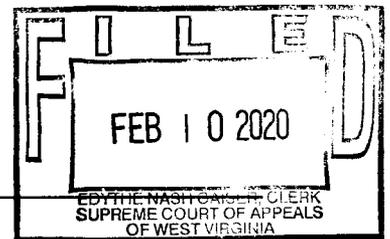


DO NOT REMOVE
FROM FILE

FILE COPY



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0007

State of West Virginia ex rel. TROY Group, Inc., Baris Vural, Georganne Ickler, and Aimee Orum

Petitioners,

v.

The Honorable David J. Sims, Judge of the Circuit Court of Ohio County, and Nakita Willis,

Respondents.

(From the Circuit Court of Ohio County, West Virginia – Civil Action No. 19-C-61)

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Presented by Counsel for Respondent:

Robert C. James, Esquire (WVSB #7651)
Jordan V. Palmer, Esquire (WVSB #12899)
FLAHERTY SENSABAUGH BONASSO PLLC
1225 Market Street
P.O. Box 6545
Wheeling, WV 26003
T: (304) 230-6600
F: (304) 230-6610
rjames@flahertylegal.com
jpalmers@flahertylegal.com

Dated: February 7, 2020

TABLE OF CONTENTS

I.	QUESTION PRESENTED.....	1
II.	STATEMENT OF THE CASE.....	2
III.	SUMMARY OF ARGUMENTS.....	9
IV.	STATEMENT REGARDING ORAL ARGUMENT.....	10
V.	ARGUMENT.....	10
	A. Failure to Meet Standard for Issuance of Writ of Prohibition	11
	B. The Petitioners Have Failed to Articulate a Reason the Circuit Court Should Have Reached a Different Conclusion	12
	1. Circuit Courts May Consider New Evidence Presented to Them When Ruling.....	12
	2. Petitioners Did Not Present an Original Document, Nor Could They Authenticate Their Purported Copy.....	13
	3. There is no Presumption of the Alleged Agreement’s Validity, and Even if Such Presumption Exists, the Record Defeats Such A Presumption	15
	C. The Circuit Court’s December 5, 2019 Order Finding the Purported Agreement was Not Authenticated is Neither an Error Under an Abuse of Discretion Standard Nor Under a de novo Review	17
	1. The Petitioners Have No Evidence to Authenticate the Purported Agreement.....	18
	2. Viewing the Facts in Any Light, There is At Least a Factual Issue Surrounding the Authenticity of the Agreement, Making it Improper to Dismiss This Matter.....	19
	D. Referral to Arbitration Inappropriate at This Time	21
VI.	CONCLUSION.....	21

TABLE OF AUTHORITIES

<u>STATE CASES</u>	<u>PAGE</u>
--------------------	-------------

<i>Burch v. Nedpower Mount Storm, LLC</i> , 220 W. Va. 443, 450, 647 S.E.2d 879, 886 (2007)	1, 19
<i>Chesapeake Appalachia, L.L.C. v. Hickman</i> , 236 W. Va. 421, 444, 781 S.E.2d 198, 221 (2015)	12
<i>Copley v. Mingo Cty. Bd. of Educ.</i> , 195 W.Va. 480, 466 S.E.2d 139 (1995)	1, 19
<i>Employee Res. Grp., LLC v. Collins</i> , No. 18-0007, 2019 WL 2338500 (W. Va. June 3, 2019)	15
<i>State ex rel. Peacher v. Sencindiver</i> , 160 W. Va. 314, 233 S.E.2d 425 (1977)	11
<i>State ex rel. TD Ameritrade, Inc. v. Kaufman</i> , 225 W.Va. 250, 692 S.E.2d 293 (2010)	17
<i>State of West Virginia v. Benny W.</i> , No. 18-0349, 2019 WL 5301942 (Oct. 18, 2019)	11
<i>State v. Jenkins</i> , 195 W. Va. 620, 624, 466 S.E.2d 471, 475 (1995)	11

STATE RULES OF EVIDENCE

West Virginia Rule of Evidence 1001	14
West Virginia Rule of Evidence 1001(d)	14
West Virginia Rule of Evidence 1002	14
West Virginia Rule of Evidence 1003	14, 15
West Virginia Rule of Evidence 1004	14, 15

STATE RULES OF CIVIL PROCEDURE

West Virginia Rule of Civil Procedure 30(b)(7)	4, 5, 6, 18
--	-------------

FEDERAL CASES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 255, 106 S. Ct. 2505 (1986)	17
<i>Versarge v. Twp. of Clinton N.J.</i> , 984 F.2d 1359 (3 rd Cir. 1993)	17

FEDERAL STATUTES

9 U.S.C. Sections 1 – 307 (2006)17

I. QUESTION PRESENTED

Whether the Circuit Court of Ohio County (“Circuit Court”) erred in its December 5, 2019 Order, denying the Petitioners’ *Motion to Dismiss or, in the Alternative, Compel Arbitration*, when there is a clear factual dispute over the authenticity of the purported Mutual Agreement to Arbitrate Claims (“Agreement”), an incomplete record authenticating the document, an evidentiary record impeaching the credibility of the Petitioners’ documents, and affirmative evidence rebutting the authenticity of the document?

