IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No.: 18-0579

DAN RYAN BUILDERS, INC., DAN RYAN BUILDERS REALTY, INC., DRB ENTERPRISES, INC., MONOCACY HOME MORTGAGE, LLC, CHRISTOPHER RUSCH and CRYSTAL RANKIN,

Defendants Below, Petitioners,

v.

FRANK M. WILLIAMS, and DIANA P. WILLIAMS, et al.,

Plaintiffs Below, Respondents.

(On Appeal from Circuit Court of Harrison County, West Virginia, The Honorable Christopher J. McCarthy, Civil Action No. 09-C-57-1)

PETITIONERS' BRIEF

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I. The circuit court erred in concluding without sufficient evidentiary support that an arbitration agreement within a cohesive agreement for the construction and sale of real property was an unconscionable contract of adhesion.

II. The circuit court's ruling that the subject arbitration agreements were unconscionable and therefore unenforceable is directly at odds with current decisional law.

II. STATEMENT OF THE CASE

A. INTRODUCTION AND PROCEDURAL HISTORY

The claims asserted by the named plaintiffs in this case are subject to agreements to arbitrate. At the inception of this case, the defendants sought to enforce the agreements by the filing of a Motion to Dismiss and Compel Arbitration. The circuit court received a few abbreviated conclusory affidavits[1] and extensive briefing over a two year period, and conducted a hearing but took no testimony. Ultimately, the motion was denied by virtue of a letter decision dated December 5, 2011. Significantly, although the letter decision made no pertinent fact findings whatsoever and, with citation to eight legal decisions, concluded only that the arbitration agreements were unconscionable contracts of adhesion, the letter invited plaintiffs' counsel to prepare a proposed order. The order as prepared by plaintiffs' counsel delineated a series of conclusory findings of fact and conclusions of law which were adopted in their entirety by order dated February 6, 2012. R0053-R0486. In any event, the circuit court found that there were agreements to arbitrate, and that the arbitration agreements embraced plaintiffs' claims.

[1] The specific contents of the record before the court were the Agreements of Sale containing the subject arbitration agreements (R0058-R0059), an additional agreement between the parties which required arbitration of similar disputes (the Quality Builders Warranty Corporation Limited Warranty Agreement, R0061), affidavits from each named plaintiff containing bald, boilerplate assertions hostile to the arbitration provision – but largely inconsistent with deposition testimony later received from the plaintiffs (R0109-R0231), and the affidavits of Chris Rusch and Crystal Rankin regarding the circumstances surrounding the execution of the Agreements of Sale (R0326-R0330). The circuit court was also provided with the designated arbitration forum's fee schedule (R0331-R0336).

However, the court declined to enforce the agreements ostensibly because they are unconscionable and contracts of adhesion. Although determinations of unconscionability and a finding that a contract is adhesive are obviously highly fact intensive, the circuit court's ruling was premised upon a sparse evidentiary record consisting only of a few affidavits containing conclusory allegations and lacking material factual information. At the time an interlocutory ruling refusing to enforce an arbitration agreement had not yet been recognized as immediately appealable under the collateral order doctrine.[2] The parties and the circuit court, however, recognized the need for immediate appeal; which was thought at the time to be best achieved through the rubric of a certified question under W.Va. Code § 51-1A-3.[3] Therefore, an Agreed Order was entered on March 21, 2012, directing the parties to agree upon wording for a question to be certified for immediate appeal. R0468-R0491. The Agreed Order expressly provided that "the participation by defendants in discovery and other pretrial phases of the case in this Court will not preclude the defendants from seeking appellate review of the Court's arbitration ruling, nor the findings of fact or conclusions of law set forth in this Court's written Order of February 6, 2012." R0489. By email dated February 9, 2012 defendants' counsel initially proposed the following question:

> Whether the findings of fact entered by this Court in its written Order dated February 6, 2012 are adequately supported by the record before the Court, and whether the Court's legal conclusion that "...the Agreement at issue in this case contains an arbitration provision that was not bargained for and is unconscionable and invalid" is in accord with applicable law?

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[2] In Credit Acceptance Corp. v. Front, 231 W.Va. 518, 745 S.E.2d 556 (2013), this court held for the first time that "[a]n order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, Id.

[3] West Virginia Uniform Certification of Questions of Law Act provides in pertinent part: "[t]he supreme court of appeals of West Virginia may answer a question of law certified to it by any court of the United States ... if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

R1212. Counsel for the plaintiffs found that verbiage unsatisfactory, but neglected to explain why, nor did plaintiffs' counsel ever propose alternative wording. Ultimately, despite extensive efforts, *e.g.* R1205-R1233, the parties were unable to reach agreement on the wording for a certified question.

In the meantime, beginning in 2013, a sea change occurred in the decisional law from this Court – not necessarily in the legal precepts that apply to the enforcement of arbitration agreements, but in the faithfulness of their application to the facts and circumstances of discrete cases, and in the outcomes with respect to disputes regarding arbitrability. Since 2012 this Court has neither made a ruling nor affirmed a ruling of a circuit court declining to enforce an agreement to arbitrate on grounds of unconscionability, nor found an agreement to be adhesive as did the circuit court in this case, and at least eighteen decisions issued by this Court have resulted in the enforcement of valid and binding arbitration agreements.[4] Given these developments, defendants presented a renewed motion to compel arbitration on January 8, 2018,

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[4] *See* Hampden Coal, LLC v. Varney, 240 W.Va. 284, 810 S.E.2d 286 (2018); Chevron U.S.A., Inc. v. Bonar, No. 16-1213, 2018 WL 871567 (W.Va. Feb. 14, 2018); Kirby v. Lion Enters., Inc., No. 16-1175, 2017 WL 5513619 (W.Va. Nov 17, 2017); SWN Prod. Co. v. Long, 240 W.Va. 1, 807 S.E.2d 249 (2017); Citizens Telecomms. Co. of W.Va. v. Sheridan, 239 W.Va. 67, 799 S.E.2d 144 (2017); Employee Res. Group, LLC v. Harless, No. 16-0493, 2017 WL 1371287 (W.Va. Apr. 13, 2017); Salem Int'l Univ., LLC v. Bates, 238 W.Va. 229, 793 S.E.2d 879 (2016); Schumacher Homes of Circleville, Inc. v. Spencer, 237 W.Va. 379, 787 S.E.2d 650 (2016); Parsons v. Halliburton Energy Servs., Inc., 237 W.Va. 138, 785 S.E.2d 844 (2016); Nationstar Mortgage, LLC v. West, 237 W.Va. 84, 785 S.E.2d 634 (2016); Geological Assessment & Leasing v. O'Hara, 236 W.Va. 381, 780 S.E.2d 647 (2015); Toney v. EQT Corp., No. 13-1101, 2014 WL 2681091 (W.Va. June 13, 2014); State ex rel. Ocwen Loan Serv'g, LLC v. Webster, 232 W.Va. 341, 752 S.E.2d 372 (2013); New v. GameStop, Inc., 232 W.Va. 564, 753 S.E.2d 52 (2013); Price v. Morgan Fin. Group, No. 12-1026, 2013 WL 3184671 (W.Va. June 24, 2013); Credit Acceptance Corp. v. Front, *supra*; Shorts v. AT&T Mobility, No. 11-1649, 2013 WL 2995944 (W.Va. June 17, 2013); State ex rel. Johnson Controls, Inc. v. Tucker, 229 W.Va. 486, 729 S.E.2d 808 (2012).
Moreover, just last year this Court held that "[a] non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Such claims sufficiently arise out of and relate to the written agreement as to require arbitration." Syl. Pt. 4, Bluestem Brands, Inc. v. Shade, 239 W.Va. 694, 805 S.E.2d 805 (2017). That ruling is uniquely important in this case because most of the defendants are not signatories to the pertinent arbitration agreement.

requesting that the circuit court revisit the arbitrability issue, this time on a much more developed evidentiary record. R0709-R0714. Erroneously treating defendants' motion as a Rule 60(b) motion for relief from judgment from the February 6, 2012 ruling, even though the ruling did not constitute a judgment and was an interlocutory order contemplated to be certified for immediate appeal, the circuit court denied defendants' motion as untimely. R0001-R0012. In doing so, the circuit court refused to consider the record of evidence which has now been developed in the case, and essentially ratified the February 6, 2012 ruling. For innumerable reasons, the February 6, 2012 ruling refusing to enforce the arbitration agreements was error, the May 30, 2018 ruling is similarly error, and at bottom this Court must enforce the arbitration agreements.

