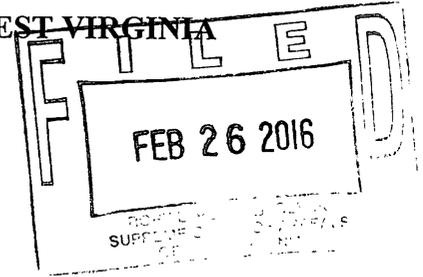


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

G & G BUILDERS, INC.,

Plaintiff Below, Petitioner



v.

CASE NO: 15-0920
(Civil Action No. 14-C-250 Below)

RANDIE GAIL LAWSON and
DEANNA DAWN LAWSON,

Defendants Below, Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

A. Deanna Lawson is Bound by the Terms of the A111 and Incorporated A201, as She Granted Her Husband Authority to Act as Her Agent, and Later Ratified His Conduct.

The Circuit Court clearly erred in determining that Deanna Lawson could not be bound to the arbitration provision as a nonsignatory, as this Court has definitively stated that the law of agency may be utilized to bind a nonsignatory. Deanna Lawson, as a nonsignatory to the AIA A111 at issue here, unequivocally vested her husband, Randie Lawson, with the authority to act as her agent for the purpose of entering into the A111. Mrs. Lawson reaffirmed this authority by permitting G&G employees to enter her land and construct a residence thereon. Accordingly, the Circuit Court's order denying Petitioner's motion to compel arbitration with respect to Deanna Lawson was in error, and should be reversed.

1. The Lawsons' contention that this Court's decision in *Chesapeake Appalachia v. Hickman* did not create new law is patently flawed and should be disregarded.

As a preliminary matter the Lawsons primarily argue, quite erroneously, that this Court's decision in *Chesapeake Appalachia, L.L.C. v. Hickman*, -- S.E.2d --, 2015 WL 7366450 (W.Va., Nov. 18, 2015) did not create any new case law, and is not binding on the instant matter. Clearly, the Lawsons are asking this Court to join them in ignoring two well-established West Virginia legal principles.

"The doctrine of *stare decisis* requires this Court to follow its prior opinions." *W.Va. Dept. of Transp. v. Reed*, 228 W.Va. 716, 724 S.E.2d 320, 323 (2012) (citing *State Farm Mut. Auto Ins. Co. v. Rutherford*, 229 W.Va. 73, 83, 726 S.E.2d 41, 51 (2011)). Further, "signed opinions containing original syllabus points have the highest precedential value because the Court uses original syllabus points to announce new points of law or to change established patterns or practice by the Court." *State v. McKinley*, 234 W.Va. 143, 153, 764 S.E.2d 303, 313 (2014).

This Court unambiguously announced a new point of law in *Chesapeake Appalachia*.

Specifically, contained within Syllabus point 10 of the signed decision, this Court stated:

A signatory to an arbitration agreement cannot require a non-signatory to arbitrate unless the non-signatory is bound under some traditional theory of contract and agency law. The five traditional theories under which a signatory to an arbitration agreement may bind a non-signatory are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *Syl. pt. 10, Chesapeake Appalachia*, 2015 WL 7366450.

The Lawsons' contention that this syllabus point does not create a new point of law is erroneous and ultimately has no bearing on the adjudication of the issues presented within this appeal.

The Lawsons are so firm in their conviction that *Chesapeake Appalachia* is not controlling in this matter that they fail to provide this Court with any guidance or analysis of that decision whatsoever. Rather, they believe that this matter should be determined based upon two federal court cases that were decided long before this Court's decision in *Chesapeake Appalachia*.¹ Essentially, the Lawsons are asserting that a Fourth Circuit case and Northern District case contain a higher precedential value than this Court's own opinions. This position is clearly wrong, and any argument attacking the applicability of *Chesapeake Appalachia*, as well as the accompanying discussion of the unpublished decision in *Dan Ryan Builders, Inc. v. Nelson*, 2014 WL 496775 (N.D.W.Va. Feb. 6, 2014), should be disregarded as irrelevant and contrary to well established West Virginia law.

2. Randie Lawson was acting as Deanna Lawson's agent when he signed the A111, thereby binding Deanna Lawson to the terms contained therein.

