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)

REPLY BRIEF

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I. INTRODUCTION

This appeal involves the enforceability of an arbitration provision, the validity of which was challenged by the plaintiffs/Respondents on the singular basis of unconscionability below. In that respect, the plaintiffs argued below that the agreements are both procedurally and substantively unconscionable contracts of adhesion. The plaintiffs supported that argument with affidavits containing conclusory allegations and lacking material factual information. Although the affidavits are abundant in number having been submitted by each named plaintiff in the case, every affidavit contains the same boilerplate conclusory statements. None of the conclusory statements, either individually or taken together, justifies the invalidation of any provision of the governing agreements in this case, particularly the arbitration provision therein. Aside from the affidavits, the plaintiffs relied only upon the substance of the instant arbitration provision, arguing that under the prior application of settled law a fill-in-the-blank form document containing an arbitration provision which preserves one party's right to pursue limited claims through the court is essentially per-se an unconscionable contract of adhesion. As detailed in Petitioners' Brief, that conclusion cannot withstand scrutiny under the current state of West Virginia decisional law.

The circuit court declined to revisit the arbitrability issue, erroneously treating a renewed motion to compel arbitration as an untimely Rule 60(b) motion for relief from judgment. Although the plaintiffs imply that the circuit court viewed defendants request for reconsideration as "years too late by any measure", Respondents' Brief at 2, any comments by the circuit court as to the timeliness of the renewed motion related solely to the court's erroneous application of Rule 60(b) and the specifically articulated time standards set forth in the Rule. The circuit court never analyzed the timeliness of a request to review the 2012 ruling refusing to enforce the arbitration agreements. Moreover, the circuit court and the parties expressly preserved defendants' right to request appellate review of the February 6, 2012 Order by virtue of the March 21, 2012 Agreed

Order. The Order contemplates that the parties would spend "thousands of hours of litigation proceedings and discovery", Respondents Brief at 2, and expressly concludes that that activity would not preclude appellate review. R0489.[1] The Order anticipates that those hours would not be wasted, explaining "[i]n the event that the appellate process should result in a reversal of this Court's arbitration ruling, and/or in the vacation of this Court's written Order of February 6, 2012, all pleadings, discovery material, admissions, expert disclosures, and other matters developed in the case in the interim shall be available for use in any arbitration proceeding that may ultimately be ordered by this Court, or by any appellate court." R0489. Consequently, plaintiffs' comment that reversal of the February 6, 2012 ruling "would waste scarce judicial resources, squander thousands of hours of attorney time, render irrelevant the circuit court's numerous hearings and rulings, and make a mockery of the Rules of Civil Procedure" is disingenuous. Respondents' Brief at 7.[2]

II. REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The plaintiffs portray the agreements of sale involved in this case as though they are inappropriate, describing them as "fill-in-the-blank" as though that is some sort of opprobrium. In the realities of today's consumer culture, one is hard-pressed to find any consumer agreement

[1] "[T]he 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.

[2] As the certified docket reflects, R1238-1255, the thrust of the litigation activity has involved claims against Evanston Insurance Company, and third party claims against Lang Brothers, Inc., Robert Lang, and Hornor Brothers Engineers, which were dismissed in 2016 pursuant to West Virginia Rule of Civil Procedure 56 and the court's perception of res judicata. The claims advanced by the plaintiffs against the defendants have been in the discovery phase for the past several years. The plaintiffs have yet to make a complete expert witness disclosure, citing the absence of full and complete discovery as the holdup. In addition, presently pending in the circuit court is the plaintiffs' Motion to Certify Class Action, an effort which is typically presented in close temporal proximity to the initial pleadings. Consequently, plaintiffs' inference that it is somehow too late in the game to enforce the valid and binding arbitration agreements is disingenuous for an abundance of reasons.

