

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

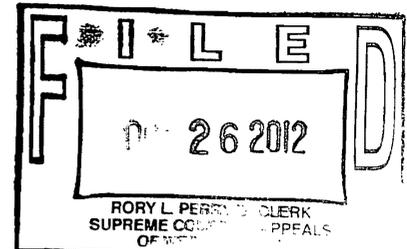
**BOARD OF TRUSTEES
OF THE WEIRTON POLICEMEN'S
PENSION AND RELIEF FUND**

Petitioner,

v.

No. 12-0959

THE HONORABLE ARTHUR M. RECHT,
Judge of the 1st Judicial Circuit, and
**THE JONES FINANCIAL COMPANIES,
LLLP, EDJ HOLDING COMPANY, INC.,
EDWARD D. JONES & CO., L.P., AND
CURT RANDY GROSSMAN,**



Respondents.

PETITIONER'S BRIEF (CORRECTED)

FROM THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA
Civil Action No. 10-C-123R

**BOARD OF TRUSTEES OF THE
WEIRTON POLICEMEN'S PENSION
AND RELIEF FUND**

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I. ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED BY ORDERING THAT THIS ARBITRATION AGREEMENT WAS VALID BY MISINTERPRETING THE IMPACT OF MARMET AND REFUSING TO DETERMINE WHETHER THE ARBITRATION AGREEMENT WAS PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE, PURSUANT TO SYLLABUS POINT 1 OF BROWN II, DECIDED WITHIN ONE MONTH OF THE UNDERLYING RULING, AND FURTHER SIMILARLY ERRED BY REFUSING TO ASSESS THE IMPACT OF THE AMBIGUITY OF THIS CONTRACT TERM.

II. STATEMENT OF THE CASE

A. PLAINTIFF/PETITIONER IS A PUBLIC PENSION FUND FOR WEIRTON'S POLICE OFFICERS

1. Petitioner is a statutorily created board existing to manage and protect the public monies collectively accumulated and referred to as the Weirton Police Pension Fund. The Weirton Police Pension Fund is established and managed pursuant to Weirton City Ordinance and West Virginia Code Sections 8-22-16 et seq. *See: A.R. 2-8 (Complaint).*

2. The statutory scheme that governs the Petitioner Board of Trustees of the Weirton Police Pension Fund is found at W.Va. Code 8-22-16 through 8-22-28. Key provisions include:

- a. West Virginia Code §8-22-18a, which creates a Pension Oversight Board “to assure prudent administration, investment and management of the funds” and to “assur[e] the funds’ compliance with applicable laws.”
- b. West Virginia Code §8-22-22 which sets forth the duties of the board of trustees generally, including their right to delegate investment authority to a professional investment advisor.

c. West Virginia Code §8-22-22, which delineates and details specific requirements and significant restrictions for the manner in which funds may be lawfully invested by the Trustees.

See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).

3. Petitioner, is a fund containing public police pension money managed by volunteer trustees who are current full-time police officers and the city's mayor. The positions of the trustees are statutorily created, and the duties and limitations of those trustees are statutorily defined. *See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).* W.Va. Code § 8-22-18 (see generally sections 16 through 28 for complete governance of police pension funds in West Virginia).

B. DEFENDANTS/RESPONDENTS ARE SOPHISTICATED FINANCIAL ADVISERS WHO WERE HIRED TO MANAGE THE INVESTMENTS OF THE FUND

4. Respondent, Edward Jones has roots dating back to 1871 and caters primarily to individual investors in suburbs and small towns. It is one of the largest brokerage groups in the nation, with more than 9,000 brokers at over 8,100 sales offices. Jones has approximately 5.3 million individual customers who collectively hold more than \$115 billion in mutual fund shares. *See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).*

5. Respondent, Curt Randy Grossman is a resident of Pittsburgh, Pennsylvania and is a financial advisor employed (or formerly employed) by Defendant Edward D. Jones

& Co. L.P. and upon information and belief, Curt Randy Grossman separated from the defendant Edward Jones' employment shortly after this lawsuit was filed. *See: A.R. 2-8 (Complaint) and A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).*

6. Through its agent Curt Randy Grossman, Edward Jones and its agent acted in a fiduciary capacity to the Fund, as evidenced by the contract and the subsequent account activity, from 2006 until 2010 when Edward Jones was fired by the Fund for mismanagement and failure to follow West Virginia Code restrictions governing investments. *See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).*

