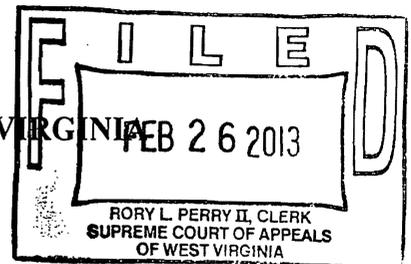


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA EX REL.
U-HAUL CO. OF WEST VIRGINIA, a West
Virginia Corporation,

Petitioner,

v.

THE HONORABLE PAUL ZAKAIB, JR.,
AMANDA FERRELL, JOHN STIGALL,
AND MISTY EVANS,

Respondents.

Case No. 13-0181
(Kanawha Co. Civil Action No. 11-C-1426)

PETITION FOR A WRIT OF PROHIBITION

**Arising from an Order Denying Motion to Compel Arbitration Entered on
March 27, 2012, and an Order on Reconsideration
Entered on January 16, 2013, in Civil Action No. 11-C-1426 in the
Circuit Court of Kanawha County, West Virginia**

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PETITION FOR A WRIT OF PROHIBITION

Pursuant to the Constitution of West Virginia (Art. VIII, § 3) and West Virginia Code § 51-1-3, Petitioner U-Haul Co. of West Virginia (“U-Haul WV”) respectfully prays for a writ prohibiting the Honorable Paul Zakaib Jr., Circuit Court Judge, from enforcing orders issued on March 27, 2012 (“Arbitration Order”) and January 16, 2013 (“Reconsideration Order”). The first order denied U-Haul WV’s motion to compel arbitration, while the second order denied its motion seeking reconsideration.

Although the Petition arises out of an arbitration motion, the controversy predominantly concerns the circuit court’s failures to apply black letter legal principles that are preliminary to the arbitration issue. In particular, the first order held that a “Rental Contract Addendum” (“RCA”) – which included an arbitration provision – had not been incorporated into Plaintiffs’ rental agreements, despite the following clause within Plaintiffs’ signed contracts: “I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum.” The circuit court instead found that the RCA was a failed modification of Plaintiffs’ rental contracts, even though the signed contracts expressly referenced the RCA’s applicability. Thereafter, the circuit court denied U-Haul WV’s motion to reconsider arbitration based on the court’s mistaken application of a standard of review only appropriate to final orders governed by Rules 54(b) and 60(b) of the West Virginia Rules of Civil Procedure.

Circuit court orders denying motions to compel arbitration are non-final, interlocutory orders well-suited to this Court’s original jurisdiction. Review is especially appropriate here based upon the clarity of the circuit court’s errors, the likelihood they will recur in other cases, the unsettled nature of the legal issues, and the prejudice U-Haul WV is certain to suffer if it is forced to pursue review through this Court’s appellate jurisdiction.

QUESTIONS PRESENTED

A. First Question Presented

In West Virginia, parties to a contract can be bound by a contract's terms, even if they failed to read those terms. West Virginia law also recognizes that a single contract may be comprised of separate documents, pursuant to the incorporation by reference doctrine. Here, the circuit court held that the RCA was a failed effort to amend existing contracts, even though those contracts expressly referenced the applicability of the RCA. Did the circuit court commit clear error in failing to hold that the RCA was a part of the contracts from their inception?

B. Second Question Presented

Precedent of the United States Supreme Court and of the West Virginia Supreme Court of Appeals recognizes that where a party to an arbitration provision challenges an entire contract's validity (as opposed to an arbitration provision standing alone) that the dispute must be decided by an arbitrator. Here, Plaintiffs argued that they were not bound by the RCA, which formed an integral part of the rental contracts. Did the circuit court commit clear error by failing to apply the severability doctrine recognized by this Court and the United States Supreme Court?

C. Third Question Presented

A West Virginia circuit court possesses the inherent power to reconsider non-final interlocutory orders for any valid reason. On the other hand, reconsideration of final orders is subject to stricter standards arising out of Rule 60(b) of the West Virginia Rules of Civil Procedure. Here, the circuit court held that reconsideration of the Arbitration Order was subject to review pursuant to Rules 54(b) and 60, even though the order was not certified as a final order. Did the circuit court commit clear error?

STATEMENT OF THE CASE

Although three questions are presented, the overarching issue is simple: did U-Haul WV and Amanda Ferrell, John Stigall, and Misty Evans (“Plaintiffs”) enter into rental contracts that incorporated the RCA. The RCA includes various contractual terms, including an arbitration provision. [Appendix Record (“AR”) at pp. 37-38; 64-68.] Evidence of U-Haul WV’s standard business practices shows that Plaintiffs’ rental agreements incorporated the RCA from the beginning. [AR at p. 55.]

Factual Background

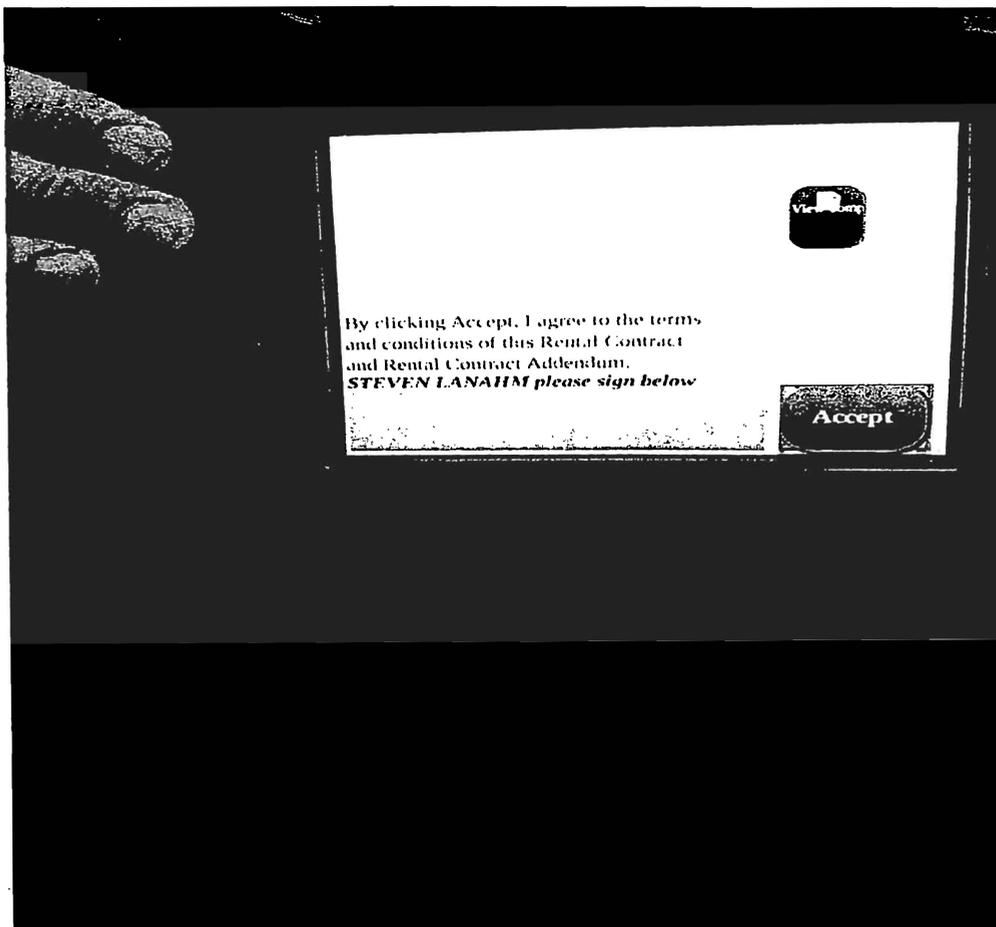
U-Haul WV rents moving equipment (i.e., trucks and trailers) to the general public through six directly owned and operated rental centers and indirectly through a network of “Independent Dealers” spread across West Virginia. [AR at p. 53; 37.]¹ Moving equipment is rented to transport cargo long distances (including across state lines) and for “in town” moves. [AR at p. 54; 36.] Customers moving out-of-state can return moving equipment to U-Haul WV affiliates located elsewhere. [See *id.*]

The glue holding everything together is U-Haul WV’s standard rental agreement, which is comprised of two documents: (1) a one-page “Rental Contract” and (2) the RCA. [AR at pp. 36-38; 53-56.] U-Haul WV customers receive paper copies of both documents. However, the manner in which customers review and agree to the Rental Contracts’ terms depends upon whether a rental is done at a U-Haul WV rental center or an Independent Dealer.