While erroneously advocating that *Chesapeake Appalachia* does not contain any new points of law, the Lawsons neglected to refute G&G's argument that Randie Lawson acted as the agent of his wife, Deanna Lawson. They amorphously assert that "without more, the signature of

¹ Specifically, the Lawsons cite *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988) and *Dan Ryan Builders, Inc. v. Nelson*, 2014 WL 469775 (N.D.W.Va., Feb. 6, 2014).

a husband cannot bind his wife.” Resp. Br. at 10. However, as with their inherently flawed argument regarding *Chesapeake Appalachia*, the Lawsons fail to follow well established legal precedent in West Virginia. The actions of the Lawsons prior to and including the contract formation, as well as the subsequent litigation, clearly demonstrate that Deanna Lawson permitted her husband to conduct business in her name, thereby authorizing him as her agent and binding her to the terms of the A111 and A201.

West Virginia law explicitly permits a wife to impute her husband with authority to act as her agent. While a marital relationship, in and of itself, does not create a presumption of agency, a wife may nevertheless grant her husband with the authority to act as her agent. *Lusher v. Sparks*, 146 W.Va. 795, 806, 122 S.E.2d 609, 616 (1961). Importantly, “[a] wife by permitting her husband to do business generally in her name may so hold him out as her agent as impliedly to authorize him to sign her name to notes for which she will be bound.” *Syllabus, Highland v. Ice*, 75 W.Va. 513, 84 S.E. 252 (1915).

The facts surrounding the contract formation, as well as the instant litigation, undeniably demonstrate that Deanna Lawson permitted her husband, Randie Lawson, to conduct business in her name. As stated in G&G’s Brief of Petitioner, Mr. and Mrs. Lawson were jointly identified as the Owner of “#1 Kilgore Creek Rd., Milton WV 25541.” APP000040. When Randie Lawson executed the A111 as the “Owner,” he was acting on behalf and as the agent of Deanna Lawson. Mrs. Lawson reaffirmed this authorization when she permitted employees of G&G to enter her property at #1 Kilgore Creek Road for the purpose of constructing a residence. This reaffirmance undeniably constitutes the “more” that the Lawsons alluded to in their Response Brief.

As long as Mrs. Lawson reaped the benefits of the contract she was perfectly content with Mr. Lawson acting as her agent. However, now that G&G seeks to bind Mrs. Lawson to the terms of the A111, she is asserting that she cannot be bound to the terms thereof. Such an argument, which would allow spouses to sue under a contract but not be sued under the same, is inequitable, unjust, and contrary to the most fundamental laws of contract and agency.

Throughout the entirety of the underlying contract and this litigation, the Lawsons have consistently behaved as though they are each other's agents with respect to the A111. Therefore, Deanna Lawson is as bound to the terms of the Agreement as if she signed the document herself, and is accordingly subject to the properly incorporated arbitration clause.

B. There is No Requirement that the Parties Have Knowledge of the Terms of the Incorporated Document Before Incorporation by Reference Can Occur.

The Respondents blatantly ignore any legal argument or document that supports a position contrary to their own self-interest. There are substantial points of law and arguments that the Respondents do not address in their Response Brief. Accordingly, it appears that Respondents have no argument to counter these points, and believe that Petitioner's brief is exemplary in its discussion of the law. However, to reaffirm these points, Petitioners will briefly note those arguments and laws for which Respondents failed to provide a response.

First, Respondents do not deny that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et. seq.* governs the enforceability of the arbitration provision contained within the A201. Accordingly, Respondents do not refute that the arbitration provision is presumptively valid, and despite an attempt to label the same as unconscionable, have failed to provide any convincing grounds, either at law or in equity, for the revocation of the contract.

Second, while the Lawsons fail to accept *Chesapeake Appalachia* as controlling law, they are apparently willing to submit that this Court's decision in *State ex rel. U-Haul Co. of*

West Virginia v. Zakaib, 232 W.Va. 432, 752 S.E.2d 586 (2013) is controlling. Under *U-Haul*, for a document to properly be incorporated by reference, it must satisfy three criteria:

- 1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable;
- 2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and
- 3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

Syllabus Point 2, *U-Haul*, 752 S.E.2d 586.

