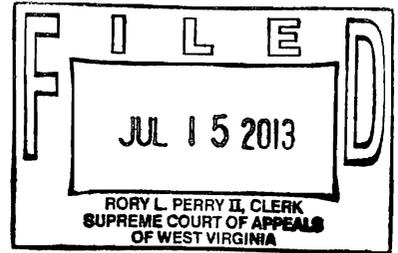


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0379



WAYNE KIRBY and JOYCE KIRBY, Plaintiffs Below, PETITIONERS

VS.

LION ENTERPRISES, Inc. and T/A BASTIAN HOMES, Defendant Below, Respondent.

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PETITIONERS' BRIEF

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West Virginia Code § 55-8-12

### I. ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE ARBITRATION PROVISION WAS “BARGAINED FOR.”
2. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE ARBITRATION PROVISION WAS “FAIRLY NEGOTIATED.”
3. THE CIRCUIT COURT ERRED IN CONCLUDING THAT CLAIMS BY THE PLAINTIFFS ARE WITHIN THE TERMS OF THE ARBITRATION PROVISION.

### II. STATEMENT OF CASE

Plaintiffs entered into a construction contract with Lion Enterprises, Inc. T/A Bastian Homes, the respondent, to build them a new home. The respondent hired a subcontractor, Ed Dwire, doing business as Dwire Plumbing, to do the plumbing work on the new home. Before completion of the new home, the subcontractor was negligent in performing the plumbing work resulting in massive water leak. The water leak substantially damaged major portions of the partially constructed home. The damaged portions had to be removed and replaced at a cost of nearly \$30,000.00. The leak, the removal of the damaged portions, and the replacement of the damaged portions caused a substantial delay in the completion of the new home. Plaintiffs were/ are seeking recovery for the damages done to their realty and damages for annoyance and inconvenience. On February 3, 2012, the plaintiff filed a lawsuit against Lion Enterprises,

T/A Bastian Homes and Ed Dwire, doing business as Dwire Plumbing. Paragraph 9 of the plaintiffs' complaint alleged that "... Ed Dwire ... failed to perform their work in a professional and confident manner. .. "Appendix page 5. Paragraph 10 of the plaintiffs' complaint alleged that "... Ed Dwire ... was negligent in performing the work ... : Appendix page 5. On July 6, 2012, the respondent filed a motion to dismiss the complaint and to compel arbitration. Appendix page 7. On March 15, 2013, the lower court granted Defendant (general contractor), Lion Enterprises, Inc., T/A Bastian Homes' Motion to Dismiss and has compelled arbitration. The court's order has no effect on the plaintiffs' cause of action against the subcontractor, defendant Ed Dwire, a non-party to the contract.

#### I. SUMMARY OF ARGUMENT

The petitioners did not bargain for the arbitration provision in the construction contract they entered into with Lion Enterprises. The arbitration provision was not "fairly negotiated." The claims made by the petitioners do not pertain to the "terms of" of their agreement with the respondent.

#### II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Memorandum Decision without oral argument

#### III. ARGUMENT

Petitioners believe there are three fundamental questions this Court should ask in determining whether it should reverse the Order of the Circuit Court Judge. These questions are:

1. Was arbitration provision "bargained for" by the parties?
2. Was arbitration provision "fairly negotiated" by the parties?
3. Are the claims made by petitioners "pertaining to the terms ..."?

The standard of review in this case is a high standard as stated in Grayiel v. Appalachian Energy Partners 2001–D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012). “This Court will preclude enforcement of a circuit court's order compelling arbitration only after a de novo review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.” Syllabus Point 4, McGraw v. American Tobacco Company, 224 W.Va. 211, 681 S.E.2d 96 (2009).

The Grayiel, supra, also provides the standard for the circuit court in its consideration of defendant's motion. “When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syllabus Point 2, State ex rel. TD Ameritrade v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010).