C. THE PROCEEDINGS BELOW WERE FRAUGHT WITH INCORRECT LEGAL CONCLUSIONS BY THE TRIAL JUDGE BASED UPON MARMET AND WITHOUT THE CLARIFICATION PROVIDED BY BROWN II, WHICH WAS HANDED DOWN APPROXIMATELY A MONTH AFTER THE TRIAL COURT'S RULING IN THIS CASE

7. On July 30, 2010, Petitioner Weirton Police Pension Fund filed a lawsuit against Edward Jones for making investments of public money in direct violation of West Virginia Code § 8-22-22. *See: A.R. 2-8 (Complaint).*

8. Other than a couple of agreed stipulations extending time to answer, the first pleading filed by defendant in this action was a "Motion to Compel Arbitration and stay the action." That motion was filed on October 13, 2010. *See: A.R. 9-10 (Motion to Compel Arbitration and Stay Action).*

9. After that, the case sat procedurally in a voluntary stay informally agreed to by the parties, while the possibility of resolving the matter was explored.

10. After significant time had passed, and the parties had not been able to resolve the claims, and unable to move forward without a ruling on the pending motion (defendants were taking the position they were entitled to a stay of all activity in the circuit court because of their argument regarding arbitration), plaintiff actually noticed for hearing and oral argument the motion to compel arbitration and stay the action so that the case could move forward out of its procedural lull. *See: A.R. 81-82 (Notice of Hearing)*.

11. Subsequently, on May 2, 2012, the plaintiff filed “The Trustees of the Weirton Police’s Pension & Relief Fund’s Objection to Defendants’ Motion to Compel Arbitration and Stay the Action.” *See: A.R. 85-103 (The Trustees of the Weirton Police’s Pension and Relief Fund’s Objection to Defendants’ Motion to Compel Arbitration and Stay the Action)*. Plaintiff argued that Brown v. Genesis Healthcare Corp., 228 W. Va. 646, 724 S.E.2d 250 (2011) was controlling and that the arbitration provision here was both procedurally and substantively unconscionable, that it was ambiguous, and that it should be stricken. That first Brown case will be referred to herein as Brown I.

12. The next day, on May 3, 2012, finding the United State’s Supreme Court’s (then) very recent ruling in Marmet Health Care Center, Inc., et al. 11-391 v. Clayton Brown et al. Clarksburg Nursing Home & Rehabilitation Center, LLC, DBA Clarksburg Continuous Care Center, et al. 11-394 v. Sharon A. Marchio, Executrix of the Estate of Pauling Virginia Willett, 132 S. Ct. 1201; 182 L. Ed. 2d 42 (Feb. 2012), the Petitioners filed “Supplement to the Trustees of the Weirton Police’s Pension & Relief Fund’s Objection to the Defendant’s Motion to Compel Arbitration & Stay the Action” in order to advise the Court of the ruling and that Plaintiff’s brief had failed to cite that case. This case shall hereinafter be referred to as Marmet. Marmet had partially reversed Brown I and

remanded for further proceedings to determine application of West Virginia law in light of the partial reversal of Brown for its per se rule against arbitration agreements in nursing home contracts. *See: A.R. 104-112 (Supplement to the Trustees of Weirton Police's Pension & Relief Fund's Objection to Defendant's Motion to Compel Arbitration and Stay the Action).*

13. Then, on May 4, 2012, the Court held oral argument on the motion to compel arbitration and stay the action. *See: 155-163 (Official Transcript from the May 4, 2012 hearing).*

14. At that hearing, because of the obvious weight of the United States Supreme Court ruling in Marmet, the trial Judge would hear nothing of plaintiffs' arguments regarding procedural or substantive unconscionability. On the contrary, the Judge made the following statements:

THE COURT: I have read all of the papers, and most important, of course, I have read the United States Supreme Court' opinion in Marmet Health Care Center, Inc. versus Brown. That is dispositive of this case. Period. There's no getting around it.

THE COURT: "There are times, probably, if, in fact, there is an attack on the contract itself, for example, going back to your law school days, if there was no meeting of the minds, go back to those ---- you remember in Williston you had all of the ingredients of a contract, you could attack it on that basis, and then I think the Arbitration Clause would fail with it, or if you had testimony – and I don't see anything here – where there may have been a question asked at the time that this contract was entered into, "Is there an Arbitration Clause in the contract?" And they say, "no," then, of course, you have fraud. There is no allegation of that point. That would change things, but I see nothing in this case that has that.