Suggested Answer: No. A motion to dismiss may only be granted when a circuit court determines, in viewing the facts in a light most favorable to the nonmoving party, beyond doubt that the nonmoving party can prove no set of facts in support of her claim. *Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 450, 647 S.E.2d 879, 886 (2007) citing Syllabus Point 3, *Copley v. Mingo Cty. Bd. of Educ.*, 195 W.Va. 480, 466 S.E.2d 139 (1995). Here the record reflects that Petitioners failed to fully and properly authenticate the purported Agreement, the integrity and credibility of the Petitioners’ documents were impeached, and there was a record rebutting the authenticity. As such, the Circuit Court committed no abuse of discretion or other error in denying the Petitioners’ Motion.

II. STATEMENT OF THE CASE

The Respondent, Nakita Willis, is an African American woman over sixty (60) years of age and who had worked for TROY Group, Inc., (TROY) for fourteen (14) years where she was recognized as an exceptional employee having received the top sales performance award in 2016 and 2017. (Appendix, p. 000025). In January of 2018, she was promoted to Enterprise Account Manager and was assigned to work under the Petitioner, Baris Vural. (Appendix, p. 000025). It is in relationship to the actions and events occurring around and after assuming this new position in 2018 that she brought the herein lawsuit alleging age and race discrimination, wrongful and retaliatory constructive discharge, a violation of the Wage Payment and Collection Act, and the tort of outrage. (Appendix, pp. 000021-000035).

Pre-suit, the Respondent, Nakita Willis, made a demand on the Petitioners, sent them an advanced copy of the Complaint, and attempted to explore settlement of this case. (Appendix, pp. 000079, 000096 – 000110). Given TROY's current claim that an Arbitration Agreement existed precluding suit, it is worth noting that the Petitioners strangely never raised the existence of a purported Agreement, and/or did not seek to deter suit because of the alleged Agreement. Instead, the Petitioners simply indicated that their attorney could accept service of a complaint, if one was filed. (Appendix, pp. 000079, 000112 – 000114).

Months after receiving a demand and nearly a month after suit was filed, the Petitioners produced, for the first time, a partially unsigned, non-original, fifteen-year-old document entitled Mutual Agreement to Arbitrate Claims, purportedly signed by the Respondent, Nakita Willis. (Appendix pp. 000014-000018, 000079, and 000121). Then after another two months, they decided to file their *Motion to Dismiss, or in the Alternative, Compel Arbitration*. (Appendix 000057-000059).

Because of this sudden and unexpected assertion of such an Agreement, Respondent pressed TROY about the validity of the Agreement, and sought to fully evaluate its authenticity. TROY admitted it did not have the original ink version to make available to the Respondent for inspection.¹ (Appendix p. 000131). After both parties briefed the matter and the Circuit Court heard oral argument, it concluded that since the Respondent had raised, *inter alia*, the issues of authenticity of the document in her Response and having signed an affidavit challenging authenticity, that limited discovery was appropriate. (Appendix pp. 000010, 000092-000093).

As the Petitioners were claiming all employees signed similar agreements to arbitrate, the Petitioners were asked to produce other Mutual Agreements to Arbitrate Claims within a few years before and after the purported at issue Agreement. The Mutual Agreements to Arbitrate Claims in 2006 and in 2007 were signed by TROY's actual Wheeling Human Resource employee who worked from about 2004 through 2008 (Beth Fedorke) or by the Plant Controller, and appeared to be in order. (Supplemental Appendix, pp. 000071-000130). However, TROY's document production revealed that these agreements did not exist in 2003 and were "remarkably" rolled out with the employee hired immediately before the Respondent, Nakita Willis. Respondent was hired in 2004, and there were only four (4) agreements from 2004, but all four (4) agreements from that year are incomplete, and contained irregularities and/or other red flags, particularly when contrasted with all of the clean fully executed agreements from 2006 and 2007, raising the question of when and if this policy was actually implemented.²

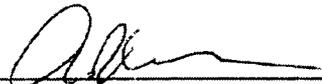
¹ Later deposition testimony would reveal the original was shredded under the direction of TROY and the produced document supposedly came from scanning the original in 2016 and putting it on a server where Director of HR, Ms. Orum, would have exclusive editing privileges to the document. (Aimee Orum Deposition, p. 35; Supplemental Appendix, p. 010).

² TROY maintained it was overly burdensome to produce all of the Mutual Agreements to Arbitrate Claims, so they only produced ones involving the co-defendants and ones from a limited few years around 2004.

The earliest dated Mutual Agreement to Arbitrate Claims produced by TROY and the first one supposedly signed by an employee was from February of 2004. Oddly, the day it was signed by the employee was a Sunday, when TROY would not be expected to be open. (Supplemental Appendix, pp. 059-063). More telling, TROY never signed off on its own agreement the very first time it was supposedly implemented. (Supplemental Appendix, p. 063).