Nowhere within their Response do the Respondents refute the fact that the A111 clearly references the A201. Moreover, the Respondents do not dispute the fact that the A111 describes the A201 in terms that sufficiently identify it beyond doubt. Accordingly, the first two of the *U-Haul* factors clearly favor incorporation by reference.

Respondents appear to center their argument on the third *U-Haul* criteria. Specifically, they assert that because Mr. Lawson was not provided a copy of the A201 he cannot possibly be deemed to have knowledge of, or assented to, the same. However, the Respondents did not provide a single case that states an incorporated document must be provided to the signatory at the time of the signing for incorporation to be proper. *U-Haul* and its progeny only require a clear reference, ascertainable identity, and knowledge of the incorporated document. Accordingly, whether or not Mr. Lawson was provided with a copy of the A201 is neither determinative nor persuasive in deciding whether a document was properly incorporated.

Furthermore, the Respondents misread the knowledge requirement contained within *U-Haul*. For a document to be properly incorporated by reference, the parties are only required to have knowledge *of* the document and assent *to* the referenced document. *see* Syll. pt. 2, *U-Haul*,

752 S.E.2d 586. The Respondents are asking this Court to require the parties have knowledge of the *substance* of incorporated document without providing any supporting case law. Accordingly, whether Mr. Lawson had knowledge of the exact terms contained within the A201 is immaterial. It is sufficient that Mr. Lawson had knowledge of the A201 and assented to the same.

Mr. Lawson disputes that he had knowledge of the A201. The explanation underlying Mr. Lawson's purported lack of knowledge is simple: he failed in his duty to read the contract, and is now using that failure to assert that the terms of the contract do not apply to him. It is well established law in West Virginia that "a party to a contract has a duty to read the instrument." Syllabus Point 4, *Am. States Ins. Co. v. Surbaugh*, 231 W.Va. 288, 745 S.E.2d 179 (2013). "Failing to read a [contract]... is not sufficient reason to hold a clear and conspicuous policy provision unenforceable." *Surbaugh*, 745 S.E.2d at 190. The Respondents readily admit that arbitration is a matter of contract; however, they simultaneously assert that a basic principle of contract law, specifically the duty to read, does not apply to their situation.

The Lawsons are asking this Court to incentivize negligence in the execution of a contract. If the Court accepts the Lawsons' argument, the duty to read would be rendered impotent, as any party to a contract would be able to avoid an incorporated document simply by refusing to read the signed contract. This proposition violates a fundamental rule of contract law. Moreover, allowing parties utilizing AIA forms to defeat incorporation by reference by neglecting to read would lead to absurd and chaotic results. In addition to the A201, the A111 incorporates by reference seventeen different sets of construction drawings. APP000050. Permitting the Lawsons to avoid an incorporated document because they neglected to read the

A111 would permit parties to assert that any construction drawing they later wish to avoid was not properly incorporated by reference.

Accordingly, Mr. Lawson should not be permitted to benefit from his failure to read the A111. There is no dispute that Mr. Lawson was provided a copy and an opportunity to read the A111. He has provided no evidence, either in his affidavit or in his response brief, to show that he read the document prior to signing. Therefore, the Lawsons should be bound by the terms of the A111 and deemed to have knowledge of the terms contained therein, including the multiple conspicuous provisions citing the A201.

C. The Lawsons' Contention that G & G Waived Its Right to Arbitration Has No Factual Or Legal Support, and Must Be Rejected.

The Lawsons contend that because Petitioner filed suit in Circuit Court to enforce its mechanic's lien, it waived its right to seek arbitration under its contract. Initially, the Circuit Court did not find that Petitioner had waived its right to seek arbitration based on the suit filed before it. Had it considered that issue, it would have found that the Lawsons failed to provide any factual support to overcome their very heavy burden to prevent arbitration of the dispute between them and Petitioner. This Court should find the same.

