
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 11-1649

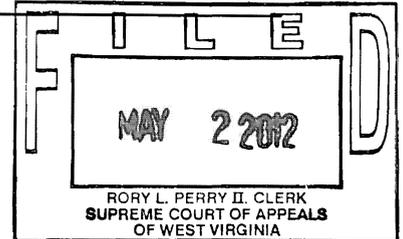
CHARLENE A. SHORTS

Petitioner,

v.

AT&T MOBILITY, LLC and AT&T MOBILITY CORPORATION,
and PALISADES COLLECTION, LLC

Respondents.



PETITIONER'S REPLY BRIEF

Christopher J. Regan (WV Bar #8593) Counsel of Record
James G. Bordas, Jr. (WV Bar #409)
Jason E. Causey (WV Bar #9482)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410 phone
(304) 242-3936 fax
CRegan@bordaslaw.com
JBordas@bordaslaw.com
JCausey@bordaslaw.com

And

Thomas E. McIntire (WV Bar #2471)
82½ 14th Street
Wheeling, WV 26003
(304) 232-8600 phone
(304) 232-5719 fax
mcintire@wvdsi.net

Counsel for Petitioner, Charlene Shorts

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION.....1

II. PALISADES FAILED TO RESPOND TO THE PETITION APPEALING THE CIRCUIT COURT’S ORDER REQUIRING ARBITRATION OF ALL CLAIMS, INCLUDING THOSE BROUGHT IN COURT BY PALISADES AGAINST SHORTS AND THE COUNTERCLAIM BY SHORTS AGAINST PALISADES.....3

III. PRIOR WRIT PROCEEDING AND PROCEDURAL BACKGROUND PERTINENT TO THE REPLY4

IV. ARGUMENT.....8

A. Shorts has neither waived her position in regard to what contract may lawfully be applied, nor did this Court decide that issue against her.....8

1. Footnote 9 does not work a waiver.....8

2. The record overwhelmingly supports Ms. Shorts’ position that she objected to the application of the 2006 and 2009 arbitration provisions.....9

3. The issue of what contract should apply has never been *analyzed* in the Circuit Court or this Court and it would be a manifest injustice for Shorts not to receive a decision on the merits of that key aspect of her case.....9

B. Shorts’ case must be decided under the provisions to which she agreed without ATTM’s purported unilateral modifications.....11

C. Shorts is correct that the 2003 and 2005 provisions are unconscionable and ATTM’s arguments to the contrary fail the syllabus point tests of *Brown, Dunlap, and Art’s Flower Shop*.14

1. ATTM’s shotgun authority does not survive *Wilson*.....16

2. The Circuit Court has yet to evaluate the relevant provisions and Shorts was denied discovery below; nonetheless the record may contain sufficient facts to rule the 2003 and 2005 provisions unconscionable if this Court reaches the issue.16

3. Substantial justice will be done by holding the parties to the original contract and finding them unconscionable under the governing law.19

V. CONCLUSION20

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

West Virginia Cases

Art's Flower Shop, Inc. v. C & P Telephone Company, 186 W.Va. 613, 413 S.E.2d 670 (1991)14, 16

Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 223 S.E.2d 433 (1976).....2, 3, 15, 17

Bischoff v. Francesca, 133 W. Va. 474, 56 S.E.2d 865 (1949)..... 11-12

Brown v. Genesis Healthcare Corp., __ W.Va. __, __ S.E.2d __ (2011)1, 2-3, 11-12, 14-16

Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979)4

McGinnis v. Cayton, 173 W. Va. 102, 312 S.E.2d 765 (1984).....16

Mylan Laboratories Inc. v. Am. Motorists Ins. Co., 226 W. Va. 307, 700 S.E.2d 518 (2010) ...5, 9

Potesta v. U.S. Fid. & Guar. Co., 202 W. Va. 308, 504 S.E.2d 135 (1998)8

Smith v. Hedrick, 181 W. Va. 394, 382 S.E.2d 588 (1989).....5

State ex rel. AT&T Mobility LLC v. Wilson,
226 W.Va. 572, 702 S.E.2d 543 (2010).....2, 5-10, 13, 15-17

State ex rel. Bronson vs. Wilkes, 216 W.Va. 293, 607 S.E.2d 399 (2004) 7-9

State ex rel. Clites v. Clawges, 224 W.Va. 299, 685 S.E.2d 693 (2009)..... 12-14

State ex rel. Dunlap v. Berger, 211 W.Va. 549,
567 S.E.2d 265 (2002)12, 14, 16, 18

State ex rel. Frazier & Oxley, L.C. v. Cummings, 214 W. Va. 802, 591 S.E.2d 728 (2003)3

State ex rel. Medical Assurance of W. Virginia, Inc. v. Recht, 213 W.Va.
457, 583 S.E.2d 80 (2003) 2, 5, 8-9

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 228
W.Va. 125, 717 S.E.2d 909 (2011).....18

State ex rel. United Asphalt Suppliers, Inc. v. Sanders, 204 W. Va. 23,
511 S.E.2d 134 (1998) 2-3, 11

Sturm v. Parish, 1 W.Va. 125 (1865)12

Ward v. Sams, 182 W. Va. 735, 391 S.E.2d 748 (1990).....20

Federal Cases

AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 179 L.Ed.2d 742 (U.S. 2011)10, 15

Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) 13-14

Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012).....1

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)..... 13-14

Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1773-75 (2010)15

Cases From Other States

Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000).....12

Luna v. Household Finance Corporation III, 236 F.Supp.2d 1166 (W.D.Wash.2002)15

Statutes

W.Va.Rev.R.App.Pro 10..... 3, 6-7

W.Va.Rev.R.App.Pro 14(g).....4

W.Va.Rev.R.App.Pro 20.....1

Other

Black's Law Dictionary 1100 (7th ed.1999)5

Blackstone’s Commentaries on the Laws of England in 1765, Book II, Ch. 3011

I. INTRODUCTION

During the five-year history of this litigation, the Respondent, ATTM, has initiated at least three different appellate proceedings: an appeal to the United State Court of Appeals for the Fourth Circuit, a *certiorari* Petition to the Supreme Court of the United States, and an extraordinary writ Petition in this Court. Appellant Charlene Shorts, by contrast, has never appealed until initiating this proceeding. Nonetheless, ATTM claims that there are no issues for this Court to decide and that Shorts' *first invocation of her appellate rights* in this case is therefore "frivolous." Brief for Respondents, AT&T Mobility, LLC and ATT&T Mobility Corporation at 7 (Herein: "Response" and "ATTM").

Shorts' appeal is not frivolous. It properly presents a clear and vitally important question of contract law in the context of modern consumer arbitration contracts: whether the drafter of a contract of adhesion is free to modify the contract unilaterally, imposing new terms on its counterparties without their consent simply because it claims the new terms are "more favorable" than those to which the parties agreed. ATTM contends it has already secured this breathtaking right, whereas Ms. Shorts contends that this Court has yet to grant ATTM such power. The rights of every West Virginian who interacts with consumer arbitration contracts are at stake – well warranting Rule 20 treatment in this Court. *See* W.Va.Rev.R.App.Pro 20(1), (2).

It bears mentioning at the outset that ATTM's Response expressed its contempt for Ms. Shorts' argument without dealing in any substantive way with her primary authority – this Court's landmark opinion in *Brown v. Genesis*, --- S.E.2d ----, 2011 WL 2611327 (W.Va. 2011).¹ Notwithstanding the detailed discussion of West Virginia's law of contract and

¹ *Brown* was overruled in part by the Supreme Court of the United States on a ground not relevant here. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012):

arbitration in *Brown*, on which Ms. Shorts primarily relied,² ATTM dismisses *Brown* in two sentences. ATTM made no effort to explain how its position, or the Circuit Court’s Order, can survive syllabus point 10 of *Brown*, declaring that “only a clear and unmistakable writing” may bind a party to arbitrate and that such an agreement “will not be extended by construction or implication.” *Id.*

Before reaching the main issues, though, a word must be said about the disturbingly personal tone of the Response towards Charlene Shorts. ATTM variously states that Ms. Shorts is “unwilling to accept reality,” is “undeterred by [her] defeat” and that she “doesn’t know when to quit,” or, that this young West Virginian is conveying “utter desperation” in appealing to this Court. Response at 1, 6, 6, 21. Of course, every appeal has a party that prevailed below and one that did not; that commonplace circumstance hardly justifies ATTM’s mockery and insults.

But more telling is that ATTM’s Brief, while well-stocked with haughty declarations, omits more controlling law than just *Brown*. It ignores the opinion in *State ex rel. United Asphalt Suppliers Inc. v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998), that prefigured key parts of *Brown* regarding the necessity of written consent to an arbitration agreement to make it enforceable. *Id.* at Syl. Pt. 3. It also ignores *Ashland Oil Inc. v. Donahue*, 159 W.Va. 463, 470, 223 S.E.2d 433, 438 (1976) – the seminal opinion on unconscionability.

ATTM relies heavily on a claim that a footnote in *State ex rel. AT & T Mobility, LLC v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010), constitutes the law of this case. Brief at, e.g., 4-6, 9-10. But ATTM ignores this Court’s long-standing position that footnotes do not decide issues necessary to the case or create precedent, *State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003), and that *dicta*, unnecessary to the

² Petitioner’s Brief at, e.g. 5-6.

decision, neither create precedent, nor establish the law of the case. *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808, n.8, 591 S.E.2d 728, 734 (2003).

In other words, ATTM finds no space in its Brief for this Court's opinions on the key issues in the case, preferring to cite scores of federal trial court opinions that are inapposite on the facts, irrelevant to West Virginia law and of little precedential weight compared to this Court's on-point decisions in cases like *Brown, Ashland Oil, United Asphalt, Medical Assurance* and *Cummings*.³ Ms. Shorts declines to say that ATTM's neglect of the controlling authority makes its position "frivolous." However, attention to this Court's cases does tend to show that ATTM's position is wrong and Ms. Shorts therefore asks that the decision below be REVERSED.

II. PALISADES FAILED TO RESPOND TO THE PETITION APPEALING THE CIRCUIT COURT'S ORDER REQUIRING ARBITRATION OF ALL CLAIMS, INCLUDING THOSE BROUGHT IN COURT BY PALISADES AGAINST SHORTS AND THE COUNTERCLAIM BY SHORTS AGAINST PALISADES.

Palisades has never asked the Circuit Court to compel arbitration of the claim brought by Palisades against Shorts or the counterclaim brought by Shorts against Palisades. Further, when Shorts moved for clarification as to whether the July 27, 2011 Order and Memorandum Opinion also required arbitration of the claims between Shorts and Palisades, Palisades remained silent. And, now, Palisades continues its silence in failing to file a brief in this appeal.⁴ In such circumstances, Rule 10 of the Rules of Appellate Procedure permits the Court to deem that "the respondent agrees with the petitioner's view of the issue" and to impose "such other sanctions as the Court may deem appropriate." *Id.* at (d) & (j).