which does not originate from a pre-printed form.[3] For that reason, this Court has recognized that even the most adhesive of contracts, in which the 'weaker party' has absolutely no role or part in negotiating the terms are not necessarily invalid. *See* New v. Gamestop, Inc., 232 W.Va. 564, 753 S.E.2d 62 (2013). Instantly, the plaintiffs did have a role in negotiating the most important terms of the agreement, and there was absolutely no testimony from any of the plaintiffs that they attempted to negotiate other aspects of the agreements and were denied. R781-1182. The plaintiffs describe the substance of the agreements of sale as containing "complicated legalese".[4] Respondents' Brief at 3. However, that approach to invalidating written agreements is or should be a dead letter in West Virginia given recent jurisprudence. Under current decisional law, parties are bound by what they sign, whether they read the agreement, understood the agreement, consulted with legal counsel regarding the agreement, or otherwise.[5]

Building on their rebuke of the agreement of sale, the plaintiffs then castigate the defendants' business model as a "soup to nuts" approach as if that (1) has anything to do with the validity of the arbitration provision, and (2) renders the defendants immoral and unconscionable ab initio. Without any evidentiary support for such a statement, the plaintiffs remark "[t]his business model allowed the Petitioners to control nearly every aspect of the transaction, however, without disclosing the common ownership to the prospective purchaser." Respondents' Brief at 3-4. While the record for this appeal does not contain the substance of every disclosure to the plaintiffs as to the relationship between the defendants, the substance of the very Agreement of

[3] "[T]he bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts...." New v. GameStop, Inc., 232 W.Va. 564, 577, 753 S.E.2d 62, 75 (2013) (*quoting* State ex rel. Clites v. Clawges, 224 W.Va. 299, 306, 685 S.E.2d 693, 700 (2009)).

[4] In fact, the term "legalese" was last utilized by this Court in Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 682, 724 S.E.2d 250, 286 (2011).

[5] *See* Petitioners' Brief at 29.

Sale which is the subject of this appeal is in conflict with plaintiffs' commentary. By way of example, the Agreement of Sale for Travis and Jennifer Parker states in pertinent part:

> Our Lender is Monocacy Home Mortgage, LLC or its assigns ("Our Lender").
>
> ...
>
> (C) We recommend that Bowles, Rice, McDavid & Graff be selected as Settlement Agent ("Our Title Company"), and that Our Lender be selected as Lender. **You are under no obligation to select the Settlement Agent or Lender recommended by Us.** If (i) You obtain a Mortgage from Our Lender, (ii) Our Title Company acts as Settlement Agent, (iii) You are not in default under any provision of this Agreement and (iv) Settlement occurs (check one): __ upon completion of the Home/ __ on or before _____, 200__. You shall receive from Us or Our Lender the following incentives (if checked):
>
> ...
>
> If You exercise Your right to select either another Settlement Agent or another Lender, then You shall not be entitled to receive any credit or contribution under this Section. Additionally, if Our Lender provides You directly a closing cost or other cash incentive or rebate (a "Lender Direct Incentive"), then the amount provided by Our Lender will be deducted from the incentives that we have offered above. You elect to use the following Settlement Agent:
>
> ...

R0738, R0740 (emphasis added). Moreover, as explained in defendants' principal brief, many of the plaintiffs elected to use an outside lender in lieu of DRB's preferred, affiliated lender, and many of those plaintiffs negotiated to retain the incentive otherwise contingent on utilizing Dan Ryan Builders, Inc. recommended lender and title company. That evidence is plainly at odds with the additional gratuitous statement on Page 3 of Respondents' Brief that "[t]he Petitioners pressured all of the Respondents to use Petitioners' legal counsel for the purchase and closing of the real estate transaction...." Moreover, that statement is not even supported by the substance of the plaintiffs' boilerplate affidavits, as many of the plaintiffs utilized their own legal counsel or

the legal counsel recommended by their chosen lender. Notwithstanding, whatever legal counsel the plaintiffs utilized for the closing on the purchase of their home has nothing to do with the substance of the Agreement of Sale entered into before the start of construction on the home.

