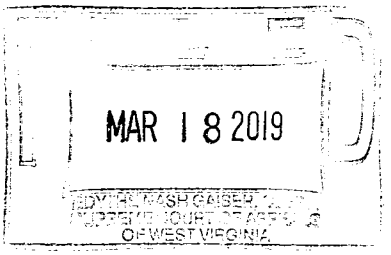
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



JEFFREY N. EVANS and
AMERIPRISE FINANCIAL SERVICES, INC, and
KRISTINA NICHOLLS and STEPHEN BAYLES,
Defendants Below,

Petitioners,

v.

No. 18-0876
(Companion Appeal 18-0871)

DEBRA K. BAYLES,
Plaintiff Below,

Respondent.

RESPONDENT'S BRIEF AND CROSS DESIGNATION OF ERROR

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I. STATEMENT OF THE CASE

The instant case regards Respondent Debra K. Bayles' improper and fraudulent removal as a beneficiary from investment accounts held by Ameriprise for her husband, W. Nelson Bayles, which were funded by a rollover of Mr. Bayles' 401K. The Respondent (Plaintiff Below), Debra K. Bayles, was married to Nelson Bayles for 22 years and they were married all times material and relevant to this dispute. *Appendix I at 418.* Nelson Bayles, a resident of Cameron, Marshall County, West Virginia, died on March 26, 2013. *Appendix I at 417-418.* At the time of his death, he was 64 years of age, had been retired, and had applied for Social Security Disability. *Appendix I at 391, 417-418.*

Nelson Bayles had a 401K pension account with a company called NiSource from his prior employer, upon which his spouse, Respondent, Debra Bayles, was the beneficiary. During the first half of 2012, Nelson Bayles and his daughter, Petitioner, Kristina Nicholls, met with an Ameriprise financial adviser, Petitioner Jeffrey N. Evans, to discuss the rollover of that 401K account to another type of investment account. *Appendix I at 438-443.* The selection of Petitioner Jeffery N. Evans was not a by chance encounter. Petitioner, Kristina Nicholls, had a personal relationship with Ameriprise agent and Petitioner, Jeffrey N. Evans. She worked with his spouse, she attended their wedding, and she attended other social events at their house. *Appendix I at 429-434, 552.* Petitioner, Debra Bayles, was not advised of this meeting. *Appendix I at 391.* Ms. Bayles and her step-daughter, Ms. Nicholls, did not get along. *Appendix I at 767.*

At the aforesaid meeting, the parties discussed, in Mrs. Bayles' absence, the idea of rolling over Nelson Bayles' 401K account with NiSource to an Ameriprise IRA. It was

determined that this would be impossible to do without the consent of Respondent, Debra Bayles, who was a spousal beneficiary of the 401K account. *Appendix I at 441.*

Accordingly, on June 20, 2012, the Petitioner, Jeffery N. Evans, brought the Respondent, Debra Bayles, and her husband in for a meeting at his office in Pennsylvania about rolling over the 401K to an IRA. During said meeting, Mrs. Bayles asked Petitioner Evans how any new account at Ameriprise would affect her status as beneficiary of the 401K proceeds, and whether her beneficiary status could be changed at a later date without her consent. Petitioner Evans warranted to Mrs. Bayles that she was the beneficiary of the rollover funds and represented to her that by executing the spousal consent forms for the 401K her status as beneficiary of the rollover proceeds could not be changed in the future without her consent. The meeting lasted approximately 30 minutes. *Appendix I at 418-419, 791-792.*

On that same date, the decedent, Nelson Bayles signed the Ameriprise Brokerage Individual Retirement Account Application, account number 264133, to transfer the NiSource 401K rollover proceeds. This application referred to an agreement containing one of the arbitration clauses at issue herein. No documents were signed by Mrs. Bayles on said day. Mrs. Bayles testified that there was no discussion of any arbitration clause at this meeting. *Appendix I at 418-419,509-525, 625-630.*

Following the meeting, a spousal consent form was sent to Mr. Bayles the holder of the 401K and was presented to Respondent Debra Bayles. In material reliance upon the representations of Petitioner, Jeffery N. Evans, the Respondent, Debra Bayles, signed the spousal consent form from NiSource on June 26, 2012. *Appendix I at 418-419.*

Prior to signing said document, Respondent, Debra Bayles, again contacted Petitioner Evans by telephone and asked him for reassurance that her beneficiary status on the new account

would not change in the future if she consented of the rollover of the 401K to Ameriprise by sending in the form. *Appendix I at 418-419.* Once again, Petitioner Evans represented to Mrs. Bayles that she was the beneficiary going forward and that she would remain so unless she consented to a beneficiary change in the future. *Appendix I at 418-419.* But for those representations, Respondent, Debra Bayles, would never have agreed to sign the spousal consent form and the 401K would have remained intact. *Appendix I at 418-419.*