With respect to U-Haul WV rental centers, interactive electronic terminals are used to show Rental Contract terms to customers and to get their express assent to those terms. [AR at pp. 54 ¶10; 481 ¶8; 467-471.] Specifically, terms are shown to customers on the

¹ The moving equipment is owned by a non-West Virginia affiliate and the authority to rent the equipment stems from contractual relationships between U-Haul WV and its affiliate. [AR at p. 54 ¶8; 36.]

terminals one screen at a time until all terms have been shown. [See *id.*] Before a customer can view a subsequent screen's terms, the customer must press a button on the terminal "Accept[ing]" the terms then shown. [AR at pp. 482 ¶8, 472.] If a customer "Accept[s]" all of the contractual terms displayed, he or she reaches a screen displaying the following statement: "By clicking Accept, I agree to the terms and conditions of this Rental Contract and Rental Contract Addendum. [CUSTOMER NAME] *please sign below.*" [Id.] Before a Rental Contract can be finalized, a customer must sign his or her name on the terminal using a stylus and press a button marked "Accept." [See *id.*] The following photograph shows the screen containing the incorporation by reference language to which customers must manifest their assent by signing their name and pressing "Accept":



[AR at pp. 700; 665.] Once a customer signs the terminal and presses the Accept button, a one-page paper Rental Contract containing all of the terms shown to, and accepted by, the customer on the interactive terminal is printed to paper; the paper Rental Contract also contains a copy of the customer's signature. [AR at p. 482 ¶8.] The one-page paper Rental Contract is then given to customers as described below.

As to Independent Dealers, Rental Contracts are always executed using pre-printed one-page paper contracts. [AR at p. 483 ¶ 10.] That is, customers hand-sign their signatures to pre-printed Rental Contracts. The pre-printed Rental Contracts are identical to the one-page Rental Contracts generated through the electronic process used in U-Haul WV rental centers. [See *id.*]

U-Haul WV's unvarying and routine business practice requires its employees (working in its directly-owned rental centers) and its Independent Dealers to require every customer to agree to the Rental Contracts' terms before any moving equipment is provided. [AR at pp. 54-55, 36-37.] These mandatory practices were evidenced in a comprehensive affidavit signed by U-Haul WV's president, Jeff Bowles, that was provided to the circuit court in support of the motion to compel arbitration. [AR at pp. 53-56, 36.] Authenticated copies of the Stigall and Evans Rental Contracts were attached to the first Bowles affidavit. [AR at pp. 58, 60.] Instead of disputing the authenticity of their Rental Contracts, Stigall's and Evans's affidavits opposing arbitration admitted that the contracts were authentic: "*after I signed the contract . . . the U-Haul representative hand[ed] me a folder in which he inserted **the contract I had signed.** . . .*" [AR at pp. 120-21; 125-26 (emphasis added).]² Both Rental Contracts contain the following

² With respect to Ferrell, a glitch in U-Haul WV's electronic record database prevented it from providing the circuit court with a copy of Ferrell's November 12, 2009 Rental Contract. [AR at pp. 54-55 ¶13.] U-Haul WV, however, proffered evidence that Ferrell would have agreed to terms identical to those contained in the Stigall and Evans Rental Contracts. [AR at pp. 53-56.] As with Stigall and Evans, Ferrell executed an affidavit opposing arbitration in which she admitted that she signed a standard U-Haul WV Rental Contract: "*after I signed the*

clause directly above Stigall's and Evans's signatures: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum."

[AR at pp. 58; 60.]

With respect to the RCA, U-Haul WV provided unchallenged evidence proving that its unvarying and routine business practice – for rentals contracted through its directly-owned retail outlets and those contracted through Independent Dealers – is to provide every customer with a RCA before transferring possession of moving equipment. [AR at pp. 55 ¶¶16, 21.] The RCA is a multicolor pamphlet that sets forth additional contractual terms. [AR at pp. 55; 64-68, 37.]³ These terms include a wide variety of material terms that are not addressed in

contract . . . the U-haul representative hand[ed] me a folder in which he inserted *the contract I had signed*. . ." [AR at pp. 123-24 (emphasis added).]

³ In accordance with the requirements of Rules 16(e) and 7(e) of the Revised Rules of Appellate Procedure, U-Haul WV consulted with Plaintiffs in the compilation of the Appendix Record. Following U-Haul WV's identification of Appendix Record items, Plaintiffs requested the inclusion of the exhibits they offered at the hearing on the Motion to Compel Arbitration. To ensure that the correct items were included in the correct order, U-Haul WV asked Plaintiffs to transmit copies of their exhibits. One exhibit was a copy of a U-Haul WV RCA. [AR at pp. 696-697.] However, the copy transmitted to U-Haul WV is an inaccurate, incomplete, and misleading representation of the standard form RCA. In particular, the document provided by Plaintiffs fails to reproduce the RCA's front cover – which bears the title "Rental Contract Addendum" in large bold letters at the top of the cover. The document provided by Plaintiffs also falsely implies that the RCA's back cover is the front cover. Moreover, although the document provided by Plaintiffs reproduces three pages of contractual terms – including the arbitration provision – it omits three additional pages of contractual terms. Similarly, with respect to one of the pages that is reproduced, it is entirely obstructed by a U-Haul WV "Safemove Validation Tag"; the "tag" is provided to customers who purchase optional U-Haul WV services and the tag (on its own face) does not alter the terms of the RCA. U-Haul WV asked Plaintiffs to provide a true and accurate representation of the RCA they used at the March 2012 hearing, but they indicated either that they could not do so.

Plaintiffs, however, are estopped from denying the RCA's true nature. Among other things, the proposed order submitted by Plaintiffs ruling on the Motion to Compel Arbitration – which was signed by the circuit court – admitted that "[a]s for the RCA, it is made of cardstock and is a multicolor document that is folded to serve as a document holder for the [Rental Contract]. On the front cover of the RCA, in bold large type appears the title: 'RENTAL CONTRACT ADDENDUM' with the next line stating in bold and slightly smaller type "DOCUMENT HOLDER." A few small lines of text appear next stating: 'Additional Terms and Conditions for Equipment Rental.' . . . The back cover of the folded RCA contains an advertisement for additional services offered by the Defendant. An example of the RCA was introduced into evidence at the hearing as Plaintiffs' Exhibit 3." [AR at pp. 3-4. (All capitals in original; bold and underlining added).] Having admitted the RCA's true nature in their proposed order, which was signed by the court, Plaintiffs are estopped from disputing the RCA's true nature.

Also, on multiple occasions, Plaintiffs offered black and white copies of the RCA that – although of poor quality – generally reproduced all of the RCA's terms. [See AR at pp. 119-120, 569-70.] Finally, Plaintiffs never objected to the authenticity of the various RCAs U-Haul WV offered as evidence in support of the original Motion to Compel Arbitration and during the hearing on the motion to reconsider. [See AR at pp. 64-68, 701-702.]

the Rental Contracts, including obligations regarding the return of equipment. The RCA's front cover has the words "Rental Contract Addendum" at its top in a bold caption as follows:

**RENTAL CONTRACT ADDENDUM
DOCUMENT HOLDER**

Additional Terms and Conditions for EQUIPMENT Rental
Place rental contract documents in this holder & keep available throughout your move.