Refocusing specifically on the arbitration agreement, the plaintiffs then quote the entirety of the arbitration agreements, presenting it as though to underscore how difficult the language is to understand. However, the substance of this particular agreement is simple and straightforward. The provision explains that all claims must be settled by arbitration, "and not in a court of law". The provision explains that before "commencing arbitration, the dispute shall first be mediated". The provision explains the arbitration and mediation shall be in accordance with the applicable American Arbitration Association rules for the Construction Industry. The provision reiterates that the arbitration will be binding, and that the provision precludes them from "initiating any proceeding or action whatsoever". R0742-0743. *See* Dan Ryan Builders, Inc. v. Nelson, No. 3:10-cv-76, 2014 WL 496775, *12 (N.D. W.Va. Feb. 6, 2014).

Notwithstanding the clear and unambiguous language of the arbitration agreement, the plaintiffs then recite statements from their boilerplate affidavits as to what they allege was not done in connection with execution of the agreements of sale, complaining primarily that the agreement was not explained to or understood by them. That presentation demonstrates the fundamental fallacy of the plaintiffs' argument, and of the circuit court's ruling. The 'stronger party' to a written agreement is never obligated explain the terms of the agreement, to advise the other party to read the agreement, to ensure that the other party read and understood the agreement, or to suggest that the other party obtain independent legal counsel. *See* Argument Section B hereinbelow. Plaintiffs' effort to invalidate the arbitration agreement on any such basis cannot pass scrutiny. There is no basis to suggest in generally applicable contract law that a written

agreement is procedurally unconscionable merely because the 'weaker party' evidently neglected to read and allegedly did not understand the terms of the agreement. Consequently, that cannot be a basis for invalidating an arbitration agreement. Plaintiffs' argument to the contrary is reminiscent of the obligation in criminal prosecution to Mirandize an arrestee.

Crowning plaintiffs' fallacious argument, the Respondents' Brief provides "[t]he complete lack of understanding of the arbitration provision by the Respondent could not be more clearly demonstrated than by the sworn testimony of Crystal Rankin, the Petitioners' only employee charged with explaining the Sales Agreements to each of the Plaintiffs prior to execution." Respondents' Brief at 5. There is no support in any West Virginia caselaw for giving any credence to the degree of comprehension of a contractual provision by a signatory thereto. It would turn litigation on its head to do so, because then every proceeding would turn on the subjective understanding of the parties to clear and unambiguous contractual provisions. That was the thrust of a recent appellate decision in American States Insurance Co. v. Surbaugh, 231 W.Va. 288, 745 S.E.2d 179 (2013).[6] The controlling question is whether the language to a provision is clear and unambiguous. Thus, plaintiffs' argument that the arbitration agreements cannot be enforced because they did not understand them presents a fundamentally mistaken view of applicable law. Even if the subjective understanding of the plaintiffs was relevant, whether or not the sales person

[6] The decision in Surbaugh is explained in more detail in Section B of the Argument. Significantly, however, in its analysis of a similar argument from the plaintiff in that case this Court quoted with interest the following passage from a California appellate court:

> Failing to read a policy ... is not sufficient reason to hold a clear and conspicuous policy provision unenforceable. To hold otherwise would turn both contract and insurance law on its head. Insurers are not required to sit beside a policy holder and force them to read (and ask if they understand) every provision in an insurance policy.