The second agreement to supposedly ever be signed is the one at issue here, and purportedly signed by Respondent, Nakita Willis, in March 2004, which is also unsigned by a representative of TROY and, of course, which Respondent denies signing. (Appendix, p. 018).

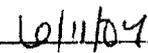
The third agreement supposedly ever signed at TROY was signed in June of 2004, and contains the signature of "Aimee R. Orum," the "Director of HR." The signature lines for TROY from the document itself are as follows:



Signature of Authorized Company Representative



Title of Representative



Date

(Supplemental Appendix, p. 029). Though not apparent on its face, there are irregularities here which were revealed during the deposition of TROY's 30(b)(7) representative, Aimee Orum. Ms. Orum testified that although this is her signature she also confirmed that she was not the "Director of HR" in June 2004; she did not start working for TROY until May 31, 2005; her name was Aimee Olmstead until she got remarried in 2011; and her title was changed to "Director of HR" in 2015 or 2016. (Aimee Orum Deposition, p. 12 – 16; Supplemental Appendix pp. 004-005).

The fourth and final Mutual Agreement to Arbitrate Claims existing in 2004 was purportedly signed in December of 2004, by an employee who denies he ever signed a Mutual Agreement to Arbitrate Claims and who reviewed his personnel file while at TROY and noted that the Mutual Agreement to Arbitrate Claims did not exist in his file as recently as 2018, yet somehow an agreement was produced by TROY in the summer of 2019. (Supplemental Appendix, pp. 064-069).

Through only limited discovery, Respondent determined that the original Agreement no longer existed, that it and other agreements to arbitrate were not fully executed, and it is unclear if the arbitration agreements were actually implemented by TROY in 2004. All of the produced mutual agreements to arbitrate claims from 2004 had serious credibility and authenticity issues. Furthermore, the agreements from 2005 are not signed by a representative of TROY either, except for one falsely filled in by Aimee Orum. (Supplemental Appendix, pp. 030-034). Therefore, Willis sought the deposition of TROY's Rule 30(b)(7) designee and according to the deposition notice the witness was to have, *inter alia*, (a) "knowledge of the circumstances around the purported signature of Nakita Willis being affixed to the Mutual Agreement to Arbitrate" and (b) "knowledge of the policies and procedures of TROY Group, Inc. with regards to having employees sign a Mutual Agreement to Arbitrate." (Supplemental Appendix, pp. 019-020). TROY designated Aimee Orum. Incredibly, when asked about these topics she conceded she had no knowledge of the circumstances of when, where, or how the purported Agreement was presented (if ever) to Respondent. (Aimee Orum deposition p. 29, 30; Supplemental Appendix pp. 008 – 009). She added that typically the company representative was to sign it upon it being executed (important since the purported Willis Agreement and the few other agreements from that time were not signed by a representative). (Aimee Orum Deposition p. 30,

Supplemental Appendix, p. 009). While Aimee Orum testified about company policy on signing such documents, she explained it was an unwritten and/or undocumented company policy. (Aimee Orum Deposition, p. 29; Supplemental Appendix, p. 008). This was problematic as she started work at TROY in May of 2005. Thus, she had no actual knowledge from the relevant time frame of 2004. Since there were no written policies and she did not start work at TROY until over a year after the subject Agreement was purportedly executed she was asked as follows:

Q. In preparation for today's deposition, I do not want to get into any conversations you had with an attorney, but had you seen this list of items [the topics on the Rule 30(b)(7) Notice] to talk about?

A. Yes.

Q. Did you investigate as you felt was necessary so that you could fully address any questions that I have on the six topics?

A. Yes.

Q. As part of that investigation, did you talk to anybody, in particular, outside of counsel?

A. Yes.

Q. Who did you talk to?

A. Our chairman, Patrick Dirk.

Q. Anyone else?

A. Our president, Brian Dirk.

Q. What did you talk about with them?

A. Only advising them that I was to be here today.

Q. Did you talk to anybody in the company to get information that you felt you needed to know to answer any of these – to address questions on any of these six topics?

A. No.

Q. Did you review any documents to prepare?

A. Yes.

Q. What documents did you look at?

A. The arbitration agreement.

Q. Anything else?

A. Yes. Nakita Willis's file, personnel file.

(Aimee Orum Deposition, pp. 7, 8; Supplemental Appendix, p. 003).

TROY designated a Rule 30(b)(7) witness as having knowledge of the noticed topics but had no first-hand knowledge of the circumstances of when or if the Agreement was presented to the Respondent, how it was presented, or what might have been said to the Respondent about the

Agreement. Further, the corporate representative did not and could not actually know the policies TROY had in March 2004 since she did not start at TROY until well over a year later, there were no written policies in existence that she could review, she failed to review any corporate documents, policies, procedures, etc. (outside of Respondent's personnel file), and conducted no meaningful investigation on such matters. (Aimee Orum deposition, pp. 7-8; Supplemental Appendix, p, 003). Thus, the Agreement was not authenticated and there was no policy in effect that would have required the document for employment established.