On September 5, 2012, without Mrs. Bayles' knowledge or consent, the decedent, Nelson Bayles, opened a second IRA account with Ameriprise through Petitioner Evans. *Appendix I at 501-508, 647-654.* According to Petitioner Evans, he completed an active portfolio's account application with an assigned account number ending in 961133. The decedent Mr. Bayles allegedly requested that approximately One Hundred Thousand Dollars ($100,000.00) of the IRA proceeds be directed into an account numbered 961133 and that the remaining balance of funds be retained in the initial account numbered 264133. *Appendix I at 501-508,647-654.* The decedent, Nelson Bayles, named his wife and Respondent, Debra Bayles, the beneficiary of the new account numbered 961133 and containing approximately $100,000.00, as evinced by the account paperwork. *Appendix I at 501-508, 647-654.*

On the same day, and contrary to his prior representations to Mrs. Bayles, Petitioner Evans prepared a change of beneficiary form for Mr. Bayles' execution on the initial account numbered 264133, naming his friend and Petitioner, Kristina Nicholls, and her brother and Petitioner, Steven Bayles, as account beneficiaries. This was done without the knowledge or consent of the Respondent, Debra Bayles. *Appendix I at 516-518, 783.* Both the Brokerage Application and the Portfolios Application refer to pre-dispute arbitration clauses. Neither document was ever signed by Respondent, Debra Bayles. *Appendix I at 501-515.*

At the time the decedent, Nelson Bayles, signed the Brokerage Application he was 63 years of age. When he signed the Portfolios Application, he was 64. To the best of Respondent Debra Bayles' knowledge, other than his employer accounts, Mr. Bayles had never previously dealt with an individual financial advisor and, in fact, didn't even write his own bills as during their marriage either Respondent or Petitioner Nicholls handled writing his bills. The decedent had a tenth-grade education and did not hold any offices or positions requiring extensive paperwork. *Appendix I at 418-419.*

On September 24, 2012, Ameriprise allegedly sent a letter addressed to the decedent, Nelson Bayles, which inaccurately showed the Petitioners Kristina and Steven as the beneficiaries of both accounts. *Appendix I at 529.* Not too long thereafter, Nelson Bayles became hospitalized for surgery. While hospitalized, Mr. Bayles assured Mrs. Bayles that the money in the Ameriprise account was there for her. *Appendix I at 783 and 794.*

After Mr. Bayles passed away, Respondent, Debra Bayles, was installed as the administratrix of his Estate. *Appendix I at 19.* Mrs. Bayles called Petitioner Evans' office on multiple occasions, following her husband's death, to determine the status of the account held at Ameriprise of which she believed herself to be beneficiary. Petitioner Evans' office failed to provide her any information regarding the accounts. This is despite the fact that even he thought there was a conflict as to who the beneficiaries of the accounts were based upon his own files, Mr. Bayles intent, and the paperwork received from the Ameriprise home office. *Appendix I at 748-770 and 793.*

When she couldn't get information from Petitioner Evans, Mrs. Bayles had her attorney write to him to determine the date of death value of the IRA account. This information was necessary for the completion of the non-probate inventory of the estate appraisement forms.

Appendix I at 522 and 770. Petitioner, Jeffery N. Evans, responded indicating only that he could not provide information regarding the accounts without a letter of appointment from the court and written authorization from the executor. *Appendix I at 522.*

The Respondent, Debra Bayles, by counsel, provided her appointment paperwork to Petitioner as acknowledged by Petitioner Ameriprise on May 29, 2013. *Appendix I at 522.* Mrs. Bayles thereafter obtained new counsel and made a second request for the date of death values and beneficiary information on or about December 12, 2013. *Appendix I at 754-755.* Petitioner Ameriprise finally responded by sending correspondence with the information requested showing two accounts and Petitioners Kristina Nicholls and Stephen Bayles as beneficiaries of both accounts. *Appendix I at 523-524.* Respondent, Debra Bayles, was shocked because she was of the reasonable belief that she was the beneficiary of all of the IRA proceeds. *Appendix I at 792-796.*

Despite Petitioner Ameriprise's indication that the children were the beneficiaries of the IRA accounts, a clear discrepancy existed in beneficiary forms and files of the Petitioners. The Petitioners were aware of these discrepancies as evidenced by their own internal emails. *Appendix I at 500-501, 748-770.* The emails are quite revealing. They begin by acknowledging the discrepancy and Ameriprise's life events office asking Petitioner Evans' office to "ask if the family would agree as to what designation should apply," with Petitioner Evans' office asserting that "no they will not agree on this we are sure". *Appendix I at 767.* The emails further establish that while Petitioner Evans was communicating to his friend, Ms. Nicholls, and her brother that they were beneficiaries of the money, he was telling Respondent, Debra Bayles, the matter was in the hands of Estate Settlement and he could not say to her or do anything. *Appendix I at 764.*