THE COURT: So I am following the United States Supreme Court opinion.

See: A.R. 155-163 (Official Transcript from the May 4, 2012 hearing).

15. Because the trial court so adamantly believed that Marmet was dispositive without any further analysis needed, the trial Judge even expressed some frustration with

undersigned plaintiffs' counsel for not originally citing to the United States Supreme Court case that partially overruled *Brown I*. As mentioned, plaintiff filed a supplemental brief a day after their original brief pointing out the omission, but arguing that the case left unaffected the arguments being advanced by plaintiff. *See: A.R. 104-112 (Supplement to the Trustees of Weirton Police's Pension & Relief Fund's Objection to Defendant's Motion to Compel Arbitration and Stay the Action)*. The trial judge would hear nothing of plaintiffs' argument that notwithstanding *Marmet*, the trial judge has a duty to analyze procedural and substantive unconscionability.

THE COURT: As a matter of fact, you didn't even know about the Supreme Court's opinion, and that bothered me. That bothered me a great deal. When I read the first Brief, and you're relying on upon the West Virginia Supreme Court case, that wasn't right, just wasn't right. And you found out about it, and I got another paper this morning. Its there. That is it. It speaks for itself. And there is nothing more to say.

MS. TORISEVA: I understand, Your Honor. If I may just have 30 seconds. I do believe this Court has authority to examine our contractual arguments, not a categorical rule against arbitration, but our contractual arguments about this arbitration provision. In fact, no only do you have the right to do so, I think you have the duty to do so ----

THE COURT: Why?

MS. TORISEVA: ---- because we've objected. That's the law.

THE COURT: What are you going to put on? What facts are you going to put on regarding this contract?

MS. TORISEVA: That its both procedurally and substantively unconscionable –

THE COURT: It is not. It is not.

MS. TORISEVA: I understand, Your Honor.

THE COURT: And you are --- again , it is the way that you continually try to get around these things. I don't blame you. I'm not critical of those efforts , but it just can't be done. It cannot be done. Not in this case. And unless – I mean, they put these in every contract there is.

The contract in the nursing home case, I mean, there is just a pure negligent – I mean, next time you go anywhere, you go into a hospital, you’re goin to have an Arbitration Clause. You buy a product, you sign an Arbitration Clause. Its going to get rid of the enire jury system.

Talk about tort reform, there is not going to be any torts at all that are heard by a jury, and that’s how bad it is. I agree with you.

And with those findings, how I disagree with the concept, I cannot and I will not, go against the United States Supreme Court’s opinion in Brown. So prepare the Order.

See: 155-163 (Official Transcript from the May 4, 2012 hearing).

16. Notably, about a month later, the West Virginia Supreme Court of Appeals issued a ruling upon remand from the United States Supreme Court in what is referred to herein as Brown II. Brown v. Genesis Healthcare Corp., 729 S.E.2d 217; 2012 W. Va. LEXIS 311, (Submitted Following Remand, June 13, 2012).

D. THE ARBITRATION AGREEMENT AND ITS FORMATION

17. Defendants have offered an “Edward Jones Account Agreement”, “Disclosure Statement”, “Edward Jones Privacy Notice”, “Revenue Sharing Disclosure” and a “Acceptance of Trust” with a signature section for trustees of the fund. That arbitration provision is found on page 19 and reads as follows:

ARBITRATION AGREEMENT

This Agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:

1. All parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of arbitration forum in which a claim is filed.
2. Arbitration awards are generally final and binding; a party’s ability to have a court refers or modify an arbitration award is very limited.
3. The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.
4. The arbitrators do not have to explain the reason(s) for their award.
5. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

6. The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible in arbitration may be brought in court.

7. The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

I agree that this Agreement shall be governed by the laws of the State of Missouri without giving effect to the choice of law or conflict of laws provisions thereof. Any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents, and/or employees for me, to this Agreement, or the breach thereof, or relating to transactions or accounts maintained by me with any of your predecessor or successor firms by merger, acquisition or other business combinations from the inception of such accounts shall be settled by arbitration in accordance with the rules then in effect of the Board of Directors of the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within five (5) days after demand by you that I make such an election, then you will have the right to elect the arbitration tribunal of your choice. Judgement upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action, or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this Agreement except to the extent stated herein. (Emphasis Omitted).