RETURNING EQUIPMENT

- Call the phone number listed on your contract for the assigned Company location for EQUIPMENT return. Failure to do so may result in additional charges.

EQUIPMENT RETURNS: Equipment returns are accepted during normal business hours. Upon return, the walk-around inspection and rental contract close will be completed.

ESTIMATED CHARGES: Estimated charges will be returned only at the drop-off location during normal business hours.

EZ-FUELSM AGREEMENT:

- Customer must return Truck with fuel and with the same fuel-gauge reading as indicated on the rental contract or pay fuel charges and a service fee as shown and agreed to on the rental contract.

NORMAL BUSINESS HOURS

Mon - Thu: 7:00 a.m. - 7:00 p.m. Sat: 7:00 a.m. - 7:00 p.m.
Fri: 7:00 a.m. - 6:00 p.m. Sun: 9:00 a.m. - 5:00 p.m.

These are normal business hours at corporate stores.
Independent dealer locations hours may vary.

AFTER-HOURS DROP-OFF POLICY:

If you have decided to drop off rental EQUIPMENT after our normal business hours, you must:

1. Park Truck and/or Trailer legally and in accordance with company policy.
You agree that a \$30 service fee may be added to any amounts paid by U-Haul for any parking fines, penalties, moving violations and tow charges not paid directly by customer even if said amounts are later received by U-Haul.
2. Secure all additional rental equipment inside Truck or Trailer with padlock.

3. Customer must return Truck with fuel and with the same fuel-gauge reading as indicated on the rental contract or pay fuel charges and a service fee as shown and agreed to on the rental contract.

4. Place Safemove/Non-Safemove validation tag, Truck keys and padlock key in the key drop.
 - \$50 charge if Truck keys not left in drop box.
5. Keep your copy of the rental contract documents and contact this location during the next business day if you are due any money.

Reminder: The Customer is responsible for all damages and/or missing rental EQUIPMENT, parking fines, penalties, moving violations and towing charges until contract is closed out.

IF YOU ARE NOT PRESENT FOR THE WALK-AROUND INSPECTION / DAMAGE REVIEW, A COMPANY REPRESENTATIVE WILL DO THIS IN YOUR ABSENCE.

DAMAGE POLICY

- Customer will be responsible for any loss or damage to EQUIPMENT and customer's deposit will be applied toward EQUIPMENT damage when optional SafemoveSM/SafemoveSM or Damage Waiver is not purchased.

CLEANING POLICY

- Customer agrees to pay a cleaning fee if the EQUIPMENT is not returned in as clean of a condition as when it was picked up. The determination as to the condition of the EQUIPMENT shall be made by Company.

[AR at pp. 64, 67.] The arbitration provision is as follows:

BINDING ARBITRATION OF DISPUTES:

By agreeing to arbitrate the disputes that are subject to this Agreement, you (the Customer) and Company agree to have all disputes between you decided by an independent and neutral arbitrator.

You are giving up your right to go to court to assert or defend your rights under or in connection with this Agreement (except for matters that may be taken to small claims court). You are entitled to a fair hearing, but the arbitration procedures are simpler and more limited than rules applicable in court. Arbitrator decisions are as enforceable as a court order and are subject to a very limited review by a court. For more information, go to: www.adr.org.

Company hopes that it will not have any disputes with its customers. However, Company acknowledges that some disputes and claims may arise. Company believes it is in the best interest of its customers and Company to resolve any disputes in a forum that provides the fastest and fairest method for resolving them. Arbitration will not limit your rights of recovery by law or statute, including, but not limited to, the right to recover fees and costs.

You hereby acknowledge that the Rental Agreement is between you, the Customer, and Company. You acknowledge and agree that this Agreement shall be governed by the Federal Arbitration Act. You acknowledge and agree that the Agreement consists of all the terms and conditions set forth in the Rental Contract, and Rental Contract Addendum Document Holder. Except as expressly provided herein, you and Company agree to submit any and all claims to this agreement, or the breach hereof (collectively "Claims"), to binding arbitration before the American Arbitration Association ("AAA") in accordance with the Supplementary Procedures for Resolution of Consumer Related Disputes, and judgment may be entered on the award rendered by the arbitrator(s) in any court having jurisdiction thereof. You also agree to submit all Claims you may bring against Company's affiliated corporations to binding arbitration as provided. The arbitrator to be selected by the parties pursuant to the Rules of The American Arbitration Association must be a retired judge of the state trial court. This arbitration requirements does not apply to (a) claims for personal injuries, (b) claims that may be brought in small claims court, or (c) collection actions that may be assigned by Company to a collection agency in the event of your failure to pay Company amounts that may be due under the Agreement.

Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not have authority to award relief for or against anyone other than the parties to this Agreement. If you or Company requires arbitration of a Claim, neither you or Company, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may any such Claim be pursued on your or our behalf in any litigation in any court. Claims, including assigned Claims, of two or more persons may not be joined or consolidated in the same arbitration. The arbitrator may award relief only on an individual (non-class, non-representative). If you or Company submit a request for binding arbitration, your maximum out-of-pocket expenses for the arbitrator and the administrative costs of the AAA will be an amount equal to the civil court filing fee and that Company will pay all of the remaining fees and administrative costs of the arbitrator and the AAA. If a court or the Arbitrator finds any provision of this clause unenforceable, that provision may be served without affecting the agreement to arbitrate.

You agree that no employee of Company or any affiliated company has authority to modify the written terms and conditions of the Agreement, and that any modification of the Agreement may only be in writing signed by you and a Company representative.

This Agreement shall be binding upon your heirs, assigns and representatives.

[AR at pp. 65; 68.]

U-Haul WV's employees and Independent Dealers place paper copies of each customer's one-page Rental Contract into the folded RCA. [AR at pp. 308-09 ¶12.] The RCA

(containing a copy of the Rental Contract) is then handed to each customer either before or at the same time keys are provided to moving equipment. [AR at p. 55 ¶16.]

Procedural History

Plaintiffs filed their Class Action Complaint on August 19, 2011 in the Circuit Court of Kanawha County. [AR at p. 23.] The Complaint alleges that each Plaintiff rented a “motorized truck” and that U-Haul WV added a mandatory “environmental fee” of \$1, \$3 or \$5 to their “bills.” Plaintiffs allege in the aggregate total out-of-pocket damages amounting to \$9. In particular, Stigall alleges he rented a motorized truck on April 25, 2010 and was charged a \$5 fee, Ferrell alleges she rented a motorized truck on November 12, 2009 and was charged a \$3 fee, and Evans alleges she rented a motorized truck on March 2, 2010 and was charged a \$1 fee. [AR at p. 25.] Plaintiffs further allege that U-Haul WV gave each of them the choice of paying an “optional environmental charge” that each of them declined to pay. [AR at pp. 24-25.] Based upon the “optional environmental charge,” Plaintiffs allege that the assessment of a separate “mandatory” environmental fee of \$1, \$3 or \$5 is “deceptive, false and fraudulent.” [See *id.*]

Notably, the Complaint accurately alleges that some Rental Contracts are formed electronically, while others are executed on paper. In particular, the Complaint admits that:

at some of the defendant’s locations [(i.e., those that are U-Haul WV rental centers)], the customer is directed to an electronic terminal where the customer is directed to approve the charges. At that time, certain other options are offered to the customer such as optional liability and contents insurance. The customer can electronically agree to these charges by responding affirmatively to offer on the electronic terminal.

[AR at p. 24 ¶9.] The Complaint also admits that other U-Haul WV rental locations (i.e., Independent Dealers) use pre-printed paper contracts, instead of electronic interactive terminals. [AR at p. 25 ¶12.]