In intra office emails between the life events office of Petitioner Ameriprise and Petitioner Evans' office, they described in detail the beneficiary discrepancy, talked about how the Petitioners could get sued over this, discussed that they needed something in writing from Debra Bayles to contest the beneficiary designations, and/or needed her to institute a "court action" to contest the beneficiary designations. At the same time, Petitioner Evans and/or his office was failing and/or refusing to provide any of this information to Respondent, Debra Bayles. *Appendix I at 748-770.*

Without resolving the discrepancy or even informing Debra Bayles such a discrepancy existed, the Petitioners made the unilateral decision that Mrs. Bayles was not an account beneficiary and paid out the entire balance of all the accounts to Petitioners, Kristina Nicholls and Steven Bayles. *Appendix I at 754.*

When Respondent, Debra Bayles, found out about this, she believed that she had been lied to. Accordingly, she filed a Complaint with the Circuit Court of Marshall County on September 5, 2014 alleging detrimental reliance, breach of contract, unjust enrichment and negligence. *Appendix I at 1.* In response, the Petitioners filed a Motion to Dismiss and Compel Mandatory Arbitration on November 19, 2014. The Circuit Court denied said motion on May 19, 2015. *Appendix I at 127 and 8.* The Petitioners appealed the Circuit Court denial on June 22, 2015. *Appendix I at 135-140.* This Court reversed and remanded the Circuit Court decision, finding there were unresolved issues, including whether the arbitration clause was unconscionable and whether any of Mrs. Bayles' claims fell outside the substantive scope of the Arbitration Agreement. *Appendix I at 148-163.*

Upon Remand, the Circuit Court granted a Motion to Amend the Complaint permitting the Respondent to allege fraud and directed a brief period for discovery. *Appendix I at 174.*

After a limited period of discovery, Petitioners Ameriprise and Evans filed a Renewed Motion to Dismiss and Compel Mandatory Arbitration. *Appendix I at 215.* The Petitioner filed a response to said motion. *Appendix I at 390.* The Circuit Court issued an Order on September 15, 2018, whereby the Circuit Court entered an Order dismissing Plaintiff's claims and ordering mandatory arbitration. *Appendix I at 875.* Both Plaintiff and Defendant below appealed the Circuit Court's order on separate issues.

II. SUMMARY OF ARGUMENT

Respondent, Debra Bayles, alleges that she was the rightful beneficiary of the proceeds of the Ameriprise accounts at issue. She had a legal right to be named the beneficiary under her husband's 401K account with NiSource, a status that could not have been changed without her consent. Mrs. Bayles detrimentally relied upon misrepresentations made by the Petitioners in June of 2012, misleading her into signing a spousal consent form to rollover the proceeds of the NiSource 401K account to an Ameriprise IRA account under the false pretense that her status as beneficiary of those funds would not change. Despite these material representations, the Petitioners changed the beneficiary of the rollover funds without Mrs. Bayles' knowledge or consent and removed her as beneficiary. Following the death of Nelson Bayles, the Petitioners, knowing that there was a dispute over the funds, nevertheless unilaterally decided that Mrs. Bayles was not a beneficiary of or party to any account held by Ameriprise and released all of the monies to Petitioners, Kristina Nicholls and Steven Bayles.

Now, the Petitioners audaciously assert that, pursuant to the same IRA account agreements which they have already decided that Mrs. Bayles is not a party to or beneficiary of, she is somehow bound to arbitrate her civil claims against all them pursuant to the terms of those agreements. This position is ridiculous, untenable, and turns West Virginia contracts law on its

head. Mrs. Bayles is not a party to any arbitration agreement claimed valid or applicable by the Petitioners, she is not a signatory to any of them, and she was conferred no benefit and/or received no consideration from the Petitioners. Mrs. Bayles did not agree nor consent to the arbitration of her claims herein. The civil claims pled by her in the underlying action are individual to her and fall far outside of the scope of any arbitration clause claimed applicable by the Petitioners.

The Petitioners seek to compel the Respondent, Debra Bayles, to arbitrate tort claims that fall outside of the scope of the agreements the Petitioners rely upon agreements to which she is a non-party, and contracts that are the by-product of fraudulent misrepresentations made to Mrs. Bayles. The Petitioners now seek to confer upon themselves the benefits of their wrongful conduct and further deny Mrs. Bayles access to the Court by holding her bound to contractual arbitration clauses that would not exist in the absence of their fraud. The arbitration clauses relied upon by the Petitioners are procedurally and substantively unconscionable.

Consequently, since the arbitration clauses are unenforceable both as to the causes pled, as well as the causes of Fraud and/or Concealment referred to by the Circuit Court that were discovered on May 19, 2017. Wherefore, the Petitioner contends the Circuit Court erred in dismissing the Complaint below and granting mandatory arbitration (see cross designations of error herein), and but was correct in permitting the Petitioner to proceed on the claims of Fraud and Concealment occurring after the death of Nelson Bayles.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits that oral argument is necessary under Rule 20 given the error committed below, being that Respondent was not a party to the arbitration clause and has her

own separate causes of action outside the scope of the arbitration clause. This appeal presents a matter of public importance insofar as it regards the scope of and application of arbitration clauses procured by improper means and/or to non-party, non-signatory consumers. There being no case directly on point to the facts of this case, the Respondent believes that this matter may present matters of first impression in West Virginia, and/or expand upon or further the scope of the law of contracts with respect to arbitration in this State.