See: A.R. 9-10 (Motion to Compel Arbitration and Stay Action), A.R. 11-21 (Memorandum of Law in Support of the Edward Jones Defendants' Motion to Compel Arbitration and Stay the Action), and A.R. 22-80 (Affidavit of R. Shepard in Support of E. Jones' Motion to Compel Arbitration and Stay Action).

18. The arbitration provision (see above) attempts to set the law of Missouri as the controlling law that governs the Agreement between the parties whereby Edward Jones' defendants undertake the investment responsibility for the management of the Fund.

See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).

19. No negotiations occurred in the formation of the contract, which was prepared in its entirety by Edward Jones, without revision or input from the Trustees of the Weirton Police Pension Fund. However, the specific details of the formation of the contract remain to be discovered, as there have been no depositions, nor has there been any written discovery on any matter since the filing of defendants Motion to Compel arbitration and stay the action. *See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).*

20. Upon information and belief, the contract is identical to the one used by Edward Jones across the nation for its individual and also, apparently for its public trust fund clients. *See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action).*

III. SUMMARY OF ARGUMENT

Brown I was handed down by the West Virginia Supreme Court with essentially two main holdings: (1) that Congress did not intend for the FAA to apply to arbitration clauses in pre-injury contracts, when a personal injury or wrongful death occurred after the signing of the contract; and (2) two of the three cases on appeal were held to be unconscionable as a matter of law and the third was remanded for consideration of unconscionability by the trial court since it was not considered below. *Brown I* was the first time the West Virginia Supreme Court of Appeals “fully explained the principles and application behind unconscionability”. *Brown I*, at 263, 659. In opposing Defendant/Respondent’s Motion to Compel Arbitration and Stay the Action, Plaintiff relied on the reasoning in *Brown I* regarding procedural and substantive unconscionability

of a contract term. Marmet reversed Brown I, holding that the so called per se rule against arbitration was invalid and remanded for consideration of whether the arbitration clauses at issue “are unenforceable under state common law principles that are not specific to arbitration and preempted by FAA.” Marmet, 132 Sct. At 1204, 182 L.E.2d at 46. On remand, Brown II, Chief Justice Ketchum again writing for the Court held;

Under the Federal Arbitration Act, 9 U.S.C. §2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, UNLESS the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” Brown I, *Syllabus Point 6*, Brown II, *Syllabus Point 1*, *reaffirming after remand* (Emphasis added).

Judge Recht, however, did not apply the holding after the word “UNLESS” in this Court’s ruling above. He erroneously found that Marmet stood for the proposition that arbitration agreements can never be challenged and that they are always enforceable. See: *A.R. 120-126 (Findings of Fact, Conclusions of Law and Order entered Granting Defendants’ Motion to Compel Arbitration and Stay the Action) and A.R. 155-163 (Official Transcript from the May 4, 2012 hearing)*.

Even though Petitioner’s counsel tried to argue that the holding in Marmet was distinguishable from the instant case (Petitioner was never relying on the per se rule), the Judge would hear nothing of it. Counsel had several factual and legal arguments to be made and presented regarding the arbitration clause, namely, the arguments regarding ambiguity of a contractual provision, and procedural and substantive unconscionability of a contractual provision. Judge Recht was blinded by the glare of the United States Supreme Court’s partial reversal of the Brown I holding. In fairness, the trial judge also did not have the benefit of the thorough explanation offered in Brown II, which made clear that everything but Syllabus Point 21 remained intact from Brown I, especially the law

regarding a trial court's duty to examine procedurally and substantively unconscionable terms in a contract.

This matter should be reversed and remanded to allow the trial judge the benefit of the reasoning in Brown II which was handed down approximately one month after this trial judge placed an obvious overwhelming reliance on Marmet. Petitioner should be permitted the opportunity to fully develop all arguments made below pursuant to Brown I that were called into doubt by Marmet, upon which the trial judge relied. Brown II teaches that this case, is suitable for remand with instructions to allow discovery, and this is the only way to properly apply the new reasoning set out in Brown II.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although the principle issues in this case have been authoritatively decided in the Court's recent decision in Brown v Genesis Healthcare Corp. (Brown II), *infra*, oral argument would likely be helpful to discuss the proceedings below as some matters in the record are subject to dispute and interpretation by the parties. This case is then appropriate for a Rule 19 argument and disposition by memorandum decision.