³ ATTM cites over ninety such opinions, including dozens in a single footnote the frank thesis of which translates as: "if this Court thinks what we're asking is bad, don't worry, we found other courts that have done even worse." *See* Response at n. 10 and accompanying text.

⁴ ATTM likewise fails to address this assignment of error.

Plainly, it appears that Palisades does agree with Shorts that this matter belongs in court. Palisades started this action by filing its Complaint in Magistrate Court on June 14, 2006. (A-550). After Shorts filed her Answer and Counterclaim on July 14, 2006 (A-547), Palisades invoked the general jurisdiction of the courts and removed this action to the Circuit Court of Brooke County on August 1, 2006 (A-544) and began to litigate there and to this day has never requested arbitration. Therefore, even if Palisades wanted arbitration, which it apparently does not, any right it may have had to require Shorts to arbitrate has long been waived.

Notwithstanding the additional errors discussed below, the Court should find that Palisades has waived any right it had to require arbitration of the claims brought by Shorts against it. Accordingly, the Circuit Court's Order should be reversed.

III. PRIOR WRIT PROCEEDING AND PROCEDURAL BACKGROUND PERTINENT TO THE REPLY

In 2010, ATTM brought an extraordinary writ Petition before this Court in this case. Such a proceeding is, by definition, one that comes to this Court on a limited record and a narrow issue. W.Va.R.App.Pro. 14(g); *Hinkle v. Black*, 164 W. Va. 112, 121, 262 S.E.2d 744, 749 (1979). In July of 2010, this Court entered an order specifically limiting the scope of the extraordinary writ proceeding in this case. The Order stated:

The Court further, by its own motion, hereby narrows the issue for review to: Whether the absence of class wide arbitration in a consumer arbitration agreement, under West Virginia law, renders the arbitration agreement to be unconscionable.

Order of this Court dated July 27th, 2010 in No. 35537. This Court echoed that Order in its opinion issued in October of 2010:

we limited our consideration in this proceeding to the issue of whether the absence of class wide arbitration in a consumer arbitration agreement renders the arbitration agreement unconscionable *per se* under West Virginia law.

State ex rel. AT & T Mobility, LLC v. Wilson, 226 W. Va. 572, 577, 703 S.E.2d 543, 548 (2010).

And of course, that is the precise issue decided by *Wilson*. *Id.*

The opinion in *Wilson* clearly explains that it was the Circuit Court, and *not* this Court, that found that ATTM's unilateral modifications to the arbitration provisions in 2006 and 2009 would apply. *Id.* at 580, 551 ("Pursuant to the arbitral provisions that *the trial court found to be controlling . . .*")(emphasis supplied). This Court reiterated, in its conclusion, that the decision as to what provision applied was that of the Circuit Court: "[w]hen this matter is returned to the circuit court, the trial court should evaluate the provisions of the arbitration clause *it has found to control . . .*" *Id.* (emphasis supplied). ATTM repeatedly tries to convert this Court's description of Judge Wilson's ruling into an adoption of that ruling. Response at, e.g. 6. But ATTM's description is an incorrect exegesis (ATTM would say "distortion") of the Court's opinion, as the language above shows.

This Court did include footnote 9 in *Wilson*, upon which ATTM now seeks to premise virtually its entire position. But this Court has said: "language in a footnote generally should be considered *obiter dicta* which, by definition, is language 'unnecessary to the decision in the case and therefore not precedential.' *State ex rel. Medical Assurance v. Recht*, 213 W.Va. 457, 471, 583 S.E.2d 80, 94 (2003) (citing *Black's Law Dictionary* 1100 (7th ed.1999))." *Mylan Laboratories Inc. v. Am. Motorists Ins. Co.*, 226 W. Va. 307, 318, 700 S.E.2d 518, 529 (2010). Nonetheless, sensing that ATTM would try to turn the *obiter dicta* of footnote 9 into a holding of the Court, Shorts filed a petition for rehearing on that issue which this Court denied. This Court issued no opinion in denying the rehearing petition and is of course not required to. The without-comment denial of such petitions to appellate courts have been routinely held to lack preclusive effect, including in West Virginia. See e.g. *Smith v. Hedrick*, 181 W. Va. 394, 396, 382 S.E.2d

588, 590 (1989). ATTM's Brief seeks to convey the opposite impression, claiming that the denial of rehearing controls unless something "has changed" since it issued. Response at 10. This Court was very clear about the scope of its ruling, going so far as to say explicitly that *Wilson*: "does not address the issue of which agreement is controlling, finding that the issue is not properly before us." *Wilson* at n. 20.

Furthermore, the colloquy between counsel and this Court does not support the interpretation of the footnote insisted upon by ATTM.⁵ The fact is that Rule 10(f) of the West

⁵ The transcript Shorts was able to make from the webcast of argument in *Wilson* shows the exchange and how it reflects that 1) Shorts "absolutely" objected to the application of the unilaterally modified agreements by Judge Wilson and 2) The issue was not before the Court at that time because Shorts was nonetheless the prevailing party below:

JUSTICE McHUGH: Did you -- in reference to that 2003 -- and, certainly, Judge Wilson accepted the 2005. You argued initially -- and I see references in here --that you wanted to go under the 2003 agreement.

MR. REGAN: Well, it was our thought that the agreement out of which the dispute arose was the controlling agreement.

JUSTICE McHUGH: Did you -- go ahead. Did you object then to his finding that the 2005 was applicable?

MR. REGAN: Well, begging your pardon, Justice McHugh, Judge Wilson actually applied the '06 and '09 versions.