Surbaugh, 231 W.Va. at 299, 745 S.E.2d at 190 (*quoting* Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Group, 197 Cal.App.4th 1146, 128 Cal.Rptr.3d 330, 338 (2011)).

for the defendants understood the agreement herself is completely beside the point, and it is foolish for the plaintiffs to extrapolate anything of the sort from Crystal Rankin's level of comprehension.[7]

Significantly, the plaintiffs did not attempt to rebut the record of evidence which has demonstrated that none of the plaintiffs were coerced into purchasing a home in Crystal Ridge, or into signing the Agreement of Sale to initiate the transaction. As demonstrated by the plaintiffs' testimonial evidence, these plaintiffs shopped around. They had the capacity to understand the real estate transaction and the terms within the Agreement of Sale. None of the plaintiffs sought to negotiate the arbitration provision. Dan Ryan Builders, Inc.'s sales agents did not deny anyone the opportunity to thoroughly review the Agreement of Sale prior to signing. The plaintiffs have failed to sustain the burden of proving that the arbitration agreements are anything other than valid and enforceable. The one-sided conclusory presentation of the facts contained in Respondents' Brief is exactly the kind of inadequate record that this Court has repeatedly rejected in the past several years.[8]

III. ARGUMENT

A. SUMMARY

In an effort to avoid the clear effect of this Court's recent rulings concerning the efficacy and enforceability of arbitration agreements, the plaintiffs argue that "[s]ubsequent common law should not be retroactively applied to the circuit court's 2012 Order." Respondents' Brief at 7. The plaintiffs contend in their submission that the unconscionable and unenforceable nature of the

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[7] Moreover, the plaintiffs have never before argued Crystal Rankin misled them as to the meaning of the arbitration agreements. Rather, their boilerplate affidavits state in pertinent part: : "The arbitration provisions of Agreement of Sale and Limited Warranty Agreement were not explained to me by Defendant Dan Ryan Builders, Inc., or any representative, thereof, nor was it explained what arbitration was, nor what rights I would give up by signing the agreement." R0110.

[8] *See* Hampden Coal, LLC v. Varney, 240 W.Va. 284, 810 S.E.2d 286 (2018); Kirby v. Lion Enters., Inc., 233 W.Va. 159, 756 S.E.2d 493 (2014); Pingley v. Perfection Plus Turbo-Dry, LLC, 231 W.Va. 553, 746 S.E.2d 544 (2013).

arbitration agreements was demonstrated below by more than 40 testimonial affidavits and the substance of the arbitration agreement. However, the plaintiffs can only prevail on that argument if this court views the arbitration agreement on uneven grounds with other contractual provisions. Initially, the Court would need to adopt some requirement applicable only to arbitration agreements that the parties read, understand, and be provided the advice of independent counsel in order for arbitration agreements to be enforceable. That sort of requirement would not survive under the Federal Arbitration Act. Next, the Court would need to vacate recent jurisprudence which plainly recognizes enforceability of arbitration agreements even where they are not perfectly mutual. It is inescapable that valid and binding arbitration agreements exist and must be enforced by this Court.

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.

According to the plaintiffs, the record before the circuit court in 2012 consisted of "clear and concise affidavits ... detailing their experience with Petitioners during the purchase of a home located in the Development." Respondents' Brief at 6. While the affidavits were clear and concise, they were also conclusory, and they lacked the factual detail regarding each plaintiff's individual experience culminating in the Agreement of Sale. Consequently, contrary to the assertion on page 9 of Respondents' Brief, the affidavits do not carry the plaintiffs' burden of proof in demonstrating that the arbitration agreements are unconscionable – not under the then-current jurisprudence, and certainly not under current decisional law.

The plaintiffs now emphasize that the import of the arbitration agreements was concealed from them, and the agreements were not explained to them by defendants' sales person. Respondents' Brief at 10. In that respect, the plaintiffs somehow have the notion that the

arbitration agreements are unenforceable unless the defendants can demonstrate that the agreements were explained to and understood by the plaintiffs. That position is reminiscent of the plaintiff's position in American States Insurance Co. v. Surbaugh, 231 W.Va. 288, 745 S.E.2d 179 (2013), where it was argued that a clear and unambiguous, conspicuous insurance policy exclusion was unenforceable because it had not been brought to the attention of the insured. Significantly here, as in Surbaugh, the circuit court did not find that the contractual provision at issue is ambiguous or inconspicuous.[9] Nonetheless, the plaintiffs here, like the plaintiff in Surbaugh, argue that defendants' never told them about the arbitration agreement. Surbaugh makes clear that defendants' fulfilled their obligation to the plaintiffs by making the arbitration agreement clear, unambiguous and conspicuous.

