stated reasons, the Randolph County Circuit Court erred in holding that Plaintiffs' claims for negligence were beyond the applicable two year statute of limitations and that the mold/mildew waiver in the contract was valid and enforceable.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19(a) (1) of the W.V.R.R.A.P. Appellants request oral argument on this matter. This case involves assignments of error in the application of well settled case law. However, Appellants believe that oral argument will assist the Court in fully understanding the issues in the case and rendering a decision regarding the same. This case is not appropriate for a memorandum decision.

ARGUMENT

ASSIGNMENT OF ERROR ONE

The court erred in failing to apply the discovery rule regarding the statute of limitations on Plaintiffs' claims for negligence.

In *Dunn v. Rockwell*, Syl. Pt. 5, 225 W.Va. 43, 689 S.E.2d 255 (2009), the West Virginia Supreme Court of Appeals outlined a five step analysis to be used in determining whether cases are barred by the applicable statute of limitations. "First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action.....And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine." *Id.* The first step in the test is a question of law solely. *Id.* However, a decision on step two through five will almost always involve questions of material fact to be determined by the jury. *Id.*

"Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall

have accrued if it be for damages for personal injuries[.]” West Virginia Code § 55-2-12. The discovery rule is applicable to all torts unless there is a clear statutory exclusion. *Dunn v. Rockwell*, Syl. Pt. 2, 225 W.Va. 43, 689 S.E.2d 255 (2009). Pursuant to the discovery rule the statute of limitations begins to run when the Plaintiff knows or should know the following : “(1) the plaintiff has been injured, (2) the identity of the entity who owed the Plaintiff a duty to act with due care, and who may have engaged in conduct that breached the duty, and (3) that the conduct of that entity has a causal relation to the injury.” *Id* at Syl. Pt. 2.

When Appellee filed a Motion for Summary Judgment regarding a statute of limitations issue, the circuit court should have used the five step analysis laid out in *Dunn*. First the Court would need to ascertain the statute of limitation on each claim. Based upon W.Va. Code 55-2-12 the statute of limitation for Plaintiffs’ negligence claim is two years. Plaintiff’s contract claim is subject to a ten year statute of limitations. W.Va. Code 55-2-6. The second step in the analysis is to identify when the requisite elements of the cause of action occurred. In the instant case we know that Perfection Plus was done with the Pingley home on or about July 2007. However, there was no allegation by the Defendant as to when the mold began to grow and thus when the damages started. The only evidence in this regard was the testimony by Norman Wagner that there was no mold at the residence when his crew left in July 2007. Additionally, the cause of action would accrue not just when the was mold related growth but when the mold began to cause damage or injury to the Plaintiffs. Further, Brandy Pingley began to experience health related symptoms in 2009. Based upon Plaintiff’s testimony it was not until the winter of 2009 and early 2010 that she began to

suspect mold growth. In that Defendant provided no evidence to the contrary, the Court should have used Plaintiffs evidence in its analysis and held that the statute did not begin to run until the winter of 2009 when Plaintiffs began to suspect mold growth. At a minimum there are genuine issues of fact as to when the requisite elements of the cause of action occurred and thus this issue should be resolved by the jury.

Third the Court should have applied the discovery rule and made a determination as to when Plaintiffs knew or should have known that they were injured because of the negligence of Perfection Plus Turbo Dry, LLC. Plaintiffs were not fully aware that there was a mold problem in their home until the home was tested by Home Inspector, Roland Jones. They were not aware that the mold infestation was the cause of Brandy Pingley's health issues until she was examined by Dr. Kevin Trangle. Defendant Perfection Plus Turbo Dry, LLC provided no evidence as to when Plaintiffs knew or should have known that they were injured because of the negligence of Perfection Plus. At a minimum, again it was not until the winter of 2009/2010 that Plaintiffs even began to suspect mold growth. Defendant made a general argument in the underlying case that Plaintiffs knew earlier that there was water lying under their home. It is not enough to begin the statute of limitations that Plaintiffs knew there was water. They have to have or should have had an understanding that the standing water was causing some type of injury or damage. Therefore, the court should have utilized Plaintiffs' evidence and applied the discovery rule. Again, at a minimum, there were genuine issues of material fact as to when Plaintiffs knew or should have know that they were injured because of the negligence of Perfection Plus and thus the issue should have been submitted to a jury for resolution.