JUSTICE McHUGH: Well, I can read the --

MR. REGAN: And we absolutely objected to that. In fact, had we not prevailed, we would have sought relief from Judge Wilson.

CHIEF JUSTICE DAVIS: That's not what he asked you. He asked you if you all objected when Judge Wilson didn't apply the 2003 agreement.

MR. REGAN: Yes, yes. Yes, we did.

CHIEF JUSTICE DAVIS: And where do we find that?

MR. REGAN: Well, you would find that in the briefs that were before Judge Wilson before he decided the issue, which should be part of the record here. But since we prevailed, though, on the ultimate unenforceability, even of the '06 and '09, we couldn't bring that up here.

JUSTICE McHUGH: Well, I read here, "It is the 2005 arbitration agreement, with its consumer oriented revisions in December 2006, 2009, that the Court finds to be the agreement that is the focus of the legal issue before the Court.

MR. REGAN: Right, Justice McHugh. And the key there is "the revisions of '06 and '09." Charlene Shorts never signed either one of those. In fact, AT&T just puts them out on its website, and once they've put it out on the website, they say, "Those are your new arbitration deals that you're getting."

Virginia Rules of Appellate Procedure, in effect at the time, does not allow for cross-assignments of error in extraordinary writ proceedings. *State ex rel. Bronson vs. Wilkes*, 216 W.Va. 293, n. 2, 607 S.E.2d 399 (2004) (cross assignments of error are limited to appellees and not available in original jurisdiction proceedings). Accordingly, Shorts' consistent objection to the application of ATTM's newly-minted arbitration provisions was simply not before this Court – something the record of the case clearly shows.

And that --

JUSTICE McHUGH: Aren't you in a situation, "Yeah, that 2003 is really not favorable to me, but I tell you what, I'll take what you're giving me here, plus, I'll take the good part of the 2005 and 2009 agreement, whatever the case may be, that's good, too"?

MR. REGAN: We didn't play any games like that. We said every last one of these agreements is unenforceable. And we prevailed even on their favorites, the '06 and '09 ones, in front of Judge Wilson. So we couldn't appeal and claim that, "Hey, wait a minute, it was really only the '03."

JUSTICE McHUGH: In the future, when you litigate these, do you think there are any factual findings that the trial judge has to make?

MR. REGAN: Well, I think Judge Wilson was -- if he made a mistake, he made a mistake in not justifying how AT&T could bind Ms. Shorts to these new -- this new stuff. I mean, there was nothing in his order that justified that. But, again, we're in no position to complain about it because his ultimate position was she doesn't have to arbitrate. So that's what I --

JUSTICE KETCHUM: Is there any evidence in the record that -- there's no findings of fact by the judge that she didn't sign '06 and '09. Is there any evidence in the record, testimony, that she didn't sign '06, '09?

MR. REGAN: Well, I mean, evidence of what you sign goes the other way. The '05 agreement that is signed is in the record.

JUSTICE KETCHUM: What about '06 and '09? Is there any evidence that she --

MR. REGAN: She never -- no, there's no evidence she signed it. And she didn't, and they agreed she didn't sign it, so, I mean, I can't -- I couldn't produce, you know, evidence of no signing of that. Everybody agreed that it never took place. They just put this stuff out on the website, and then say, "This is your new consumer friendly deal, so good for you." And, you know, we think Judge Wilson probably made a mistake there, but, again, he didn't afford them any relief, so we had nothing to appeal on that.

The '03 and '05 agreements are the only ones that could control, and I think the key here is: They failed *Dunlap* eight ways from Sunday . . .

Tr. of oral argument in *Wilson* at 3-9 (A 157-158).

IV. ARGUMENT

A. Shorts has neither waived her position in regard to what contract may lawfully be applied, nor did this Court decide that issue against her.

There is no waiver. This Court noted that “[i]n responding to the motion to compel below, Ms. Shorts took the position that the terms of the 2003 agreement were the only applicable provisions that governed the issue of arbitration.” *State ex rel. AT & T Mobility, LLC v. Wilson*, 226 W. Va. 572, 575, 703 S.E.2d 543, 546 (2010). Judge Wilson’s adverse finding on that issue is, of course, subject to an appeal, and this is that appeal. No Rule of this Court, nor any case, requires a prevailing party to seek extraordinary relief from *reasoning* of a trial court leading to a favorable decision for that litigant. In fact, this Court has specifically rejected attempts by Respondents in writ proceedings to raise their own errors. *See Bronson, supra*. Moreover, “waiver is the intentional relinquishment of a known right” *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 310, 504 S.E.2d 135, 137 (1998). Nothing in the record supports such a finding – in fact, the extensive record of Shorts’ objections to the unilaterally modified contract supports the opposite conclusion. Petitioner’s Brief at 15-17.⁶

1. Footnote 9 does not work a waiver.

In respect to footnote 9, this Court did not *decide* what provision should apply, as it repeatedly made clear by referencing the provisions “the [Circuit Court] has found to control.” *See also, Wilson* at n. 20. Moreover, no such decision was necessary to determine that a class-action ban, without more, does not invalidate an arbitration provision in a consumer contract. The statement in footnote 9 was therefore *obiter dicta*, unnecessary to the decision in the case. *Medical Assurance, supra*. The issue before the Court in *Wilson* was clearly stated in this Court’s July 27th Order narrowing the issue – whether the absence of class-wide arbitration

⁶ Citing Record at A-8, A-54, A-118-128, A-139, A-155, A146-166, A-401, A-566-570 & A-577-81.

rendered an arbitration agreement unconscionable. *All* the relevant provisions banned class actions, and therefore, *a fortiori*, a determination as to which applied was beside the point in *Wilson*.⁷

In any case, ATTM is making too much of a footnote and forgetting that the proceeding was before this Court on an extraordinary writ. The colloquy that occurred reflected that counsel's statement Shorts *did object* to the application of the unilaterally modified agreements, but, under questioning from Justices McHugh, Ketchum and Davis, he acknowledged that as the prevailing party below, Shorts was in no position to assign errors during the writ proceeding. *Bronson, supra*. Footnote 9 is not the "law of the case." *Medical Assurance, Mylan, supra*.