On November 26, 2011, U-Haul WV filed its Motion to Compel Arbitration, its supporting memorandum, and supporting affidavits. [AR at pp. 32-85.] In particular, the first Bowles affidavit discussed U-Haul WV's process for executing Rental Contracts and provided authenticated copies of Stigall's and Evans's Rental Contracts and copies of the RCA that would have been provided to Plaintiffs. [AR at pp. 54-68.] Based on the RCA's arbitration provision, U-Haul WV argued that it was entitled to an order compelling arbitration.

Plaintiffs filed a two-pronged Response on January 9, 2012. [AR at pp. 96-126.] Plaintiffs' first prong argued that the RCA never became a part of their Rental Contracts because it was nothing more than a failed attempt to amend existing one-page Rental Contracts. [AR at pp. 104-106.] The second prong argued that the RCA did not become a part of the Rental Contracts because U-Haul WV's contracting practices are unconscionable. [AR at pp. 99-100; 104-05.] Critically, however, both prongs argued that the RCA was not part of Plaintiffs' Rental Contracts. In addition, Plaintiffs' Response made no effort to controvert or dispute the accuracy of the testimony set forth in the first Bowles affidavit. Likewise, neither the Response nor Plaintiffs' counter-affidavits disputed the accuracy of the first Bowles affidavit or the authenticity of the Stigall and Evans Rental Contracts and the RCAs appended to the affidavit.

U-Haul WV then filed its Reply to the Response on March 2, 2012. [AR at pp. 289-312.] U-Haul WV noted that the existence and applicability of the RCA was a term of the Rental Contracts themselves that was disclosed to, and accepted by, Plaintiffs before they signed their Rental Contracts. [AR at pp. 292-93; 308 ¶7.] As such, U-Haul WV argued that the RCA had been a part of Plaintiffs' Rental Contracts from the beginning because the RCA had been incorporated into the contracts by reference. [AR at pp. 292-95.] Consequently, U-Haul WV argued that Plaintiffs' challenge to the RCA as a whole ran afoul of the severability doctrine and divested the circuit court of the power to consider challenges to arbitration. [AR at pp. 303-05.]

With briefing completed, the circuit court held a hearing on the Motion to Compel Arbitration. [AR at pp. 621-658.] Although U-Haul WV's oral argument remained within the bounds of the memoranda and evidence placed in the record before the hearing, Plaintiffs relied upon new arguments and evidence that had not been previously disclosed to U-Haul WV or the circuit court. In particular, Plaintiffs attacked the validity of the one-page Stigall and Evans Rental Contracts proffered by U-Haul WV. More specifically, Plaintiffs argued that they had not signed one-page paper contracts containing the incorporation by reference language and that they had only signed "electronic box[es]." [AR at pp. 636-639.] In support of these new arguments, Plaintiffs only relied upon an alleged photograph of the "electronic box" and a new affidavit signed by Ferrell. [AR at pp. 636-639.] Neither Stigall nor Evans submitted supplemental affidavits. Ironically, Plaintiffs' new arguments contradicted their Response, their counter-affidavits, and their Complaint.⁴

Despite U-Haul WV's express objection to these new arguments and evidence and its request to submit rebuttal affidavits, the circuit court neither ruled on U-Haul WV's objection nor granted its request to submit rebuttal affidavits following the hearing. [AR at pp. 650-652.] Instead, the circuit court merely directed both sides to submit proposed orders. Thus, U-Haul WV submitted a proposed order, instead of a supplemental affidavit.⁵

On March 27, 2012, the circuit court entered the Arbitration Order, which was the proposed order submitted by Plaintiffs. [AR at pp. 1-13, 13.] The order adopted by the circuit

⁴ Indeed, Plaintiffs' Response memorandum and counter-affidavits not only failed to dispute the authenticity of the Stigall and Evans Rental Contracts, they admitted that the contracts were authentic. [See, e.g., AR at p. 121 (Stigall affidavit: "It was not until after I signed the contract that the U-haul [sic] representative hand [sic] me a folder in which he inserted the contract that I had signed. I thought it was just a folder to hold the contract." (emphasis added)); AR at p. 123 (Ferrell affidavit) (same); AR at p. 125 (Evans affidavit) (same).]

⁵ U-Haul WV's proposed order addressed the new arguments and evidence by holding that they should not be considered because of their lateness. [AR at pp. 314-340; 334-337.] Alternatively, the proposed order held that the new arguments and evidence were insufficient to counter the case made for arbitration by U-Haul WV. [See *id.*]

court admitted that the Rental Contracts “state[] before the signature line[s]: ‘I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum.’” [AR at p. 15.] Nevertheless, the order found that the RCA had not been physically provided to Plaintiffs before they signed their Rental Contracts, which precluded the RCA from being incorporated into the Rental Contracts. As a result, the circuit court held that the RCA was no more than a failed effort to modify the Rental Contracts. [AR at pp. 4; 6.]

As to severability, the order asserted that Plaintiffs had only challenged the RCA’s arbitration provision: “while there are other purported provisions in the [RCA], the plaintiffs do not challenge those provisions.” [AR at p. 11.] As a result, the circuit court held that the severability doctrine did not apply. Thus, the court held that it was not obligated to refer the matter to an arbitrator.

U-Haul WV submitted its motion to reconsider within one month of the order’s issuance. [AR at pp. 355-58; 466-77.] In its motion and supporting memorandum, U-Haul WV argued that the order mischaracterized the evidence and the law regarding the incorporation by reference doctrine. [AR at pp. 467-71.] U-Haul WV further argued that the order ignored principles of law recognizing the enforceability of contracts executed electronically. [AR at pp. 473-75.] Finally, U-Haul WV submitted a third affidavit signed by Jeff Bowles that rebutted the new arguments and evidence relied upon by Plaintiffs at the March 6 hearing. [*Id.* at 481-83.]

Only two days before the hearing on the motion to reconsider, on June 27, 2012, Plaintiffs responded. [AR at pp. 557-571.] Plaintiffs asserted that reconsideration was procedurally improper and, even if appropriate, U-Haul WV’s motion failed to justify a different result. [AR at pp. 561-563.] Finally, Plaintiffs submitted an affidavit signed by Gene Sigman, which implied that the “electronic boxes” used in 2009 did not display contractual terms. [AR at

pp. 565-567; 573-82.] Critically, neither the Complaint nor any other document filed by Plaintiffs before June 27, 2012 made any mention of Sigman.

At the hearing, U-Haul WV submitted to the circuit court a photograph of its standard electronic terminal displaying the language incorporating the RCA by reference that is displayed to U-Haul WV customers. [AR at pp. 700; 665.] The photograph also displayed the “Accept” button that customers must press to assent to the Rental Contracts’ terms. Plaintiffs objected to the exhibit’s admissibility based on an alleged lack of authentication. [AR at p. 665.] In response, U-Haul WV’s lead counsel responded that the person who took the photograph was seated at the counsel table and could readily authenticate the photograph. [AR at p. 666 (“... I have the photographer present who took a photograph of this, if you would like to have him testify with regard to it.”).] Neither the circuit court nor Plaintiffs insisted on evidence of authenticity.

The circuit court denied the motion to reconsider at the end of the hearing. [AR at p. 690.] The court, however, held that proceedings would be stayed for 30 days following the issuance of a written order to enable U-Haul WV to file a petition in this Court. [AR at p. 691-92.] Plaintiffs were directed to submit a proposed order to the circuit court. [AR at p. 690.] Approximately six months later, Plaintiffs submitted their proposed order to the circuit court. [AR at p. 583.] Although U-Haul WV filed an objection [AR at pp. 589-96], the court signed the proposed order [AR at p. 18].

The circuit court’s Reconsideration Order asserted that its power to reconsider the denial of a motion to compel arbitration stems from Rule 54(b) of the West Virginia Rules of Civil Procedure, which implies that Rule 60(b) provides the applicable legal standard. [AR at p. 14.] Further, the order stated that the third Bowles affidavit was not actually new evidence. [AR at p. 16.] Finally, the order relied in part upon the Affidavit of Gene Sigman, even though: (1)

Sigman is a stranger to the litigation; (2) his affidavit testimony consisted of hearsay within hearsay; and (3) U-Haul WV never had an opportunity to challenge Sigman's conclusions. [AR at pp. 16-17.]