B. STATEMENT OF THE RELEVANT FACTS

This case involves multifaceted tort and property damages claims asserted by a group of individuals who are the original owners of roughly half of the homes in a residential development known as "Crystal Ridge" located in Bridgeport, West Virginia. Plaintiffs instituted this action against Dan Ryan Builders, Inc. and affiliated entities and individuals on February 9, 2009 seeking property damage, decreased property values, and emotional distress related to alleged defects and deficiencies in, on, under, around and adjacent to their properties and in the development as a whole. R0019-R0052.

The plaintiffs acquired their property from Dan Ryan Builders, Inc. by virtue of Agreements of Sale under which the plaintiffs agreed to purchase, and Dan Ryan Builders, Inc. agreed to build and sell residential homes to the plaintiffs' specifications. In addition to establishing the terms and conditions of each purchase/sale, the Agreements of Sale also establish the manner in which any disputes between the parties were to be resolved. R0737-R0743. In that respect, each Agreement of Sale contains the following standard arbitration provision:

19. ARBITRATION.

(a) Any dispute arising under or pursuant to this Agreement, or in any way related to the Property and/or with respect to any claims arising by virtue of any representations alleged to have been made by Us, or any agents and/or employees thereof, (with the exception of "Consumer Products" as defined by the Magnuson-Moss Warranty Federal Trade Commission Improvements Act, 15 U.S.C. Section 2301 et seq. and the regulations promulgated thereunder) shall be settled and finally determined by arbitration and not in a court of law, irrespective of whether or not such claim arises prior to or after Settlement hereunder, pursuant to the Construction Industry Arbitration Rules and the Supplementary Procedures for Residential Construction Disputes of the American Arbitration association ("AAA") then in effect. Prior to commencing arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of AAA, or another mediation service designated by Us. The parties hereto specifically acknowledge that they are and shall be bound by arbitration and are barred from initiating any proceeding or action whatsoever in connection with this Agreement. Notwithstanding anything to the contrary herein contained, in the event You default by failing to settle on the Property within the time required under this Agreement, then We may either (i) commence an arbitration proceeding under this Section 19, or (i) bring an action for its damages, including reasonable attorneys' fees, as a result of the default in a court having jurisdiction over the Purchaser. You expressly waive your right to mediation and arbitration in such event. Each party shall be entitled to full discovery in accordance with the local rules of court in the event that arbitration is invoked under this Section 10. The provisions of this Section 19 shall survive the execution and delivery of the deed, and shall not be merged therein.

See e.g. R0742-R0743.

The arbitration provision above-quoted typically appears on the 6th page of the seven page Agreement of Sale, *e.g.* R0737-R0743, although one version of the Agreement of Sale utilizes a different font pushing the arbitration provision to the 8th of nine total pages. *E.g.* R0744-R0752. With either format, the purchaser initialed each page of the Agreement – including the page containing the arbitration provision. In addition, the purchaser acknowledged by signing the last page of the agreement:

> YOU ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTAND THE PROVISIONS OF THIS AGREEMENT. YOU

> FURTHER ACKNOWLEDGE RECEIPT OF A COPY OF (I) THIS AGREEMENT; (II) THE STANDARD FEATURES LIST AND OPTIONAL FEATURES LIST; (III) SKETCH FLOOR PLANS OF THE HOME, AND (IV) ALL ADDENDA TO BE ATTACHED TO THIS AGREEMENT PURSUANT TO SECTION 16.
>
> ... PLEASE MAKE SURE THAT ALL PROVISIONS ARE READ AND UNDERSTOOD BEFORE SIGNING.

See e.g. R0743.

Based upon the indisputable documentary evidence alone, in light of the recent trend in West Virginia decisional law, the arbitration provision would be enforceable as to each of the plaintiffs. However, based upon the record accumulated through discovery over the last several years, there is additional compelling evidence which would make enforceability of the arbitration provision unassailable. The depositions of 26 of the plaintiffs have been taken to date (*see* R0781-R1182), and the Agreement of Sale governing each transaction with each of the plaintiffs has been produced. Discovery has demonstrated that during the review of the Agreement of Sale, many of the plaintiffs negotiated the price of the home. Additionally, many of the plaintiffs elected to use an outside lender in lieu of DRB's preferred, affiliated lender Monocacy Home Mortgage, LLC, but negotiated to retain a purchase price credit/incentive otherwise contingent on the use of Monocacy Home Mortgage, LLC, and DRB's preferred settlement attorney and title company. Many of the plaintiffs also negotiated the addenda to the agreement, including individualized landscaping requests, and property sale contingencies. With the exception of a couple of homes which were constructed as spec homes, the plaintiffs were able to make selections and modifications to the layout, electrical, data and telecom, flooring, cabinetry, countertops, and fixtures in their homes. *See* R0781-R1182. Consequently, the sales process and the Agreement of Sale, itself, was not a take-it-or-leave-it scenario.

In their depositions, all of the plaintiffs conceded that they were not compelled to purchase their home in Crystal Ridge, and that no one forced them to sign the Agreement of Sale. Many of them testified that they looked at existing and/or new homes elsewhere before deciding to purchase in Crystal Ridge. *See* R0824-R0826, R0873-R0875, R0898-R0900, R0947-R0948, R0973-R0974, R0979-R0980, R0987-R0990, R1028-R1029, R1072-R1074, R1107-R1109, R1120-R1122. Most of the plaintiffs are college educated. *See* R0805, R0869, R0892-R0894, R0918-R0919, R0925-R0927, R0972, R0982-R0985, R1026-R1027, R1045-R1046, R1089-R1091, R1105-1106, R1134-R1136, R1141-R1143, R1162-R1165. Several are employed by the federal government in Bridgeport, West Virginia. *See* R0782, R0800, R1071, R1084, R1089-R1091. At least six of the plaintiffs are, or were, in the sales and finance industries, *e.g.* R0901-R0907, R0925-R0927, R0944-R0945, R1008-R1009, R1047-R1049, R1051-R1052; when asked, three of the six could not remember if the form agreements they utilized on a daily basis included an arbitration provision. Only three of the 26 plaintiffs deposed thus far were first-time home buyers at the time of this transaction. *See* R0782-R0784 (two prior); R0806 (first purchase); R0823-R0824 (first purchase); R0870-R0872 (two prior); R0895-R0897 (two prior); R0928-R0929 (first purchase); R0945-R0946 (one prior); R0985-R0986 (two prior); R1010-1011 (two prior); R1046 (one prior); R1052-R1055 (2 prior, one of which was new construction); R1071-R1072 (one prior); R1092 (one prior, new construction); R1119 (one prior); R1144-R1145 (two prior); R1165-R1166 (two prior). One of the three utilized a realtor throughout the negotiation process. *See* R0824-R0826. A couple of the plaintiffs have prior experience with new construction.

Contrasted with the plaintiffs' position vis a vis the Agreements of Sale, Dan Ryan Builders, Inc. arguably had the weaker bargaining position. In a market where other homes, both

new and pre-owned, were available for purchase, Dan Ryan Builders, Inc. had to be competitive. These plaintiffs were shopping around, and were generally educated and experienced in real estate transactions. Many of the plaintiffs negotiated substantial monetary incentives while still utilizing their own lenders and settlement agents. Despite those circumstances, none of the plaintiffs – and none of the purchasers in Crystal Ridge – objected to or attempted to negotiate the arbitration provision.

