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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**HOME INSPECTIONS
OF VA AND WV, LLC,**
Petitioner

**DO NOT REMOVE
FROM FILE**

v.

Interlocutory Appeal from an
Order of the Circuit Court of
Berkeley County (19-C-237)

JESSE HARDIN,
Respondent

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

ARGUMENT..... 1

- I. The parties’ contract provision, which begins with the bold heading “ARBITRATION” and mandates informal resolution, is clearly an enforceable arbitration provision..... 1
- II. The circuit court erroneously disregarded the contract term “ARBITRATION” because it is a heading. 5
- III. Respondent failed to rebut multiple United States Supreme Court cases recognizing arbitration as an informal means of resolving disputes..... 6
- IV. Respondent did not, and cannot, rebut that a valid, enforceable arbitration provision need not specify any terms or rules for the arbitration proceeding. 7
- V. An overturned and abrogated Nebraska case interpreting a different contract, under a different state’s laws, with completely different terms, between different parties, is irrelevant to the present case. 8
- VI. Respondent’s argument that Petitioner “failed” to challenge the content of his sham affidavit with its own affidavit overlooks the relevant legal issue. 11

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).....	6
<i>Clayton v. Nicely</i> , 116 W. Va. 460, 182 S.E. 569 (1935).....	2
<i>Knights of Columbus Council 3152 v. KFS BD, Inc.</i> , 280 Neb. 904, 791 N.W.2d 317 (2010).....	9
<i>Kramer v. Eagle Eye Home Inspections, Inc.</i> , 14 Neb. App. 691, 716 N.W.2d 749 (2006).....	9
<i>State ex rel. City Holding Co. v. Kaufman</i> , 216 W. Va. 594, 609 S.E.2d 855 (2004).....	1
<i>State ex rel. Frazier & Oxley, L.C. v. Cummings</i> , 212 W.Va. 275, 569 S.E.2d 796 (2002)	1
<i>Tracy Broad. Corp. v. Telemetrix, Inc.</i> , 17 Neb. App. 112, 756 N.W.2d 742 (2008).....	9

Statutes

W. Va. Code § 55-10-13.....	7
-----------------------------	---

Other Authorities

<i>Title-and-Headings Canon, Black's Law Dictionary</i> (11th ed. 2019).....	3
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ARGUMENT

This case is simple. The parties' contract contains a valid, unambiguous, enforceable arbitration provision. Respondent's arguments are lacking and unpersuasive. Petitioner's brief thoroughly explained how the circuit court erred and why the parties' arbitration provision should be enforced. The following reply briefly addresses the most relevant errors and flawed arguments in Respondent's brief.

I. The parties' contract provision, which begins with the bold heading "ARBITRATION" and mandates informal resolution, is clearly an enforceable arbitration provision.

This Court has explained: "Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." Syl. pt. 3, *State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 596, 609 S.E.2d 855, 857 (2004) (quoting syl. pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002)).

There is no such ambiguity in the parties' contract. It requires the parties to arbitrate their disputes in clear, mandatory language:

ARBITRATION: Any dispute concerning the interpretation of this agreement or arising from this inspection and report, except one for inspection fee payment, shall be resolved informally between the parties.

USE BY OTHERS: Client promises Inspector that client has requested this inspection for Client's own use only and will not disclose any part of the inspection report to any other person with these exceptions

ONLY: one copy may be provided to the current seller(s) of the property for their use as part of this transaction only, and one copy may be provided to the real estate agent representing Client and/or bank or other lender for use in Client's transaction only.

ATTORNEYS FEES: The prevailing party in any dispute arising out of this agreement, the inspection, or report(s) shall be awarded all attorney's fees, arbitration and other costs.

SEVERABILITY: Client and inspector agree that should a Court of Competent Jurisdiction determine and declare that any portion of this contract is void, voidable or unenforceable, the remaining provisions and portions shall remain in full force and effect.

DISPUTES: Client understands and agrees that any claim for failure to accurately report the visually discernible conditions at the Subject Property, as limited herein above, shall be made in writing and reported to the inspector within ten business days of discovery. Client further agrees that, with the exception of emergency conditions, Client or Client's agents, employees or independent contractors, will

App. 76.