2. The record overwhelmingly supports Ms. Shorts' position that she objected to the application of the 2006 and 2009 arbitration provisions.

Ms. Shorts notes, without further comment, the copious citations to her briefing, below and in the writ proceeding where she made note of her objections to the application of the 2006 and 2009 provisions. *See* Petitioner's Brief at 15-17. ATTM makes no response to this.

3. The issue of what contract should apply has never been analyzed in the Circuit Court or this Court and it would be a manifest injustice for Shorts not to receive a decision on the merits of that key aspect of her case.

When Judge Wilson originally decided to apply the unilaterally re-written arbitration provisions, his order did not provide any analysis or reasons for that decision except to say that ATTM had "made the revised 2006 provision available on its website and also sent notice of the

⁷ "Because the trial court erroneously concluded that *any* arbitration agreement which contains language banning class action relief is unconscionable we grant a writ of prohibition . . ." *Wilson*, 226 W. Va. 572, 574, 703 S.E.2d 543, 545 (2010) (emphasis supplied).

2006 provision to its then-current customers with their December 2006 bills”).⁸ Shorts was not a current customer at the time notice was purportedly given and, therefore, received no such notice. (A-537-538) (“I never agreed to the AT&T Mobility arbitration agreements of December 2006 and 2009. These agreements were not provided to me and to this day, I have never seen them.”) ATTM has introduced nothing to contradict Shorts’ Affidavit and does not contend otherwise. In any event, the right to change the terms of a contract by such procedures is unknown to the law as of this writing and Judge Wilson did not elaborate.

It may be that since Judge Wilson would go on to hold *all* the agreements unconscionable in light of the class action ban, the issue of which contract applied did not seem front-and-center. Likewise, this Court, in announcing through *Wilson* that a class action ban alone did *not* invalidate an arbitration agreement, did not need to decide which contract applied since they were alike in that particular.

But while that rather grand issue was occupying the center stage in the Circuit Court, this Court, and the Supreme Court of the United States in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744, 179 L. Ed. 2d 742 (2011), Ms. Shorts never ceased to maintain her position that she only agreed to two arbitration provisions – the 2003 and 2005 – and that ATTM was not at liberty to change the terms of the contract as it pleased, *much less while the parties were actively litigating the meaning of the contracts*.

Accordingly, this fundamental issue where a party seeks to enforce a contract – “what contract is at issue and did the parties consent to its terms” – has never been given its due attention. Ms. Shorts calls to this Court’s attention ATTM’s position that it can create new terms

⁸ A-139. The litigation itself was well underway in 2006. A 10-12, 54-55, 40-41 (acknowledging that the 2006 and 2009 provisions are offers to Shorts and nothing to which she agreed). *See also* A-71, wherein ATTM specifically states that Shorts’ “May 2005 Cingular agreement directly controls . . . ”

for the contract to be applied in this case *even in 2009, years into the litigation of the issues the contract is supposed to govern*. If such a remarkable power exists in West Virginia's contract law, it warrants a reasoned decision and not the summary treatment ATTM seeks.

B. Shorts' case must be decided under the provisions to which she agreed without ATTM's purported unilateral modifications.

ATTM's response deals with the uncomfortable question of its unilateral modifications by saying that "West Virginia law calls for examining the process under which arbitration will actually be conducted."⁹ This is not a quote from a case, but a premise ATTM pulls out of thin air to replace the well-known basics of contract law – offer and acceptance, meeting of the minds, a writing, consent and consideration. ATTM's logic is that, when it changes its arbitration provisions (with or without notice to its customers), it is changing the way its arbitrations will occur and that courts have suggested a "focus" on the reality of what will occur in the arbitration, not a formal description of it. *But this logic nowhere includes any support for ATTM's right to change the contract in the first place*. Why shouldn't Shorts be allowed to alter the "process under which the arbitration will actually be conducted" if she wants to? ATTM's unstated premise is that "this is our arbitration contract and we can make it say what we want when we want and Ms. Shorts can like it."

Of course, the ability to unilaterally alter contract terms without consent or even notice to a counterparty would make chaos of contract law. Centuries of contract law, dating at least to Blackstone's Commentaries on the Laws of England in 1765,¹⁰ rest on the concept that the court will enforce what the parties have actually agreed to nothing else. The more modern authorities are not to the contrary. *United Asphalt* at Syl. Pt. 3; *Brown* at Syl. Pt. 10; *Bischoff v. Francesca*,

⁹ Response at 10-11.

¹⁰ *See generally*, Book II, Ch. 30 regarding for example, the necessity of a writing when a contract is for longer than one year. *Id.*

133 W.Va. 474, 489, 56 S.E. 2d 865, 873-74 (1949). A unilateral modification such as ATTM proposes here is also, by definition, a promise without consideration that fails as a matter of law. See e.g. *Sturm v. Parish*, 1 W.Va. 125 (1865).