V. ARGUMENT

A. THE TIMELINE OF THE PROCEEDINGS IN THE CASE BELOW ILLUMINATES THE ERROR IN THIS CASE AND HOW JUDGE RECHT'S RULING WAS SIMPLY PREMATURE AS IT WAS ISSUED POST-MARMET BUT PRE-BROWN II

On July 30, 2010, Petitioner (Weirton Police Pension Fund) filed a Complaint against its financial advisor Edward Jones for malfeasance in handling the pension account alleging seven figure losses and violations of West Virginia statutes. Defendants' first and only substantive pleading has been a Motion to Compel Arbitration and Stay the Action, filed October 13, 2010. Brown I was decided on June 29, 2011, setting forth the first

comprehensive guidance and analysis regarding procedural and substantive unconscionability of a contract term. Brown I.

Since nothing was progressing in the case, and defendant had not noticed their motion for hearing, Petitioner noticed the hearing on defendants' motion to compel arbitration on February 15, 2012. On May 2, 2012, Petitioner filed an objection/brief against arbitration. In that response, Petitioner relied heavily on Brown I, and failed to cite Marmet, which reversed Brown I in part, and remanded in part for further consideration. Petitioner advised the court prior to the hearing of the oversight and requested that the court should still focus on procedural and substantive unconscionability, and that Marmet is distinguishable from Petitioner's contract arguments, which relied heavily on the holding in Brown I and that appeared to survive Marmet. In addition to arguing that the arbitration agreement is procedurally and substantively unconscionable, Petitioner also argued that the contract term is ambiguous. *See: A.R. 85-103 (The Trustees of the Weirton Police's Pension and Relief Fund's Objection to Defendants' Motion to Compel Arbitration and Stay the Action)*.

On May 4, 2012, the trial court conducted oral argument and ruled from the bench citing Marmet as "dispositive" and saying there was "no getting around it" absent overall contract invalidity based on a lack of meeting of the minds or fraud. *See: A.R. 155-163 (Official Transcript from the May 4, 2012 hearing)*. Notably, the trial court lacks the benefit of the West Virginia Supreme Court's reasoning in Brown II, upon remand from the United States Supreme Court.

Subsequent to the trial court's ruling in this case, C.J. Ketchum, writing for the Court on remand in Brown II, explained that arbitration provisions can, in fact, still be

voided if they are procedurally or substantively unconscionable under West Virginia law, as set forth in Brown I.

“In accordance with the Supreme Court’s mandate, we overrule Syllabus Point 21 of Brown I. We otherwise find that the Supreme Court’s decision does not counsel us to alter our original analysis of West Virginia’s common law of contracts. The doctrine of unconscionability that we explicated in Brown I is a general, state, common-law, contract-law principle that is not specific to arbitration, and does not implicate the FAA.”

Brown II at 729 S.E.2d. at 222-223.

B. BECAUSE OF THE DOUBT CREATED BY MARMET, THE BROWN II SYLLABUS POINTS THAT WERE REITERRATED AND REAFFIRMED BY BROWN II ARE WORTH REPEATING HEREIN AS ALL BUT 2 AND 3 (WHICH OVERRULE THE PER SE RULE) APPLY TO THE INSTANT CASE, WERE ARGUED BELOW, AND WERE ESSENTIALLY DISREGARDED BY THE TRIAL JUDGE

1. "Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract." Syllabus Point 6, Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).
2. "Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act." Syllabus Point 21, Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).
3. In accordance with Marmet Health Care Center, Inc. v. Brown, 563 U.S. , 132 S.Ct. 1201, 182 L. Ed. 2d 42 (2012) (per curiam), Syllabus Point 21 of Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011) is overruled.
4. "The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case." Syllabus Point 12, Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).
5. "An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of

the contract as a whole." Syllabus Point 3, Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986).

6. "A determination of unconscionability must focus on the relative positions of the parties, the adequacy [**3] of the bargaining position, the meaningful alternatives available to the plaintiff, and 'the existence of unfair terms in the contract.'" Syllabus Point 4, Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc., 186 W.Va. 613, 413 S.E.2d 670 (1991).

7. "Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." Syllabus Point 1, Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986).

8. "If a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result." Syllabus Point 16, Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).

9. "A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Syllabus Point 20, Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).

10. "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." Syllabus Point 17, Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).

11. "A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter [**5] the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person." Syllabus Point 18, Brown v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).

12. "Substantive unconscionability involves unfairness in 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 v. Genesis Healthcare Corp., W.Va. , 724 S.E.2d 250 (2011).

