IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0905

HOME INSPECTIONS OF VA AND WV, LLC,

Petitioner

v.

Interlocutory Appeal from an Order of the Circuit Court of Berkeley County (19-C-237)

JESSE HARDIN,

Respondent

PETITIONER'S BRIEF

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Home Inspections of VA and WV, LLC

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STATEMENT OF THE CASE

This case arises from a real estate transaction where Respondent, Jesse Hardin ("Mr. Hardin"), purchased certain improved real estate in Berkeley County, West Virginia ("the Property") from William and Sharon Paxson ("the Paxsons") on August 17, 2017. App. 5–6. Prior to his purchase, Mr. Hardin engaged Petitioner, Home Inspections of VA and WV, LLC ("Home Inspections"), to conduct a limited visual inspection of the Property on June 23, 2017. App. 75 & 79. Mr. Hardin's contract with Home Inspections included the following arbitration provision:

> **ARBITRATION**: Any dispute concerning the interpretation of this agreement or arising from this inspection and report, except one for inspection fee payment, shall be resolved informally between the parties.

App. 75.

On June 21, 2019, Mr. Hardin filed a Complaint against the Paxsons and Home Inspections alleging, *inter alia*, breach of contract, negligence, and fraud. App. 5–31. Generally, Mr. Hardin contends the Property contains numerous undisclosed defects which were known, or

should have been known, to the Paxsons. *Id.* He also contends Home Inspections failed to report, or "adequately report," the defects, resulting in a breach of their contract and "professional negligence." App. 8–16.

On August 9, 2019, Home Inspections filed a motion to dismiss, or, alternatively, stay further judicial proceedings and compel arbitration. App. 143–51. Home Inspections argued the circuit court lacked jurisdiction under Rule 12(b)(1) and Mr. Hardin failed to state a claim under Rule 12(b)(6) because their contract contained an enforceable arbitration provision. *Id.*

On August 26, 2019, Mr. Hardin filed his response and attached a self-serving affidavit, claiming their contract—the same contract he alleged Home Inspections breached—was an adhesion contract. App. 166. Mr. Hardin also disputed whether their contract contained an enforceable arbitration provision and successfully argued the circuit court should ignore the arbitration provision's heading – "**ARBITRATION**" – when determining the parties' intent. *Id.*

On September 3, 2019, Home Inspections filed its reply, arguing the court should disregard Mr. Hardin's self-serving affidavit and apply the plain language and intent of their bargained-for arbitration provision. App. 180–89.

On September 13, 2019, the circuit court denied Home Inspections' Motion to Dismiss. In support of its refusal to enforce the parties' arbitration provision, the circuit court observed "only the heading of the paragraph alludes to arbitration" and concluded it could not "find that by agreeing to resolve any dispute informally, the parties have mutually assented to be bound to arbitration when there is a lack of *any* term describing the arbitration process . . . ." App. 197. The circuit court further reasoned the parties' arbitration provision "fails to require the disputes to be resolved by binding arbitration, who the arbitrator would be, by what rules arbitration would be demanded and resolved and the finality and effect of submission to arbitration. If Home Inspections wanted arbitration, it had to clearly and unambiguously set forth those requirements . . . ." App. 199.

On September 18, 2019, Home Inspections moved the circuit court to stay proceedings pending appellate review. *See* App. 191–99; 201–02. On October 2, 2019, Home Inspections timely noticed its appeal. On October 4, 2019, the circuit court entered an order granting Home Inspections' motion to stay while it pursues this interlocutory appeal.[1] App. 208–09.

[1] "An 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, *Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C.*, No. 18–0384, 2019 WL

SUMMARY OF ARGUMENT

Home Inspections only asks this Court to enforce the terms of the parties' bargained-for contract, which expressly includes an arbirtation provision. Their arbitration provision is prominently written on page two, beginning with the word "**ARBITRATION.**" Nevertheless, the circuit court *explicitly disregarded* this bolded, capitalized term because it was a heading, then determined the parties' arbitration provision was too ambiguous to be enforced. App. 197–98. Absent contrary language within a contract, headings are terms to be considered like any other and must be given their full effect in contractual interpretation. The circuit court clearly erred by disregarding the parties' intent plainly stated in bold and all capital letters – "**ARBITRATION.**"

The circuit court also erroneously rejected the contract's appropriate characterization of arbitration as an informal resolution process, despite several United States Supreme Court cases that describe arbitration as an informal method of resolving disputes. Similarly, the circuit court erroneously equated the arbitration provision's silence on procedural methods with the absence of an agreement to arbitrate. The parties' contract

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6258134 (Nov. 19, 2019) (quoting Syl. pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013)).

clearly and unambiguously contains an enforcable agreement to arbitrate; to find otherwise, the circuit court literally stripped the parties' arbitration provision of the word "**ARBITRATION**" and ignored their explicit intent.