Not only are these general authorities on point and antithetical to ATTM's conclusions, specific authority is equally hostile to ATTM's power-grab. *State ex rel. Dunlap v. Berger* explicitly rejected the concept of *post-hoc* sanitizing of arbitration contracts. 211 W.Va. 547, 568, 567 S.E.2d 265, 284 (2002). In *Dunlap*, this Court cited with approval the comments of *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 685 (Cal. 2000):

Such a willingness "can be seen, at most, as an offer to modify the contract; an offer that was never accepted. *No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it.*"

State ex rel. Dunlap v. Berger, 211 W. Va. 549, 568, 567 S.E.2d 265, 284 (2002) (quoting *Armendariz, supra*, (emphasis supplied). Unconscionability is customarily analyzed as of the time the contract was written. *Brown* at * 22.

ATTM tries to pull a fast one in arguing *State ex rel. Clites v. Clawges*, 224 W.Va. 299, 685 S.E.2d 693 (2009). ATTM would have this Court believe that *Clites* established a rule of law allowing a litigant to write a new contract for purposes of the litigation including new terms such as paying the costs of the arbitration. Response at 11. This Court did no such thing and quite to the contrary, this Court explicitly said in *Clites*:

While we find this *particular* agreement to be enforceable, *we limit the application of our holding to the facts of this case*. The record before us was not sufficiently developed for us to address the many varied issues that arise in contract disputes such as the one between the parties to this action, including the issue of whether sufficient consideration was given in exchange for the Agreement.

State ex rel. Clites v. Clawges, 224 W. Va. 299, 307, n. 3 685 S.E.2d 693, 701 (2009) (first emphasis in original, second emphasis supplied). Apparently, while collecting ninety

purportedly on-point cases to string-cite in its footnote 10, ATTM entirely omitted to notice this Court *explicitly warning litigants* not to take *Clites* as a general proposition in future cases.

ATTM next claims that if this Court fails to allow it to re-write the contract at will it would be engaging in “speculation” about how the arbitration will “actually occur.” Response at 11-12. This contention again entirely assumes its conclusion that ATTM has the right to unilaterally vary the arbitration provisions in the first place. ATTM is saying “because we can change the rules at will, it is pointless to talk about our old rules, therefore, we must be allowed to change the rules at will.”¹¹ ATTM’s argument about “speculation,” *citing Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) is completely circular and (it may be needless to say by now), *Green Tree* does not say anything about allowing a litigant to re-write the contract during litigation, favorably or not. The case concerned an argument about whether the omission of material from an arbitration contract could make it unconscionable without evidence of how those terms might be supplied coming into the record. *Id.*

Not content to have ignored the warning about the scope of *Clites* and then played fast and loose with *Green Tree*, ATTM next proceeds to *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). ATTM writes that the *Rodriguez* Court dismissed as “not ‘serious’” an argument that the party seeking to avoid arbitration had relied, upon entering into the agreement on precedents indicating that the agreement was unenforceable. Response at 12. ATTM well-illustrates the rule: “beware of a citation quoting only a single word.” In fact, the Supreme Court did *not* dismiss that argument and what is more, Shorts did not make that argument. The *Rodriguez* Court said “petitioners do not make any serious allegation that they

¹¹ Page 12 of the Response is particularly compelling evidence that ATTM is assuming its conclusion as it quotes this Court’s statement from *Wilson* “under the provisions the trial court found to govern” . . . Shorts has certain rights. But this is cited in a part of the Response that is supposed to be explaining *why those provisions actually govern in the first place.*

agreed to arbitrate future disputes relating to their investment contracts in reliance on *Wilko's* holding that such agreements would be held unenforceable by the courts.” *Rodriguez at 485, 1922*. There is of course a difference between saying an argument is not “serious” and that it is not being “seriously made.” But that has not been Charlene Shorts’ argument anyway. Her position is that the agreements she entered into are in fact unconscionable under the governing law and that ATTM is not at liberty to write a new agreement, presume her consent and compel her to observe that new agreement. *See Dunlap at 568, 284, supra*. ATTM has no effective response to this argument, as its gymnastics with *Clites, Green Tree* and *Rodriguez* show.

C. Shorts is correct that the 2003 and 2005 provisions are unconscionable and ATTM’s arguments to the contrary fail the syllabus point tests of *Brown, Dunlap, and Art’s Flower Shop*.

Turning to the more substantial question, it becomes easy to see why ATTM is so determined to work a waiver of Ms. Shorts’ longstanding opposition to the 2006 and 2009 contracts. The agreements Shorts actually entered into in 2003 and 2005 do not survive the tests of *Brown, Dunlap* and *Art's Flower Shop, Inc. v. C & P Telephone Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991). ATTM finds no space to discuss *Brown* in its brief and refers to *Brown* as “merely [!] part of the Court’s comprehensive discussion of the doctrine of unconscionability” (Response at 13). Ms. Shorts submits that a landmark, unanimous, 86 page opinion of this Court, decided with this issue pending, cannot be waved away like a mosquito in that fashion.

Brown indeed comprehensively treated West Virginia’s law of unconscionability and made specific reference to the importance of the writing and the importance of consent. For example, *Brown* mentioned how basic contract principles continue to apply, even after a litigant invokes the talismanic “federal policy in favor of arbitration”:

Thus, while there is a strong and “liberal federal policy favoring arbitration agreements,” such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. “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, citing *Luna v. Household Finance Corporation III*, 236 F.Supp.2d 1166, 1173–74 (W.D.Wash.2002) (emphasis supplied). Under this doctrine, the existence of the very power ATTM claims – “we can rewrite this contract at will” would be sufficient to support a finding that it is unconscionable as wholly one-sided under *Ashland Oil, supra*.¹² Moreover, ATTM’s appeal to the federal law on arbitration as somehow allowing its creative revisions (Response at 11-12) runs afoul of syllabus point 7 of *Brown*, requiring arbitration agreements to be treated “like any other contract.” *Id.* See also, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773-75 (2010) (holding that arbitration under the FAA is strictly limited to what both parties consented to and rejecting the rights of courts, arbitrators or parties to add or modify the procedures of arbitration without an agreement by the parties to be charged).