#### **WAS ARBITRATION PROVISION “BARGAINED FOR” BY THE PARTIES?**

The circuit court correctly stated in Conclusion of Law No. 5 that this Court “emphasized that the importance that the agreement to arbitrate must have “**bargained for.**” Id.” (emphasis added). Appendix page 43. On August 8, 2012, Plaintiff, Wayne Kirby, submitted a sworn statement to the circuit court stating, “I, nor my wife, bargained for the arbitration provision . . .” Appendix page 37. The defendant did not offer anything contrary to plaintiff's sworn statement. There was more than six months from the time the plaintiff filed his affidavit until February 27,

2013, and the date of the filing of the stipulation to issue a decision on defendant's motion without a hearing. Appendix page 2. There was no hearing on the Defendant's motion to dismiss. Appendix page 39. Therefore, the circuit court had only the pleadings, the defendant's motion and the parties' respective memoranda in support of their positions.

This Court stated in syllabus point 3 in Board of Ed. of Berkeley County v. W. Harley Miller, Inc., 236 S.E.2d 439, 160 W.Va. 473 (1977)

It is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

Petitioners note that this Court said, "It is **presumed**. . ." (Emphasis added). Miller, supra.

Petitioners believe the presumption is rebuttable. Petitioners rely on the following statements and reasoning in Miller, supra,

In real life we can envisage arbitration provisions being imposed upon consumers in contract situations where consumers are totally ignorant of the implications of what they are signing, and where consumers bargain away many of the protections which have been secured for them with such difficulty at common law.

Where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, then, arbitration is mandatory,

The important words in the new rule are that the agreement to arbitrate must have been "bargained for." The concurring opinion in the first Miller case, supra, spoke of the traditional contract of adhesion situation in which one party to a contract may be confronted by another party which holds either a monopolistic or oligopolistic position in some particular line of commerce. While this exception would appear to address the most likely avenue for abuse in the law of arbitration, **there are two more** which should be

specifically mentioned. Whenever a party can bring an arbitration clause within the unconscionability provisions of § 2-302 of the Uniform Commercial Code, W.Va. Code, 46-2-302 (1963), then that, too, would indicate that there was no meaningful bargaining with regard to the arbitration provision and should invalidate it. Furthermore, when arbitration is wholly inappropriate, given the nature of the contract, and could only have been intended to defeat just claims, the provision cannot be considered to have been bargained for.

The question of whether an arbitration provision is "bargained for" must, in order to make arbitration workable, always be a matter of law for the court to determine and never a question of fact. Under modern case law in other jurisdictions there is a strong presumption that an arbitration provision is part of the bargain. Therefore in West Virginia **only** if it appears from the four corners of a written contract or from the obvious nature of the contracting parties, or from the obvious nature of the activity covered by the contract, that the arbitration provision is so inconsistent with the other terms of the contract or so oppressive under the circumstances that it could not have been bargained for, should a court refuse to enforce the arbitration provision.

The end result of the rule which we enounce today is that all arbitration provisions in all contracts which indicate that the parties intended to arbitrate their differences rather than litigate them are presumptively binding, Miller, at page 160 W. Va. 486, 236 S.E.2d 447. (Emphasis Added).

Petitioners contend that Miller, supra. has a three-prong approach to guide the circuit courts in considering a motion to compel arbitration. First, was the arbitration provision "bargained for?" It is noted that the presumption is not "strong" in West Virginia. Secondly, even if "bargained for," is the provision procedurally and/or substantively "unconscionable." Lastly, is the "arbitration wholly inappropriate?"

Plaintiff, Wayne Kirby, provided the court with his sworn statement that neither of the plaintiffs bargained for the arbitration provision. Appendix page 37. There is nothing in the record refuting or challenging plaintiff's statement. The circuit court discounted plaintiff's sworn statement in Conclusion of Law No. 13. The court stated that it ". . . is of the opinion that declaratory statements that a contract was not bargained for are insufficient without additional evidence tending to support a foundational claim for procedural or substantive unconscionability. Appendix page 46.

If plaintiff's sworn statement, which was not refuted, nor challenged, is not sufficient to rebut the presumption, what does a party do to rebut the presumption? Petitioners contend that they rebutted the presumption created by this Court and the circuit court was offered no evidence to contradict or challenge plaintiff's sworn statement. Thus the arbitration provision fails the first prong of Miller.