Mr. Hardin attached an affidavit to his response to Home Inspections' motion. In its order, the circuit court relied extensively on Mr. Hardin's self-serving affidavit, which alleged what he believed the contract's terms meant *after* he signed it. The circuit court's consideration of matters outside the pleadings in this manner was wholly inappropriate under Rule 12. Assuming *arguendo* that the circuit court properly considered matters outside the pleadings, the alleged facts it relied upon from Mr. Hardin's affidavit are irrelevant to the only question before the circuit court: Does an enforcable arbitration provision exist? The circuit court's erroneous reliance upon Mr. Hardin's self-serving affidavit and arguments further demonstrates why its decision should be reversed.

With proper deference to West Virginia and Federal law establishing a clear preference for arbitration, and the parties' plain, unambiguous arbitration provision, this Court should reverse the circuit court's decision and enforce the parties' bargained-for contract. Mr. Hardin should not be permitted to enforce only those provisions of his contract with

Home Inspections that serve his purposes. His claims in the underlying matter are subject to arbitration under the contract he signed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided by this Court in Syllabus Point 1, *West Virginia Dep't of Health & Human Res. v. V.P.*, 241 W. Va. 478, 825 S.E.2d 806 (2019) (holding only matters contained in the pleadings may be considered on a 12(b)(6) motion); Syllabus Point 3, *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016) (holding the authority of a trial court is limited to threshold issue of whether a valid arbitration exists and governs the plaintiff's claims when a motion to compel arbitration is filed); *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 436, 781 S.E.2d 198, 213 (2015) (noting the liberal federal policy favoring arbitration agreements); Syllabus Point 5, *New v. Gamestop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62 (2013) (holding unambiguous written instruments expressing intent of parties are not subject to judicial construction or interpretation); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372 (2013) (quoting United States Supreme Court explaining courts must rigorously enforce arbitration agreements as written); Syllabus Point 9, *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 729 S.E.2d

808 (2012) (holding courts may not refuse to enforce valid arbitration agreements because they will lead to piecemeal litigation); and Syllabus Point 1, *Mut. Imp. Co. v. Merchants' & Bus. Men's Mut. Fire Ins. Co.*, 112 W. Va. 291, 164 S.E. 256 (1932) (holding arbitration is favored under the law), oral argument under Rule 18(a) is not necessary unless the Court determines other issues arising upon the record should be addressed. If the Court determines oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

BY REMOVING THE TERM "ARBITRATION" FROM THE PARTIES' ARBITRATION PROVISION, THE CIRCUIT COURT IMPROPERLY ALTERED THE PARTIES' CONTRACT AND SUBSEQUENTLY ERRED BY FINDING THE ARBITRATION PROVISION AMBIGUOUS AND UNENFORCEABLE.

On June 23, 2017, Mr. Hardin executed a contract with Home Inspections for a "limited visual inspection" of the Property. App. 75. Their contract specifically included the following provision:

> **ARBITRATION**: Any dispute concerning the interpretation of this agreement or arising from this inspection and report, except one for inspection fee payment, shall be resolved informally between the parties.

Id. Under clear West Virginia and Federal law, the circuit court should have granted Home Inspections' Motion to Dismiss, enforced this bargained-for

arbitration provision, and required the parties to arbitrate their dispute. "When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, [its] review is *de novo*." Syl. pt. 1, *West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 796 S.E.2d 574 (2017). Accordingly, Home Inspections respectfully requests this Honorable Court to reverse the circuit court's decision and enforce the arbitration provision in the parties' contract.