Significantly, there is no testimony from any of the plaintiffs that they ever sought to negotiate the arbitration provision and were refused. Moreover, each plaintiff testified that DRB's sales agent did not deny anyone the opportunity to thoroughly review the Agreement of Sale prior to signing. Consequently, the record evidence that has now developed in this case compels the enforcement of the arbitration provision.

C. THE CIRCUIT COURT'S FEBRUARY 6, 2012 RULING

The circuit court's February 2012 ruling was made against the background of the then-existing body of West Virginia law, which was not particularly hospitable to the enforcement of arbitration agreements. As stated, the ruling was initially announced in a letter-decision. The letter provides in substantive part:

> The Court finds that the contracts containing the arbitration provision are contracts of adhesion. Generally, contracts of adhesion are not inherently unlawful; but, the contracts at issue in this case contain an arbitration provision that was not bargained for and that the Court finds is unconscionable and invalid based upon a review of the following pertinent case law and the parties' exhibits.

R0466. For that conclusion, the letter cites the following eight West Virginia decisions: Board of Education of Berkeley v. W. Harley Miller, Inc., 160 W.Va. 473, 236 S.E.2d 439 (1977); Art's Flower Shop, Inc. v. Chesapeake & Potomac Telephone Company of West Virginia, Inc., 186 W.Va. 613, 413 S.E.2d 670 (1991), Arnold v. United Companies Lending Corp., 204 W.Va.

229, 511 S.E.2d 854 (1998), State ex rel. Dunlap v. Berger, 211 W.Va. 549, 567 S.E.2d 265 (2002), State ex rel. TD Ameritrade v. Kaufman, 225 W.Va. 260, 692 S.E.2d 293 (2010); Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011); and State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 228 W.Va. 125, 717 S.E.2d 909 (2011). R0466-R0467. The circuit court asked plaintiffs' counsel to prepare detailed findings of fact and an order containing the court's rulings. Thereafter, the circuit court adopted in its entirety an eight page memoranda prepared by plaintiffs' counsel containing the following pertinent conclusory findings of fact. R0468-R0475.

> 3. The Plaintiffs had no role or input in the formulation of any of the terms in [the Agreement of Sale] ... and the only terms negotiated by the Plaintiffs were certain home design specifications and the sales price, which negotiation was conducted prior to the Agreement being presented to Plaintiffs for execution.
>
> 4. The Plaintiffs were lead (sic) to believe that the terms of the Agreement ... were non-negotiable....
>
> 6. Each of the Plaintiffs, upon presentation of the Sales Agreement which was a fill-in-the-blank form document consisting of "boilerplate language" prepared by the Defendants, were instructed to initial each page of and sign the agreement to evidence receipt of the same ....
>
> 7. Arbitration ... was not explained to the Plaintiffs either orally or within terms of the documents.
>
> 8. The arbitration clause in the Sales Agreement required that the sole arbitration service was to be selected and designated by Defendants.
>
> 9. The cost of filing an arbitration action and the costs and fees of arbitration itself were never disclosed to the Plaintiffs, nor was it disclosed that the Plaintiffs could be held responsible for the Defendants' attorneys' fees and costs under the Sales Agreement.
>
> 10. The arbitration clause forces the Plaintiffs to pursue any and all claims by arbitration while reserving the right to Defendants to pursue their claims for non-performance under the Sales Agreement through courts of competent jurisdiction – the only substantive remedy the Defendants would ever need and the Plaintiffs waived all rights to arbitration in the

> latter circumstance. The operation of the arbitration clause, and its impact, were never explained to the Plaintiffs.
>
> 12. The Plaintiffs were "steered" to the same legal counsel used by the Defendants and lender, Defendant Monacacy (sic) Home Mortgage, LLC, which is a subsidiary of some or all of the other Defendants, with the promise of reduced closing costs, and, believing that promise, most Plaintiffs used the Defendants' legal counsel after signing conflict waivers.
>
> 13. The Defendants' representatives did not allow the Plaintiffs sufficient time or advise them to read the Sales Agreement prior to executing it.
>
> 14. The Defendants' representatives did not recommend that the Plaintiffs seek independent legal counsel prior to executing the Sales Agreement ....

R0469-R0471. The court found as a matter of law "that the arbitration provision in the Agreement herein is a contract of adhesion, which such contracts are not inherently unlawful; but the Agreement at issue in this case contains an arbitration provision that was not bargained for and is unconscionable and invalid." R0474. Further, "[t]he contracts at issue, specifically the provisions regarding arbitration, are unconscionable under the finding of the Court and, therefore, are unenforceable against the Plaintiffs in this matter and do not bar the Plaintiffs from asserting the claims against the Defendants in this Court." R0474. On that basis, the circuit court denied defendants' initial motion to compel arbitration.

By denying defendant's recent Motion to Compel Arbitration as untimely under Rule 60(b) in lieu of reconsidering the prior interlocutory ruling, the circuit court essentially ratified each of the foregoing findings of fact and conclusions of law, and refused to consider the record of evidence that has now developed in the case. As it stands, the circuit court's ruling lacks the requisite factual record for a finding of unconscionability. Moreover, the ruling cannot be supported by the current state of West Virginia decisional law.

III. SUMMARY OF ARGUMENT

The circuit court's 2012 ruling found that there are agreements to arbitrate, and that the arbitration agreements embraced the plaintiffs' claims. However, the court declined to enforce the agreements on the basis that they are unconscionable contracts of adhesion. The court made that fact-intensive determination on a woefully insufficient factual record, consisting only of conclusory affidavits. Moreover, the circuit court supported the determination by decisional law which manifests an anti-arbitration animus.

Under current decisional law, it is inescapable that valid and binding arbitration agreements exist. Moreover, a thorough analysis of the factors determinative of substantive and procedural unconscionability, based upon the now developed factual record, demonstrates that the arbitration agreements are neither adhesive, nor substantively or procedurally unconscionable as a matter of law. The defendants invited the circuit court to revisit the arbitrability issue based upon the now-developed factual record and the more-enlightened West Virginia decisional law. The circuit court erroneously viewed defendants' invitation as a Rule 60(b) motion for relief from a judgment, and denied defendants' renewed Motion to Compel Arbitration as untimely. The circuit court's 2012 ruling refusing to enforce the arbitration agreements was erroneous, and the May 30, 2018 ruling essentially ratifying the prior ruling is similarly error. This Court must enforce the arbitration agreements.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in West Virginia Rule of Appellate Procedure 18(a), oral argument is necessary in this case. Although the now developed record of facts and the legal arguments are adequately presented in this Brief, the decisional process will be significantly aided by oral argument. This case is suitable for Rule 20 oral argument because the Court can take this opportunity to delineate the quantum and quality of proof necessary to establish

unconscionability, and the procedural mechanism that a court should utilize to make the fact-based determination of unconscionability in the face of an otherwise valid and enforceable arbitration agreement. In addition, the Court can take this opportunity to clarify that West Virginia Rule of Civil Procedure 60(b) does not apply to interlocutory rulings. This appeal otherwise involves the application of now settled law on the enforceability of arbitration agreements.

V. ARGUMENT

A. STANDARD OF APPELLATE REVIEW.

The circuit court's 2012 ruling denying defendants' motion to compel arbitration must be reviewed de novo. "When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is de novo." Syl. Pt. 2, Hampden Coal, LLC v. Varney, 240 W.Va. 284, 810 S.E.2d 286 (2018) (*quoting* Syl. Pt. 1, W.Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc., 238 W.Va. 465, 796 S.E.2d 574 (2017)). "[W]here the challenge to the arbitration clause is based on unconscionability, the issue presented is a question of law controlled by contract principles. As with all questions of law, our review of the circuit court's conclusion is plenary." Employee Resource Group, LLC v. Harless, No. 16-0493, 2017 WL 1371287, *3 (W.Va. Apr. 13, 2017) (citations omitted).