### **WAS ARBITRATION PROVISION "FAIRLY NEGOTIATED" BY THE PARTIES?**

In addition to the circuit court discounting plaintiff's sworn statement, the court also concluded "that the arbitration provision was fairly negotiated . . ." in Conclusion of Law No. 14. (Emphasis added). Appendix page 46. There is absolutely nothing in the record below even suggesting that the arbitration provision was negotiated, fairly or otherwise. Plaintiff's affidavit states, "I raised objection to the arbitration provision with William Burkett of Bastian Homes. I was told not to worry about it because they were bonded." Appendix page 37. There was no fair negotiation. In fact, there was NO negotiation between the parties.

While the petitioners contend there was NO negotiation between the parties, petitioners will assume for argument sake there was "negotiation." In Conclusion of Law No. 16, the circuit court correctly states this Court's refusal to "write a special rule" in State ex rel. Johnson Controls, Inc. v. Tucker, 229 W.Va. 486, 729 S.E.2d 808 (2012). Yet the circuit court wrongly states that this court was "faced with identical circumstances" as in the instant case. Appendix page 47. (Emphasis Added). The circuit court noted, ". . . the contract encompasses two adult and a construction company. . . "Appendix page 47. Johnson Controls, supra. involved Glenmark Holding, an LLC, and seven other business entities, all of whom appear to be sophisticated. In Miller, supra. this Court spoke of arbitration as a condition precedent and use Pettus v. Olga Coal Co., 137 W. Va. 492, 72 S.E.2d 881 (1952) as an example. This Court

stated, “What Pettus really stands for, after the haze of its convoluted legal reasoning has settled, is that where there are **two sophisticated parties**, on the one hand unionized employees and on the other a major coal company, and where the arbitration clause was bargained for and was intended by both parties to provide an effective alternative to litigation, then the courts should require both parties to proceed to arbitration.” Miller, supra. at page 444.

In Conclusion of Law No. 17, the circuit court concluded that the terms arbitration provision “are substantively fair.” Appendix page 47. The circuit court states:

In the contract between Mr. and Mrs. Kirby and Bastian Homes, the arbitration provision provides that the board of arbitrators shall consist of three members: one member chosen by the contractor; one member chosen by the homeowner; and one member chosen by the two designees. The Court finds that the method chosen by the parties in selecting a board of arbitrators is not one-sided and will not have an overly harsh effect on either party.

The “method” was not chosen by the parties. The petitioners were presented with an adhesion contract. Moreover, the arbitration provision provided:

- Each of the board of arbitrators shall be a qualified residential contractor (or a substantially similar classification of arbitrator as maintained by the American Arbitration Association) having an office and/or conducting a primary amount of its work within a reasonable radius of Bastian Home office.

In Conclusion of Law No. 12, the circuit court concluded that the claims of the plaintiff were subject to binding arbitration. Appendix page 45. The circuit courts states:

This court finds that the claims made by the Mr. and Mrs. Kirby against Bastian Homes are subject to binding arbitration. The agreement **clearly and unmistakably** states that if “any disagreement or dispute shall arise pertaining to the **terms** of this agreement, all matters and controversies shall be submitted to a board of arbitrators . . .” The agreement articulates the **parties’ rights and duties as they pertain to the construction of the plaintiffs’ home. Specially, Paragraph 13 sets forth the homeowners right in the event of delay in construction.** (Emphasis Added).

Paragraph 13 of the construction agreement entitled “Delays in Completion of Construction” is completely one-sided. It precludes liability to the contractor and provides a harsh consequence

to homeowners. Moreover, the petitioners have NO RIGHTS under paragraph 13. Paragraph 13 in its entirety provides:

**13. DELAYS IN COMPLETION OF CONSTRUCTION:**

(a) The Contractor **is not responsible** for any delays in construction because of weather, work stoppage by suppliers of materials or labor, unavailability of materials, or any circumstances beyond the Contractor's control.

(b) Any delay caused by Owner(s), **their agents**, or **Owner(s)'s Subcontractors** for over thirty days, without the written consent of Contractor, shall constitute a breach of this agreement. (Emphasis added). Appendix page 13.

The circuit court has wrongly stated, "Specifically, Paragraph 13 sets forth the homeowners' rights in the event of a delay in construction. The paragraph speaks to plaintiffs' potential "wrongs," not "rights."

"A determination of unconscionability must focus on the relative positions of the parties, the adequacy 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). Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 229 W.Va. 382 (2012).