A. The Circuit Court Erred by Removing the Term "ARBITRATION" from the Parties' Arbitration Provision.

The parties' arbitration provision *begins with the word* "**ARBITRATION**"; yet, the circuit court held, "reading this provision to mean that the parties have agreed to a binding arbitration of their disputes leads to an absurd result. To reach such a conclusion, one would need to look to headings in a contract to form the actual agreement of the parties . . . ." App. 198. There is no support in law to excise a key term from a contract simply because it is a heading.

i. Headings are terms in a contract to be given their plain meaning under longstanding legal principles established by this Court.

"In construing the terms of a contract," courts in West Virginia "are guided by the common-sense canons of contract interpretation."

Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996). Contracts are one of the oldest established areas of the law, dating back to the Ancient Greeks. *See* Plato, *The Laws*, Book 11, §23, Contracts. A relevant cannon in this case is *expression unius est exclusion alterius*, which means to express or include one thing implies the exclusion of the other. *Black's Law Dictionary* (11th ed. 2019). The Court has long recognized this fundamental principle. "In the interpretation of written instruments 'the express mention of one thing implies exclusion of another, *expressio unius est exclusio alterius* . . . .'" Syl. pt. 3, *Bischoff v. Francesa*, 133 W. Va. 474, 475, 56 S.E.2d 865, 866 (1949) (quoting *Harbert v. Harrison Cty. Court*, 129 W. Va. 54, 64, 39 S.E.2d 177, 186 (1946)). By including a provision in their contract entitled "**ARBITRATION**", Mr. Hardin and Home Inspections excluded litigation as a means of resolving their disputes.

This Court's "primary concern is to give effect to the plain meaning of the [contract] and, in doing so, [*it should*] *construe all parts of the document together.* [It] will not rewrite the terms of the [contract]; instead, [the court will] enforce it as written." *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995) (construing an insurance policy) (emphasis added). Indeed, "[i]t is not the right or province of a court to alter,

pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). This is precisely how the circuit court erred when it essentially removed the term "**ARBITRATION**" from the parties' arbitration provision.

The heading in the parties' contract is conspicuous; it clearly evidences their intent to arbitrate. What other intention could the bold, capitalized word "**ARBITRATION**" demonstrate? This Court recently considered and interpreted the meaning of a contract's provision according to its heading. *See First Mercury Ins. Co., Inc. v. Russell*, 237 W. Va. 733, 778–79, 806 S.E.2d 429, 434–35 (2017) (utilizing the heading in an insurance contract when analyzing whether it provided coverage). The circuit court should have done the same. It clearly erred when it ignored the heading of the parties' arbitration provision, then found the provision too ambiguous to be enforced.

ii. The circuit court never considered the parties' arbitration provision as written.

The circuit court, while ignoring the "**ARBITRATION**" heading, concluded the remainder of the parties' arbitration provision was insufficient to compel arbitration: "Examining the sparse reference to

'informal dispute' resolution cannot find or divine a binding agreement to arbitrate." App. 199. It is abundantly clear that the circuit court excised "**ARBITRATION**" from the arbitration provision, and subsequently concluded that no enforceable arbitration provision exists. The circuit court improperly altered the terms of the parties' contract in reaching its conclusion. *See Gamestop,* 232 W. Va. 574, 753 S.E.2d 72 (2013). Thus, the circuit court erred because it did not reject the enforceability of the parties' *actual* arbitration agreement; it instead rejected the enforceability of an *altered* version it created after removing the key term "**ARBITRATION.**"

B. The Circuit Court Erred by Finding the Parties' Arbitration Provision Ambiguous.

If the circuit court had considered the parties' arbitration provision in its entirety, without ignoring the key term "**ARBITRATION,**" there would have been no ambiguity. What else could Mr. Hardin and Home Inspections have bargained for in a paragraph beginning with the bold, capitalized word "**ARBITRATION,**" followed by a sentence explaining that "any dispute" arising from their agreement "shall be resolved informally between the parties?" The parties clearly intended their disputes to be settled by arbitration.

i. Arbitration is an informal method of resolving disputes.

In support of its ambiguity determination, the circuit court erroneously found arbitration is not an informal method of resolving a dispute. This finding contradicts several United States Supreme Court cases that have repeatedly stated the opposite. *See* App. 197–98.