The aspect of the ruling which denied defendants' renewed motion to compel arbitration on the basis that it was an untimely motion for relief from judgment pursuant to Rule 60(b) must be reviewed under an abuse of discretion standard. Law v. Monongahela Power Co., 210 W.Va. 549, 558 S.E.2d 349 (2001). However, because the circuit court erred in treating the motion as one under Rule 60(b), the matter is really a question of law warranting plenary review.

B. THE CIRCUIT COURT'S 2012 RULING WHICH INVALIDATED THE CLEAR AND UNMISTAKABLE ARBITRATION AGREEMENTS ON THE BASIS THAT THEY ARE UNCONSCIONABLE CONTRACTS OF ADHESION WAS MADE ON AN INADEQUATE RECORD.

The circuit court found the instant arbitration agreements to be unconscionable and invalid contracts of adhesion on a scant evidentiary record consisting solely of conclusory allegations.[5] It is immediately apparent that the record at the time of the 2012 ruling was not adequate to make the findings of fact that would have to be made to support the legal conclusion that the arbitration agreements were unconscionable and/or contracts of adhesion. It is not surprising, under those circumstances, that the circuit court made its decision in a letter that made no findings of fact – there was obviously an inadequate record to make any findings of fact. The circuit court then compounded the problem by adopting and entering an order which made conclusory findings of fact with no record to support them. It may rationalize the circuit court's handling to some degree because at the time there was little direction in this Court's jurisprudence as to the quantum and quality of the evidence that would have to appear in a record to support a determination of unconscionability of an arbitration agreement, and in fact there was very little guidance in the case law as to the type of procedure that a circuit court would have to employ to create the necessary record.[6] However, it would seem obvious that either through

[5] Instantly, having found that the arbitration provisions are unconscionable and invalid contracts of adhesion, the circuit court ostensibly made the prerequisite threshold determination that the agreement otherwise satisfies the elements of a contract.

[6] The quantum and quality of evidence, and the procedural mechanism that should be utilized to make an adequate analysis of unconscionability in the face of an otherwise valid and enforceable arbitration agreement is still largely undefined. If for no other reason, the Court should take this opportunity to delineate the quantum and quality of proof necessary to invalidate an arbitration agreement on the basis of unconscionability, and the procedural mechanism which should be utilized by the circuit court to make that analysis. The Court should make clear that this fact-intense determination requires discrete determinations of salient facts, and that circuit courts need to insist on an adequate evidentiary record and employ the procedural mechanisms available to develop that record. The case law discussed hereinbelow more than suggests that where the evidentiary record is demonstrably inadequate, an arbitration agreement cannot be invalidated on the basis of unconscionability. Here, despite the absence of a sufficient evidentiary record, the circuit court invalidated the arbitration agreement. That determination

deposition testimony, detailed affidavits, or live testimony it would be incumbent on a circuit court to undertake some process necessary to build an appropriate factual record. Otherwise, a finding of unconscionability becomes vague and speculative, and also defies meaningful review on appeal.

Our case law makes clear that when a litigant moves to enforce an arbitration agreement "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 that arbitration agreement." Syl. Pt 2, in part, State ex rel. TD Ameritrade, Inc. v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010). The first consideration entails not only a determination that the arbitration agreement satisfies the elements of a contract, but also whether there are any contract defenses that would invalidate the agreement. It is well-settled in West Virginia that as a contractual provision, arbitration agreements are susceptible to all generally applicable contract defenses, "such as laches, estoppel, waiver, fraud, duress" misrepresentation, mutuality of assent, undue influence, and lack of capacity, Parsons v. Halliburton Energy Services, Inc., 237 W.Va. 138, 146, 785 S.E.2d 844, 852 (2016) (internal citations omitted), including unconscionability. Moreover, it has become well-settled that "the burden of proving that a contract term is unconscionable rests with the party attacking the contract." Employee Res. Group, LLC v. Harless, 2017 WL 1371287 at *4 (*quoting* Brown, 228 W.Va. at 680).[7]

All of the standard defenses to the validity of a contract are necessarily fact intensive, e.g. estoppel, fraud and duress. Similarly, the analysis of whether a contract term is unconscionable

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cannot be sustained.

[7] Thus, while it is clear that the plaintiffs bear the burden of proving that the instant arbitration agreements are unconscionable, it is not clear whether the burden is by a preponderance of the evidence or a different standard.

must take "into consideration all of the facts and circumstances of a particular case." Syl. Pt. 5, in part, Kirby v. Lion Enterprises, Inc., 233 W.Va. 159, 756 S.E.2d 493 (2014) (*quoting* Brown v. Genesis Healthcare Corp., *supra*). In order to conclude that a contractual term is unenforceable on grounds of unconscionability, there must be finding "that the provision at issue 'is both procedurally and substantively unconscionable.'" Employee Res. Group, LLC v. Harless, 2017 WL 1371287 at *4 (*quoting* Brown, 228 W.Va. at 658). "Courts should apply a 'sliding scale' in [evaluating a contract term for unconscionability]: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Syl. Pt. 20, Brown, *supra*.

> The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.

Toney v. EQT Corp., No. 13-1101, 2014 WL 2681091, *5 (W.Va. June 13, 2014) (*quoting* Syl. Pt. 12, Brown). By necessity, the analysis "involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." Syl. Pt. 6, in part, Kirby v. Lion Enters., Inc., *supra* (*quoting* Syl. Pt. 3, Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986)). Even outside of the context of an arbitration agreement, "[a] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and 'the existence of unfair terms in the contract.'" Syl. Pt. 8, Pingley v. Perfection Plus Turbo-Dry, LLC, 231 W.Va. 553, 746 S.E.2d 544 (2013) (*quoting* Syl. Pt. 4, Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of W.Va., Inc., 186 W.Va. 613, 413 S.E.2d 670 (1991)). It is a "fact-intensive analysis into a range of factors." Kirby, 233 W.Va. at 166, 756

S.E.2d at 500. Consequently, a circuit court cannot decide the issue without any factual development.

Because the analysis necessary for a determination of unconscionability is so fact-intensive, this Court suggested in Grayiel v. Appalachian Energy Partners 2001-D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012), that even where arbitration is raised in the context of a motion to dismiss at the initiation of a case the motion should be treated as one for summary judgment and disposed of in that manner. That is because in analyzing whether the arbitration agreement is unconscionable, the court must consider matters outside the pleadings. *See* Id. at 97 n4, 736 S.E.2d at 97 n4. That observation is significant here because by considering only conclusory affidavits, the circuit court essentially did not consider any matters outside the pleadings. In Grayiel this Court acknowledged that like any summary judgment order, in ruling on a motion to dismiss based upon an arbitration agreement the circuit court "must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl. Pt. 4, in part, Id. (internal citations omitted). Here, the absence of any findings of fact is demonstrated by the fact that the circuit court's letter decision contained absolutely no findings of fact.

