No. 13-0181 – *State of West Virginia ex rel. U-Haul Co. of West Virginia, a West Virginia Corporation v. The Honorable Paul Zakaib, Jr., Amanda Ferrell, John Stigall, and Misty Evans*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Justice Ketchum, dissenting:

I respectfully dissent. The majority opinion, although well reasoned, fails to consider several West Virginia statutes which would have led to a different outcome in this case. A fair reading of these statutes requires that the plaintiffs' lawsuit be resolved in arbitration.

These statutes, which were not applied by the circuit court, are in Article 2A of the Uniform Commercial Code ("the UCC"), titled the "Uniform Commercial Code – Leases."[1] This article of the Uniform Commercial Code "applies to any transaction, regardless of form, that creates a lease."[2] By "lease," the Legislature meant "a transfer of the right to possession and use of goods for a term in return for consideration."[3]

The plaintiffs' rental of U-Haul's equipment was a "lease" governed by Article 2A of the UCC. The terms of the lease agreement between the plaintiffs and U-

[1] *W.Va. Code*, § 46-2A-101 to -532.

[2] *W.Va. Code*, § 46-2A-102 [1996]. The official comment to *W.Va. Code*, § 46-2A-102 says that Article 2A was designed to govern "transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi-national organization for a number of years."

[3] *W.Va. Code*, § 46-2A-103(j) [2006]. This statute was amended to make some stylistic changes in 2012, but no changes were made to subsection (j).

Haul should, therefore, have been addressed by the parties and the circuit court under Article 2A. The UCC states that a "lease agreement" has the following meaning (with emphasis added):

> "Lease agreement" means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or *by implication from other circumstances including course of dealing* or usage of trade or course of performance as provided in this article. . . .[4]

Plainly, the Legislature intended that a lease agreement may include not just the explicit terms of the writing signed by the parties, but also includes the parties' "course of dealing," that is, the sequence of conduct between the parties previous to the agreement. The parties' course of dealing may be regarded as establishing a common basis of understanding for interpreting the lease. The UCC offers the following definition of "course of dealing":

> A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is *fairly to be regarded as establishing a common basis of understanding* for interpreting their expressions and other conduct.[5]

The circuit court in this case found that the plaintiffs were not bound by the arbitration provision in the U-Haul Addendum because the circuit court found there was

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[4] *W.Va. Code*, § 46-2A-103(k) [2006] (emphasis added). *W.Va. Code*, § 46-2A-106 [1996] imposes limitations on the applicable law and judicial forums that can be chosen by the parties to a consumer lease, but the Official Comment to the statute makes clear that "this section does not limit selection of a nonjudicial forum, such as arbitration."

[5] *W.Va. Code*, § 46-1-303(b) [2006] (emphasis added).

nothing in the record to show each plaintiff had knowledge of, and assented to, U-Haul's arbitration provision when they signed the Rental Contract. The plaintiffs argue that, as a company policy, U-Haul never presented, discussed, or noted the arbitration clause to its customers before the Rental Contract was signed. The plaintiffs therefore contend that a typical U-Haul customer signing a Rental Contract would never know they had agreed to arbitrate any disputes until *after* they had reviewed and agreed to the Rental Contract. If I relied solely on this presentation of the facts by the plaintiffs, at first blush the circuit court's reasoning would seem to be sound.

But the substantial record reveals additional facts beyond those cited by the plaintiffs that the circuit court clearly did not consider, and which misinformed the circuit court's construction of the parties' agreement. The record shows that these three plaintiffs did not make isolated, sporadic, or one-time transactions, but rather had an established "course of dealing" with U-Haul. The three plaintiffs had repeatedly signed agreements with U-Haul, and repeatedly received copies of U-Haul's Addendum. For example, one plaintiff signed Rental Contracts and received copies of the Addendum at least eleven times before filing the underlying lawsuit. Another plaintiff signed the Rental Contract and received the Addendum at least four times.[6] On this record, I cannot