SUMMARY OF ARGUMENT

This Court's jurisprudence holds that its original jurisdiction extends to circuit court orders adjudicating arbitration motions. Likewise, the number of opinions issued by this Court reviewing such orders further demonstrates that the review of these orders is well-suited to this Court's original jurisdiction. Here, review is especially compelling given the nature of the circuit court's errors, the prejudice U-Haul WV will likely suffer without immediate review, and the importance (and unsettled nature) of the issues presented.

With respect to the nature of the circuit court's errors, the court's decisions on the incorporation by reference doctrine and the standard of review applicable to motions seeking reconsideration of non-final interlocutory orders clearly and unmistakably ignored this Court's well-established precedent. To the extent arbitration provisions and other contractual terms are routinely incorporated by reference into consumer agreements, it is all but certain that West Virginia courts will be considering these issues with increasing frequency in the future. Moreover, to the extent the United States Supreme Court's recent interpretations of the Federal Arbitration Act are likely to spur renewed interest in arbitration, the issues encompassed within the Petition are likely to arise repeatedly in the future. Finally, the electronic contracts at issue here are quickly supplanting traditional paper-based contracts. The circuit court's orders threaten severe harm to the enforceability of such electronic contracts in West Virginia and run the risk of improperly warping this State's commercial law. Consequently, review of the circuit court's decisions would benefit future litigants and lower courts.

Similarly, the role and application of the severability doctrine in the context of documents incorporated by reference has not been addressed by this Court. Addressing the severability doctrine in this unique context would provide West Virginia litigants with invaluable guidance in navigating the doctrine and avoiding potential pitfalls. Based upon the ever continuing evolution of arbitration case law, these issues are certain to recur in this state.

Based upon the first two questions presented, this Court should hold that Plaintiffs' Rental Contracts incorporated the RCA from their inception. As a result, the Court should find that the parties' Rental Contracts contain the arbitration provision set forth in the RCA. Finally, the Court should find that Plaintiffs improperly attacked the RCA as a whole and in the process violated the severability doctrine. Therefore, this Court should remand this case to the circuit court with instructions to compel arbitration.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 16(d)(6), 18(a), and 20 of the Revised Rules of Appellate Procedure, U-Haul WV respectfully requests oral argument. Even if the Court resolves this Petition through a memorandum decision, oral argument pursuant to Rule 20 is still appropriate given the significance of the questions presented. Although some of the legal issues comprised in this Petition have been the subjects of opinions issued by this Court, these issues have never been considered in the context of consumer arbitration. Moreover, no decision of this Court appears to have addressed the validity and enforceability of electronic contracts.

ARGUMENT

The review of circuit court orders adjudicating arbitration motions falls squarely within this Court's original jurisdiction. Indeed, this Court recently reaffirmed that a "petition for a writ of prohibition is an appropriate method to obtain review by this Court of a circuit

court's decision to deny or compel arbitration." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 729 S.E.2d 808, 814 (2012). With respect to prohibition in general,

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). To the extent the existence of clear error receives substantial weight, the Petition focuses principally upon the circuit court's erroneous decisions. Nevertheless, as noted below, the *Berger* standard's remaining factors also support review by way of prohibition.

I. A writ should issue because the circuit court's orders are clearly erroneous.

This Court should find that the circuit court committed at least three errors that were clearly erroneous as a matter of law. First, this Court should find that the circuit court committed clear error in finding that the RCA was an unsuccessful modification of Plaintiffs' Rental Contracts, as opposed to an integral part of the Rental Contracts from their inception. Second, this Court should find that the circuit court committed clear error in its refusal to apply the severability doctrine. Third, this Court should find that the circuit court's Reconsideration Order is based upon a manifestly erroneous standard of review.

A. The circuit court committed clear error by holding that the RCA was an unsuccessful effort to modify pre-existing Rental Contracts.

In the Arbitration Order, the circuit court held that the RCA was a failed attempt to modify pre-existing Rental Contracts. The circuit court made this holding even though its Arbitration Order admitted that Plaintiffs' Rental Contracts included the following clause: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." [AR at p. 2.] As demonstrated below, the circuit court's holding is inescapably at odds with the evidence and the law.

1. The RCA's applicability was an express term of the Rental Contracts that was expressly disclosed to and accepted by Plaintiffs.

Each one-page Rental Contract set forth the following term directly above each Plaintiff's hand-written signature: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." As a result, each Plaintiff had express notice of the RCA's existence and applicability. Under black letter legal principles, nothing more was required to incorporate the RCA by reference into Plaintiffs' Rental Contracts.

As noted in Professor Williston's treatise, "[w]here a writing refers to another document, that other document . . . becomes constructively a part of the writing, and in that respect **the two form a single instrument.**" Richard A. Lord, 11 Williston on Contracts § 30.25 (4th ed. 2011) (emphasis added). This Court has recognized and applied this principle previously. In *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.*, it was held that:

Nothing in West Virginia . . . law precludes incorporation of prior contract provisions by reference to an earlier contract. . . . In *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 223 S.E.2d 433 (1976), this Court held that "[i]t is a well-recognized principle of law that, even though writings may be separate, they will be construed together and considered to constitute one transaction

when the parties are the same, the subject matter is the same, and the relationship between the documents is clearly apparent.”

Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co., 186 W. Va. 613, 616-17, 413 S.E.2d 670, 673-74 (1992). The following year, this Court applied the same principle: “Under the Federal Arbitration Act, an arbitration agreement can be incorporated into a subcontract by reference in a general contract.” Syl. Pt. 2, *Rashid v. Schenck Construction Co., Inc.*, 190 W. Va. 363, 438 S.E.2d 543 (1993).

Here, U-Haul WV presented the circuit court with uncontroverted evidence that the three elements cited in *Art's Flower Shop* exist with respect to Plaintiffs' Rental Contracts and the RCA. Each Rental Contract clearly identifies that it is between “U-Haul” and the “Customer.” Each Rental Contract also clearly disclosed the existence and applicability of the RCA: “I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum.” With respect to the RCA, as admitted in the circuit court's Arbitration Order, its front cover conspicuously states that it is the “Rental Contract Addendum.” [AR at p. 2; 64, 67.] In addition, the RCA's language clearly manifests its relationship to the Rental Contracts:

These terms and conditions, the terms and conditions of the individual rental contract signed by the Customer, together constitute the entire Agreement (“This Agreement”) for the rental of that equipment identified on the individual rental contract . . . I, the Customer, agree to all terms and conditions of this Agreement.

[AR at pp. 293-94; . 65, 68.] In sum, the *Art's Flower Shop* criteria were proven as to the Rental Contracts and the RCA.

The fact that Plaintiffs did not receive a copy of the RCA before they signed the Rental Contracts alleged in the Complaint is a red herring. The fact remains that the Rental Contracts expressly and undeniably disclosed the existence and applicability of the RCA. The

law requires nothing more. Consequently, the RCA was an enforceable part of the Rental Contracts from their inception. Moreover, the RCA would have become a part of the Rental Contracts even if it had never been provided to Plaintiffs at all. *See Logan & Kanawha Coal Co., LLC*, 841 F. Supp. 2d 955, 960 (S.D. W. Va. 2012) (“the doctrine does not require that the party actually receive the terms to be incorporated” (internal citation omitted)). In a similar case involving comparable facts, the Texas Court of Appeals noted:

The New Account Form, in a statement just above the Account Holders’ signature line, incorporates the Client Agreement by reference, plainly referring to the Client Agreement, which contains a binding arbitration clause. By their signatures, the Account Holders acknowledged that they had received, read, understood, and agreed to abide by the terms and conditions of the Client Agreement. **Even if the Client Agreement was not attached to the New Account Form, and even if the Client Agreement was not signed, the Account Holders were nevertheless on notice that there was a Client Agreement, that it contained a binding arbitration clause, and that it was incorporated into the New Account Form by reference. . . .**

In re Raymond James & Assoc., Inc., 196 S.W.3d 311, 319 (Tex. App. 2006) (emphasis added).