The inadequacy of the factual record to support the 2012 ruling is demonstrated by this Court's recent decision in Hampden Coal, LLC v. Varney, *supra*. In that decision, the Court explained that "[t]he entirety of the circuit court's unconscionability ruling consists of a cursory summary of the parties' arguments, after which the court" found the agreement to be one of adhesion, and both substantively and procedurally unconscionable. 240 W.Va. at 294. The Court then undertook to complete the analysis which the circuit court was obligated but

neglected to make. Notably, this Court found significant that a shortened limitations period was reasonable, and did not make the agreement unfair, one-sided, or overly harsh; thus, the agreement was not substantively unconscionable. Id. at 296-297. With regard to procedural unconscionability, this Court rejected counsel's argument that the agreement in that case was procedurally unconscionable because of the inequality in bargaining power and because "they were presented with documents, including the Agreement, that they were instructed to sign if they wished to remain employed; that he had no opportunity or ability to review or negotiate the terms of the Agreement; and that although the Agreement advised him to seek legal advice if he did not understand or had questions about the Agreement, this was not true because he was told that all documents had to be signed and returned immediately." Id. at 298. Rather, this court observed that "there is no **evidence** that he tried but was denied the opportunity to either seek the advice of counsel or negotiate any terms of the Agreement. It is axiomatic that his counsel's arguments are not evidence." Id. at 298 (emphasis added).

Instantly, the plaintiffs who had the burden, failed to adduce anything approximating or approaching the quantum and quality of evidence necessary for the court to make the findings necessary on the issue of whether the arbitration agreements were unconscionable or contracts of adhesion. The circuit court made its decision in a letter devoid of any fact findings whatsoever. The fact findings only came into the picture because the trial court asked plaintiffs' counsel to prepare an order. Counsel included fact findings consisting of the same conclusory assertions as were contained in the scant affidavits. At bottom, there are no findings of material facts that support the conclusions. One salient example is the conclusion that "[t]he Defendants' representatives did not allow the Plaintiffs sufficient time or advise them to read the Sales Agreement prior to executing it." R0471. If one looks at the totality of the record, there was not

a scintilla of evidence that would support that conclusion. No evidence was submitted with respect to the plaintiffs being denied the opportunity to "seek independent legal counsel prior to executing the Sales Agreement". R0471. The conclusory affidavits presented by the plaintiffs actually indicated that the terms of the Agreements of Sale were negotiable, nonetheless, the court baldly condemned the agreements as contracts of adhesion. There was no evidence, and consequently the circuit court made no findings as to "the age, literacy, or ... sophistication of [the plaintiffs]...." Kirby at 166 n10, 756 S.E.2d at 500 n10 (*quoting* Syl. Pt. 17, Brown v. Genesis Healthcare Corp., *supra*). The court's analysis of "the manner and setting in which the contract was formed" was woefully uninformed. Id. In those respects, the 2012 ruling suffers from the same inadequacies as the determination in Hampden Coal. Given the burden of proof, the record was simply woefully inadequate to support the circuit court's ruling.

Recognizing the inadequacy of the record to support the conclusion that the instant arbitration agreements are unconscionable contracts of adhesion, the defendants offered the circuit court the opportunity to reexamine the issue via the renewed motion to compel arbitration. With the renewed motion, a much more developed record was presented to the court. As more fully spelled out in Section D, the record of evidence that has now developed demonstrates unerringly that the arbitration agreements are not unconscionable. Unfortunately, the circuit court declined to revisit the issue.

C. THE CIRCUIT COURT'S 2012 RULING IS DIRECTLY AT ODDS WITH RECENT DECISIONAL LAW.

Although there was a time when this Court was less than enthusiastic about the enforcement of arbitration agreements, particularly in tort cases, in recent years this Court has now firmly embraced the concept that the standards that govern motions to compel arbitration are driven by principles arising from the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. ("FAA").

Current West Virginia decisional law on the FAA clearly establishes that arbitration is favored and arbitration agreements must be upheld, because they are valid, irrevocable, and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see* Syl. Pt. 2, New v. GameStop, Inc., 232 W.Va. 564, 753 S.E.2d 62 (2013); Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012). This Court has established a "strong presumption favoring arbitration" such that any "[d]oubts as to whether a particular grievance is arbitrable should be resolved in favor of arbitration." Salem Int'l Univ., LLC v. Bates, 238 W.Va. 229, 235, 793 S.E.2d 879, 885 (2016) (*quoting* Local Div. No. 812 v. Transit Auth., 179 W.Va. 31, 34-35, 365 S.E.2d 76, 79-80 (1987)). Arbitration agreements are on "equal footing with other contracts", thus, courts must "enforce them according to their terms." New, 232 W.Va. at 572, 753 S.E.2d at 70 (*quoting* State ex rel. Johnson Controls, Inc. v. Tucker, 229 W.Va. 486, 494, 729 S.E.2d 808, 816 (2012). Accordingly, any ruling that is inimical to the enforceability of an otherwise valid arbitration agreement is contrary to the recent trend of applicable law. *See* Nelson, 230 W.Va. at 291, 737 S.E.2d at 560. *See also* Hampden Coal, LLC v. Varney, *supra*; SWN Prod. Co. v. Long, 240 W.Va. 1, 807 S.E.2d 249 (W.Va. 2017); Citizens Telecomms. Co. of W.Va. v. Sheridan, 239 W.Va. 67, 799 S.E.2d 144 (2017); Employee Res. Group, LLC v. Harless, *supra*; Schumacher Homes of Circleville, Inc. v. Spencer, 237 W.Va. 379, 787 S.E.2d 650 (2016); Nationstar Mortgage, LLC v. West, 237 W.Va. 84, 785 S.E.2d 634 (2016).

While the legal standards that obtain to the enforceability of arbitration agreements have always largely been adequate, and the burden of proof for invalidating arbitration agreements properly placed, previously West Virginia courts such as the court instanter had allowed the determination of unconscionability to be made on an inadequate record. Thus, consistent with

the anti-arbitration animus that characterized pre-2012 case law, the circuit court seized on the contract defense of unconscionability to invalidate the instant arbitration agreements. In that regard, the circuit court manifested the attitude that disfavors arbitration as a dispute resolution mechanism, reminiscent of the decision in Brown v. Genesis Healthcare Corp., *supra*. As has become readily apparent over the past 6 years, however, it is precisely that anti-arbitration animus that the FAA and the more-enlightened cases forbid.

Significantly, the circuit court's 2012 letter decision makes the determination that each Agreement of Sale in its entirety was an unconscionable contract of adhesion. If that was the finding, however, then the circuit court was obligated to rescind, unwind, and in effect cancel the agreements, have the plaintiffs return their homes and have the defendants return the plaintiffs' money. The circuit court did not proceed in that manner. Rather, the circuit court elected to not enforce only the arbitration clause. Thus, the plaintiffs retained the entire benefit of the bargain, and the defendants retained the money, but the defendants did not receive the benefit of the arbitration clause. In effect, by not unwinding the transaction the circuit court did not actually invalidate the entire contract – the court only invalidated the arbitration agreement. In that respect, the circuit court displayed marked animus to the arbitration clause and dealt with the arbitration clause in a discriminatory manner in contravention of this Court's pronouncement that arbitration agreements are "on equal footing with other contracts."

Citing Brown, the circuit court in this case evidently determined that because the Agreements of Sale contain a broad arbitration clause, that the agreements were adhesive and unconscionable per se; this, despite the fact that in all other respects the Agreements of Sale were standard real estate sales agreements and in every single respect the provisions of the agreements had been fully executed. According to the circuit court's letter decision, the court also viewed a

perceived lack of mutuality within the arbitration agreement as unconscionable, on the basis that the provision enables Dan Ryan Builders, Inc. to pursue certain remedies in court, but relegated the purchaser specifically to arbitration. The circuit court cited Arnold v. United Companies Lending Corp., 204 W.Va. 229, 511 S.E.2d 854 (1998), for that principle, suggesting that the circuit court viewed these Agreements of Sale as particularly unconscionable because they involve consumer transactions. The memorandum decision issued in 2012, which was prepared by plaintiffs' counsel and adopted by the circuit court, contains additional pertinent conclusions of law. In that respect, the circuit court adopted plaintiffs' argument that the perceived expense associated with arbitration made the arbitration agreements unconscionable, citing State ex rel. Dunlap v. Berger, 211 W.Va. 549, 567 S.E.2d 265 (2002). Decisional law over the past six years renders each of these grounds unsustainable.