13. "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 [**6] 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, State ex rel. Dunlap v. Berger, 211 W.Va. 549, 567 S.E.2d 265 (2002).

C. THE CONTRACT BETWEEN THE PARTIES IS A CONTRACT OF ADHESION

A plain reading of the entire contract, done only for the purpose of framing the context of the arbitration provision as instructed by common law, reveals that this is a textbook contract of adhesion. It was prepared and drafted by a sophisticated international entity Edward Jones, likely by its lawyers,utilizing financial and legal terms that are nearly incomprehensible to the average person who lacks expertise in either financing or law. It is replete with boilerplate language. It is a "one size fits all" contract used with all Edward Jones clients, both individuals and businesses, during the relevant time period.

Significantly, as we learned in Brown v. Genesis Healthcare Corporation, et al. (Brown I and II) and its historical progeny, contracts of adhesion are much more likely to fail the litmus test on unconscionability. If these were two sophisticated business entities, who had negotiated terms of a unique non-form, non-boilerplate contract, the analysis would likely end here. Such is not the case at bar.

D. THE TRUSTEES OF THE POLICEMEN'S PENSION FUND HAVE NOT MADE A "KNOWING AND INTELLIGENT WAIVER" OF THE PUBLIC'S RIGHT TO A TRIAL BY JURY (ARTICLE III § 13) OR THE PUBLIC'S RIGHT TO OPEN ACCESS TO THE COURTS (ARTICLE III, § 17)

These constitutional protections of a jury trial and open access to courts were adopted to ensure impartial and open enforcement of West Virginia law. Justice Starcher, writing for the Court, frames this issue squarely:

These constitutional rights – of open access to the courts to seek justice, and to trial by jury – are fundamental in the State of West Virginia. Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals — tribunals that involve, in the case of the jury, members of the general citizenry. These fundamental rights do not exist just for the benefit of individuals who have disputes, but for the benefit of all of us. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends. *Brown II*, citing *State ex rel Dunlap v. Berger*, 211 W.Va. 549, 560, 567 S.E.2d 265, 276 (2002).

For this public entity, governed by a statutorily created board of trustees, to give up their right to sue in a West Virginia court, that waiver and right must be knowing, intelligent and informed.

It is not enough, as here, for defendants to simply assert that the trustees have signed a boilerplate adhesion contract prepared entirely by Edward Jones' lawyers. That act is not sufficient to constitute a "knowing and intelligent waiver" of the dual constitutional rights of open access to the courts of West Virginia and to a trial by jury. The language in the agreement, itself, amounts to legalese, "gobbledygook" and to the average lay person, conflicting statements about rights. Paragraph 6 of the purported Arbitration Agreement for example states that "in some cases, a claim that is ineligible for arbitration may be brought in court." This clause begs the question to the average person

whether they can bring any matter in court or whether they are forced to go to arbitration. Likewise, the entire last paragraph regarding class actions would leave skilled lawyers to argue about the meaning and what rights are in fact left if the paragraph is strictly applied. In *State ex rel. Dunlap v. Berger*, the Court found that the arbitration provision was difficult to comprehend and “the pre-printed parts of the document would probably be seen by the average person as legal gobbledygook.” 211 W.Va. at 554, 567 S.E.2d at 270. The *Dunlap* court went on to also find that the financing agreement which prohibited punitive damages and class action relief was unconscionable, and therefore, the arbitration clause was unenforceable.

This arbitration agreement not only extinguishes the right to open access to West Virginia courts, as well as the right to a jury trial, but purports to make Missouri law govern the agreement of the parties. Why would trustees vested with a duty to follow West Virginia Code §8-22-16 et. seq. knowingly agree to forego West Virginia law that protects the fund from bad investment and bad investment advisors? Why would any knowledgeable person agree to Missouri Law?

The waiver of a constitutional right must be more than mere acquiescence, and police officers trustees signing a contract of adhesion entirely prepared by lawyers from a sophisticated brokerage firm, where that agreement is filled with complex language, is not sufficient to waive the important constitutional rights at issue. This specific arbitration provision, as written, is invalid and must be stricken.

E. The Arbitration Provision at Issue is also Invalid because it Results in an Unconscionable Outcome and Violates Public Policy

The West Virginia legislature, through the statutory framework set forth herein, has determined that it is public policy for the State of West Virginia to protect the integrity of

police and firefighter's publicly funded pension. West Virginia code enumerates, in rather specific detail, the rules and limitations on trustees, and fiduciary investment managers, regarding the specific manner in which investments may be made. Set forth therein are specific and extensive guidelines, which are the very guidelines alleged to be violated, causing substantial loss of revenue.