Moreover, in a very similar case, a California federal district court rejected assertions indistinguishable from Plaintiffs’. In that case, the court held that the plaintiff’s assertion “that he either was never given a copy of the folder jacket or was given it after he signed the rental agreement . . . is immaterial because the terms of an incorporated document must only have been easily available to him; they need not have actually been provided.” *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 999 (N.D. Cal. 2012). Moreover, given testimony of U-Haul WV’s president, the circuit court should have found that the RCA was “easily available to” each of the Plaintiffs:

Although copies of the [Addendum] are usually provided to customers after they sign the [Rental Contract], U-Haul of WV has no policy or practice precluding its employees or Independent Dealers from providing customers with copies of the [Addendum]

upon their request **before** they sign the [Rental Contract]. Moreover, U-Haul of WV employees and Independent Dealers are encouraged and required to comply with every reasonable customer request. I have no knowledge of any U-Haul of WV customers being denied copies of the [Addendum] upon their request before the signing of any [Rental Contracts].

[AR at p. 309 ¶15.] As to Stigall and Ferrell, the fact that the RCA was “easily available” is arguably irrelevant given their extensive prior dealings with U-Haul WV. Before the Rental Contracts alleged in the Complaint, Stigall executed at least six Rental Contracts, while Ferrell executed at least three Rental Contracts. [AR at p. 310 ¶¶21-22.] Stigall and Ferrell would have received copies of U-Haul WV’s RCA in the course of each of these prior Rental Contracts.

Finally, and perhaps most importantly, another California federal district court recently rejected arguments virtually identical to Plaintiffs’ in a case involving the same standard form rental contracts and RCA. In that case, a plaintiff, Botorff, sued U-Haul corporate entities affiliated with U-Haul WV on the basis of two rental contracts she had executed with U-Haul WV’s affiliate. The federal court began its analysis by noting that the RCA had been expressly referenced in Botorff’s Rental Contracts. *See Botorff v. Amerco*, No. 2:12-CV-01286-MCE, 2012 WL 6628952 at *1 (E.D. Cal. Dec. 19, 2012) (noting that the RCA had been “referred to in both contracts signed by Plaintiff”). Like Plaintiffs here, Botorff argued that she should not be bound by the RCA’s terms because no one:

. . . provided [her] with the Rental Contract Addendum prior to her signing the rental contracts nor referred [her] to any additional documents. After [she] had signed both contracts and paid the rental fees, UHI’s representative gave [her] an envelope containing multiple papers, including the Rental Contract Addendum, and the keys to the rental truck. UHI’s representative again did not call [her] attention to the additional papers or discuss any terms or conditions in those papers.

Id. (citations omitted). Indeed, Botorff argued that no arbitration agreement existed “because she did not receive the Rental Contract Addendum containing the arbitration clause until after she had signed the rental agreement and paid for her truck.” *Id.* at *3.

After observing that the determinative issue was whether the RCA’s terms had been incorporated by reference, the district court reasoned first that Botorff’s signature indicated “that she had read and understood the terms of the Rental Contracts and the Rental Contract Addendum.” *Id.* at * 4. The district court further reasoned that Botorff could have easily asked to review the RCA before she signed her Rental Contracts. *See id.* Consequently, the district court held “that the arbitration agreement contained in the Rental Contract Addendum was validly incorporated by reference into the rental contracts that Plaintiff signed and thus is enforceable against Plaintiff.”

In sum, the circuit court committed clear error when it failed to find that the RCA had been incorporated by reference into each Plaintiff’s Rental Contract.

2. Plaintiffs’ failure to read the Rental Contracts and the RCA does not allow them to avoid their contractual obligations.

Just this month, this Court reaffirmed that “[a] party to a contract has a duty to read the instrument.” Syl. Pt. 4, *Am. States Ins. Co. v. Surbaugh*, ___ W.Va. ___, ___ S.E.2d ___, No. 11-1186 (Feb. 6, 2013). As noted, Plaintiffs’ signed Rental Contracts that stated: “I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum.” Consequently, neither Plaintiffs’ failure to notice the Rental Contract language expressly referring to the existence and applicability of the RCA nor their failure to request and read the RCA can absolve them from the RCA’s obligations. Finally, the mere fact that the RCA contains an arbitration provision does not change the analysis. *See, e.g., McCaddin v. Se. Marine Inc.*, 567 F. Supp. 2d 373, 383 (E.D.N.Y. 2008).

3. U-Haul WV's use of electronic terminals to execute some contracts does not allow Plaintiffs to avoid the terms of their Rental Contracts.

After filing a memorandum of law and affidavits responding to U-Haul WV's Motion to Compel Arbitration, Plaintiffs argued for the first time at the motion's hearing that the one-page paper Rental Contracts proffered by U-Haul WV were somehow less than reliable. The basis of this argument was a new affidavit signed by Ferrell provided to U-Haul WV and the circuit court at the hearing on the motion. In essence, the second Ferrell affidavit asserted that, rather than signing a one-page pre-printed contract, she had instead signed an "electronic box." [AR at p. 698-699.] The circuit court's Arbitration Order was based, in part, upon Plaintiffs' new arguments and evidence. [AR at pp. 2-3.] In seeking reconsideration, U-Haul WV demonstrated that Plaintiffs' new arguments and evidence were contrary to the law, Plaintiffs' Complaint, Plaintiffs' prior memorandum and affidavits, and the evidence.

According to the motion to reconsider, West Virginia has adopted the Uniform Electronic Transactions Act, W. Va. Code §§ 39A-1-1 *et seq.* ("UETA"). Under the UETA, the term "'Agreement' means the bargain of the parties in fact, as found in their language or inferred from other circumstances . . ." W. Va. Code § 39A-1-2(1). An "'[e]lectronic signature' means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." W. Va. Code § 39A-1-2(8). "A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." W. Va. Code § 39A-1-7(b). Finally, the UETA provides that:

- (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner . . .
- (b) The effect of an electronic record or electronic signature . . . is determined from the context and surrounding circumstances at the time of its creation, execution or adoption . . .

W. Va. Code § 39A-1-9.

As explained to the circuit court, the validity and enforceability of Plaintiffs' Rental Contracts was demonstrated both by the evidence proffered by U-Haul WV and by Plaintiffs' own admissions. [AR at pp. 467-71.] With respect to Plaintiffs' admissions, Ferrell's second affidavit admits that she signed an "electronic box" and was then given a one-page paper Rental Contract that bore a copy of her electronic signature. [AR at p. 698.] Ferrell further admits that an agent of U-Haul WV placed the one-page paper Rental Contract "in a folder/flyer [(i.e., the RCA)] and provided it to her [w]hereupon [she] exited the building and proceeded to drive off in the U-Haul truck." [AR at p. 698.] Notably, Ferrell's affidavit does not claim that the "electronic box" did not disclose contractual terms to her. Nor could she given the admissions in the Complaint that are binding on her. [AR at p. 24 ¶9 ("customer can electronically agree to these charges by responding affirmatively to offer on the electronic terminal.").] Ferrell's admissions are important evidence of "the context and surrounding circumstances" of her Rental Contract and they demonstrate that she is bound to the terms and conditions set out in U-Haul WV's standard Rental Contract, including the terms set forth in the RCA. In other words, Ferrell admitted that she was given a one-page paper Rental Contract that bore a copy of her hand-written signature. Rather than questioning the presence of her signature on this document or the contractual terms directly above it, Ferrell deliberately and *admittedly* "exited the [U-Haul] building and proceeded to drive off in the U-Haul truck." In sum, Ferrell's admissions are compelling evidence of the "the context and surrounding circumstances at the time of [her Rental Contract's] creation, execution or adoption." W. Va. Code § 39A-1-9(b).