The corporate representative also testified that the server where the personnel documents were scanned and stored before the originals were all destroyed was a server which provided her exclusive editing access. (Aimee Orum deposition, pp. 18-19; Supplemental Appendix, p, 006). It is further shown that she was the person who exclusively "retrieved" from the server the subject Agreement. (Aimee Orum deposition, pp. 18-19; Supplemental Appendix, p. 006). Given Aimee Orum's questionable testimony, her exclusive access to the scanned Agreement raises serious concerns.

Meanwhile, Respondent maintained and continues to maintain that her signature on the Agreement is not authentic and that she did not sign it. In July 2019, Respondent signed an Affidavit swearing to this fact (Appendix, p. 000129).³ While the Circuit Court allowed discovery about authentication, TROY did not take Respondent's deposition to directly explore her position or otherwise directly challenge her Affidavit. Since she was not deposed and given an opportunity to further explain her initial Affidavit, Respondent signed a second Affidavit elaborating and explaining the reason why she did not believe she had signed the Agreement. In it, she explained that she was very confident she did not sign the Agreement, because in March

³ Discovery revealed that employees were generally not given a copy of the Agreement, affirming part of Respondent's Affidavit. (See Aimee Orum Deposition, p. 30, Supplemental Appendix p. 009).

of 2004, she was being represented by attorney Patrick Cassidy on an unrelated employment matter and thus, had a heightened sensitivity to any employment documents that might affect her rights. (Appendix, pp. 000254 - 000255). Had she actually been given the purported Agreement to sign, she would have been highly alarmed at the prospect of not having access to the court; she would have raised it with her counsel; and she may even have refused the job offer. (Appendix, pp. 000254 - 000255).

Before discovery closed on the issue of arbitration, the Respondent filed a Motion to Strike, seeking to strike Petitioners' designation of confidentiality and to be allowed to make public all the produced arbitration agreements so she would have additional opportunities to potentially further impeach the integrity of TROY's personnel documents. (Appendix, pp. 000134 - 000153). Freedom from the confidential designation could have lead to additional evidence supporting that the policy of forcing employees to sign arbitration agreements did not go back as far as 2004. However, the Circuit Court denied said motion.

Then, based on the foregoing and the additional details contained in the supplemental briefs, Judge Sims issued an Order on December 5, 2019, Denying the Petitioners' motion and stating the following:

Here, significant and troubling questions exist with regard to the authenticity of the agreement produced by the Defendants. The circumstances around the signing (or lack thereof) of the document raises a clear factual dispute. Defendants have dismissed Plaintiff's arguments in this regard and have failed to provide the Court with a clear and cogent explanation for the discrepancies raised. **It is clear that Defendants cannot authenticate the agreement**, particularly given the confusing testimony of Ms. Orum and questions over her access to the document after it was purportedly signed.

(emphasis added) (Appendix, p. 000008).

The Respondent's Response to the *Petitioners' Motion to Dismiss, or in the Alternative, Compel Arbitration* addressed a number of other reasons that the Petitioners' Motion should be

denied. But the Court ruled exclusively on the Petitioners' inability to authenticate the document, and it is solely out of this discretionary decision that the Petitioners' bring this Writ.

III. SUMMARY OF ARGUMENT

This Court should not grant the Writ of Prohibition seeking to overturn the Circuit Court of Ohio County's December 5, 2019, Order Denying Petitioners' Motion to Dismiss or in the Alternative, Compel Arbitration.

As an initial matter, the Petitioners have not met the standard for the issuance of a Writ of Prohibition. The core legal issue here is that authenticating of a document is to be reviewed on an "abuse of discretion "standard," however, a Writ of Prohibition cannot be predicated on such a standard and as such the Petition must be summarily dismissed.

Second, the Petitioners have failed to articulate a reason the Circuit Court could and should have reached a different conclusion. Again, the substantive issue is authentication, and the Petitioners have offered no explanation as to how the purported Agreement can be authenticated. They first criticized the Circuit Court for considering documents that the Circuit Court in a prior ruling on a collateral issue said were not relevant; but with the added record the Circuit Court eventually reviewed and the current record making clear that the documents have relevance, the Petitioners cite no authority as to why the subject documents should not have and could not have been considered. In addition, the Petitioners did not present an original document, nor could they authenticate a copy. Finally, while they argue a presumption for authentication, they cite to no legal authority under West Virginia law and simply reference a Memorandum Decision by this Court which was applying Kentucky law and is readily distinguishable to the herein matter.

Finally, it is clear from the record that the Petitioners did not authenticate the purported Agreement. Even if there were some presumption of authenticity, TROY's credibility and documents were adequately impeached. Finally, the Respondent, has thoroughly and adequately denied and provided explanation for her denial of the authenticity of the document. And clearly, no court can determine there is not a factual dispute more than sufficient to support denying a Motion to Dismiss.