Surbaugh underscores that in generally applicable contract law, whether a party to the agreement was told about a particular provision, saw the provision, read the provision, was told to read the provision, understood the provision,[10] was told to involve independent legal counsel, or otherwise are of no consequence. In order to recognize such a requirement in the circumstances of this case, pertaining only to arbitration agreements, this Court would be recognizing a categorical rule against arbitration that would not survive under the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. ("FAA"). *See* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533, 132 S.Ct. 1201, 1203-1204 (2012) ("West Virginia's prohibition against predispute agreements to

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[9] And such a finding would be erroneous here, because the language of the arbitration agreement is plain, clear and unambiguous, and the agreement itself is offset by a clearly marked, bold, and all capital heading: 19. **ARBITRATION**. 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.* R0742-0743.

[10] The totality of plaintiffs' reliance on Crystal Rankin's testimony demonstrates the absence of any meaningful evidence to support the circuit court's finding that this was a contract of adhesion. Crystal Rankin's testimony concerning her understanding of the arbitration provision is the most frequently cited bit of evidence in Respondents' Brief.

arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA"); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011) ("a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.'") (*quoting* Perry v. Thomas, 482 U.S. 483, 492 n9, 107 S.Ct. 2520, 2527 n9 (1987)).

Plaintiffs' effort to distinguish Hampden Coal, LLC v. Varney, 240 W.Va. 284, 810 S.E.2d 286 (2018), is confused and ineffective. Initially the plaintiffs argue that the Hampden Coal circumstances differ because "the plaintiff supported this assertion with only the language of the agreement itself explaining that the arbitration agreement contained a one-year limitations period." Respondents' Brief at 11. Then, in an about-face, the plaintiffs contend that same plaintiff "focused his unconscionability argument on the specific facts involved in the execution of the agreement rather than merely based on its terms." Id. The thrust and significance of Hampden Coal is in the inadequacy of the factual record to support a determination of unconscionability. While instantly the plaintiffs' conclusory affidavits provide in part "nor was it recommend[ed] that I seek legal advice regarding the Agreement of Sale", "I was not told to read the Agreement before [initialing each page and signing]" and "I was never given the option to exclude arbitration as a provision of the Agreement of Sale", e.g. R110, there was no **evidence** presented below that the plaintiffs tried but were denied the opportunity to seek legal advice, read the Agreements, or exclude the arbitration provision. *See* Hampden Coal, 240 W.Va. at 296, 810 S.E.2d at 298.[11] "It

[11] As explained in Petitioners' Brief, the February 6, 2012 Order contained findings of fact on those matters even though the circuit court's letter decision contained no such findings. Plaintiffs argue that the circuit court's wholesale adoption of their order containing the findings of fact was entirely appropriate. However, this Court has very recently cautioned against that approach, remarking "we would be remiss if we failed

is axiomatic that his counsel's arguments are not evidence." Id. Moreover, as stated, the defendants were not even obligated to recommend that plaintiffs seek legal advice, tell the plaintiffs to read the agreement, or make sure that the plaintiffs understood the agreement.

The record of evidence before the circuit court was clearly inadequate to support the conclusion that the instant arbitration agreements are unconscionable contracts of adhesion.