Respondent argues that, when the arbitration provision's terms are given their plain and ordinary meaning, it "results in inconsistent terms." Resp't's Br. 4. Respondent also argues the word arbitration "is totally inconsistent with the remaining language of that provision." *Id.* In other words, Respondent argues, and the circuit court found, the parties' arbitration provision is too ambiguous to be enforced. This is the lynchpin of Respondent's argument, yet he never explains what the parties' arbitration provision could possibly mean if it is not an "ARBITRATION" provision. Respondent asks the Court to nullify this provision of his contract as though it has no meaning whatsoever, but this Court has consistently held, "[a] contract must be considered as a whole, effect being given, if possible, to all parts of the instrument." *Syl., Clayton v. Nicely*, 116 W. Va. 460, 182 S.E. 569 (1935).

The most relevant portion of the parties' contract provides, "**ARBITRATION:** Any dispute . . . shall be resolved informally between the parties." App. 76. Examining these terms and their common meaning leaves the reader with only one reasonable conclusion: the parties intended to require binding arbitration of all disputes. If not arbitration, what other method of binding, informal dispute resolution did Respondent reasonably intend?

The arbitration provision begins with an emphatic, bold heading: "**ARBITRATION.**" Under the headings' canon, titles and headings are permissible indicators of meaning. *Title-and-Headings Canon, Black's Law Dictionary* (11th ed. 2019). There is no reason to ignore this heading and its obvious meaning.

The arbitration provision broadly encompasses "any dispute." Respondent has never argued his claims would not be subject to arbitration if a valid and enforceable arbitration provision exists.

The arbitration provision is written in mandatory terms: "shall be resolved informally." Inclusion of the term "shall" denotes mandatory compulsion. Importantly, the language "shall be resolved informally," by itself, narrows the dispute resolution methods available to the parties to only one—ARBITRATION. Litigation is not an informal means of dispute

resolution. Informal settlement discussions, mediation, and arbitration are informal means of dispute resolution; however, *only* arbitration provides a binding result.¹ Through informal discussions or mediation, the parties would not be able to comply with their contractual requirement that any dispute “shall be resolved.” Thus, arbitration is the only method which satisfies the parties’ chosen mandatory contract language: “**ARBITRATION**: Any dispute . . . *shall* be resolved *informally* between the parties.” There is no internal inconsistency or alternative meaning, particularly when the bold heading “**ARBITRATION**” is given proper consideration.² Therefore, there is no ambiguity and no reason to refuse to enforce the parties’ arbitration provision.

¹ See discussion *infra* regarding the law’s recognition that arbitration is an informal method of dispute resolution; indeed, it is the only *binding* method of informal dispute resolution.

² On the first page of his brief, Respondent argues: “[C]ontrary to Petitioner’s assertions . . . the word “**ARBITRATION**” does not appear to be in bold script.” Resp. Br. at 1–2. Respondent is simply wrong. By comparing the “**ARBITRATION**” heading to the all-capitalized word “**ONLY**,” which appears five lines below, there can be no question that the word “**ARBITRATION**” appears in bold. If there were still any question, the Court should note Respondent himself bolded the word “**ARBITRATION**” in his response to Petitioner’s motion to dismiss below. App. 164. Moreover, the Circuit Court also bolded the word “**ARBITRATION**” in its Order denying Petitioners’ motion to dismiss. App. 197.

II. The circuit court erroneously disregarded the contract term “**ARBITRATION**” because it is a heading.

In his brief, Respondent claims the circuit court did not excise the term “**ARBITRATION**,” ignore it, or improperly alter the terms of the contract. Resp’t’s Br. 14. The circuit court’s order demonstrates otherwise. *See* App. 197–98. The circuit court found the parties’ arbitration provision “anticipates only that any disputes between the parties ‘shall be resolved informally between the parties.’ Only the heading of the paragraph alludes to arbitration. Nowhere in the above-quoted provision do the parties agree to an ‘arbitration’ of future disputes between them.” App. 197. Further, the circuit court concluded the provision only required any dispute to be “resolved informally between the parties” because finding there exists an enforceable arbitration provision would lead “to an absurd result. To reach such a conclusion, *one would need to look to headings in a contract to form the actual agreement of the parties . . .*” App. 198 (emphasis added). Given this language, it is clear the circuit court disregarded the “**ARBITRATION**” heading in analyzing and construing the arbitration provision.