The Defendant alleges that the Plaintiffs' claim fails because it is time barred by the statute of limitations, and that the Plaintiffs had knowledge of the Defendant's negligent water restoration services on or around July 2007. Following this line of reasoning, the Defendant claims that because the Plaintiffs noticed the trench under their home in July 2007, the statute of limitations barred them from bringing suit any time after July 2009.

While the Plaintiffs have acknowledged that they in fact did notice the trench under their home around the time the Defendant finished working on the home, the Plaintiffs had no knowledge that this trench was a potential problem, or that the Defendant had been negligent. Not experts in the field of water restoration, the Plaintiffs had no way of knowing that the Defendant had not left the trench there for a purpose, nor did they know that the vapor retardant barrier charged to Defendant, Huttonsville Public Service District's, insurance company needed to be placed in all of their crawlspaces to prevent future water accumulation and associated problems. It was not until mold began to grow in the Plaintiffs' home that the Plaintiffs became aware of the fact that something was wrong with the restoration work done to their home, and it was not until the Plaintiffs learned that the Defendant had failed to put vapor retardant barriers in all the crawlspaces under their home that the Plaintiffs' had full knowledge that the Defendant had been negligent and caused this damage to their home.

In regard to step four of the analysis, Plaintiffs are not making a claim nor is there any evidence to support a claim that Appellate fraudulently concealed facts from the Plaintiffs to prevent them from knowing about the negligence and/or damages. In step five of the analysis, the Court should have looked to whether there is some other tolling

doctrine which is applicable. In the instant case, Plaintiff initially filed the Complaint against Defendant Huttonsville Public Service District in 2009, less than two years after the initial sewer backup. Therefore pursuant to W.Va. Code 55-2-21 the statute of limitations for any related claims would have been tolled upon the filing on the initial complaint.

The Court failed to properly conduct the five step analysis required when evaluating any statute of limitations argument. Had the court properly gone through the analysis, the circuit court should have at a minimum found that there was a genuine issue of material fact as to the statute of limitations and therefore, resolved by the jury.

ASSIGNMENT OF ERROR TWO

The trial Court erred in holding that the contract between the parties was not an unconscionable contract of adhesion.

Contracts on a standardized form with boiler plate language are generally accepted as contracts of adhesion. *Clites v. Clawges*, 224 W.Va. 299, 685 S.E.2d 693, 700 (2009). These types of contracts are generally “take it or leave it” and one party has no real choice regarding terms. *Id.* “The form nature of the contract, containing no individualized terms relating to . . . [the plaintiff’s] . . . bespeaks a contract of adhesion.” *Copley v. NCR Corp.*, (1990) 183 W.Va. 152, 156, 394 S.E.2d 751,755. Merely because a contract is one of adhesion does not always mean it is invalid. *Clites citing Dunlap v. Berger*, (2002), 211 W.Va. 549, 557, 567 S.E.2d 265, 273. After determining that a contract is one of adhesion, the court must determine if the contract and/or provision is unconscionable. *Clites* at Pg. 700. See also *Troy Mining Corp. v Itmann Coal Co.*, 176 W.Va. 599, 604, 346 S.E.2d749, 753 (1986).

Whether an arbitration provision is unconscionable or if the contract is one of adhesion is a matter of law to be determined by the Court by looking to the entire contract, the contracting parties, and the undertakings covered in the contract. *Clites v. Clawges*, Syl. Pt. 3, 224 W.Va. 299, 685 S.E.2d 693 (2009) , citing *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.*, Syl. Pt. 3, 160 W.Va. 473, 236 S.E.2d 439 (1977). In examining unconscionability, the court must look to the relative position of the parties, the adequacy of the bargaining positions, meaningful alternatives available to the Plaintiffs and the existence of unfair terms in the contract. *Clites*, Syl. Pt. 4, citing *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, Inc.*, Syl. Pt. 4 , 186 W.Va. 613, 413 S.E.2d 670 (1991).

Exculpatory provisions within a contract of adhesion which is applied would substantially restrict an individual from enforcing and seeking statutory and/or common law remedies and relief that exist for the protection of the public are unconscionable. *Dunlap v. Berger*, Syl. Pt. 2, 211 W.Va. 549, 567 S.E.2d 265 (2002). "There is no absolute rule by which courts may determine what contracts contravene public policy of the state. The rule of law, most generally states, is that 'public policy' is that principle of law which holds that 'no person can lawfully do that which has a tendency to be injurious to the public or against public good.'" *Wellington Power Corp., v. CAN sur. Corp.*, 217 W.Va. 33, 39; 614 S.E.2d 680, 686 (2005) quoting *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984), quoting *Allen v. Commercial Casualty Ins. Co.*, 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944). Sources used to determine public policy include but are not limited to federal and state constitutions, public statutes, judicial decisions, applicable principles of common law,

recognized prevailing concepts of the government relative to the safety, health, morals and general welfare of citizens. *Id.*