The Supreme Court has observed, "the principal advantage of arbitration [is] its informality." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). "[T]he choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). "Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974). In fact, "the informal procedures which make arbitration so desirable in the context of contractual disputes are inadequate to develop a record for appellate review of statutory questions." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648 (1985). "And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Concepcion*, 563 U.S. 333, 345 (2011). To be clear, "the relative informality of arbitration is one of

the chief reasons that parties select arbitration. 'Parties trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (quoting *Mitsubishi Motors Corp.*, at 628).

Given this unequivocal characterization of arbitration as "informal," the circuit court was clearly wrong to conclude arbitration is *not* an informal method of resolving disputes. Indeed, it is the primary method of binding, informal dispute resolution.

ii. Arbitration agreements need not include specific terms or processes to be valid and enforceable.

The circuit court bolstered its ambiguity determination by finding, "this provision does not include terms such as how are arbiters to be selected, how many arbiters will decide the issue, where arbitration will take place, by what rules and by whose authority and whether or not the arbiters' grant or denial of a reward [sic] is binding or appealable." App. 197. By requiring such specificity, the circuit court ignored the Federal Arbitration Act ("FAA"):

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; **but if no method be provided therein**, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason

> there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5 (emphasis added).

Similarly, West Virginia Code § 55-10-13(a) provides, "[i]f the parties have not agreed on a method, the agreed method fails or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator." W. Va. Code § 55-10-13. This Court has held that when "an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to section 5 of the Federal Arbitration Act . . . ." Syl. pt. 3, in part, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013).

The United States Congress and the West Virginia Legislature have explicitly provided statutory mechanisms to prevent arbitration agreements from becoming unenforceable if parties do not include an arbiter or method for selecting one, or either otherwise becomes unavailable. These legislative enactments illustrate the required preference for arbitration and

underscore the error of the circuit court's analysis, which contradicted clear public policy by requiring unnecessary specificity and failing to enforce the parties' arbitration provision.

Furthermore, the United States Supreme Court has rejected an argument, similar to the circuit court's reasoning, that silence as to costs and fees created a risk that a party would bear prohibitive arbitration costs: "The record reveals only the arbitration agreement's silence on the subject and that fact alone is plainly insufficient to render it unenforceable." *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 91 (2000). The *Green Tree* Court explained, "[t]o invalidate the agreement on that basis would undermine the liberal federal policy favoring arbitration agreements." *Id.* (citation and quotation omitted).

iii. The arbitration provision is not ambiguous when read as it was written in the parties' contract.

The circuit court altered the meaning and intent of the parties' contract, which was expressed in unambiguous language. This Court has long held that judicial re-drafting of parties' contracts is impermissible. *See* Syl. pt. 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

The circuit court created an entirely different contract, then determined *that* judicially-created contract was ambiguous and unenforceable. The parties expressed their intent in plain and unambiguous language. Accordingly, the contract "is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *Id.* at Syl. pt. 1. The circuit court erred by judicially constructing an alternate contract, then finding it ambiguous rather than enforcing the parties' clear intent to arbitrate.

The circuit court found that the parties' arbitration "provision anticipates only that any disputes between the parties 'shall be resolved informally between the parties.'" App. 197. The circuit court then held, "[o]nly the heading of the paragraph alludes to arbitration." *Id.* The circuit court ignored the "**ARBITRATION**" heading when analyzing the parties' arbitration provision. Neither Mr. Hardin, nor the circuit court, cited any legal authority whatsoever to justify ignoring the provision's heading. By doing so, the circuit court determined the enforceability of an arbitration provision it improperly rewrote, rather than the one the parties bargained for in the contract Mr. Hardin signed.

The circuit court further explained it could not "find that by agreeing to resolve any dispute informally, the parties have mutually

assented to be bound to arbitration when there is a lack of *any* term describing the arbitration process . . . ." App. 197. The circuit court concluded it would be an "absurd result" to find an enforceable arbitration provision exists in the parties' contract. App. 199. "To reach such a conclusion, one would need to look to headings in a contract to form the actual agreement of the parties . . . ." *Id.* In this explanation, the circuit court all but conceded that an enforceable provision exists—*if* the **ARBITRATION** heading is read with the rest of the provision. Home Inspections agrees. The circuit court erred by failing to do so. This Court should read the parties' arbitration provision as written, enforce the parties' entire bargained-for agreement, and reverse the circuit court's decision.