For these reasons as more specifically set forth in the "Argument" Section, Petitioners' Petition for Writ of Prohibition should be denied. Judge Sims did not make any errors of law or abuse his discretion.

IV. STATEMENT REGARDING ORAL ARGUMENT

To the extent this Court has further questions, concerns, and/or has leanings towards adopting a novel legal position, Respondent welcomes oral argument. Nevertheless, Respondent respectfully submits the Denial of the Petitioners' Motion to Dismiss is based on clear legal precedent and thus, there are no novel legal or other dispositive issues not authoritatively decided and that the facts and arguments are adequately covered in the briefs and as such is not particularly requesting oral argument.

V. ARGUMENT

This Court should not grant the Petitioners' Petition for Writ of Prohibition seeking to bar enforcement of the Circuit Court of Ohio County's December 5, 2019, Order Denying Petitioners' Motion to Dismiss or, in the alternative, Compel Arbitration. The Circuit Court simply made a finding that a non-original, partially unsigned, purportedly fifteen-year old document coming from a party whose credibility was impeached and who got caught falsifying documents was not authenticated. The Circuit Court acted well within its rights, its decision was

not an abuse of discretion, and particularly under the factual circumstances did not constitute an error as a matter of law.

A. Failure to Meet Standard for Issuance of Writ of Prohibition.

Petitioners note in their Petition the following:

“In Syllabus Point 2 of *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977), this Court explained that “[a] writ of prohibition **will not issue to prevent a simple abuse of discretion by a trial court**. It will only issue where the trial court having no jurisdiction or has such jurisdiction exceeds its legitimate powers.”

(Emphasis added, Petitioners’ Brief p. 7).

Here, the Petitioners came before the Circuit Court with a non-original document which they purported to bind the Respondent to arbitration. There were multiple controversies surrounding the Agreement itself, and as detailed *infra* the Petitioners were never able to sufficiently authenticate the document in the Circuit Court’s opinion. Because of these compounding flaws, the Circuit Court essentially found that the Petitioners failed to make an adequate showing of authenticity “sufficient to enable a reasonable juror [to] find in favor of authenticity.” *State v. Jenkins*, 195 W. Va. 620, 624, 466 S.E.2d 471, 475 (1995). Specifically, Judge Sims concluded that with regards to the document, “[I]t is clear that Defendants cannot authenticate the agreement...” (Appendix p. 000008).

It is well founded law that, “a trial court’s ruling on authenticity of evidence will not be disturbed on appeal unless there has been abuse of discretion.” *State of West Virginia v. Benny W.*, No. 18-0349, 2019 WL 5301942 (Oct. 18, 2019).⁴

⁴ While the Petitioners do not clearly articulate the standard, the Petitioners seem to be conceding that an abuse of discretion standard applies here as they defined the Question Presented stating, “[That] question is whether the Respondent Circuit Court of Ohio County (“Circuit Court”) **abused** or exceeded its legitimate powers by denying Petitioners ... Motion to Dismiss ... in its Order entered December 5, 2019.” (Emphases added; Petitioners’ Petition, Question Presented, p. 1, Paragraph 1).

Therefore, as a preliminary matter, since the ruling by the lower court is to be reviewed on an abuse of discretion standard and a Petition for a Writ of Prohibition cannot be predicated on a review of a ruling whose standard for review is abuse of discretion, the Petitioner's Petition must be summarily dismissed.

B. The Petitioners Have Failed to Articulate a Reason the Circuit Court Should Have Reached a Different Conclusion.

The Petitioners posture their entire argument based on the presupposition that the alleged Agreement is presumed valid. This misses the point. The substance of the arbitration agreements is presumed valid, but the validity of the actual underlying document is not presumed. *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 444, 781 S.E.2d 198, 221 (2015). Here, the Petitioners have failed to clear the very first hurdle – authentication – that allows a finder of fact to even consider a document. There is no explanation in their entire “Argument” section as to why the Circuit Court should have considered the Agreement sufficiently authenticated.

The Petitioners make only three (3) arguments as to why the Circuit Court's opinion was erroneous. These arguments each fail, but more importantly, even if this Court were to determine the Petitioners were correct on each point, they still failed to demonstrate why the Circuit Court should have ruled in their favor or how a different conclusion should have been reached.

1. Circuit Courts May Consider New Evidence Presented to Them When Ruling.

The Petitioners argue that the Circuit Court erred in considering evidence which it had refused to consider in a prior unrelated order (i.e. the Motion to Strike).

In taking part in discovery, Respondent determined that all four of TROY's supposed earliest arbitration agreements contained irregularities undermining their potential authenticity

and found two (2) agreements falsified by TROY's representative. Respondent sought to further discover the circumstances surrounding these agreements but was arguably restricted from taking part in certain discussions under the outstanding Protective Order. The Respondent asked the Circuit Court to strike the protective designation of the other arbitration agreements, but the Circuit Court denied this motion, finding in part, that only Respondent's alleged Agreement is "relevant in this matter." Petitioners have overzealously latched on to this language to claim the Circuit Court erred in later considering the other documents. Petitioners are overstating the importance of this single line from an unrelated order and have taken it out of context.