As noted previously, arbitration is strongly favored, and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.* 380 F. 3d 200, 204 (4th Cir. 2004) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983)). The party opposing arbitration on the basis of waiver bears a heavy burden. *Patten Grading*, 380 F. 3d at 204 (citing *Microstrategy, Inc. v. Lauricia*, 268 F. 3d 244, 250 (4th Cir. 2001)). Waiver only arises when the party seeking arbitration "so

substantially utilized the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.” *Maxum Founds, Inc. v. Salus Corp.*, 779 F. 2d 974, 981 (4th Cir. 1985).

The Lawsons’ argument in support of waiver is based solely on Petitioner’s filing of a three-count complaint in the Circuit Court of Cabell County, West Virginia. The Lawsons fail to note that Petitioner’s complaint sought enforcement of a mechanic’s lien that it had filed on the Lawsons’ residence on January 27, 2014, in order to get paid the sums owed it by the Lawsons. Pursuant to W. Va. Code §38-2-34, Petitioner was required to file this suit to preserve its right to enforce the lien. This Court has previously noted that the proper procedure for the enforcement of a mechanic’s lien when arbitration is required is to stay the litigation to enforce the mechanic’s lien until such time as arbitration is concluded. *State ex rel Center Designs, Inc. v. Henning*, 201 W. Va. 42, 46, 491 S.E. 2d 42, 46 (1997). This Court has never held that a party filing suit to enforce a mechanic’s lien has waived its right to pursue contractually mandated arbitration.

Further, Petitioner did not “substantially utilize” the litigation machinery in the Circuit Court. The complaint contained two counts against the Lawsons, one to enforce the mechanic’s lien, and a second, alternative count seeking damages for unjust enrichment.² After being served on May 23, 2014, the Lawsons filed their answer, cross-claims and counterclaim on June 13, 2014. Petitioner moved to dismiss the counterclaim and for a stay of the litigation relating to the claims between Petitioner and the Lawsons on July 2, 2014. Docket sheet in C.A. No 14-C-250, APP000150-000151. It took no steps in the Circuit Court to prosecute either Counts I or II of the complaint, seeking instead to have the Lawsons’ counterclaim dismissed for lack of

² Count III of the complaint was against Newtech Systems, Inc., a party that Petitioner had no contractual agreement with and no right or obligation to arbitrate.

subject matter jurisdiction and staying the entire litigation pending arbitration. APP000025-000034. Petitioner did not delay in asserting its rights to arbitration and seeking a stay of the entire litigation; within three weeks it was of record that both Petitioner's and the Lawsons' remedies had to be sought through arbitration.

In *Patten Grading*, the Fourth Circuit Court of Appeals considered the argument that a delay of 4 months by the party seeking arbitration constituted waiver of the right to arbitrate. It held "we have previously concluded that delays of such length, without more, are insufficient to demonstrate a party's waiver of the right to arbitration." *Patten Grading*, 380 F. 3d at 205. It concluded that a delay of four months had not resulted in any delay to the party seeking to avoid arbitration. *Id.* In this matter, the Lawsons knew in three weeks that Petitioner was going to seek to arbitrate the entire dispute between them. The Lawsons were not prejudiced by any delay, and they cannot meet their heavy burden to overcome the requirement to arbitrate their dispute with Petitioner.

Similarly, Petitioner did not take any steps through discovery or motions to prosecute their claims in the Circuit Court. A review of the docket sheet indicates that discovery was only pursued by the Lawsons, and not by Petitioner. APP000150-000151. The most Petitioner did was file fact and expert witness disclosures, as required by the Scheduling Order entered by the Court on September 11, 2014. Otherwise, Petitioner filed responses to discovery served by the Lawsons and sought to bring its motion before the Court.³

The Fourth Circuit in *Patten Grading* also addressed a party's participation in discovery, stating that "a party seeking arbitration will not lose its contractual right by prudently pursuing

³ The Lawsons filed interrogatories and requests for production of documents, to which Petitioner responded on July 28, 2014, making the project files available for inspection by counsel for the Lawsons. The inspection and copying of a large volume of documents occurred in the fall of 2014, and counsel for Petitioner sent a notice of hearing for its Motion to Dismiss on January 11, 2015, setting the hearing for February 13, 2015, which was cancelled due to inclement weather. The motion was ultimately heard on March 20, 2015.