C. The Circuit Court Erred by Refusing to Enforce the Parties' Entire Arbitration Provision as Written.

The parties' contract includes an unambiguous arbitration provision the circuit court improperly rewrote, then erroneously refused to enforce. The FAA, the United States Supreme Court, and this Court make it abundantly clear the circuit court erred because the parties' contract contains an arbitration provision it should have enforced.

i. The FAA declares a national policy favoring arbitration.

The FAA provides that "[a] written provision in any contract . . . involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity of the revocation of any contract." 9 U.S.C. § 2.[2] "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); *See also State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372 (2013); *Gamestop*, 232 W. Va. 564, 753 S.E.2d 62 (2013). Here, the circuit court erred by failing to consider the FAA's underlying framework and follow its preference for arbitration.

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[2] There is no question that the contract here is one "involving commerce." *See, e.g., Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (explaining that the term "involving commerce" in the FAA is equivalent to "affecting commerce," which signals "the broadest permissible exercise of Congress' Commerce Clause power" and holding that debt-restructuring agreements executed in Alabama by Alabama residents were well within the Supreme Court's previous pronouncements on the extent of Congress' Commerce Clause power and satisfied the FAA's "involving commerce" test); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (finding that the FAA governs any arbitration agreement if some economic activity of one of the parties—not necessarily the parties' transaction or the contract itself—has a nexus to interstate commerce); and *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370 (11th Cir. 2005) (holding FAA governed the arbitration agreement because employer's overall employment practices affect commerce).

ii. The overarching purpose of the FAA is to ensure enforcement of parties' agreements to arbitrate according to their terms.

The FAA "reflects the overarching principle that arbitration is a matter of contract. . . . And consistent with [the FAA], courts must *rigorously* enforce arbitration agreements according to their terms. . . ." *Ocwen*, 232 W. Va. at 360, 752 S.E.2d at 391 (citing *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013)) (emphasis added). Indeed, the FAA establishes "a liberal federal policy favoring arbitration agreements." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Concepcion*, 131 S. Ct. at 1745. A court may dismiss or stay the lawsuit if all issues in the proceeding are arbitrable. 9 U.S.C. §§ 3 and 4. Furthermore, the FAA

> requires that if a lawsuit presents multiple claims, some subject to an arbitration agreement and some not, the former claims *must be sent to arbitration—even if this will lead to piecemeal litigation.* A trial court may not issue a blanket refusal to compel arbitration . . . merely because . . . other parties in the lawsuit are not subject to the arbitration agreement.

Syl. pt. 9, in part, *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 729 S.E.2d 808 (2012) (emphasis added). Thus, the FAA requires courts to compel a party who has "failed, neglected or refused to comply"

with a valid agreement to arbitrate his claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991).

"In enacting Section 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10–12 (1984). Thus, the FAA "creates a body of federal substantive law[,] which is "applicable in state and federal court." *Id.* at 12 (internal quotations omitted).

When a party files a motion to compel arbitration under the FAA, "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. 3, *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650, 655 (2016) (quoting Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010)).

Mr. Hardin's Complaint is premised upon Home Inspections' alleged breach of contract and West Virginia's corresponding standards of professional conduct for home inspectors. Under the FAA, "a written provision to settle by arbitration a controversy arising out of a contract that

evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 489, 729 S.E.2d 808, 811 (2012). Here, the parties unambiguously indicated a clear intent to have "any dispute . . . arising from [the] inspection and report" resolved by arbitration. App. 76. Thus, the first inquiry is satisfied because the parties' contract contains a valid, enforceable agreement to arbitrate disputes.

Similarly, Mr. Hardin's claims fall within the substantive scope of the parties' arbitration provision. This Court has explained that the "second question must be weighed in view of the FAA being a 'congressional declaration of a liberal federal policy favoring arbitration agreements,' and establishing that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]'" *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 436, 781 S.E.2d 198, 213 (2015) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)).

Breach of contract and professional negligence claims are among the claims parties most often anticipate when including an arbitration

provision in their contract. The arbitration provision in this case plainly states:

> **ARBITRATION**: Any dispute concerning the interpretation of this agreement or arising from this inspection and report, except one for inspection fee payment, shall be resolved informally between the parties.