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

In support of their argument that the arbitration agreements are unenforceable under state contract law as unconscionable contracts of adhesion, the plaintiffs either intentionally misconstrue or utterly misapprehend the clear and concise statement of defendants' argument. The defendants have not argued that "this Court has only recently established the presumption favoring enforceability of arbitration provisions...." (Respondents' Brief at 14). To reiterate, the defendants acknowledge that there has not been a change in the legal precepts that apply to the enforcement of arbitration agreements. Rather, the change has been in the faithfulness of their application to the facts and circumstances of discrete cases, and in the outcomes with respect to disputes regarding arbitrability. The plaintiffs have tried to minimize the substantive significance of this change in the law by relegating it to a procedural issue, to wit, whether it justifies the alleged delay in bringing this appeal. In fact, as a significant substantive issue the legal landscape in West Virginia relative to the enforcement of arbitration agreements is markedly different than it was six years ago.

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to caution the lower courts regarding the risks attendant to adopting and entering – wholesale – orders prepared by counsel." Taylor v. W.Va. Dep't of Health & Human Res., 237 W.Va. 549, 558, 788 S.E.2d 295, 304 (2016). This Court then turned its remarks to counsel, "we find it necessary to admonish counsel regarding preparing and tendering over-reaching orders which fail to succinctly identify and address the critical factual and legal issues." Id.

The significance of the pre-2012 state of the law is highlighted by the following statement on page 13 of Respondents' Brief: "the circuit court found in 2012 that the arbitration provision was inequitable and, therefore, unconscionable, contained in a contract of adhesion, rendering the arbitration provision unenforceable." In 2012 the widespread hostility toward arbitration agreements and arbitration as a method of dispute resolution nearly permitted circuit courts to determine, as a visceral reaction, that an arbitration agreement was inequitable and therefore unenforceable. That animosity was demonstrated most clearly by Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011) and Brown v. Genesis Healthcare Corp., 229 W.Va. 382, 729 S.E.2d 217 (2012). That hostility does not reflect today's law – it also does not reflect the well-established presumption favoring arbitration. Under the current state of West Virginia decisional law a circuit court cannot render an arbitration agreement unenforceable based upon a visceral reaction that the agreement is inequitable.

Providing only vague commentary, the plaintiffs attempted to distinguish four of the recent decisions enforcing arbitration agreements from the facts of this case. *See* Respondents' Brief at 15.[12] Significantly, however, the plaintiffs evidently could not distinguish Chevron U.S.A., Inc. v. Bonar, No. 16-1213, 2018 WL 871567 (W.Va. Feb. 14, 2018), Toney v. EQT Corp., No. 13-1101, 2014 WL 2681091 (W.Va. June 13, 2014), Kirby v. Lion Enterprises, Inc., 233 W.Va. 159, 756 S.E.2d 493 (2014), State ex rel Ocwen Loan Servicing, LLC v. Webster, 232 W.Va. 341, 752 S.E.2d 372 (2013), or Grayiel v. Appalachian Energy Partners 2001-D, LLP, 230 W.Va. 91, 736 S.E.2d 91 (2012), all of which auger forcefully for enforcement of the arbitration agreements. Moreover, plaintiffs' effort to distinguish the decision in Citizens Telecommunications Co. of W.Va. v. Sheridan, 239 W.Va. 67, 799 S.E.2d 144 (2017), falls woefully short. Plaintiffs describe

[12] The plaintiffs spend a considerable amount of time attempting to distinguish the cases which they contend do not reflect a sea change in the law.

that case as factually different, "regarding a modification to an arbitration agreement". Respondents Brief at 15. In fact, the case involved an arbitration agreement unilaterally established by the defendant, which included a class-action waiver. This Court found the agreement to be conscionable and enforceable against the plaintiff. If a unilaterally imposed arbitration agreement is enforceable, then this bargained for, conspicuous, clear and unambiguous arbitration agreement must be enforced.