Respondent submits that a Rule 20 argument and resulting decision will best serve not only the parties herein and the Circuit Court, but other litigants, circuit court judges and members of the bar. As such, full Rule 20 argument and consideration is requested.

IV. ARGUMENT

A. Standard of Review

Appellate review of an Order granting a Motion to Dismiss a complaint is de novo. See **Syllabus point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995).**

An Order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine. **See Credit Acceptance Corp. v. Front, 231 W.Va. 518, 745 S.E.2d 556 (2013).**

B. The Petitioners' Assignments of Error Nos. 1, 2 and 3 are without merit as the Court's findings on the issue of subsequent acts of fraud were made upon issues not yet before the Court and appear to only have been made in acknowledgement of that fact.

The Petitioners' arguments on all Counts of its Petition regard findings by the Court concerning issues of fraud and concealment. The Petitioners exceptions and objections to those

findings, raised on appeal, are premature as issues of subsequent acts of fraud and/or concealment were not pled by the Respondent in the action hereinbelow. Instead, those acts and/or omissions were discovered for the first time in the course of the depositions taken in the underlying matter. The Respondent has not yet filed a Complaint and/or Amended Complaint regarding those issues and the same are not yet before the Court. The statute of limitations has not expired on said claims, and the Respondent intends upon filing the same.

On appeal, the Petitioners are asking this Court to rule upon issues of the arbitrability of unpled fraud claims that have not yet been made part of pleadings hereinbelow. The Petitioners' appeal with respect to the same is improper as they are asking this Court to make substantive findings with respect to a claim that has not been brought before the trial court.

With respect to the Circuit Court's findings regarding fraud in the subject Order. The Respondent's reading of the same is that those findings were included as *dicta* and to clarify the metes and bounds of those fraud claims the Circuit Court found not to be yet before it.

Accordingly, the Petitioners' appeal on Counts 1 through 3 should be denied as it seeks substantive intervention by this Court on claims not yet before the Circuit Court.

C. The Petitioners' Assignments of Error Nos. 1 and 3 are without merit as those arguments improperly presume that a valid and enforceable arbitration agreement between Petitioner and Respondent exists.

1. The Petitioners' assignments of error Nos. 1 and 3 hinge upon the existence of a valid arbitration agreement. However, no valid arbitration agreement exists between the Petitioner and Respondent and she is not a party to any arbitration agreement alleged applicable by the Petitioner.

The Petitioners' assignments of error Nos. 1 and 3 fail because they improperly assume that a valid agreement to arbitrate exists between the parties. The Respondent is not a party to

any valid arbitration agreement with the Petitioners. Moreover, any arbitration agreement alleged applicable by the Petitioners is the direct byproduct of fraud on the part of Petitioners.

As the spouse of the decedent, the Respondent had a right to remain a beneficiary of the decedent's 401K with NiSource. Without her consent, that could not be changed under the 401K plan and the proceeds of the plan could not be distributed. This is evident from the NiSource forms, and Petitioner Evans does not dispute the Respondent's allegations concerning these rights. *Appendix I at 621-623, 736.*

Petitioner Evans made representations to the Respondent that she would be afforded those same beneficiary protections if she consented to the rollover of the NiSource 401K into an Individual Retirement Account (IRA) with Petitioner Ameriprise. However, an IRA does not contain the same protections under the Employee Retirement Income Security Act of 1974 (ERISA) and Retirement Equity Act of 1984 as a 401K. **See Charles Schwab & Co., Inc. v. Debickero, 593 F.3d 916 (9th Cir. 2010).** The Respondent relied to her detriment upon respondent's false representations permitted the transfer of funds from the 401K to the IRA account handled by Petitioner. *Appendix I at 418-419.* The Petitioners changed the beneficiary designation on a portion of the IRA account money without the Respondent's knowledge in direct contravention to the representations made directly to her. *Appendix I at 418-419, 648-660, 794.* The Respondent's claims in the underlying action regard her deprivation of her rights as a protected spouse under the 401K, the Petitioners securing a modification of those rights under false pretense, and do not stem from her being an intended third-party beneficiary to any contract with the Petitioners containing an arbitration clause.

The federal policy espoused by the Federal Arbitration Act of upholding arbitration agreements to the same level as other contracts was not a repudiation of state contract law, quite

the opposite. "When a trial court is required to rule upon a motion to compel arbitration pursuant to the **Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006)**, the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." **Syl. Pt. 5, Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va 421, 781 S.E.2d 198, 203 (2015). quoting *Syllabus Point 2*, State ex rel. TD Ameritrade, Inc. v. Kaufman, 225 W.Va. 250, 692 S.E.2d 293 (2010).**

In West Virginia, "[t]he fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." **Syl. Pt. 5, Virginian Export Coal Co. v. Rowland Land Co., 100 W.Va 559, 131 S.E. 253 (1926).** The reason for this is that the Respondent, Debra Bayles, has no contractual relationship with the Petitioners for the purposes of arbitration.