Moreover, the only affidavits filed by Stigall and Evans failed to question the enforceability of their Rental Contracts based upon the use of an "electronic box." Indeed, both

admitted that they signed the Rental Contracts submitted to the circuit court by U-Haul WV. More precisely, the following is a partial reproduction of Evans's affidavit:

AFFIDAVIT OF MISTY EVANS

STATE OF WEST VIRGINIA
COUNTY OF WAYNE, to-wit:

The undersigned Misty Evans, being first duly sworn, deposes and states as follows:

1. I am over the age of 18 and a citizen and resident of Wayne County.
2. Prior to signing the truck rental contract I was not provided any fold-out flyer.
3. It was not until after I signed the contract did the U-haul representative hand me a folder in which he inserted the contract that I had signed. I thought it was just a folder to hold the contract.
4. It was not until this lawsuit was brought that I became aware that I was required to arbitrate any claim.


Misty Evans

[AR at pp. 125-126.] Notably, the affidavit signed by Stigall is virtually identical to Evans's affidavit. [AR at pp. 121-122.]⁶

With respect to the Sigman affidavit filed with Plaintiffs' memorandum opposing reconsideration, it fails to disprove or explain any of the admissions made by the Plaintiffs in their affidavits and their Complaint.⁷ Indeed, Sigman is a complete stranger to this litigation. Moreover, in contrast to the facts set forth in the three affidavits signed by Jeff Bowles, Sigman's affidavit is rife with vague conclusory statements that are completely lacking in personal

⁶ Before Ferrell's affidavit mentioning the so-called "electronic box," she executed an affidavit that was submitted in support of Plaintiffs' Response opposing the Motion to Compel Arbitration. Ferrell's earlier affidavit was identical to the affidavits filed by Stigall and Evans. [AR at pp. 123-124.] Ferrell's latter affidavit made no effort to harmonize her contradictory affidavits.

⁷ U-Haul WV previously objected to the Sigman at the June 2012 hearing and in a formal objection to Plaintiffs' proposed order, which became the Reconsideration Order. [See AR at p. 673-674 ("this man is not a plaintiff who has filed this affidavit. We don't know who he is, we don't know anything about him and we got it, what, two days ago? And we don't think it's an appropriate consideration for the Court."); AR at pp. 594-595.]

knowledge. [*Compare* AR at pp. 53-56 (first Bowles Aff.), pp. 307-311 (second Bowles Aff.), pp. 481-483 (third Bowles Aff.); *with* AR at pp. 565-567 (Sigman Aff.).] In addition, the affidavit's conclusory implication that U-Haul WV's electronic terminals did not display contract terms in 2009 ignores that the Complaint alleges that Stigall's and Ferrell's Rental Contracts were executed in 2010 and that contract terms are shown on the terminals.⁸ Lastly, the admissibility of the Sigman affidavit is suspect at best given that the purported facts alleged within it were obtained by a private investigator, hired by Plaintiffs, who engaged in unauthorized conversations with a U-Haul WV employee.⁹ Courts have excluded such evidence in the past and imposed ethical sanctions. *See, e.g., Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003). In sum, Sigman's affidavit is incapable of overcoming Plaintiffs' own admissions.

Finally, although electronically-executed contracts are still new, courts enforce them. With respect to contracts executed over the Internet, a commentator noted:

[C]ourts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998. Essentially, courts have settled on a mechanical approach to determining whether assent was given by simply testing whether the click can be proved. Over time, courts have made it clear that absent fraud or deception, **the user's failure to read, carefully consider, or otherwise recognize the binding effect of clicking "I Agree" will not preclude the court from finding assent to the terms.**

⁸ The Complaint clearly alleges that Stigall's and Ferrell's Rental Contracts occurred in 2010. *See* AR at p. 25. Likewise, the Complaint clearly alleges that the terms and conditions of some Rental Contracts at some rental locations are displayed to, and accepted by, customers using electronic terminals. *See* AR at 24 ("certain other options are offered to the customer . . . The customer can electronically agree to these charges by responding affirmatively to offer on the electronic terminal.").

⁹ U-Haul WV only became aware of Mr. Sigman's status as a private investigator retained by Plaintiffs in January 2013 after Plaintiffs submitted their proposed order. *See* AR at pp. 583-588 ("the Plaintiffs submitted evidence from their investigator which shows that the Defendant updated the electronic boxes used by the Defendant following the transactions that give rise to this case. *See* Affidavit of H.E. 'Gene' Sigman . . ."); AR at p. 673 ("MR. LOVE: Your Honor, we want to object to this as being, first of all, inadmissible and inappropriate. . . . this man is not a plaintiff who has filed this affidavit. We don't know who he is, we don't know anything about him and we got [the Sigman affidavit], what, two days ago?").]

Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 Berkeley Tech. L.J. 577, 579 (2007). Although the U-Haul WV Rental Contracts are not “clickwrap” contracts because they were not executed over the Internet, the evidence produced by U-Haul WV established that U-Haul WV customers whose Rental Contracts are executed electronically are required to click a button indicating that they “Accept” the Rental Contracts’ terms. [AR at p. 482 ¶8.] In particular, all of the contractual terms set forth in the one-page Rental Contract are displayed on U-Haul WV’s interactive terminals one screen at a time until all of the terms have been displayed. [See *id.*] Before a customer may review contractual terms and conditions appearing on a subsequent screen, he or she must press a button on the terminal that is marked “Accept.” [See *id.*]

Finally, Judge Bailey of the Northern District of West Virginia recently enforced an arbitration agreement that was incorporated into an electronically-signed agreement:

During that transaction, Wince accepted the terms of ATTM’s wireless service agreement by signing his name on an electronic signature-capture device. ([Doc. 8] at 2). This service agreement expressly incorporated the “binding arbitration clause” of “AT & T’s current Terms and Conditions Booklet...”

Wince v. Easterbrooke Cellular Corp., 681 F. Supp. 2d 679, 682 (N.D. W. Va. 2010).

In short, the law and the evidence demonstrates that Plaintiffs executed U-Haul WV Rental Contracts that expressly incorporated the RCA by reference, regardless of whether their Rental Contracts were executed electronically or on paper.

B. The circuit court committed clear error by failing to compel arbitration following Plaintiffs’ challenge to the entire RCA.

A circuit court’s power to consider arguments in opposition to a motion to compel arbitration depends upon the defense asserted by a party opposing arbitration. A defense that attacks the validity of a contract – as opposed to an arbitration provision within a contract –

deprives a circuit court of the power to consider objections to arbitration and requires an immediate referral to an arbitrator. This Court recently noted that: “[u]nder the Federal Arbitration Act . . . and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract . . . is a trial court permitted to consider the challenge to the arbitration clause. . . .” Syl. Pt. 4, *State ex rel. Richmond American Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909, 918 (2011). Defenses that rely on broader challenges to the validity of a contract must be decided by arbitrators and are beyond the purview of circuit courts. As explained by this Court,

If a party challenges the enforceability of the entire contract (including the arbitration clause) – that is, the party does not sever the arbitration clause from the rest of the contract and make a “discrete challenge to the validity of the arbitration clause” – then the court is completely deprived of authority and only an arbitrator can assess the validity of the contract, including the validity of the arbitration clause.

Sanders, 717 S.E.2d at 918 (emphasis added).

Here, Plaintiffs’ challenge went far beyond a surgical attack on the RCA’s arbitration provision. Rather, they attacked the validity of every contractual term set forth in the RCA based upon procedural unconscionability. Indeed, the RCA’s arbitration provision is only a small part of the RCA. Given the nature of the incorporation by reference doctrine, Plaintiffs’ challenge to the RCA was nothing less than a challenge to Plaintiffs’ Rental Contracts in their entirety. *See, e.g.*, 11 Williston on Contracts § 30.25 (4th ed. 2011) (“[w]here a writing refers to another document, that other document . . . becomes constructively a part of the writing, and in that respect the two form a single instrument.”).