It is now clear that at the time it issued its ruling, the Circuit Court did not appreciate the gravity of the evidence of potential fraud, which undermines the credibility of TROY's position and undercuts the authenticity of TROY's documents. The documents had relevance and the Circuit Court was free to consider it.⁵ The Petitioners are asking this Court to determine that it was clear error for the Circuit Court to be so bold as to consider new evidence presented to it and not be hamstrung by prior rulings or dicta in light of this new evidence. Such a position is not valid, and the Petitioners have cited no law to support this position. As such, the Court properly considered the evidence and argument presented in its Order.

2. Petitioners Did Not Present an Original Document, Nor Could They Authenticate Their Purported Copy.

The Petitioners argue that no original document is required to validate an arbitration agreement. The Respondent does not dispute that an original is not *always* required to enforce a contract. But, the party putting forward the document must authenticate it, and the Petitioners' argument on this point does not explain why the Circuit Court should have ruled differently.

⁵ The other arbitration agreements are relevant as they relate to confirming and/or rebutting policy claims by TROY and they are relevant as they show TROY's documents and representative lack integrity.

While the Trial Court's Order does not appear to be based on West Virginia Rule of Evidence 1002 (and the surrounding Rules 1001 through 1004), the Rule does provide further support that the Petitioners' Motion should have been denied. Rule 1002 of the West Virginia Rule of Evidence states, "An original writing, recording, or photograph is required in order to prove its content, unless these rules or state statute provides otherwise." Rule 1001(d) states:

An "original" of a writing or recording means the writing or recording itself or any copy or counterpart intended to have the same effect by the person who executed it. For electronically stored information, "original" means any printout – or other output readable by sight – if it accurately reflects the information....

Despite the Petitioners apparent attempts to conflate the two, we are not dealing with a printout of electronic information. We are dealing with a physical written document that was then supposedly scanned to an electronic copy. Strictly applying Rule 1002, TROY does need the original "wet ink" document. But exceptions to this Rule exist: Rule 1003 does allow a duplicate in place of the original, "unless a genuine question is raised about the original's authenticity," and Rule 1004 does allow for duplicates provided the proponent is not "acting in bad faith."

Respondent respectfully submits there are clear and genuine questions raised about the authenticity of the original Agreement and the chain of production for any duplicates. Here, the uncontested facts are that: (1) the employee is not given a copy of what they sign; (2) the documents were scanned onto a server in which editing privileges to the documents existed; (3) TROY gave its local Wheeling Human Resource person, Ms. Orum, exclusive power without supervision to edit the documents; and (4) TROY then proceeded to destroy all originals. (Aimee Orum Deposition, pp. 7, 8, 18, 19; Supplemental Appendix pp. 003, 006). This situation clearly opens the door for fraud and the evidence supports such potential fraud. The lack of any

apparent checks on this system to ensure the integrity of the documents, after destroying originals, opens the door to potential bad faith.

Moreover, Rules 1003 and 1004 still do not lift the burden on the Petitioners to authenticate the duplicates. Their Petition fails to explain how it was authenticated; and the record is replete with evidence that it is not authentic. The Petitioners cite two (2) cases which discuss the right to electronically contract and the Petition references the acceptance of electronic signatures. However, this is not a matter involving an electronic signature. These arguments are red herrings and inapplicable to these circumstances. Here, the Petitioners have a copy of a document which they cannot authenticate, and which does not sufficiently meet the exceptions for not producing an original under the Rules of Evidence.

3. There is no Presumption of the Alleged Agreement's Validity, and Even if Such Presumption Exists, the Record Defeats Such a Presumption.

The Petitioner argues for a presumption that a signature is valid but cites no authority under West Virginia law for such a presumption. The best authority they can find is to refer to a memorandum decision applying Kentucky law, which does not control in this matter. *Employee Res. Grp., LLC. v. Collins*, No. 18-0007, 2019 WL 2338500 (W.Va. June 3, 2019)

Moreover, the facts in this case are readily distinguishable from *Employee Res. Grp. LLC. v. Collins*. For one, the defendant actually deposed the employee and impeached the employee's credibility as the employee apparently denied providing a I-9, a copy of her driver's license and a W-4, all of which the employer was then able to produce to impeach the employee's testimony. Here, Respondent was not deposed and her denial and/or her credibility was not impeached through a deposition. Moreover, the employer (Employee Resource Group, LLC) had an extensive electronic signing system that included various checks to ensure all documents were signed by the employee and/or electronically accepted by the employee. Such

nearly fool-proof systems were not in place for the herein matter by TROY. In fact, Aimee Orum was supposed to be able to testify about the circumstances of the supposed signing by Respondent but could not. (Aimee Orum Deposition, pp. 29, 30; Supplemental Appendix, pp. 008-009). Aimee Orum did not even have knowledge of the situation or of policies from that time. (Aimee Orum Deposition, pp. 29, 30; Supplemental Appendix, pp. 008-009). Finally, Kentucky law included a statute that limited what could be denied and enforcing electronic scenarios. The facts and law here are both completely different.