Even a casual reading of the construction agreement between the petitioners and the respondent will reveal that there are no express remedies for the petitioners. On the other hand there are remedies available for the respondent. Paragraph 12, entitled "Contractor's Remedies, not only provides for potential remedies of the respondent, but also, provides for resolution other than by arbitration. Appendix page 13. The construction agreement between the petitioners and the respondent contemplates breach only by the petitioners and remedies only for the respondent. The petitioners contend that the construction agreement is unconscionable under Brown II, supra. Specifically, paragraph 12 of the agreement provides:

In the event of default by the Owner(s) in payment of any amount due to Contractor or a breach of any other provision of this Agreement, Owner(s) do hereby **irrevocably** authorize and empower any attorney or any court to (sic) record . . . to appear for and confess **judgment** against Owner(s), **without notice** to the Owner(s), **for the Contract Price** and all other amounts owed to the Contractor, together with **interest** as the rate of fifteen percent (15%), Contractor's cost of **suit**, and **reasonable attorney fees**. Owner(s) **waive and release all errors of defect of Contractor** in confession judgment if the Owner(s) fail to timely pay or otherwise breach this Agreement. Owner(s) also **waive any benefits to Owner(s)** under any present or future laws **exempting** any real or personal property of Owner(s), or proceeds there from, from attachment, levy or sales as a result of Contractor obtaining **judgment** against Owner(s) for the failure of Owner(s) to **timely make payment** to the Contractor as required to the Contractor as required under this Agreement **or otherwise breaching** this Agreement or laws which provide for stay of execution, exemption from **civil process**, or extension of time for payment. (Emphases Added). Appendix page 13.

Petitioners contend that this provision is not only one-sided, it is also unconscionable. In a worst case scenario, the petitioners would owe an absorbent amount to the respondent. Assuming that the petitioners had paid most of the money owed under the construction agreement, and failed to make a timely payment of money or would otherwise breached the agreement, they would owe the respondent \$179,371.00 (contract price), plus any unpaid amount, fifteen per cent (15%) interest, inter alia. Any amount owing with double in 4.8 years at the rate of fifteen per cent (15%). There is nothing similar inuring to the petitioners in the event of breach by the Contractor, the respondent. In fact, there are no rights, nor remedies provided to the petitioners in the construction agreement. The rights and remedies expressed in the construction agreement between the petitioners and the respondents are not only one-sided, they are unconscionable.

Accordingly, the arbitration provision fails the second prong of Miller, supra.

**ARE THE CLAIMS MADE BY PETITIONERS “PERTAINING TO THE TERMS . . .”?**

Petitioners in their lawsuit make allegation against Ed Dwire, doing business as Dwire Plumbing in paragraphs 9 and 10. See Appendix page 5. There was a single act, the massive water leak that gave rise to Petitioners’ claims.

Paragraph 19 (Arbitration Clause) states in pertinent part:

The parties hereby agree and acknowledge that in the event **any disagreement or dispute shall arise pertaining to the terms of this Agreement**, all matters and controversies shall be submitted to a board of arbitrators . . . (Emphasis Added) Appendix page 14

Petitioners have raised no “disagreement or disputes” that are “pertaining to the terms of the arbitration clause of the construction contract with the respondent. Petitioners’ claims are based on common principles of negligence and delegation of duty. This Court in **Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 468 S.E.2d 712, 196 W.Va. 97 (1996)** “If language in a contract is found to be plain and unambiguous, such language should be applied according to such meaning. Additionally, if there is ambiguity in a contract or a contract term, courts have regularly given the meaning against the party that supplied the contract or the term.

A review of the arbitration language in other cases before this Court would reveal specific language in the respective arbitration provision that is not present in this case.

The language in **Brown I**, supra. was:

Brown I all disputes and disagreements between Facility and Resident (or their respective successors, assigns or representatives) arising out of the enforcement or interpretation of this Agreement **or related hereto** or the services provided by Facility hereunder including, without limitation, allegations by Resident of neglect, abuse or negligence which the Resident and Facility are unable to resolve between themselves shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect (Emphasis Added).

The language in Johnson Controls, supra. was

All claims, disputes and controversies arising out of **or relating** to this contract, or the breach thereof, shall, in lieu of court action, be submitted to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (Emphasis Added).