The arbitration clauses at issue lack the *sine qua non* of all valid contracts - a meeting of the minds between the parties. Respondent is not a party to any arbitration agreement with the Petitioners and it is undisputed that the Respondent Debra Bayles is a non-signatory of any claimed arbitration agreements. Petitioner's counsel, during the deposition of Mrs. Bayles, was certain to point out that Debra Bayles didn't sign any Ameriprise documents, didn't open any accounts with Evans, that Evans was not her financial advisor, and that "NiSource Consent" makes no reference to Ameriprise or Evans. *Appendix I at 795.* Surely in order to be considered a competent party to a contract, one must first be considered a party at all.

"Our case law requires that a party must assent to arbitration before it can be forced into arbitration and denied access to the courts." **State ex rel. City Holding Co. v. Kaufman, 216**

W.Va. 594, 609 S.E.2d 855, 859 (2004), citing State ex rel. United Asphalt Suppliers, Inc. v. Sanders,204 W.Va. 23, 511 S.E.2d 134, 138-139 (1998). As recently as 2009, the West Virginia Supreme Court of Appeals has reiterated that non-parties to agreements have no standing to compel arbitration, when it stated "...The Home Show, LLC was not a party to the written arbitration agreement and has no standing in this matter." **Chrihfield v. Brown, 224 W.Va. 407, 686 S.E.2d 58, 63 (2009).** This is in accord with **State ex rel. United Asphalt Suppliers, Inc.** which states "[a] court is not required to compel arbitration between parties who have not agreed to such arbitration" and further states "the policy favoring arbitration does not compel the court to require arbitration of disputes if arbitration was not the intent of the parties." **State ex rel. United Asphalt Suppliers, Inc., supra at 138-139, citing Collins v. International Dairy Queen, Inc., 169 F.R.D. 690, 693-694 (M.D. Ga. 1997).**

Ms. Bayles is not the only party in this suit not to sign the arbitration clause, in fact, neither Petitioner Stephen Bayles nor Respondent Kristina Nicholls were parties to said agreements. *Appendix at 501514.*

In West Virginia, "[a] party generally cannot be forced to participate in an arbitration proceeding unless the party has, in some way, agreed to participate." **Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va. 421, 781 S.E.2d 198, 216 (2015).** As the West Virginia Supreme Court of Appeals has held, "'[a] court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring express assent to arbitration should be invoked.' **Syl. Pt. 9, Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va. 421, 781 S.E.2d 198 (2015) quoting Syllabus Point 3, State ex rel. United Asphalt Suppliers, Inc. v. Sanders, 204 W.Va. 23, 511 S.E.2d 134 (1998).** "A

signatory to an arbitration agreement cannot require a non-signatory to arbitrate unless the non-signatory is bound under some traditional theory of contract and agency law. The five traditional theories under which a signatory to an arbitration agreement may bind a non-signatory are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." **Syl. Pt. 10, Id.** "[A] court should be wary of imposing a contractual obligation to arbitrate on a non-contracting party. **Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 97 (2d Cir.1999)." Id. at 217**.

None of the aforementioned exceptions to the non-signatory rule are applicable in the instant case. Ms. Bayles is not a signatory to another document that incorporates the subject Arbitration Agreement into that document. There has also been no assumption of the Arbitration Agreement by the Respondent. Moreover, veil-piercing and/or alter ego theory would have no bearing on an individual such as the Petitioner.

The Petitioners argued below that doctrines of agency and/or estoppel rendered the arbitrations agreements applicable to the Respondent. However, the Petitioners' actions evince that no such relationship exists.

First, the exceptions of estoppel and/or third-party beneficiary status fail as the Petitioners have unilaterally taken the position that the proper beneficiaries of the subject accounts are the children of the decedent. The Petitioners' assertion that Mrs. Bayles should be forced to arbitrate her claims is contradicted by their decision that she is a non-party, non-beneficiary. In fact, Ameriprise long ago paid out the proceeds of the account to the children. They denied Debra Bayles information regarding the subject IRA accounts since she was, according to them, not the beneficiary. *Appendix I at 748-750.*

The Petitioners took the position at the Circuit Court level that Mrs. Bayles was a non-

party. At Paragraph 1, page 11 of the Renewed Motion to Dismiss and Enforce Arbitration, the Petitioners state:

> On September 24, 2012, Ameriprise mailed a beneficiary confirmation letter ("Letter") to Mr. Bayles at his home address. See Exhibit 10. The letter showed that his two children, Kristina and Stephen, were the beneficiaries of both of his IRA accounts. Mr. Bayles gave the Letter to Kristina for safekeeping. See Exhibit 2 at 38, 39, 60, and 62. The Letter instructed Mr. Bayles to inform Ameriprise of any discrepancy or error in the beneficiary designations. The decedent elected not to do so. See Exhibit 3 at 152. Consequently, the account proceeds from both accounts were paid to Kristina and Stephen following Mr. Bayles' passing on March 26, 2013.