Meanwhile, Petitioners claim that because they have a non-original, not fully executed document with a signature that they contend is the Respondent's, they should be entitled to a presumption that it is valid. And they claim, with no legal authority, that burden be solely placed on Respondent to prove that it is not her signature (which she has nonetheless effectively done).

Respondent maintains that her signature on the Agreement is not authentic and that she did not sign it. In July 2019, Respondent signed an Affidavit swearing to this fact (Appendix, p. 000129).⁶ TROY did not take the Respondent's deposition to directly explore her claim or otherwise challenge it. Had the Respondent been deposed, she would have explained the reason why she did not believe she had signed the Agreement. She was very confident it was not signed by her because in March of 2004, she was being represented by counsel on an employment matter in court and thus, had an extremely heightened sensitivity to any employment documents that might affect her rights. (Appendix, pp. 000254 - 000255). Had she actually been given the purported Agreement to sign, she would have been highly alarmed at the prospect of not having access to the court; she would have raised it with her counsel; and, she may even have refused the job offer. (Appendix, pp. 000254 - 000255). Of course, she contends she did not raise it with

⁶ Discovery revealed that employees were generally not given a copy of the Agreement, affirming part of Respondent's Affidavit. (Aimee Orum Deposition, p. 30, Supplemental Appendix, p. 009).

her attorney at the time because she never actually saw it or signed it. (Appendix, pp. 000254 – 000255).

There is no presumption favoring the Petitioners on this point, and no deposition taken of Respondent attempting to impeach her regarding her denial of her signature on the purported Agreement.

C. The Circuit Court’s December 5, 2019 Order Finding the Purported Agreement was Not Authenticated is Neither an Error Under an Abuse of Discretion Standard nor Under a de novo Review.

This Court has held that when it comes to assessing arbitration, that:

[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 the arbitration agreement.

Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

In addition to the court having to make a preliminary finding of whether an authentic agreement actually exists, in a Motion to Compel Arbitration on issues involving a factual dispute, the court must consider all of the non-moving party’s evidence and construe all reasonable inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505 (1986); *Versarge v. Twp. of Clinton N.J.*, 984 F.2d 1359, (3rd Cir. 1993).

Here the purported Agreement was not adequately authenticated and to the extent TROY attempted to authenticate it, TROY and its witness were impeached on such efforts, while Respondent, who denied the authenticity of the document did not have her testimony directly challenged and was not impeached.

1. The Petitioners Have No Evidence to Authenticate the Purported Agreement.

The Petitioners have never successfully provided evidence to authenticate the purported Agreement. They were given the chance to finally provide sufficient evidence to overcome their burden to provide *prima facie* authentication to allow a jury to weigh the credibility of the Agreement, but they failed at this opportunity.

TROY's Rule 30(b)(7) Corporate Designee, Aimee Orum, was required to have, *inter alia*, (a) "knowledge of the circumstances around the purported signature of Nakita Willis being affixed to the Mutual Agreement to Arbitrate" and (b) "knowledge of the policies and procedures of TROY Group, Inc. with regards to having employees sign a Mutual Agreement to Arbitrate." However, she had no first-hand knowledge of the circumstances of when the Agreement was presented (if ever) to Respondent, how it was presented (if it was even presented), or what might have been said to Respondent about the Agreement. (Aimee Orum Deposition, pp. 29, 30; Supplemental Appendix, pp. 008-009). Aimee Orum did not actually know the policies TROY had in effect in March of 2004 since she did not start at TROY until well over a year later; there were no written policies in existence that she could review; she failed to review any corporate documents, policies, procedures, etc. outside of Respondent's personnel file; and she conducted no meaningful investigation on such matters as she only talked with two people and even then the conversation was limited to simply notifying them she would be testifying – she did not discuss substantive issues with them. (Aimee Orum Deposition, pp. 7-8, 29; Supplemental Appendix, pp. 003-006). It was the Petitioner's burden to present *prima facie* evidence sufficient to allow a jury to consider the validity of the Agreement, but TROY failed to present sufficient testimony or evidence to overcome this hurdle. As such, Judge Sims had a reasonable basis to write, "It is clear that Defendants cannot authenticate the agreement." **The Petitioners' entire**

Petition never claims how or why the Agreement should be considered sufficiently authenticated to move forward.

2. Viewing the Facts in Any Light, There is At Least a Factual Issue Surrounding the Authenticity of the Agreement, Making it Improper to Dismiss This Matter.

A Motion to Dismiss may only be granted when a circuit court determines, in viewing the facts in a light most favorable to the nonmoving party, beyond a doubt that the nonmoving party can prove no set of facts in support of his or claim. *Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 450, 647 S.E.2d 879, 886 (2007) citing Syllabus Point 3, *Copley v. Mingo Cty. Bd. of Educ.*, 195 W.Va. 480, 466 S.E.2d 139 (1995).