Respondent’s argument virtually concedes that properly considering the heading “**ARBITRATION**” as part of the provision leads to the inevitable conclusion that it is an arbitration provision. There is simply no support in the law, dating back centuries, for Respondent’s argument that

the heading in this contract should be ignored. Petitioner's brief provided several legal citations demonstrating that it was error for the circuit court to ignore the heading "**ARBITRATION**" when considering the parties' contract. Pet'r's Br. 8–11. Respondent offers no rebuttal to those points—because they are irrefutable—and, instead, simply claims the Court did not excise or ignore the term. "[O]ne would need to look to headings in a contract to form the actual agreement of the parties"; the circuit court's order speaks for itself and illustrates this fundamental error.

III. Respondent failed to rebut multiple United States Supreme Court cases recognizing arbitration as an informal means of resolving disputes.

Petitioner cited five United States Supreme Court cases demonstrating that arbitration is an informal method of resolving disputes. Pet'r's Br. 11–13. Respondent's response is summarized by the following unsupported claim in his brief: "the word 'arbitration' is totally at odds with an informal resolution 'between the parties.'" Resp't's Br. 16. The United States Supreme Court disagrees. Respondent's failure to support his bald claim with *any* legal authority is telling.

The only case Respondent discussed was *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Nothing in Respondent's brief contradicts the point that the Supreme Court has consistently acknowledged arbitration

as an *informal* means of resolving disputes between parties. Instead, Respondent simply relies upon the circuit court's finding that it would lead to an "absurd result" to enforce arbitration where the parties' provision states, "**ARBITRATION**: Any dispute concerning the interpretation of this agreement or arising from this inspection and report . . . shall be resolved informally between the parties." Resp't's Br. 17; App. 76. Respondent has offered no basis in law or logic to conclude that reading the parties' "**ARBITRATION**" provision, in its entirety, and compelling arbitration would lead to an absurd result. Moreover, neither Respondent, nor the circuit court, has explained what, other than "**ARBITRATION**," the parties could have possibly intended by agreeing they "shall" resolve any disputes "informally" when arbitration is the only binding and informal method of dispute resolution.

IV. Respondent did not, and cannot, rebut that a valid, enforceable arbitration provision need not specify any terms or rules for the arbitration proceeding.

Section (B)(ii) of Petitioner's Argument is titled, "[a]rbitration agreements need not include specific terms or processes to be valid and enforceable." *See* Pet'r's Br. 13–15. Respondent's brief failed to address this argument.³ Petitioner cited the FAA, West Virginia Code § 55-10-13, and

³ On page 11 of Respondent's brief, he states, "[t]he circuit court further noted that 'this provision does not include terms such as how are arbiters selected, how many

precedent from this Court and the United States Supreme Court. Respondent cites no law to the contrary. Therefore, this Court should conclude that, although the parties' arbitration agreement is succinct, it is not ambiguous or unenforceable simply because it does not provide the level of detail found in other arbitration provisions.

V. An overturned and abrogated Nebraska case interpreting a different contract, under a different state's laws, with completely different terms, between different parties, is irrelevant to the present case.

Respondent argues the "circuit court looked to language in other cases similar to that in the Inspection Contract here . . . to show that the inclusion of such language in other actual arbitration agreements was only a first step prior to any arbitration of those disputes." Resp't's Br. 12.

Respondent then relies heavily upon a Nebraska case the circuit court also quoted in its order. In Respondent's brief, the provision is inaccurately republished, and the citation is lacking. The provision, as stated in the Nebraska court's order, reads as follows:

arbiters will decide the issue, where arbitration will take place, by what rules and by whose authority and whether or not the arbiters' grant or denial of a reward is binding or appealable. The clause does not say that the informal resolution between the parties would be binding and exclusive of any other remedy." (quoting App. 197). Respondent acknowledged this issue, yet he failed to respond to the legal arguments advanced in Petitioner's brief regarding the same. Thus, Respondent has waived any argument on this issue.

In the event a dispute or claim should arise from the inspection or inspection report, it is agreed that this dispute or claim shall be resolved informally between the parties or by binding Arbitration under the “Construction Industry Arbitration Rules” of the American Arbitration Association, and use as a gauge of performance the “Standards-of-Practice” of the American Society of Home Inspectors (ASHI ®).

Kramer v. Eagle Eye Home Inspections, Inc., 14 Neb. App. 691, 706, 716 N.W.2d 749, 763 (2006), *overruled on other grounds by Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010), and *abrogated by Tracy Broad. Corp. v. Telemetrix, Inc.*, 17 Neb. App. 112, 756 N.W.2d 742 (2008).