The language in Richmond, supra, was

Section 21 of those Purchase Agreements the parties had agreed to submit **any claims** to arbitration. (Emphasis Added).

The language in Grayiel, supra. was

Each one of these agreements contained an arbitration clause that, inter alia, stated that both parties were bound to arbitrate their disputes (Emphasis Added).

The language in Miller, supra. was

**All claims, disputes and other matters** in question arising out of, **or relating to this Contract** or the breach thereof, \* \* \* shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof . . . (Emphasis Added).

The language in Credit Acceptance Corp. v. Front (W.Va. June 2013), this Court most recent decision regarding arbitration states:

The Federal Arbitration Act governs this Arbitration Clause. You and we understand and agree that You and we **choose arbitration instead of litigation to resolve Disputes**. You and we voluntarily and knowingly waive any right to a jury trial. . . .

You or we may elect to arbitrate under the rules and procedures of either the National Arbitration Forum or the American Arbitration Association; however in the event of a conflict between these rules and procedures and the provisions of this Arbitration Clause, You and we agree that this Arbitration Clause governs for that specific conflict. You may obtain the rules and procedures, information on fees and costs (including waiver of the fees), and other materials, and may file a claim by contacting the organization of your choice. . . .

It is expressly agreed that this Contract evidences a transaction in interstate commerce.<sup>4</sup> The Arbitration Clause is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ("FAA") and not by any state arbitration law. (Emphasis added).

The lawsuit filed by the petitioners was because of the negligence of defendant Ed Dwire, doing business as Dwire Plumbing. Additionally, petitioners' rights under West Virginia Code § 55-8-12 allows them to sue Ed Dwire, doing business as Dwire Plumbing. The respondent was named as a defendant in the lawsuit even though it had a common law right to delegate its duty to do the plumbing to Ed Dwire, doing business as Dwire Plumbing. However, it remain liable the petitioners for non-performance or for bad performance.

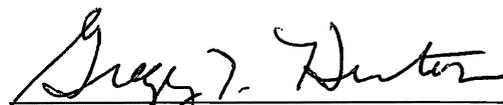
Moreover, the only language related to a "subcontractor" in the construction agreement between the petitioners and the respondent is in section 3 of the agreement. Appendix page 11. The lawsuit filed herein has absolutely no connection with section of the construction agreement between the petitioners and the respondent. The petitioners have a right to Ed Dwire, doing business as Dwire Plumbing, for negligence irrespective of the construction agreement between the petitioners and the respondent.

Additionally, there are rights available to the petitioners under the West Virginia common law that would not be available under the arbitration provision, as provided for in **Jarrett v. E. L. Harper & Son, Inc.**, 235 S.E.2d 362, 160 W.Va. 399 (1977). **Syllabus point three provides** "Annoyance and inconvenience can be considered as elements of proof in measuring damages for loss of use of real property." This element of damages would not be available under the arbitration provisions.

Arbitration is an inappropriate forum for petitioners' claims against Ed Dwire, doing business as Dwire Plumbing. Accordingly, the arbitration provision fails the third prong of Miller, supra.

## CONCLUSION

The petitioners did not bargain for the arbitration provision included in the construction contract they entered into with the respondent, nor was the arbitration provision fairly negotiated. Additionally, the lawsuit arose by the negligence of non-party and do not pertain “to the terms” of the arbitration provision. Moreover, arbitration would be inappropriate to properly resolve the claims made by the petitioners. The arbitration provision between the petitioners and the respondent fails all three prongs of Miller. The March 15, 2013 Order should be reversed.



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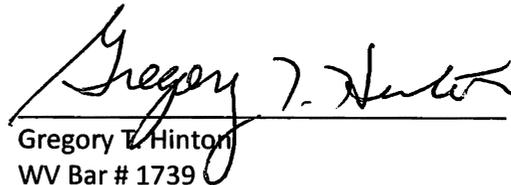
CERTIFICATE OF SERVICE

I certify that I served a copy of Petitioners' Brief on the Defendant Below, Respondent, Lion Enterprises Inc., T/A Bastian Homes, by mailing a true copy thereof to its attorney, Lee R. Demosky, at the following address,

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