App. 76. Mr. Hardin's breach of contract and professional negligence claims clearly fall within the broad scope of "any dispute . . . arising from this inspection and report." Therefore, Mr. Hardin's breach of contract and professional negligence claims squarely fall within the substantive scope of the parties' arbitration provision.

iii. Mr. Hardin cannot sue Home Inspections for breach of contract and simultaneously avoid its arbitration provision.

Mr. Hardin seeks to enforce the terms of the parties' contract against Home Inspections. His Complaint alleges a binding agreement.[3] App. 7; 18–19. Moreover, the circuit court explicitly found he signed the contract. *See* App. 77; 169; & 192. Nevertheless, Mr. Hardin attacked the validity of the parties' contract in his Response to Home Inspections' Motion

[3] For example, Paragraph 13 of the Complaint states, "Mr. Hardin entered into a contract with Home Inspections dated June 23, 2017 . . . . A true copy of the Inspection contract is attached hereto as **Exhibit 2** and made a part hereof." App. 7.

to Dismiss and Compel Arbitration.[4] App. 166. Mr. Hardin's tack is curious because his Complaint alleges Home Inspections breached the parties' contract. *See* App. 18. Discussing the doctrine of equitable estoppel, the Fourth Circuit has explained, "[t]o allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416–18 (4th Cir. 2000) (quoting *Avila Group, Inc. v. Norma J. of California*, 426 F. Supp. 537, 542 (S.D. N.Y 1977)) (applying the principle to determine "that a party may be estopped from asserting that the lack of his signature on a written document precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him").

Similarly, the circuit court found that nobody "explain[ed] the contract or point[ed] out any of the provisions of the contract to [Mr. Hardin]." App. 192. This Court has rejected the same argument. *See New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 76 (2013) ("the

[4] Several of the circuit court's findings and conclusions are misplaced. For example, the circuit court included in its findings that "no one signed that contract on behalf of Home Inspections." App. 192. Whether Home Inspections signed the contract is of no moment.

petitioner's claim that she was not advised that she was agreeing to arbitrate future claims against GameStop by signing the Acknowledgement is without merit."). The "court can assume that a party to a contract has read and assented to its terms, and . . . the court can assume that the parties intended to enforce the contract as drafted." *Id.* (quoting *Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628, 638 (S.D. W. Va. 2001); *see also Sedlock v. Moyle*, 222 W. Va. 547, 551, 668 S.E.2d 176, 180 (2008) (stating that " . . . the failure to read a contract before signing it does not excuse a person from being bound by its terms . . . . [and] [t]he person who fails to read a document to which he places his signature does so at his peril" (internal quotation omitted)). Accordingly, the circuit court erred by relying upon Mr. Hardin's self-serving assertions about his understanding of the contract he signed.

D. The Circuit Court Erred by Failing to Follow Rule 12 and This Court's Holdings and Considering Matters Outside the Pleadings to Deny Home Inspections' Motion to Dismiss.

Home Inspections filed its motion to dismiss Mr. Hardin's complaint under Rules 12(b)(1) and (6) of the West Virginia Rules of Civil Procedure and the FAA.[5] App. 143–51.

[5] 9 U.S.C. §§ 1, *et seq.*

i. Rule 12 motions are appropriate when an enforceable arbitration provision governs a plaintiff's claims.

A 12(b)(1) motion is properly asserted when a court lacks jurisdiction over the subject matter of a case. *See Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975). Because the parties' contract contains an enforceable arbitration provision, the circuit court lacked jurisdiction over the subject matter. *See Cleckley, et al., Litigation Handbook on West Virginia Rules of Civil Procedure* 341–48 (4th ed. 2012). Alternatively, Home Inspections sought dismissal under Rule 12(b)(6) because Mr. Hardin fails to state a claim upon which relief can be granted.[6]

ii. A court should not consider matters outside the pleadings when ruling on a Rule 12 motion.

It is well established that circuit courts must not consider matters outside the pleadings when ruling on 12(b) motions:

> "Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and *if matters outside the pleading are presented to the court and are not excluded by it*, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if

[6] Because the parties' contract contains an enforceable arbitration provision that encompasses Mr. Hardin's claims against Home Inspections, he failed to state a claim upon which the circuit court could grant any relief.