The plaintiffs defend the circuit court's failure to rescind, unwind and in effect cancel the agreements of sale by arguing that "a trial court may decline to enforce a contract clause – such as an arbitration provision – if the obligations or rights created by the clause unfairly lack mutuality." Respondents' Brief at 15-16. Ironically, the plaintiffs cite Dan Ryan Builders, Inc. v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012), for that entirely misinterpreted proposition.[13] Nelson was a certified question involving adequacy of consideration and mutuality of obligation. Contrary to the plaintiffs' interpretation, this Court determined in Nelson that from the perspective of adequacy of consideration the analysis must focus on the totality of the agreement.[14] Even if there was some legal authority for a circuit court to conclude "that a single clause contained within an agreement can be deemed unconscionable, invalid and unenforceable while upholding the remainder of the agreement", Respondents' Brief at 16, – which there is not – then such authority would be immaterial to the procedure utilized by the circuit court. Instantly, the circuit court broadly examined the totality of the transaction, and found the agreements of sale to be unconscionable

[13] Incidentally, the federal court's opinion in Nelson, which found this identical arbitration agreement to be valid and enforceable, is thoroughly instructive in this case. *See* Dan Ryan Builders, Inc. v. Nelson, No. 3:10-cv-76, 2014 WL 496775 (N.D. W.Va. Feb. 6, 2014). *See* Petitioners' Brief at 24-25.

[14] Moreover, the subsequent decision in Kirby v. Lion Enterprises, Inc., 223 W.Va. 159, 756 S.E.2d 493 (2014), makes clear that the entire unconscionability analysis must take into consideration the totality of the agreement. Consequently, the unconscionability analysis cannot focus only on the arbitration agreement.

contracts of adhesion in their totality. R0474. However, the circuit court left the entire transaction intact except for the arbitration agreement. That result is manifestly indicative of an animosity towards arbitration. Having found the entire agreement to be unconscionable, the circuit court should have unwound the entire transaction.

Defending the circuit court's conclusion that the instant arbitration agreements are unenforceable because they are inequitable or not perfectly mutual, the plaintiffs attempt to distinguish the circumstances of this case from the explanation contained in Nationstar Mortgage, LLC v. West, 237 W.Va. 84, 785 S.E.2d 634 (2016). In Nationstar, this Court clarified that there may be commercially necessary exceptions to complete mutuality in arbitration provisions. Because Nationstar involved a mortgage loan, the plaintiffs make the pointed argument that "this narrow allowance for an exception to arbitration is only permitted for a financial lender who needs to utilize statutory procedures for foreclosures and to protect its security interests." Respondents' Brief at 17. However, at no point in the analysis set forth in Nationstar did this Court caution that the absence of complete mutuality would only be tolerated for a financial lender. To the contrary, this Court referenced the Nelson, *supra*, case stating: "This Court has made it clear that, rather than full bilaterality, only a modicum of bilaterality is required to avoid a determination of unconscionability." Nationstar Mortgage, 237 W.Va. at 92, 785 S.E.2d at 642. By referencing Nelson, this Court certainly suggested that there may be commercially necessary exceptions to complete mutuality in industries other than financial lending – the residential construction industry in particular.

Through its recent decisions, this Court has made clear that the Brown reminiscent anti-arbitration animus does not comport with the fundamental legal precepts governing the enforceability of arbitration agreements. The significance of that change cannot be minimized by

focusing on the alleged delay in bringing this appeal. Rather, the significance is demonstrated by the fact that each of the grounds relied upon by the circuit court to invalidate the instant arbitration agreements is unsustainable.

D. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE.

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

In Respondents' Brief, the plaintiffs selectively utilize text from this Court's decision in Nationstar Mortgage, LLC v. West, *supra*, but do so out of context in a failed attempt to implicate the pre-2012 standards articulated by Brown. Nationstar Mortgage recognizes that a finding of procedural unconscionability involves considerations of fairness, and an analysis of whether a contractual provision "imposes terms beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable terms." Id., 237 W.Va. at 89, 785 S.E.2d at 639 (*quoting* Brown, 228 W.Va. at 683, 724 S.E.2d at 287). However, on close examination this Court's decision significantly eroded the degree of deference previously afforded to the plaintiffs one-sided account of the "reasonable expectations". Rather, this Court was more interested in whether the arbitration agreement was clear, unambiguous, and conspicuously placed, and whether the agreement as a whole was supported by adequate consideration.