The factual record is clear that the Petitioners cannot authenticate the Agreement. But even if the Petitioners could make the *prima facie* showing of authenticity, the record is still replete of factual issues which would require evaluation by the finder-of-fact.

Weighing the evidence, the scales very much tip in Respondent's favor that the Agreement is not authentic based on the following:

- Respondent denies she signed the Agreement (Appendix, pp. 254, 255; See also Appendix pp. 000092, 000093, 000129);
- Respondent's background story of having an employment lawyer working with her at the time adds credibility to her belief that she would not have signed the Agreement and asking her to sign such a document would have been a memorable stressful event (Appendix, pp. 254, 255);
- TROY's own admissions agree and affirm aspects of Respondent's initial Affidavit, further enhancing its veracity (Appendix, p. 000129; Supplemental Appendix p. 009);
- TROY has not challenged Respondent's Affidavit by taking her deposition when afforded the opportunity to do so and as such there is no record to impute her testimony;
- TROY failed to produce the original wet-ink version of the Agreement purported to be signed by Respondent (Appendix, p. 000131);

- The Agreement was never signed by TROY (a signature by someone at TROY would have provided everyone with a witness who could confirm whether and when they signed it and Respondent had signed it as a possible basis to authenticate the document) (Appendix, p. 000018);
- TROY had a policy of generally not giving its employees copies of what they signed, a position that allows them to potentially subsequently alter documents without anyone coming forward with a copy to refute TROY's version (this Court will appreciate the most ethical practice is to give someone a copy of what they sign) (Supplemental Appendix, p. 009);
- The Petitioners produced falsely executed documents in discovery that undermine the credibility of all of their documents (Supplemental Appendix, pp. 004, 005, 007, 009, 029 – 034, and 043; Appendix 000008);
- TROY produced two documents it knew or should have known were falsely filled in (Supplemental Appendix, pp. 004, 005, 007, 009, 029 – 034, and 043; Appendix 000008);
- When afforded an opportunity to correct the record and concede the inaccurate filling in of two documents, TROY's representative instead offered an incredible and unbelievable explanation for the irregularities contained on the documents of TROY (Aimee Orum deposition pp. 10, 24-26; Supplemental Appendix pp. 004, 007 - 008);
- TROY's representative refused to acknowledge the documents were falsely filled in (Aimee Orum deposition pp. 10, 24-26; Supplemental Appendix pp. 004, 007 - 008);
- TROY's representative did not work in 2004 for TROY and did not have the knowledge to address issues from 2004 and did not talk with anyone having direct knowledge of events in 2004 and did not review policies from 2004, as there were no written policies, yet testified about what occurred in 2004 (Aimee Orum deposition pp. 7, 8, 13, 30; Supplemental Appendix pp. 003, 004, 009); and
- TROY cannot show that the chain of custody of the subject Agreement remained in the hands of people with integrity (in fact, the entire chain of custody essentially consists of Aimee Orum, who has been caught falsely filling out agreements and who would not be candid about it during her deposition) (Aimee Orum deposition pp. 18-19; Supplemental Appendix pp. 006).

Judge Sims had a solid record to determine that the Petitioners cannot and did not adequately authenticate the Agreement. Given these factual issues it would be a miscarriage of justice to dismiss these claims and never allow a jury to sort out the facts.

D. Referral to Arbitration Inappropriate at This Time.

The Petitioners have requested that this Court find that the Circuit Court erred in denying the Petitioners' Motion to Dismiss or, in the Alternative, Compel Arbitration and appear to ask that this matter be sent to arbitration. To the extent this Court accepts the arguments of the Petitioners, an order directing the dismissal of this matter is not appropriate. The Respondent had raised other issues, including waiver, lack of consideration, and estoppel, which the Circuit Court did not address or need to address, given its findings on authentication of the underlying purported Agreement. (Appendix, pp. 000001-000009, 0000078-0000133, and 000235-000267). Thus, if this Court finds the Agreement was authenticated, it should remand the case for further evaluation by the Circuit Court regarding the other issues raised by the Respondent.

CONCLUSION

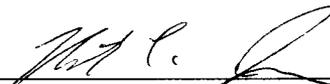
Based on the foregoing, the Circuit Court did not commit an error or exceed its powers. As such the Respondent requests that the Petition for Writ of Prohibition be denied. The Respondent further submits that a Rule to Show Cause and/or a Stay to the proceedings in the Circuit Court of Ohio County, West Virginia not be issued. The Respondent requests that this matter be dismissed and remanded back to the Circuit Court upholding the Circuit Court's December 5, 2019, Order.

Submitted this 7th day of February, 2020.

Respectfully submitted,

NAKITA WILLIS,

By Counsel


Robert C. James, Esquire (WV 7651)
Jordan V. Palmer, Esquire (WV 12899)
FLAHERTY SENSABAUGH BONASSO PLLC
1225 Market Street

P.O. Box 6545
Wheeling, WV 26003
T: (304) 230-6600
F: (304) 230-6610
rjames@flahertylegal.com
jpalmmer@flahertylegal.com