The decision in Brown v. Genesis Healthcare Corp., *supra*, was famously and summarily vacated by the United States Supreme Court as "contrary to the terms and coverage of the FAA." Marmet Health Care Center, Inc. v. Brown, 565 U.S. 530, 533 (2012). This Court has since debunked the idea that the mere inclusion of an arbitration clause in an agreement renders the agreement unconscionable per se. *See*, Nationstar Mortgage, LLC v. West, 237 W.Va. at 91, 785 S.E.2d at 641. Similarly, in Hampden Coal, the Court made clear that arbitration clauses are no more or less suspect no matter the type of contract in which they reside. 240 W.Va. at 292-293, 810 S.E.2d at __. "[W]e apply the same legal standards to our review of all arbitration agreements." Id.

The seminal case endorsing a requirement of mutuality of remedy is Arnold wherein the Court stated in Syllabus Point 5: "Where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including

access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law." That Syllabus Point was expressly overruled by this Court in Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012). In Nelson, this Court observed that "[a] single clause within a multi-clause contract does not require separate consideration or *mutuality of obligation*." Id. at 291, 737 S.E.2d at 560.

This Court has since clarified the substantive considerations for mutuality of consideration in Nationstar Mortgage, *supra*. "Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." Id., 237 W.Va. at 92, 785 S.E.2d at 642 (*quoting* Syl. Pt. 19, Brown, *supra*). With respect to one-sidedness, this Court recognized that there may be commercially necessary exceptions to mutuality in arbitration provisions. In the mortgage loan industry, for instance, "a financial institution's right to protect its security interest combined with the need for compliance with statutory foreclosure procedures explains a lack of mutuality in certain loan agreements." Id. *See also* State ex rel. Ocwen Loan Servicing, LLC v. Webster, 232 W.Va. 341, 752 S.E.2d 372 (2013). Consequently, where there is a commercial need to utilize the court system, the provision of an exception to arbitration to effectuate that need "does not ipso facto create an overly one-sided contract that is unreasonable or unfair." Nationstar Mortgage, 237 W.Va. at 93, 785 S.E.2d at 643. The holding of Nationstar Mortgage is very important in analyzing the instant arbitration clause because, what the circuit court perceived to be the unfair part of it was wording that allowed Dan Ryan Builders, Inc. to access the courts "in the event [the purchaser] default[s] by failing to settle on the Property within the time required under this Agreement" – an instance in which there is no adequate remedy available through

arbitration. That exception is entirely commercially necessary. *See* Dan Ryan Builders, Inc. v. Nelson, No. 3:10-cv-76, 2014 WL 496775, *14 (N.D. W.Va. Feb. 6, 2014).

This Court also considered the expense associated with arbitration in Nationstar Mortgage. In addition to finding that the agreement was one-sided, the trial court in Nationstar Mortgage found the agreement to impose oppressive costs upon the plaintiffs. This Court quickly observed that "the Wests have never stated that they are unable to afford to pay any arbitration fees or costs." 237 W.Va. at 93, 785 S.E.2d at 643. Moreover, even though counsel for the plaintiff in that case referred to filing fees between $3,250 and $7,000, this Court found "no factual basis for [the trial court's] conclusion that the costs of arbitration are 'oppressive.'" Id. Consequently, the potential costs associated with arbitrating claims is not a sufficient basis, even together with non-mutuality, to invalidate an arbitration agreement.

D. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE.

The evidentiary record and the findings therefrom in the 2012 ruling were insufficient to support a determination of unconscionability. Moreover, the record of evidence that has now developed demonstrates unerringly that the arbitration agreements are not unconscionable.

1. The Agreement of Sale And Arbitration Provision Therein Are Not Procedurally Unconscionable.

While there was a lack of evidence in 2012 to support a determination that the arbitration agreements are procedurally unconscionable, today there is an abundance of evidence affirmatively demonstrating that the agreements are not procedurally unconscionable. With regard to procedural unconscionability:

> Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies, include, but are not limited to, the age, literacy, or

> lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

Syl. Pt. 9, New v. Gamestop, Inc., *supra* (citations omitted).

For its 2012 ruling on the issue of procedural unconscionability, the circuit court focused on the adhesive nature of the subject Agreements of Sale. R0472-R0474. An adhesion contract is a "form contract[] submitted by one party on the basis of this or nothing." New, 232 W.Va. at 577, 753 S.E.2d at 75 (citation omitted).

> A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.

Syl. Pt. 10, Id. (citations omitted). Instantly, the circuit court placed significance on the fact that the Agreements of Sale are a "fill-in-the-blank form document consisting of 'boilerplate language' prepared by the Defendants", and that the "Plaintiffs had no role or input in the formulation of any of the terms" in the Agreements of Sale. R0469-R0470. The record evidence shows, however, that although the Agreements of Sale were preprinted, the substantive terms could be and were, in fact, negotiated between the parties. Examining this exact agreement, the United States District Court for the Northern District of West Virginia observed as follows:

> The fill-in-the-blank provisions of the contract were for a description of the property being purchased, the base price of the home, the option price, the initial cash deposit amount, any additional cash deposit amount and date to be paid, the balance due at closing, the amount DRB contributes to closing costs, the option to use DRB's preferred settlement attorney, title company, and lender, or one of the purchaser's own choosing, and a listing of addenda, including blank spaces to enter any addenda not mentioned in the contract.

Dan Ryan Builders, Inc. v. Nelson, No. 3:10-cv-76, 2014 WL 496775, *11 (N.D. W.Va. Feb. 6, 2014). In Nelson, the federal court concluded that the purchasers had the opportunity and did in fact negotiate all of the fill-in-the-blank provisions. Consequently, the court held the agreement of sale was not a contract of adhesion. The same conclusion should be reached in this case. The evidence of record overwhelmingly demonstrates that the plaintiffs negotiated the option price, and completely controlled the amount of the initial cash deposit and any additional cash deposit. The evidence also demonstrates that each plaintiff negotiated the amount of Dan Ryan Builders, Inc.'s incentive, as the amount DRB contributed as a purchase price credit or credit to closing costs varies widely among the agreements, with some purchasers receiving absolutely nothing, and one purchaser receiving $46,596 in incentives. Further, the evidence demonstrates that many purchasers elected to use their own lenders, and in some instances, their own settlement attorney and title company as well. These circumstances conclusively demonstrate that the terms of the Agreements of Sale were negotiated, and the Agreements themselves were not take-it-or-leave-it contracts of adhesion.

The determination of whether a contract is one of adhesion is only one consideration of the unconscionability analysis, the import of which has significantly eroded over the past several years. Recognizing the realities of today's consumer culture, this Court has recently noted that "while contracts of adhesion require greater scrutiny, they are not *per se* unconscionable.... [W]hat courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." State ex rel. Ocwen Loan Servicing, LLC v. Webster, 232 W.Va. at 358, 752 S.E.2d at 389 (*quoting* Grayiel, 230 W.Va. at 103, 736 S.E.2d at 103). There is nothing "bad" about the Agreements of Sale, which enabled these plaintiffs to have a home constructed to their specifications with very little money on deposit and the rest of

the construction cost being advanced by Dan Ryan Builders, Inc. It would have been cost prohibitive to require the plaintiffs to retain counsel for the preparation of their own individual purchase agreements (although the plaintiffs were not precluded from doing so). Thus, Dan Ryan Builders, Inc. utilizes a form fill-in-the-blank contract to secure its investment in the construction expense of plaintiffs' homes until such time as the home is completed and the plaintiffs consummate the purchase. In that respect, Dan Ryan Builders, Inc. retains a significant risk of loss in the relationship with the purchasers and plaintiffs herein having a distinct advantage. Those circumstances really do not support a conclusion that Dan Ryan Builders, Inc. is in a superior bargaining position. Consequently, the argument below that the Agreements of Sale are adhesive and were prepared by the stronger party cannot be supported.[8]

The circumstances surrounding contract formation also do not demonstrate procedural unconscionability. Foremost, there is no evidence, nor do plaintiffs allege, that they were coerced into signing the Agreements of Sale. To the contrary, each plaintiff quickly agreed that he/she willingly executed the Agreement of Sale. Significantly, there was no testimony that any Plaintiff attempted to opt-out of the arbitration provision or negotiate its terms. This Court found the absence of similar evidence noteworthy in Nationstar Mortgage, LLC v. West, *supra*, observing that as to the plaintiffs, "[t]hey do not assert they were coerced into signing the document." 237 W.Va. at 91, 785 S.E.2d at 641.