At the outset, the arbitration provision specifically states that Missouri law shall govern the agreement. That alone renders the entire arbitration provision invalid. If arbitration were compelled, would an arbitrator apply West Virginia law? Under Missouri law, one can imagine that there are no such provisions for the protection of West Virginia Police Pension funds. The net effect would be devastating to the claim of the Police Pension Fund.

Any agreement that contravenes the requirements established for investments by the fund in West Virginia Code §8-22-22a is illegal and unenforceable. While the trustees have a legal right under West Virginia Code § 8-22-22 to delegate their investment authority to professional investment advisors, they can only delegate their duty as described by the West Virginia legislature. They have no authority or legal right to act beyond what the legislature has prescribed.

Because of that single illegal provision designating Missouri law as controlling, the entire arbitration provision is invalid. As the Court instructed in State ex rel. Dunlap v. Berger, one party cannot unilaterally alter post litem motam terms of an agreement. The agreement is, as written, that Missouri law controls. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it, or by offering to ignore or forego offensive provisions, and the Court cannot strike down

parts of the arbitration agreement while leaving the rest. That would amount to rewriting the contract, which courts will not and cannot do. The Missouri law provision in the arbitration agreement thus renders it unenforceable and it must be stricken.

F. The Arbitration Provision at Issue is Ambiguous, Especially When Read in Light of the Entire Contract

The ambiguity of the Arbitration Agreement should be assessed in light of what a reasonable lay person would interpret, especially in light of the various arguments already set forth herein as to why the arbitration provision is invalid. Paragraph 1 purports to cause the parties to give up the right to sue each other. Paragraph 2 refers to a court potentially being able to modify an arbitration award. Paragraph 6 states that “a claim that is ineligible in arbitration may be brought in court.” The first full paragraph after the numbered paragraphs states that this agreement shall be governed by the laws of the State of Missouri after referring to the “rules of Arbitration Forum” in the immediately preceding numbered paragraph 7. The confusion continues as one reads the remaining full paragraph after the numbered paragraphs, which sets forth two entity’s rules which may govern based on election. Finally, even highly skilled wordsmiths (or lawyers) would have to carefully read the last full paragraph multiple times and, harkening back to the days of the LSAT, might even need a diagram in order to simply understand what is being stated.

Ambiguity was for the trial Court to determine. An individual need only read the Arbitration Agreement to conclude that, through the eyes of a lay person, the provision is horribly ambiguous and must be interpreted through the use of parol evidence and possible stricken. See: *E.G.Holiday Plaza, Inv. V. First Federal Savings and Loan Association of Clarksburg*, 168 W.Va. 356, 285 S.E.2d 131 (1981). See Also: *Ohio Valley Contractors*,

Inc. v. The Board of Education of Wetzel County, etc. and Joseph H. Baker & Associates, etc., 182 W.Va. 741; 391 S.E.2d 891; 1990 W.Va. Lexis 37(1990).

VI. CONCLUSION

The Circuit Court's Order granting Defendants' Motion to Compel Arbitration and Stay the Action should be reversed and this matter should be remanded with instructions for the trial judge to conduct proceedings below pursuant to the reasonings set forth in Brown II.

Respectfully submitted,

**BOARD OF TRUSTEES OF THE
WEIRTON POLICEMEN'S PENSION
AND RELIEF FUND**

By counsel


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BOARD OF TRUSTEES
OF THE WEIRTON POLICEMEN'S
PENSION AND RELIEF FUND**

Petitioner,

v.

No. 12-0959

THE HONORABLE ARTHUR M. RECHT,
Judge of the 1st Judicial Circuit, and
**THE JONES FINANCIAL COMPANIES,
LLP, EDJ HOLDING COMPANY, INC.,
EDWARD D. JONES & CO., L.P., AND
CURT RANDY GROSSMAN,**

Respondents.

CERTIFICATE OF SERVICE

I, Teresa C. Toriseva, Esquire, counsel for Petitioner, Board of Trustees of the Weirton Policemen's Pension and Relief Fund, hereby certify that I have served the foregoing *Petitioner's Brief (Corrected)* upon all counsel of record by regular U.S. mail as follows:

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