Plaintiffs did not have any input or say in the drafting of the contract. They did not have counsel present or available to assist in drafting and/or approving the contract in its current form. Plaintiffs were living in a very small home with extended family and were anxious to have the home cleaned up. The contract at issue seeks to substantially limit the legal remedies of its customer by not only requiring arbitration but by attempting to limit its liability for negligent services via the Mold/Mildew/Bacteria waiver. Indeed the reason the public hires the services of Defendant is to clean up a mess and eliminate the potential for exposure to hazardous mold, mildew and bacteria. Plaintiffs hired the company to cleanup and eliminate their risk of exposure to diseases and bacteria. Such waiver such as that set forth in the instant contract violates public policy. It is clear that the contract at issue is a form contract written with the intent to minimize legal remedies intended to protect the public. Further, limiting a cleaning company's liability when mold grows because it clearly failed to follow industry protocols and procedures (Appendix Pg. 213-252) is a violation of the public policy of health and safety, which is heavily regulated and important to the citizens of West Virginia. Indeed the reason the public hires the services of the Defendant is to clean up a mess and eliminate the potential for exposure to hazardous mold, mildew and bacteria. What Appellee is seeking to do would be no different than a lawyer or doctor having clients and patients sign contracts stating they will not be held liable for malpractice.

ASSIGNMENT OF ERROR THREE

The trial court erred in granting Defendant, Perfection Plus

Turbo-Dry LLC's motion for summary judgment as there were several genuine issues of material fact.

The court reviews a trial court's decision regarding a motion for summary judgment de novo. *Painter v. Peavy*, Syl. Pt. 1, 192 W.Va. 189, 451 S.E. 2d 755 (1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Logan Bank & Trust v. Letter Shop, Inc.*, 190 W.Va. 107, 437 S.E.2d 271 (1993) ; *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, Syl. Pt. 3. 148 W.Va. 160, 133 S.E. 2d 770 (1963).

"If a moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided by Rule 56 (f) of the West Virginia Rules of Civil Procedure." *Williams v. Precision Coil, Inc.*, Syl. Pt. 3 194 W.Va. 52, 459 S.E. 2d 329 (1995). The Supreme Court of Appeals of West Virginia has held that " a court considering a motion for summary judgment "must grant the nonmoving party the benefit of inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are just functions, not those of a judge[.]" *Id.*

In the instant case, there was a genuine issue of material fact as to when the elements of the cause of action accrued. Therefore, this issue should have been

resolved by the jury and Defendant's Motion for Summary Judgment should have been denied.

CONCLUSION

The trial court failed to conduct the proper analysis regarding whether Appellants' claims were time barred. The Court merely made a conclusory holding that because the suit was not filed within two years of the conclusion of the work by Perfection Plus Turbo Dry, LLC, that the statute of limitations have not been met. Had the Court used the proper analysis, it should have held that indeed Plaintiffs' claims for negligence were filed within the applicable statute of limitations or at a minimum that there were genuine issues of material fact in this regard which should have been resolved by a jury.

The contract between the parties was a form contract with nonnegotiable terms presented to the Plaintiffs on a take it or leave it basis. Plaintiff, Brandy Pingley, was under a great deal of stress when she signed the contract as her home had just been flooded with raw sewage and she was in a hurry to get the same cleaned. Someone in Ms. Pingley's position would assume that the cleaning company is there to clean and eliminate any potential hazardous materials from the back up. The mold/mildew waiver in the contract eliminates Plaintiffs' ability to legally enforce exactly what they would intend to contract for, that is a clean safe home. Therefore, the contract is an unconscionable contract of adhesion and should not be enforced.

The Circuit Court of Randolph County erred in granting Perfection Plus Turbo Dry, LLC's Motion for Summary Judgment as there were several genuine issues of material fact regarding the applicable statute of limitations and the mold/mildew waiver should have been declared void and unenforceable as a matter of law.

Respectfully submitted,



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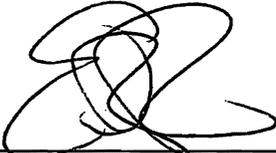
CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing Petitioner's/Appellant's Brief was served upon the Defendant by hand delivering a true and accurate copy via ~~USPS~~ this 21st day of February, 2012 to:

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