Next, the plaintiffs had other alternatives to purchasing a home in the Crystal Ridge development. This Court recently observed in connection with a contract for emergency

[8] Moreover, "[b]ecause contracts of adhesion, are by definition typically prepared by a party with more power, we do not view that factor as persuasive in itself." Nationstar Mortgage, LLC v. West, 237 W.Va. at 90, 785 S.E.2d at 640 (*citing* Williams v. Jo-Carroll Energy, Inc., 382 Ill.App.3d 781, 890 N.E.2d 566, 571 (2008) ("[J]ust because a contract is prepared by a party in a superior bargaining position, without allowing the other party to negotiate any terms, does not mean that an included arbitration clause is unconscionable.")).

restoration services "there was no great disparity in the relative positions of the parties: the Pingleys needed clean-up services, and although they claim that Perfection Plus was the only business of its type in Randolph County, the evidence of record does not reflect that Perfection Plus held 'either a monopolistic or oligopolistic position in [this] particular line of commerce.'" Pingley v. Perfection Plus Turbo-Dry, LLC, 231 W.Va. at 560, 746 S.E.2d at 551 (*quoting* W. Harley Miller, Inc., 160 W.Va. at 486, 236 S.E.2d at 447). Similarly, in New v. Gamestop, this Court rejected the plaintiffs' bald assertion that she had no other meaningful alternative to the arbitration agreement within an employment handbook. In this Court's view, that plaintiff had the option to be unemployed. 232 W.Va. at 578, 753 S.E.2d at 76. Instantly, each plaintiff was free to seek the services of another home builder, including homes being built in a comparable development within the same community, or the homes being constructed in a prestigious development just behind Crystal Ridge. The plaintiffs were also free to purchase an existing home. In that respect, many of the plaintiffs testified that they carefully considered whether to purchase an existing home, a new home in another development, or a home from Dan Ryan Builders, Inc. – and those plaintiffs elected to sign the Agreement of Sale and purchase a home from Dan Ryan Builders, Inc.[9]

To the extent the circuit court found significant that the plaintiffs allegedly did not seek independent counsel prior to executing the Agreement of Sale, R0471, this Court recognized in State ex rel. Ocwen Loan Servicing, LLC v. Webster, *supra*, that a consumer executing an agreement need not be represented by legal counsel for the contract to be enforceable. 232 W. Va. at 358, 752 S.E.2d at 389. Moreover, in Hampden Coal this Court rejected a plaintiff's argument that a contract was a procedurally unconscionable contract of adhesion because he did

[9] *See* R0824-R0826, R0873-R0875, R0898-R0900, R0947-R0948, R0973-R0974, R0979-R0980, R0987-R0990, R1028-R1029, R1072-R1074, R1107-R1109, R1120-R1122.

not have an opportunity to seek legal advice. In particular, the Court observed the absence of any evidence that the plaintiff was "denied the opportunity to either seek the advice of counsel or negotiate any terms of the Agreement." 240 W.Va. at 298, 810 S.E.2d at __.

Next, although Dan Ryan Builders, Inc. could be described as a large sophisticated corporation, there is no evidence in the record that would support a finding that the plaintiffs lacked sophistication and financial knowledge sufficient to render the sales agreements unenforceable. This Court has observed in a wide variety of circumstances that the parties challenging an arbitration agreement on the basis of procedural unconscionability failed to prove a sufficient lack of sophistication or knowledge. Those circumstances include an unemployed high school graduate, *see* New v. GameStop, Inc., *supra*, an employee with an associates degree, *see* Toney v. EQT Corp., No. 13-1101, 2014 WL 2681091 (W.Va. June 13, 2014), and educated consumers who entered into an agreement to construct a new home, *see* Kirby v. Lion Enterprises, Inc., No. 16-1175, 2017 WL 5513619, *2 (W.Va. Nov. 17, 2017). Instantly, most of these plaintiffs are college educated and employed in professional offices.[10] Moreover, most of the plaintiffs had gone through the home buying process one or more times prior.[11] *See e.g.* State ex rel. Ocwen Loan Servicing, LLC v. Webster, 232 W.Va. at 358, 752 S.E.2d at 389 (rejecting procedural unconscionability challenge to an arbitration agreement based, in part, on failure of record to support court's finding that mortgage loan borrowers "lacked sophistication and financial knowledge to a degree that rendered the contract unenforceable").

[10] *See* R0805, R0869, R0892-R0894, R0918-R0919, R0925-R0927, R0972, R0982-R0985, R1026-R1027, R1045-R1046, R1089-R1091, R1105-1106, R1134-R1136, R1141-R1143, R1162-R1165.

[11] *See* R0782-R0784 (two prior); R0870-R0872 (two prior); R0895-R0897 (two prior); R0945-R0946 (one prior); R0985-R0986 (two prior); R1010-1011 (two prior); R1046 (one prior); R1052-R1055 (2 prior, one of which was new construction); R1071-R1072 (one prior); R1092 (one prior, new construction); R1119 (one prior); R1144-R1145 (two prior); R1165-R1166 (two prior).

Finally, while most of the plaintiffs deposed thus far have asserted that they did not thoroughly review the Agreement of Sale before signing it, each plaintiff agreed that nothing prevented them from reading and reviewing the contract, or from thoroughly reviewing the contract after signing but prior to closing on the home months later. "It has long been the rule that 'a party to a contract has a duty to read the instrument.'" Nationstar Mortgage, LLC v. West, 237 W.Va. at 91, 785 S.E.2d at 641 (citations omitted). In the event that the plaintiffs' elected to forego reading the Agreement of Sale, the Court is still entitled to assume that the plaintiffs read and assented to the arbitration provision. *See* Citizens Telecomms. Co. of W.Va. v. Sheridan, *supra*; Employee Res. Group, LLC v. Harless, *supra*; Nationstar Mortgage, LLC v. West, *supra*; New v. Gamestop, Inc., *supra*.[12] The arbitration provision itself was not hidden within the agreement of sale. Rather, the provision either appears on page 6 or 8 under a clearly marked, bold, and all capital heading: 19. **ARBITRATION**. *See e.g.* R0742-R0743. Each plaintiff initialed the agreement on the page where the arbitration provision appears. Then, each plaintiff specifically acknowledged to "have read and understand the provisions of this agreement" in all capital letters directly above the signature line on the last page of the agreement of sale. *See e.g.* R0743.

For anyone who cared to read the arbitration provision, the provision itself provided a brief explanation of the alternative dispute resolution process:

> First, the provision explained that any claims arising from the contract or by virtue of alleged representations "shall be settled and finally determined by arbitration and not in a court of law." Second, the

[12] The fact that Plaintiffs do not remember the arbitration provision specifically is of no moment. In fact Plaintiffs had generally disremembered all of the provisions within the agreement of sale, even a provision dictating the amount of money each was to receive as a "purchase price credit" or credit to closing costs. *See* R0785-R0789; R0801-R0803; R0807-R0814; R0827-R0840; R0876-R0881; R0901-R0907; R0920-R0923; R0930-R0931; R0949-R0954; R0974-R0978; R0991-R0997; R1012-R1016; R1030-R1034; R1047-R1049; R1056-R1059; R1068-R1069; R1075; R1085-R1087; R1093-R1094; R1110-R1117; R1123-R1125; R1137-R1139; R1146-R1152; R1167-R1170; and R1181-R1182.