ATTM is also determined to rely on *Concepcion*, but *Concepcion* applied the 2006 provisions – something to which the parties stipulated in that case. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744, 179 L. Ed. 2d 742 (2011). *Concepcion* therefore does nothing to help ATTM here, since Shorts does *not* so stipulate. The favorable commentary of this Court on the 2006 and 2009 provisions from *Wilson* likewise only helps ATTM if it prevails on the primary issue of its right to re-write the contract at will.

¹² At one point, ATTM tips it hand all the way, asking this Court to hold that “the 2006 and 2009 provisions are ‘controlling’ for purposes of Shorts’ efforts to avoid arbitration on unconscionability grounds.” Response at 14. ATTM does not concede Shorts’ *arbitration* will be governed by the 2006 and 2009 agreement – that is subject to change without notice by ATTM, of course. What ATTM wants is for this Court to hold that the 2006 and 2009 agreements *govern the unconscionability analysis only* – anything more would be an infringement on ATTM’s right to alter the rules at will.

1. ATTM's shotgun authority does not survive *Wilson*.

The unconscionability of an arbitration provision is governed by the state law of West Virginia, as explained in *Brown*. Furthermore, *Wilson* directed that the factors explained in *Art's Flower Shop* and *Dunlap* were controlling and needed to be analyzed. ATTM's buckshot shells full of case law deciding unconscionability under federal common law or other state contract law simply do not determine the issue under *Dunlap* and *Art's Flower Shop*, and are not relevant, neither, of course, are any of those decisions of precedential value in this Court.

2. The Circuit Court has yet to evaluate the relevant provisions and Shorts was denied discovery below; nonetheless the record may contain sufficient facts to rule the 2003 and 2005 provisions unconscionable if this Court reaches the issue.

Since the Circuit Court has held that ATTM can modify the arbitration provisions at will and use its latest 2009 version of the contract at its sole discretion, the Circuit Court has never analyzed the proper factors in the first instance as to the controlling provisions. While this Court will not normally decide such an issue in the first instance, Shorts pointed out that the provisions create one-sided access to the courts, interfere with the statutory right to attorney's fees, prohibit punitive damages, ban class actions, and contain other onerous and burdensome requirements including altering the statute of limitations to the disadvantage of Shorts to as little as 100 days and allowing ATTM to unilaterally elect that the arbitration hearing be conducted by telephone. Petitioner's Brief at 18-22. These types of provisions have been criticized by this Court if not held specifically to be unconscionable. *Id.*¹³

For the first time, ATTM attempts to explain away the plainly one-sided terms in the 2003 agreement. Similarly, ATTM misses the mark in interpreting the 2005 agreement and falls back on the arbitrator's general rules when it cannot stretch the language of the agreements to

¹³ Unconscionability is typically determined as of the writing of a contract. *McGinnis v. Cayton*, 173 W. Va. 102, 114, 312 S.E.2d 765, 777 (1984).

have some appearance of fairness. However, the “arbitrator is bound by the terms of the Agreement” (A-491) and the arbitration rules provide that the “parties, by written agreement, may vary the procedures set forth in these rules.”¹⁴ Thus, AAA’s rules cannot save ATTM.

Moreover, the provision granting one-sided access to the Court is quoted on page 20 of Petitioner’s brief and is not open to interpretation. The only kind of case that can be brought to a court of general jurisdiction is the debt collection of ATTM and its assignees, like Palisades in this case. The customer would have no reason to bring a debt claim against ATTM, the creditor for this type of sale. And in any event, the ATTM drafters thought of that, and so the only kind of debt that can be brought to a Circuit Court is a debt “*you owe to us.*” (A-457). *A more perfect picture of one-sidedness could not be painted: “we can sue you over money you owe us and you can sue us about money you owe us, but as for money we owe you – that goes to arbitration.”* ATTM’s statement that this provision applies “equally to both parties” is belied by the limitation that such actions may only relate to what “you owe us.” That alone is sufficient to find unconscionability under *Ashland Oil* and it is particularly relevant here, where ATTM had its assignee, Palisades, sue Shorts and then remove her counterclaims to Circuit Court. *See Wilson* at 546, 575. It was ATTM’s assignee that brought this matter in the first place, further showing the unfairness of ATTM pulling the matter back out of Court now that it dislikes the stakes.

ATTM tortures its own language further on the issue of attorney’s fees – stating that clear language declaring that both sides shall bear their own fees does not mean that Shorts will be required to bear her own attorney’s fees. But the language won’t bear the benign construction ATTM suggests. That interpretation cannot withstand even a moment’s reflection on how

¹⁴http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afLoop=94134889874781&_afWindowMode=0&_afWindowId=n7se4rsl4_55#%40%3F_afWindowId%3Dn7se4rsl4_55%26_afLoop%3D94134889874781%26doc%3DADRSTG_004130%26_afWindowMode%3D0%26_adf.ctrl-state%3Dn7se4rsl4_147

ATTM would argue that language to the arbitrator, and how he would be likely to apply it. ATTM's position therefore falls apart. Denying attorney fees where they would be allowed by law has been held sufficient to make an arbitration provision unconscionable. *Dunlap*, 211 W.Va. at 567, 567 S.E.2d at 283 (a provision in a contract of adhesion that would operate to restrict the availability of an award of attorney fees to less than that provided for in applicable law is presumptively unconscionable).