Appendix I at 225.

The Petitioners expressly asserted in their motion that Mrs. Bayles was not the beneficiary of the subject accounts. However, Mrs. Bayles is considered a beneficiary by the Petitioners when it is favorable to them to compel her claims into arbitration. The defense cannot have it both ways. Insofar as the Petitioners assert that Mrs. Bayles is not a proper beneficiary of the proceeds of the accounts, the Petitioners cannot also claim that she has beneficiary status for the purposes of arbitration.

Since Petitioner is not a party to the Arbitration agreement in question, none of her claims, or potential claims are subject to arbitration. As such, the Petitioners' assertions in Assignments of Error Nos. 1 and 3 fail as the same presume that the Respondent is subject to a valid agreement to arbitrate.

2. **The Circuit Court's findings in the subject Order regarding fraud or concealment after the decedent's death are further evidence that, in contravention to the Petitioners' presumptions in Assignments of Error Nos. 1 and 3, a valid and enforceable arbitration agreement does not exist between Petitioners and Respondent. Any arbitration agreement claimed by the Petitioners to exist between them and Respondent is the direct and proximate byproduct of the Petitioners' fraudulent acts, constructively fraudulent acts, and/or material misrepresentations of the Petitioners.**

Even if the Court were to find an Arbitration Agreement existed between the Respondent and Petitioners, the existence of the same would be the fruits of a fraud or constructive fraud on the part of the Petitioners. An arbitration agreement procured by means of fraud is unenforceable and subject to invalidation in West Virginia. Moreover, to require arbitration under said circumstances would be to reward the Petitioners for successfully committing either fraud, constructive fraud or material misrepresentation against Debra Bayles and to promote the fraud and concealment that occurred after the death of Nelson Bayles.

"'Nothing in the **Federal Arbitration Act, 9 U.S.C. § 2**, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement.' **Syllabus Point 9,** *Brown v. Genesis Healthcare Corp.*, **228 W.Va. 646, 724 S.E.2d 250 (2011)." Syl. Pt. 3, State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders, 228 W.Va. 125, 717 S.E.2d 909, 912–13 (2011).** "Fraud in the procurement of a deed or contract always renders it voidable." **See Chesapeake Appalachia, L.L.C. v. Hickman, 236 W.Va. 421, 781 S.E.2d 198 (2015) (citing Syl. Pt. 1, Jones v. Comer, 123 W.Va. 129, 13 S.E.2d 578 (1941)).** It is well settled doctrine that fraud in the procurement of an agreement or the obtaining of some benefit vitiates any right to receive the fruits of the contract or the benefits. **See Id. (quoting Syl. Pt. 2, Engeman v. Taylor, 46 W.Va. 669, 33 S.E. 922 (1899)).** The facts of this case clearly support a finding that the subject Arbitration Agreement was secured through means of fraud, constructive fraud or material misrepresentation.

Mr. Bayles first went to meet Evans with his daughter, Kristina Nicholls. During that meeting, Evans explained to Mr. Bayles without Debra Bayles' consent or agreement, that he would not be able to set up an account unless Mrs. Bayles consented. *Appendix I at 438-443.*

Petitioner Evans confirmed in his own deposition that, if Mr. Bayles' money remained at NiSource, then Petitioner Evans could not manage the account. Further, he could not take over management of the account without the consent of Debra Bayles and would receive no compensation for managing said account.

Respondent, Debra Bayles, alleges that Petitioner Evans made material misrepresentations to her that she relied upon prior to signing the spousal consent to rollover the accounts from NiSource and that but for those representations, she would never have signed said consent. *Appendix I at 418-419.* Specifically, Ms. Bayles alleges Petitioner Evans made material representations that Respondent would remain the beneficiary on said accounts even after rollover to an IRA and the same couldn't be changed without her consent. These representations were clearly false, as the Petitioners' claim that the beneficiary was changed, and it further paid the proceeds of the IRAs to Co-Petitioners, Stephen Bayles and Kristina Nicholls.

But for the misrepresentations to her, Mrs. Bayles would not have signed the consent form and the arbitration agreements in question would not exist since no money would have ever been subject to rollover. As such, under West Virginia law, the arbitration clause must be invalidated as a direct byproduct of fraud, constructive fraud and/or material misrepresentation. This Court should not permit the Petitioners to receive the fruits or benefits of an Arbitration Agreement obtained by illegal or improper means. In summary, the Arbitration Clause was poisoned from the beginning and as such, should not be enforceable in any proceeding.