discovery in the face of a court-ordered deadline”. *Patten Grading*, 380 F. 3d 207 (citing *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F. 3d 88 (4th Cir. 1995)). In *Patten Grading*, the parties’ discovery efforts were confined to the exchange of interrogatories and requests for production of documents, which the court noted as “minimal.” The Court took particular note that the parties had not conducted depositions. *Id.* It concluded that the scope of discovery conducted was not sufficient to establish prejudice to the party seeking to avoid arbitration. *Id.*

The current matter aligns with the facts in *Patten Grading*. Petitioner complied with requests for discovery and court-ordered mandates, but took no active steps to use the machinery of the Circuit Court to prosecute its claims. As such, it cannot be found to have waived the right to compel arbitration, and this Court should reject the Lawson’s arguments in that regard.

D. The Arbitration Provision Contained within the A201 is Neither Procedurally nor Substantively Unconscionable. However, to the Extent the Court Believes Respondents’ Argument May Have Merit, This Case Should be Remanded For Further Discovery.

Respondents’ contention that the arbitration provision contained within the A201 is unconscionable is completely without merit. Arbitration clauses can only be deemed unenforceable under state common law principles that are not specific to arbitration. *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 395, 729 S.E.2d 217, 230 (2012). Such clauses are presumptively valid based upon a “liberal federal policy favoring arbitration agreements[.]” *Moses H. Cone Mem’l. Hosp.*, 460 U.S. at 24. In fact, this Court has gone so far as to determine that the exact arbitration provision at issue here is neither procedurally nor substantively unconscionable. *see State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, 729 S.E.2d 808 (2012).

Here, the Lawsons were not given the A111 nor the A201 on a take it or leave it basis. Mr. Lawson was given the opportunity to review the contract prior to signing, and failed to do so. Mr. Lawson cannot claim that the terms were hidden when he made no effort to even review the document he was signing. If that were the case, Mr. Lawson would be able to claim that the entirety of the contract was hidden from him.

To the extent this Court believes Respondent's claim of unconscionability may have some merit, it should remand this action to the Circuit Court for discovery and argumentation regarding the same. *see Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012) (a circuit court's determination of unconscionability involves a fact-intensive analysis); *see also Kirby v. Lion Enterprises, Inc.*, 233 W.Va. 159, 166, 756 S.E.2d 493, 500 (2014) (remanding case for to Circuit Court for factual development and argument of unconscionability claim).

CONCLUSION

Deanna Lawson is bound by the arbitration provision as she granted Mr. Lawson the authority to act as her agent, and ratified his conduct by allowing construction workers onto her property. Further, the identity of the document containing the arbitration provision was readily available to Mr. Lawson had he conformed to his duty to read the contract. His knowledge of the terms contained within the incorporated document, or alleged lack thereof, is immaterial in determining whether the A201 was properly incorporated by reference. The A201 and A111 are industry standard documents that are not overly complex or boilerplate. Moreover, it is not unconscionable to bind the Lawsons to the terms contained within these documents as they were

provided the A111, and chose not to read the documents. Finally, G&G did not waive its right to arbitration, as G&G did not substantially avail itself of the litigation process.

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RANDIE GAIL LAWSON and
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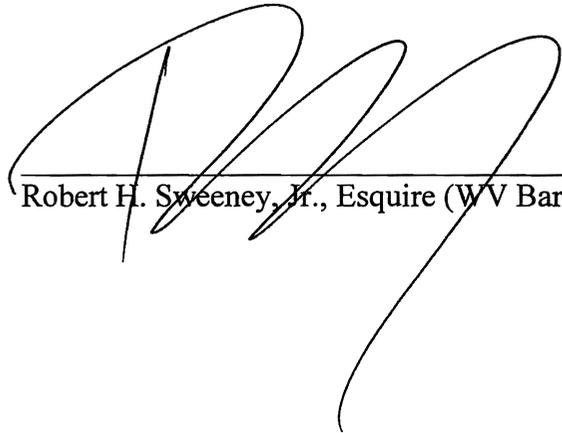
CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing "*Petitioner Reply Brief*" by depositing a true and correct copy thereof, postage prepaid, in the United States Mail, to the following counsel of record on this 26th day of February, 2016.

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