Ignoring that clear analysis, the plaintiffs argue that "the arbitration provisions at issue here could not conform with Respondents' reasonable expectations." Respondents' Brief at 21. The plaintiffs explain their reasonable expectations by referencing the absence of complete mutuality, and then stating that the arbitration provisions "were added into the Sales Agreement without any discussion, negotiation or even notice to Respondents." Id. Finally, the plaintiffs once again reference Crystal Rankin's comprehension of the agreement. The plaintiffs' embellished argument that the arbitration agreements are procedurally unconscionable suffer from two new errors of law.

Initially, the plaintiffs contend that the substance, terms and conditions of their agreement to purchase a home from the defendants were established before they were presented with the written agreements of sale. As a legal premise that argument necessarily fails. This transaction involves the purchase of real estate. Consequently, under the Statute of Frauds, W.Va. Code § 36-1-3, the contract for sale had to be memorialized in writing.

Once the agreement of sale was reduced to writing, the terms of the written agreement preempt any contrary or different oral understanding of the parties. Under the parol evidence rule:

> Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration.

Syl. Pt. 3, Larew v. Monongahela Power Co., 199 W.Va. 690, 487 S.E.2d 348 (1997). The circuit court did not find, and the plaintiffs have not alleged illegality, fraud, duress, mistake or insufficiency of consideration in connection with the agreements of sale. Nor has there been any contention that the agreements of sale or arbitration agreement therein are "uncertain, incomplete, or ambiguous...." Id. at 694, 487 S.E.2d at 352. Consequently, even if the arbitration agreement differs from the understanding of the plaintiffs during oral discussions, then the clear and unambiguous writing controls.

In the last six years, this Court has consistently and appropriately rejected the concept that the mere inclusion of an arbitration provision in a contract renders it unconscionable. After all, that premise is contrary to the dictates of the FAA. Nonetheless, the entire thrust of the Respondents one-sided, unsupported argument is that the defendants snuck an arbitration agreement into a written agreement that was thrust upon them after the terms and conditions of their agreement to purchase real property had been verbally established. The plaintiffs have failed

to demonstrate any procedural unconscionability in connection with the agreements of sale as a whole, or the arbitration agreements.

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

Plaintiffs again defer to the perceived absence of complete mutuality in the arbitration agreement in their effort to render the agreement substantively unconscionable. As explained in Petitioners' Brief, and hereinabove, under the current state of West Virginia decisional law complete mutuality is not required. Rather, there are "commercially reasonable" exceptions to complete bilaterality, and the United States District Court for the Northern District of West Virginia has already observed that this particular arbitration provision is "commercially reasonable". Dan Ryan Builders, Inc. v. Nelson, 2014 WL 496775 at *14.

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.

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 support of their argument that the circuit court properly considered defendants' renewed motion to compel arbitration as a Rule 60(b) motion for relief from judgment, the plaintiffs cite Powderidge Unit Owners Association v. Highland Properties, Ltd., 196 W.Va. 692, 474 S.E.2d 872 (1996), Law v. Monongahela Power Co., 210 W.Va. 549, 558 S.E.2d 349 (2001), Malone v. Potomac Highlands Airport Authority, 237 W.Va. 235, 786 S.E.2d 594 (2015), and Burton v. Burton, 223 W.Va. 191, 672 S.E.2d 327 (2008). However, each one of those cases involves an effort to obtain relief from a final judgment. Powderidge and Law involve summary judgment orders. Malone involves an order granting a motion to dismiss. Burton involves a final order of

divorce and the distribution of property set forth therein. Respondents have therefore failed to identify a single case where a motion to reconsider an interlocutory order was properly considered under Rule 60(b). As interlocutory, the February 6, 2012 Order is subject to reconsideration at any time until a final judgment is entered in this case. *See* W.Va. R.C.P. 54(b); 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.

IV. 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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