ATTM replies that Shorts does not seek punitive damages – only statutory penalties and, thus, has no standing to complain about the unavailability of punitive damages. But this Court had no problem equating statutory penalties and punitive damages in *Dunlap*, at 278-79, 562-63. ATTM has no response for Shorts' suggestion that the same analysis applies here. Undeterred, ATTM suddenly interprets its 2003 provision favorably to Shorts in claiming that the scope of the punitive exclusion is less than it appears “for purposes of unconscionability analysis.” What is clear is that there is an exclusion of punitive damages, which this Court presumes, unless exceptional circumstances exist, to be unconscionable. *Id.* at Syl. Pt. 4.

While ignoring a similar modification of the statute of limitations for the 2003 agreement, ATTM claims the 100-day statute of limitations for “billing disputes” in the 2005 agreement is irrelevant to Shorts' claims. This position cannot withstand the least bit of scrutiny as Shorts' claims are focused entirely on the charging of an early termination of service fee and the limitation applies to “ANY DISPUTE YOU HAVE WITH THE BILL, INCLUDING CHARGES ON THE BILL.” (A-465). Nor is ATTM saved by the fact that this term appears outside the arbitration clause of the 2005 agreement, as that argument was rejected by this Court last term in *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909, 918 (2011) (“Richmond's argument [that under the doctrine of

severability, a trial court can only consider language in the arbitration clause] is based on a misunderstanding of the FAA, and a misunderstanding of West Virginia's contract law used in determining whether a contract provision is unconscionable.”). Thus, the Court, in interpreting the arbitration provisions, may consider the agreements as a whole, and is within its authority under the FAA to rely upon contract language and circumstances outside of the arbitration provisions in its unconscionability analysis. *Id.* at 919.

3. Substantial justice will be done by holding the parties to the original contract and finding them unconscionable under the governing law.

In reality, ATTM's repeated attempts to change the provisions of 2003 and 2005 into something a Court might enforce are all the proof this Court needs that those provisions do not withstand scrutiny. The whole purpose of ATTM's serial amendments to its arbitration provisions is plainly to find something that will persuade courts to force these claims into arbitration where ATTM will not have to face them in significant numbers.

ATTM has charged illegal early termination fees nationwide. In West Virginia, contracting for as well as collecting such charges is against the law. The result has been that a transfer of small sums, adding up to many millions of dollars from West Virginians to ATTM. ATTM has more than once settled class actions alleging similar claims under other state laws where those state courts refused to allow ATTM to use unjust arbitration terms to shield its illegal conduct.¹⁵ The whole purpose of the new, unilaterally imposed provisions of 2006 and 2009 is not to rectify the injustice of charging illegal fees. It is to prevent the *redress* of such injustice by inducing courts to funnel cases to arbitration where class actions may be banned.

There is no reason for this Court to allow ATTM to impose these new contracts on those, like Shorts, who never agreed to them, and not even a stitch of authority leans that way.

¹⁵ <http://www.attmetfsettlement.com/>

Reversing the Order of the Circuit Court and holding the 2003 and 2005 provisions unconscionable will allow the Court to work substantial justice¹⁶ in this case to the greatest extent possible and Shorts asks that the Court do so.

V. CONCLUSION

For all the forgoing reasons, the Court should reverse the July 27, 2011 Order of the Circuit Court compelling arbitration.

By:



Christopher J. Regan (WV Bar #8593)
James G. Bordas, Jr. (WV Bar #409)
Jason E. Causey (WV Bar #9482)
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410 phone
(304) 242-3936 fax
CRegan@bordaslaw.com
JBordas@bordaslaw.com
JCausey@bordaslaw.com

And

Thomas E. McIntire (WV Bar #2471)
82½ 14th Street
Wheeling, WV 26003
(304) 232-8600 phone
(304) 232-5719 fax
mcintire@wvdsi.net

Counsel for Petitioner, Charlene Shorts

¹⁶ “A fundamental consideration in any appeal is whether substantial justice has been done.” *Ward v. Sams*, 182 W. Va. 735, 739, 391 S.E.2d 748, 752 (1990).

CERTIFICATE OF SERVICE

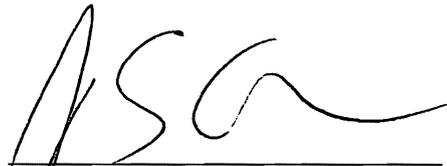
I, Jason E. Causey, counsel for Petitioner Charlene Shorts, certify that on this 1st day of May, 2012, I served the foregoing **PETITIONER'S REPLY BRIEF** via e-mail and by mailing a true and correct copy thereof in the United States Mail, postage prepaid, and addressed as follows:

Jeffrey M. Wakefield, Esq.
FLAHERTY SENSABAUGH & BONASSO, PLLC
200 Capitol Street
Charleston, WV 25301
Counsel for AT&T Mobility LLC
and

Evan M. Tager, Esq.
Archis A. Parasharami, Esq.
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Counsel for AT&T Mobility LLC

William D. Wilmoth, Esq.
STEPTOE & JOHNSTON, PLLC
PO Box 751
Wheeling, WV 26003-0751
*Counsel for Palisades Collection
LLC*

By:



Jason E. Causey #9482
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410 phone
(304) 242-3936 fax
JCausey@bordaslaw.com
*Counsel for Petitioner,
Charlene Shorts*