> provision stated that before "commencing arbitration, the dispute shall first be mediated." This highlighted that mediation and arbitration are two different processes. Last, the provision stated that the parties "specifically acknowledge that they are and shall be bound by arbitration and are barred from initiating any proceeding or action whatsoever in connection with this Agreement." This emphasized that arbitration is a binding process, and that parties are prohibited from initiating other proceedings or actions.

Dan Ryan Builders, Inc. v. Nelson, 2014 WL 496775 at *12. Where an arbitration agreement is this simple and straightforward, the plaintiffs cannot complain that it was not explained to them. *See, e.g.* Chevron U.S.A., Inc. v. Bonar, No. 16-1213, 2018 WL 871567 (W.Va. Feb. 14, 2018). Consequently, plaintiffs' conclusory allegation that they did not understand the provision, or that it was not explained to them does not support a finding of procedural unconscionability.

All of these circumstances taken together demonstrate that there was no procedural unconscionability in the formation of the Agreement of Sale and the arbitration provision therein.

2. The Agreement of Sale And Arbitration Provision Therein Are Not Substantively Unconscionable.

As the less fact-driven component of the analysis, decisional law from this Court demonstrates that the arbitration agreements are not substantively unconscionable.

> Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

Nationstar Mortgage, LLC v. West, 237 W.Va. at 92, 785 S.E.2d at 642 (*quoting* Syl. Pt. 19, Brown). In determining that the arbitration provision at issue is substantively unconscionable, the circuit court's 2012 Order (as prepared by plaintiffs' counsel) focused on three aspects of the Agreements: the arbitration service was to be selected and designated by Dan Ryan Builders,

Inc., the costs of arbitration, and the conclusion that the provision was one-sided and non-mutual. R0470-R0471, R0473.

Initially, the arbitration agreement does not, as the circuit court erroneously concluded, leave it to Dan Ryan Builders, Inc. to select and designate the arbitration service. Rather, the agreement explicitly provides for arbitration "pursuant to the Construction Industry Arbitration Rules and the Supplementary Procedures for Residential Construction Disputes of the American Arbitration association". R0742-R0743. The agreement does make pre-dispute mediation mandatory, and designates as the mediation service "the Construction Industry Mediation Rules of AAA, or other mediation service designated by Us." Id. However, the selection of the non-binding mediation service or the mediator thereof cannot affect the substantive rights of the parties. The circuit court's conclusion otherwise reflects the animus to arbitration that this Court has striven to eliminate.

Otherwise, as set forth hereinabove, the potential cost of arbitration is not a sufficient basis to invalidate an arbitration agreement. Moreover, this Court has already determined, in the context of this exact arbitration agreement, that complete bilaterality is not required. On remand from this Court's answer to a certified question in Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012), the United States District Court for the Northern District of West Virginia determined in Dan Ryan Builders, Inc. v. Nelson that this particular arbitration provision is "commercially reasonable." 2014 WL 496775 at *14.

> Although DRB is permitted to seek a remedy from the courts if [the purchaser] defaults, this is a narrow remedy. Essentially, the only instance when DRB may go to court rather than arbitration is to enforce the contract and recover damages in the event of default, which DRB admits is "failing to settle on a property." For every other issue arising out of the contract, DRB must go to arbitration.

Id. On that basis, the federal court determined that the arbitration provision is not substantively unconscionable. This Court should make the same determination. *See also* Nationstar Mortgage, 237 W.Va. at 92, 785 S.E.2d at 642.

Considering the totality of the circumstances, there was no basis for the circuit court to find that the arbitration provision is either procedurally or substantively unconscionable. Consequently, the arbitration provision must be enforced according to its plain language.[13]

E. THE CIRCUIT COURT ERRED IN TREATING DEFENDANTS' RENEWED MOTION TO COMPEL AS A MOTION FOR RULE 60(B) RELIEF FROM THE CIRCUIT COURT'S FEBRUARY 6, 2012 ORDER.

In the Order entered on May 30, 2018, the circuit court noted that it was treating defendants' renewed Motion to Compel Arbitration as a motion for relief from the court's prior ruling in its February 6, 2012 Order pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. R0009. Thus, the court *sua sponte* denied defendants' motion as untimely. This represents a clear misapplication of the West Virginia Rules of Civil Procedure and for this reason alone, the circuit court's ruling should be reversed.

It is indisputable that Rule 60(b) is applicable to only ***final*** judgments and orders. Indeed, the text of the rule itself states: "[o]n motion and upon such terms as are just, the court may relieve a party....from a ***final*** judgment, order or proceeding for the following reasons..." W.Va. R.C.P. 60(b) (emphasis added). *See also* N.C. v. W.R.C., 173 W.Va. 434, 436–37, 317 S.E.2d 793, 795–96 (1984) ("The primary vehicle by which a party may seek relief from a [final]

[13] Aside from the individual plaintiffs, Dan Ryan Builders, Inc. is the only signatory to the Agreements of Sale. However, by virtue of this Court's recent decision in Bluestem Brands, Inc. v. Shade, 239 W.Va. 694, 805 S.E.2d 805 (2017), each of the other non-signatory defendants may compel arbitration of all of the claims asserted in this case. Syl. Pt. 4, Id. ("A non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Such claims sufficiently arise out of and relate to the written agreement as to require arbitration.").

judgment or order in a circuit court is contained in Rule 60(b) of the West Virginia Rules of Civil Procedure."); Parsons v. Consolidated Gas Supply Corp., 163 W.Va. 464, 256 S.E.2d 758 (1979); Toler v. Shelton, 157 W.Va. 778, 204 S.E.2d 85 (1974); Intercity Realty Co. v. Gibson, 154 W.Va. 369, 175 S.E.2d 452 (1970). It is also indisputable that the circuit court's February 6, 2012 Order, whether treated as an order denying a motion to dismiss or a motion to compel arbitration, was ***not final***. *See* W. Va. Bd. of Educ. v. Marple, 236 W.Va. 654, 660, 783 S.E.2d 75, 81 (2015) ("[W]e do not review the denial of a Rule 12(b)(6) motion because it is not a final order."); Ewing v. Bd. of Educ., 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (1998) ("[T]he denial of a motion to dismiss is an interlocutory order"); Syl. Pt. 1, Credit Acceptance Corp. v. Front, 231 W. Va. 518, 745 S.E.2d 556 (2013) ("An order denying a motion to compel arbitration is an interlocutory ruling..."). As such, defendants, by way of their renewed Motion to Compel Arbitration, properly sought relief under Rule 54(b) of the West Virginia Rules of Civil Procedure which provides that "any order ... which adjudicates fewer than all the claims ... shall not terminate the action as to any of the claims ... and the order ... is subject to revision at any time before the entry of judgment adjudicating all the claims...." *See also* Syl. Pt. 2, in part, Taylor v. Elkins Home Show, Inc., 210 W.Va. 612, 558 S.E.2d 611 (2001) ("In an ongoing action, in which no final order has been entered, a trial judge has the authority to reconsider his or her previous rulings .... [A] trial court has plenary power to reconsider, revise, alter, or amend an interlocutory order ...."). Consequently, in treating defendants' renewed Motion to Compel Arbitration as a motion for relief from the court's prior ruling in its February 6, 2012 Order pursuant to Rule 60(b) and denying defendants' motion as untimely, the circuit court committed a clear error of law.

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VI. CONCLUSION

The February 6, 2012 ruling refusing to enforce the arbitration agreements was error, the May 30, 2018 ruling is similarly error, and at bottom this Court must enforce the arbitration agreements.

Respectfully Submitted,

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