

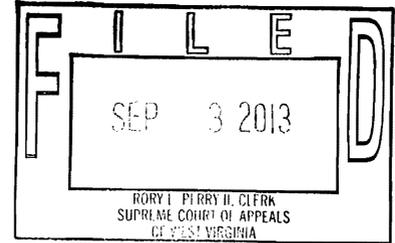
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0379

WAYNE KIRBY and JOYCE KIRBY, Plaintiffs Below, PETITIONERS

VS.

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



PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

Board of Ed. of Berkeley County v. W. Harley Miller, Inc., 236 S.E.2d 439, 160 W.Va. 473 (1977)

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 completed on 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, Inc. T/A Bastain 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

“. . . , in West Virginia there is a **strong presumption** that an arbitration provision is part of the bargain.” (Emphasis Added) Respondent’s Brief Page 4. This is the declaration made by the respondent in its brief. However, this court has stated in Board of Ed. of Berkeley County v. W. Harley Miller, Inc., 236 S.E.2d 439, 160 W.Va. 473 (1977), “Under modern case law in other jurisdictions there is a strong presumption that an arbitration provision is part of the bargain. (Emphasis Added). Petitioners believe there is no strong presumption in West Virginia for arbitration. This Court has talked about a line of cases that disapprove arbitration, as well as a line of cases that “favor” arbitration. “For a good example of this process, see Pettus v. Olga Co. . . .” Miller, Supra. It should be noted that 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.” (Emphasis Added) Miller, *Supra*.

Did the parties the parties **intend to arbitrate their differences**? What are the **differences**, if any between the petitioners and the respondent? As for the massive water leak during the construction, there is no dispute about its occurrence, nor is there a dispute about the damages it caused. Petitioners contend there are no **differences** between them and the respondent to arbitrate. What was going to be arbitrated. The doctrine of *res ipsa loquitur* would apply to the facts surrounding the water leak and its damages. Assuming there are **differences**, did the petitioners intend to arbitrate them with the respondent. In order words was the arbitration provision in the construction agreement bargained for by the petitioners? West Virginia law would answer this question by reviewing:

- The four corners of a written contract, or
- Obvious nature of the contracting parties, or
- 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

Within the four corners of the contract, there is nothing that speaks to rights or benefits inuring to the petitioners. Pages 11 through 14 of the Appendix are the construction agreement. Paragraphs Nos. 1, 2, 3, and 4 speak to the “Agreement to Purchase, Price, Not Included in Price, and Owner(s) must Provide . . .” Appendix page 11. Paragraphs No. 5, 6, 7, 8, 9, and 10 speak to “Adjustment in Contract Price, **Responsibility on Owner(s)**, Basement, Financing Contingency, Deposit, and Contractor’s Payment Schedule. (Emphasis Added) Appendix page 12. Paragraphs Nos. 11, 12, 13, 14, 15, and 16 speak to “Occupancy, **Contractor’s Remedies**, Delays in Completion, Limited Warranty, Location of Home on Lot,

and Presence of Radon Gas. (Emphasis Added). Appendix page 13. Paragraphs Nos. 17, 18, 19, and 20 speak to “Miscellaneous, Changes in Writing, Arbitration, and Governing Law.

Respondent states on page 12 of its brief the following, “With regard to Paragraph 13, contrary to the Kirbys’ claim it gives them no rights at all, the plain language of Paragraph 13 provides the Kirbys with a remedy for delays in construction that **are not** caused by weather, work stoppages, material shortages, or circumstances beyond Bastian Homes’ control.” A review of Paragraph 13 will reveal that Bastian would be absolved of liability in part A and the petitioners would be culpable in part B. There are no rights, nor remedies for the petitioners. However, there is protection for the respondent.

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.

What are natures of the parties? You have contractor (Sophisticated party/Fox) and the home owner(s) (Unsophisticated parties/rabbits).

Is there any inconsistency with other terms of the contract? A review of Paragraph No. 12 will review that the respondent **did not intend** use arbitration as an **exclusive** means of resolving differences between the parties. See below.

In the event of default by . . . or a breach of any other provision of this Agreement, Owner(s) do hereby. .. authorize. . . any attorney or any **court to (sic) record . . .** to appear for and confess judgment against Owner(s), . . Contractor’s cost of **suit**, and **reasonable attorney fees**. . . . in confession judgment . . .**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) . . . 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.

The construction agreement between was not fairly negotiated between the parties. In fact, there were no negotiations. The discussion by the respondent on page 8 of its brief does not amount to negotiation. Black Law Dictionary defines negotiation as “the deliberation, discussion, or conference upon the terms of a proposed agreement, the act of settling or arranging the terms and conditions of a bargain . . .” There were no negotiations between the parties.

There construction agreement and the addenda provide protection and/or benefit to the respondent and potential liability or responsibility to the petitioners. See Appendix page 21 for the insurance requirement. See Appendix Page 11, Paragraph 4 for what the Owner(s) must provide to Contractor. See Appendix page 12, Paragraph 6 for “Responsibility of Owner(s).” The warranty provided in Paragraph 14, Appendix page 13, is limited.

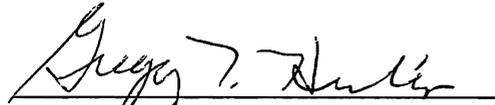
The only time there has been a dispute/difference between the parties was after the filing of the instant law, not before. The obvious dispute/difference is whether petitioners are compelled to arbitrate. If they are compelled to arbitrate what is there to arbitrate?

The arbitration provision is procedurally unconscionable because “Each of the board of arbitrators shall be qualified residential contractor (or a substantially similar classification of arbitrators) . . .” The board of arbitrator would be made of all foxes.

Moreover, this case would not be appropriate for arbitration because the Defendant Dwire has filed a cross-claim against the respondent. See Appendix page 2, item No. 11. Petitioners have the clear right to proceed against the other defendant, who has chosen to file a cross-claim against the respondent.

CONCLUSION

There is no strong presumption for arbitration in West Virginia. The arbitration provision in the instant case was not bargained for. The arbitration provision is unconscionable. The matter before this Court is appropriate for litigation, not arbitration.



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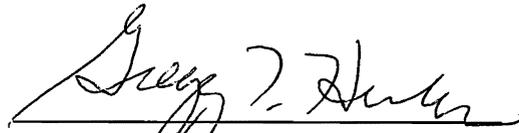
CERTIFICATE OF SERVICE

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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this the 30th day of August, 2013.



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