3. The arbitration agreements relied upon by the Petitioners are both procedurally and substantively unconscionable.

The arbitration agreements relied upon by the Petitioners are not only the byproduct of fraud, constructive fraud, and/or misrepresentation, but are also procedurally and substantively

unconscionable. "Nothing in the **Federal Arbitration Act, 9 U.S.C. §2**, overrides normal rules of contract interpretation. Generally applicable contract defenses–such as laches, estoppel, waiver, fraud, duress, or unconscionability–may be applied to invalidate an arbitration agreement." **Syl. Pt. 9, Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E. 2d 250 (W.Va. 2011) (*overruled on other grounds*, Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012)).**

"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." **Syl. Pt. 12, Id.**

"A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: 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, Id.**

The arbitration agreements contained in Agreement(s) are procedurally unconscionable. "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. 17, Id.**

Mr. Bayles was 63 years of age, had a 10th grade education, lacked sophistication. He had never dealt with his own personal financial advisor and anytime he met with Respondent Evans, he took someone else with him to the meeting. (daughter, wife, brother). According to Debra Bayles, she or Mr. Bayles' daughter handled his bills. This is further evidenced by Evans' notes provided in discovery stating that Kristina handled the bills. *Appendix I at 418-419.*

The arbitration clause incorporates by reference the FINRA rules of arbitration. Petitioner argues the FINRA rules are complex. The arbitration clause is a take it or leave it, without an opt out and therefore, one of adhesion. The meeting lasted 30 minutes and did not afford one the opportunity to even read the contract, let alone understand the terms. In fact, the arbitration clause wasn't read prior to the signing of the document and Petitioner Evans stated he ask the client to take it home to read and call if they have any questions. *Appendix I at 302-303.*

When weighing all the factors to consider, they weigh in favor of a finding of procedural unconscionability.

The arbitration clause is also substantively unconscionable. It is unfair and lopsided. Specifically, it is a contract of adhesion, arbitration is enforceable only against the consumer, it limits discovery and the cost of arbitration are unreasonably burdensome.

A contract that lacks mutual, reciprocal obligations (for instance, the weaker party has to arbitrate all claims while the stronger party reserves the right to go to court) may be so one sided and unreasonably unfair to one party that it is unconscionable. Lack of mutuality does not automatically render an agreement unconscionable; the trial court must still assess the agreement

in light of the facts and circumstances. **Dan Ryan Builders v. Nelson, 230 W.Va. 281, 737 S.E.2d 550 (2012).**

Both the brokerage agreement and portfolios agreement contain language that would require the parties to arbitrate by signing said agreement; however, Petitioners have not signed the agreement. The section where agent, Jeff Evans, signs only indicates he has provided the client with certain documents and not that he or Ameriprise agree to arbitrate any disputes. *Appendix I at 501-514.*

Discovery is limited under the FINRA rules of arbitration. Specifically, depositions are strongly discouraged in arbitration. Upon motion, the panel may permit a deposition. Of course, as outlined below, said motion hearing will cost in excess of $1000.00 dollars to maybe be able to conduct a deposition. See **FINRA Code of Arbitration 12510.**

Third, the costs of arbitration have a chilling effect on bringing a claim. As recently as October 2012, the West Virginia Supreme Court of Appeals has made it clear that "provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable, unless the court determines that exceptionable circumstances exist that make the provisions conscionable." **Graviel v. Appalachian Energy Partners, 2001-D, LLP, et al., 230 W.Va. 91, 736 S.E.2d 91, 102 (2012)**. Thus, even absent any other basis for unconscionability, the West Virginia Supreme Court has determined that if a contract clause imposes unreasonably high costs or would have a substantial deterrent effect on a person seeking to assert their rights and seek a remedy, that the provision is unconscionable as a matter of law. Further, "if an agreement to

arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable. As the United States Supreme Court recognized, 'the existence of large arbitration costs could preclude a litigant...from effectively vindicating her...rights in the arbitral forum.'" **Id. at 103 (*citing* Greentree Financial Corp.-Alabama v. Randolph, 121 S. Ct. 513 (2000))**.

For a plaintiff attempting to vindicate their rights "it is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." **Id.** As noted in **Syllabus Pt. 4 of State ex rel Dunlap v. Burger, 211 W.Va. 549, 567 S. E. 2d 265 (2002)**, the West Virginia Supreme Court made it clear that when considering an arbitration agreement that the high costs could be considered. The arbitration clause at issue here incorporates the FINRA rules of arbitration. The filing fee alone for the case in arbitration is a minimum in this case of $1425.00, over five times the filing fee in Circuit Court. Further, the more one claims to be damaged, the higher the cost, See **FINRA Code of Arbitration, 12900**. The fee per hearing session is $1,125.00. **Id. at 12902**, hearing fees and other costs. Potential prehearing conferences include Discovery Disputes, various motions, witness list and subpoenas, stipulations of fact, scheduling issues, contested issues, and any other matter that will simplify arbitration, with each hearing costing $1,125.00, plus postponement fees for any postponement of a hearing in an amount equal to the hearing session fee. **Id. at 12601**. There is also a processing fee. **Id. at 12903**. The costs alone have such a deterrent effect that even seeking relief is out of reach for some claimants. The corporate defendant has every incentive to file motions to increase the cost of litigation in an effort to make the plaintiff settle for less than is deserved and/or give up all together.