[6] The remaining plaintiff, Ms. Evans, brought suit alleging she was defrauded out of $1.00 in a transaction with U-Haul, yet even she returned to U-Haul, signed another Rental Contract and received another copy of the Addendum two months before the underlying lawsuit was filed in circuit court. Of the three plaintiffs, only her circumstances come close to a "course of dealing" under the UCC which would negate application of the arbitration provision in the Addendum. However, in light of the way the case was structured by plaintiff's counsel, and my review of the extensive record, I believe Ms. Evans also formed an agreement to arbitrate her disputes with U-Haul.

in good conscience countenance the circuit court's finding that the plaintiffs were oblivious to the existence, let alone the contents, of the U-Haul Addendum.

I firmly believe that "an agreement to arbitrate must be clear and direct, and must not depend upon implication, inveiglement or subtlety. . . . [It's] existence . . . should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet."[7] But as the unique facts of this case have been presented to this Court, I believe that the circuit court exceeded its jurisdiction. The sequence of conduct concerning previous transactions between the plaintiffs and U-Haul established that the plaintiffs each received multiple copies of the Addendum and the arbitration provision. The Rental Contract makes a clear reference to the Addendum, and even if the identity of the Addendum was vague in the first transaction between the parties, the numerous subsequent transactions would have allowed the plaintiffs to ascertain the identity and contents of the Addendum beyond doubt. Their course of conduct should fairly be regarded as establishing a common basis for understanding the parties' agreement.

It was therefore inconsistent for the circuit court to find the plaintiffs had absolutely no knowledge of the Addendum's existence or the terms of the arbitration provision, without violating the fundamental rule that "[a] party to a contract has a duty

[7] *Application of Doughboy Indus., Inc.*, 17 A.D.2d 216, 220, 233 N.Y.S.2d 488, 493 (N.Y. App. Div. 1962)

to read the instrument."[8] U-Haul has, in my judgment of the record, established that the agreement with the plaintiffs fairly incorporated an arbitration provision. A writ of prohibition is therefore warranted, and the majority opinion was wrong to deny the writ.

In addition, I believe this case is significantly flawed going forward. The plaintiffs in their complaint have asked the trial court to certify a class action. Under Rule 23(a) of the *Rules of Civil Procedure*, the plaintiffs bear the burden of establishing four prerequisites: numerosity, commonality, typicality, and adequacy of representation. Based on the record submitted to this Court, I do not believe these plaintiffs are capable of showing commonality.

We defined "commonality" in Syllabus Point 11 of *In re W.Va. Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003):

> The "commonality" requirement of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* [1998] requires that the party seeking class certification show that "there are questions of law or fact common to the class." A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of "commonality" is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members.

I do not see any evidence of commonality between these three plaintiffs and the members of their proposed class. Some of the plaintiffs or class members may have read the arbitration agreement they received, and others may not have read it. The U-

[8] Syllabus Point 4, *Am. States Ins. Co. v. Surbaugh*, 231 W.Va. 288, 745 S.E.2d 179 (2013) (quoting Syllabus Point 5, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986)).

Haul agent may have explained the agreement to some plaintiffs or class members but not others. Some plaintiffs or class members may have been educated and understood and accepted the arbitration process, while others may have been illiterate. Some plaintiffs or class members may have seen the arbitration clause and chosen to disregard it totally, while others may have never noticed that the Addendum contained supplemental contract terms.

In sum, I believe that these three plaintiffs present three unique, uncommon questions of law and fact. To determine the application of the arbitration clause to each plaintiff would require individualized assessment of each plaintiff's particular facts – and likewise, an individualized assessment of each potential class member's situation. Even under the majority opinion's enlightened discussion of contract law, some plaintiffs and some class members knowingly agreed to arbitration, and their cases should be heard there and not in circuit court. I therefore think that, going forward, the circuit court should give weight to the fact that these three plaintiffs cannot establish commonality under Rule 23.