Significantly, courts considering analogous challenges have recognized that they run afoul of the severability doctrine and must be considered by arbitrators, instead of trial court judges. Indeed, the United States Court of Appeals for the Seventh Circuit recently held that:

This issue, however, is one properly resolved by the arbitrator in the first instance because Gore attacks as unconscionable the entire Alltel Agreement, not just the arbitration clause itself. *See Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 403-04 . . . Because Gore is challenging as procedurally unconscionable the entire Alltel Agreement, not just the arbitration clause itself, we remand this case to the district court to stay the proceedings pending arbitration.

Gore v. Alltel Comm'ns, LLC, 666 F.3d 1027, 1036-37 (7th Cir. 2012). Consequently, to the extent Plaintiffs challenged the entire rental agreement, the circuit court committed clear error by failing to commit that dispute to arbitration.

C. The circuit court clearly erred in applying the wrong standard of review in its Reconsideration Order.

On the first page of the Reconsideration Order, the circuit court began by identifying “the appropriate standard of review” as follows: “[w]hile Rule 54(b) gives this Court the power to amend previous interlocutory rulings, *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 550-51, 584 S.E.2d 176, 184-185 (2003), this power is limited to situations where ‘justice requires’ reconsideration. *Id.* at 551, 584 S.E.2d at 185 (internal quotations omitted).” Similarly, the federal cases quoted and cited by the circuit court further demonstrate that the court applied a standard of review appropriate to orders certified as final under Rule 54(b). Rule 54(b), however, applies to orders that have been certified as “final” orders. Reconsideration of such orders is governed by Rule 60(b) and the standard of review appropriate to final orders. On the other hand, interlocutory orders that have not been certified as final under Rule 54(b) “should not be reviewed under Rule 60(b) of the West Virginia Rules of Civil Procedure.” *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 550-51, 584 S.E.2d 176, 184-85 (2003).

Critically, the Arbitration Order was a non-final order. Indeed, the Arbitration Order did not contain the Rule 54(b) certification necessary to treat it as a final order. Without this certification, the circuit court committed clear error in applying a standard of review only

applicable to final orders. The circuit court's application of the wrong standard of review is critical for at least two reasons.

First, motions to reconsider non-final interlocutory orders are subject to a very liberal standard, as compared to final orders subject to Rule 60(b). As noted by this Court:

Interlocutory orders and judgments are not within the provisions of 60(b), but are left to the plenary power of the court that rendered them to afford such relief from them as justice requires. . . . Such requests do not necessarily fall within any specific . . . Rule. They rely on the inherent power of the rendering . . . court to afford such relief from interlocutory judgments . . . as justice requires . . . Therefore, we agree with the general rule prevailing in the federal system and hold that **as long as a [circuit] court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.**

213 W. Va. at 551, 584 S.E.2d at 185 (internal quotation marks and citations omitted) (emphasis added). Second, according to this Court, the erroneous application of an overly strict standard of review constitutes reversible error: “we conclude that this case must be remanded so that the circuit court may rule on the merits of the motions for reconsideration in light of the broad authority it possesses under its inherent power to revisit interlocutory orders rather than under the limited authority granted it by Rule 60(b) to alter or amend final orders.” 213 W. Va. at 552, 584 S.E.2d at 186.

In sum, the circuit court committed clear error as a matter of law in applying the onerous standard of review applicable to final orders instead of the generous standard applicable to interlocutory orders.

II. U-Haul WV has no other adequate means to obtain the relief it seeks and without immediate review it will suffer prejudice that cannot be corrected by appeal.

This Court has held that a writ of prohibition is appropriate where “both parties would be compelled to go through an expensive, complex trial and appeal from a final judgment”

and where “there is a high likelihood of reversal on appeal.” *State ex rel. Wiseman v. Henning*, 212 W. Va. 128, 132, 569 S.E.2d 204, 208 (2002) (per curiam). In these situations, “[t]he remedy of appeal is usually deemed inadequate . . . and prohibition is therefore allowed.” *Id.* In the context of orders denying motions to compel arbitration, this Court’s prior observations are especially apt. As noted by a federal appeals court:

. . . Arbitration clauses reflect the parties’ preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally return to court to have the award enforced. Immediate appeal . . . helps to cut the loss from duplication.

Bradford-Scott Data Corp., Inc. v. Physician Comp. Network, Inc., 128 F.3d 504, 505-06 (7th Cir. 1997).

The prejudice U-Haul WV would suffer if it is forced to appeal the orders following a trial would be exponentially worse than that suffered by a defendant in a conventional lawsuit. Here, Plaintiffs sue in their own right and as representatives of a putative class. If U-Haul WV is forced to seek review of the Arbitration Order and Reconsideration Order through a traditional appeal, it will first be forced to spend many thousands of dollars opposing Plaintiffs’ efforts to certify a class action. Similarly, U-Haul WV will eventually be confronted with voluminous discovery requests that go well beyond the three Plaintiffs. Being forced to incur these expenses is even more prejudicial given the arbitration provision’s waiver of class action relief and the binding precedent of this Court and of the United States Supreme Court recognizing that class action waivers are enforceable. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010) (per curiam). Finally, the folly of class action treatment is

exacerbated by the fact that no Plaintiff alleges out-of-pocket damages exceeding \$5 and that two Plaintiffs knew of U-Haul WV's contracting practices (and its assessment of an "environmental fee") based on the substantial number of Rental Contracts between them and U-Haul WV that occurred before the transactions alleged in the Complaint.

In sum, in the absence of review through this Petition, U-Haul WV is certain to suffer profound damages and prejudice that cannot be corrected through a conventional appeal.

CONCLUSION

U-Haul WV respectfully prays for the issuance of a writ of prohibition barring the circuit court from enforcing its Arbitration Order and its Reconsideration Order. U-Haul WV further asks that this Court declare that the RCA became a part of each Plaintiff's Rental Contract from their inception. Further, U-Haul WV asks this Court to declare that Plaintiffs violated the severability doctrine and direct the circuit court to refer the matter to an arbitrator.

PETITIONER

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
U-HAUL CO. OF WEST VIRGINIA, a West
Virginia Corporation,

Petitioner,

v.

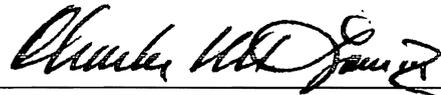
THE HONORABLE PAUL ZAKAIB, JR.,
AMANDA FERRELL, JOHN STIGALL,
AND MISTY EVANS,

Respondents.

Case No. _____
(Kanawha Co. Civil Action No. 11-C-1426)

VERIFICATION

I, Charles M. Love, III, counsel for Petitioners, being duly sworn, depose and say that I have reviewed the foregoing Petition for Writ of Prohibition and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.



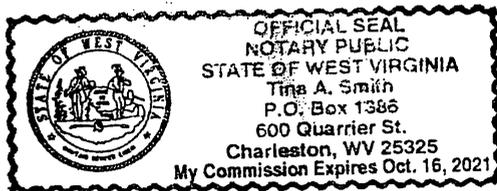
Charles M. Love, III (WVSB #2254)

Taken, subscribed and sworn to before me this 26th day of February, 2013.

My commission expires: 10-16-2021



Notary Public



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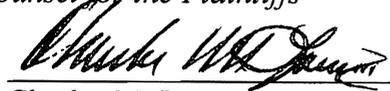
CERTIFICATE OF SERVICE

I, Charles M. Love, III, counsel for Petitioner, do hereby certify that service of the foregoing PETITION FOR A WRIT OF PROHIBITION was made upon all parties, or their counsel of record, by United States mail, postage pre-paid to the following on this 26th day of February, 2013:

Honorable Paul Zakaib Jr.
Judge, 13th Judicial Circuit
Kanawha County Judicial Annex
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Charleston, West Virginia 25301

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