As the Court may see, the arbitration agreements relied upon by the Petitioners herein are

invalid to the extent that the same are unconscionable.

4. <u>The Petitioners' appeal is also without merit as, even if the arbitration agreements could be construed as valid, the Petitioner's claims fall far outside the scope of the same.</u>

The Petitioners' appeal is without merit as the Respondent's claims are not subject to any arbitration agreement, even if the same was/were valid. The Respondent's claims regard claims of fraud, misrepresentation, detrimental reliance, etc., which do not arise out the subject accounts, but arise out of conduct that precedes the creation of any account by the Petitioners. Those claims are her own individual claims separate and distinct from any claims which could be brought on behalf of the Estate of her late husband, who was a signatory to the account. The Petitioners cannot draw into arbitration claims that do not fall within the scope of any arbitration agreement.

As argued hereinbefore, prior to signing the spousal consent form consenting to rollover of the 401K account Debra Bayles had a lawful right to be the beneficiary of the funds held in the 401K. That is a right that she would have never willingly given up had she been told the truth. Respondent Bayles specifically inquired prior to the creation of the Ameriprise Brokerage Account about whether her spousal rights would be protected into the future if she consented to the rollover. *Appendix I at 418-419.* Respondent Bayles relied, to her detriment, upon the false representations of Evans. But for these misrepresentations, there would be no spousal consent, no Ameriprise accounts, and no arbitration agreements. Her claims arise out of representations and/or transactions that precede the creation of any arbitration clause. Mrs. Bayles' causes of action exist regardless of whether she is the Administratrix of the Estate of Mr. Bayles or not. If she were removed from that position her causes of action would in no manner be affected. The

Petitioners cannot steal from Debra Bayles her right to be heard by the Courts regarding these misrepresentations by attempting to enforce an arbitration provision against her that was procured by fraud or misrepresentation.

Furthermore, the actions of Petitioner Evans, Petitioner Nichols and Petitioner Stephen Bayles of fraud and concealment of the beneficiary status after death are clearly outside the scope of the arbitration agreements. Even Petitioner Ameriprise's agents and employees acknowledge the claims reside outside arbitration. In their emails they state the claims would need to be settled between the parties outside of Ameriprise and would require a court order or court action. *Appendix I at 748-770.*

Therefore, Respondent maintains her causes of action against Petitioners Evans, Ameriprise, Kristina Nichols and Stephen Bayles are outside the scope of the Arbitration Agreements and she cannot be made to arbitrate the same.

V. CROSS ASSIGNMENTS OF ERROR

The Respondent herein, Debra Bayles has filed her own petition for appeal regarding the Order of the Circuit Court of Marshall County (J. Hummel) dated September 15, 2018. That appeal is pending before this Court as Case No. 18-0871. Said Petition for Appeal in Case No. 18-0871 sets forth the Respondent's cross assignments of error. Since those matters are already timely presented to the Court in another proceeding and remain pending, in the interests of efficiency and paperwork reduction, the Respondent hereby incorporates by reference all assignments of error set forth in her Petition (and any forthcoming Reply) in Case No. 18-0871 and arguments in support of the same contained therein as if fully set forth in the instant brief. Those assignments of error set forth in said Petition are as follows:

1. The Circuit Court of Marshall County erred in granting Defendants' (Respondents' herein) Renewed Motion to Dismiss and Compel Mandatory Arbitration, by finding that a valid Arbitration Agreement exists between the parties despite the fact that Plaintiff (Petitioner herein), Debra Bayles is not a signatory to any Arbitration Agreement.
2. The Circuit Court of Marshall County erred in granting Defendants' (Respondents' herein) Renewed Motion to Dismiss and Compel Mandatory Arbitration, as any Arbitration Agreement asserted to be applicable by the Respondents was the byproduct of the Plaintiff's (Petitioner herein) justifiable reliance upon the fraudulent, constructively fraudulent, and/or material misrepresentations on the part of the Respondents; and the Circuit Court failed to make any factual findings with respect to the same.
3. The Circuit Court erred in granting Respondents' Renewed Motion to Dismiss and Compel Mandatory Arbitration, by failing to recognize that the Arbitration Agreements relied upon by Defendants (Respondents herein) were unconscionable and therefore void.
4. The Circuit Court erred in granting Respondents' Renewed Motion to Dismiss and Compel Mandatory Arbitration, as, even if the arbitration agreements relied upon by Respondents (Defendants below), the Petitioner's claims fall far outside the scope of the same.

VI. CONCLUSION

Wherefore, for reasons heretofore stated, Respondent herein respectfully request entry of an Order affirming the September 15, 2018 order of the Circuit Court of Marshall County, in

part, reversing in part (as set forth in Case No. 18-0871) and remanding this matter back to the Circuit Court for further proceedings and a trial on the merits.

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