Correct citation of this case alone demonstrates that the *Kramer* decision is not reliable authority. It has been overruled and abrogated. But even more fundamentally, a reading of the arbitration provision in that case—that Respondent points out the circuit court considered and relied upon—demonstrates that the **ARBITRATION** provision in the case *sub judice* is distinguishable.

The arbitration provision at issue in *Kramer* read: “[i]n the event a dispute or claim should arise from the inspection or inspection report, it is agreed that this dispute or claim shall be resolved informally between the parties **or** by binding Arbitration” *Id.* (emphasis in bold added).

The provision considered by the *Kramer* court clearly provides two options for resolving disputes—readily noticed by use of the word “or.”

The same is not true for the arbitration provision currently before this Court, which distilled to the most relevant language is abundantly clear:

ARBITRATION: Any dispute . . . shall be resolved informally between the parties.

App. 76. What else does this provision of the parties' contract mean if it does not mean they intended and agreed to arbitrate their disputes? Any other reading would truly lead to an "absurd result."

Comparing the parties' arbitration provision to the purported provision in *Kramer* is akin to comparing apples to oranges. A Nebraska court's decision, which has since been overruled and abrogated, interpreting a completely different provision in a different contract with different parties under a different state's laws, is wholly irrelevant and unnecessary for the issues presented in this case. It is only the arbitration provision at issue in this case that matters. There is no need to go beyond the text of the parties' arbitration provision and West Virginia law. Language used by other parties in different contracts has no bearing on the issue before this Court. Regardless of how specific another arbitration provision may be, what terms it includes, or how it is written is well outside the relevant legal inquiry—does the contract in *this case* contain an enforceable arbitration provision?

VI. Respondent's argument that Petitioner "failed" to challenge the content of his sham affidavit with its own affidavit overlooks the relevant legal issue.

Petitioner did not "fail" to challenge Respondent's affidavit by not filing its own affidavit in support of its motion to dismiss. Petitioner argued that the circuit court should not have considered the affidavit for two reasons: (1) the motion was filed under Rule 12; and (2) the statements in the affidavit are irrelevant to the legal issues. *See* Pet'r's Br. 26–29.

First, Respondent's argument that the circuit court did not need to rule upon the motion to dismiss because it found there was no arbitration provision is flawed. Petitioner filed a motion to dismiss. The basis of that motion was the existence of an arbitration provision in the parties' contract. It defies logic to argue the circuit court found no arbitration provision, so it did not need to rule on the motion to dismiss.

Second, assuming *arguendo* the circuit court *could* consider Respondent's affidavit, its content is not germane to the pertinent issues; accordingly, they should not have been considered. *See* Pet'r's Br. 27–29. Thus, Petitioner had no reason to respond in kind. By relying upon, and including, Respondent's irrelevant statements, the circuit court strayed from its narrow authority to determine whether a valid arbitration agreement

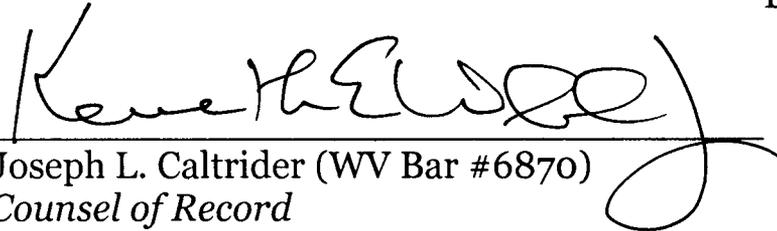
exists and whether the Respondent's claims are subject to the arbitration agreement. Pet'r's Br. 27 (citing Syl. pt. 3, *Schumacher II*).

CONCLUSION

Respondent's brief is devoid of valid legal authority and logical rationale for his argument that the arbitration provision in the parties' contract is ambiguous and unenforceable. There is nothing ambiguous about a contract provision beginning with "**ARBITRATION**" and followed by terms requiring the parties to resolve disputes informally: something that can only be accomplished through arbitration. Respondent fails to offer any alternate interpretation of these terms. No other reasonably logical interpretation exists. Therefore, there is no ambiguity and no reason the parties' arbitration provision should not be enforced. Respondent signed a contract with an unambiguous, enforceable arbitration provision. The Circuit Court erred by finding ambiguity and refusing to enforce the parties' arbitration agreement. This Court should reverse the Circuit Court's erroneous decision and enforce the parties' contract as it was written.

DATED the 27th day of February 2020.

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