> there is no genuine issue as to any material fact in connection therewith. . . .' Syllabus Point 4, *United States Fidelity & Guaranty Co. v. Eades*, 150 W. Va. 238, 144 S.E.2d 703 (1965)." Syllabus Point 1, in part, *Poling v. Belington Bank, Inc.*, 207 W. Va. 145, 529 S.E.2d 856 (1999).

Syl. pt. 1, *West Virginia Dep't of Health & Human Res. v. V.P.*, 241 W. Va. 478, 825 S.E.2d 806, 811 (2019).

iii. The circuit court's findings referenced irrelevant facts outside the pleadings.

Mr. Hardin authored a self-serving affidavit and attached it to his Response. App. 168–69. The circuit court erred by relying upon this affidavit to deny Home Inspections' Motion to Dismiss. *See* App. 191–93. Specifically, page two of the circuit court's order references various assertions from Mr. Hardin's affidavit. App. 192. The circuit court should have explicitly disregarded the affidavit and considered only the pleadings in deciding the straightforward legal issue presented: Does the parties' contract contain an enforceable arbitration provision that encompasses Mr. Hardin's claims?

Although Home Inspections' position is that the circuit court erred by considering the Mr. Hardin's affidavit, the court's findings based upon the affidavit further demonstrate that its Motion to Dismiss was incorrectly denied. In its Reply, Home Inspections argued that the only issue before the circuit court was whether the parties' contract contains an

enforceable arbitration provision. Indeed, the circuit court's authority was "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. 3, *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650, 655 (2016) (quoting Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010)).

However, the circuit court relied upon several statements from Mr. Hardin's affidavit that had no bearing on the relevant inquiry. For example, the court found that "no one signed that contract on behalf of Home Inspections" and it did not "explain the contract or point out any of the provisions of the contract to [Mr. Hardin]." App. 192. These allegations are of no moment. *See New v. GameStop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62 (2013) (finding former employee's signature on acknowledgement form that she would submit claims to arbitration evidenced the parties mutual assent to arbitrate and rejecting employee's "claim that she was not advised that she was agreeing to arbitrate future claims against GameStop by signing the Acknowledgment [as] without merit"); *see also International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000) (explaining that "a party can agree to submit to arbitration by means

other than personally signing a contract containing an arbitration clause"); *Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 90 (quoting *Medical Dev. Corp. v. Industrial Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973) (enforcing an arbitration agreement only signed by one party and noting, it is not necessary "that there be a simple integrated writing or that a party sign the writing containing the arbitration clause. All that is required is that the arbitration provision be in writing").

Curiously, the circuit court considered Mr. Hardin's contemplation of the parties' arbitration provision – *a year after he signed it*. App. 192. Mr. Hardin's affidavit states he signed the contract on June 23, 2017, but he apparently did not request a copy. App. 169, at ¶8. He then concedes, "even after reviewing the contract upon receipt of it in 2018 . . . I never considered an agreement to resolve any disputes involving that contract 'informally between the parties' to mean that I was required to arbitrate such disputes." *Id.*, at ¶13. How Mr. Hardin interpreted the contract *he evidently did not read*[7] until a year *after* he signed it was wholly irrelevant to the circuit court's inquiry.

[7] This is the only logical inference that can be drawn from reading Mr. Hardin's affidavit. If Mr. Hardin was referring to his understanding at the time he signed the contract, he would have said that. There is no mention of his understanding at the time of execution, but instead, Mr. Hardin refers to his review of the contract a year after he signed it. App. 169. The law in our State is clear about the irrelevance of a party's attempt

The circuit court's consideration of and reliance upon several statements in Mr. Hardin's affidavit contravenes this Court's clear holding in Syllabus Point 1 of *West Virginia Dep't of Health & Human Res. v. V.P.* Moreover, the circuit court's findings go far beyond the relevant inquiry and demonstrate that the court considered and relied upon Mr. Hardin's irrelevant assertions in denying Home Inspections motion to dismiss.

CONCLUSION

> "**ARBITRATION:** any dispute concerning the interpretation of this agreement or arising from this inspection and report, except one for inspection fee payment, shall be resolved informally between the parties."

App. 76.

There is nothing ambiguous about the parties' arbitration provision when the heading "**ARBITRATION**" is properly considered to determine the parties' intent. This bold, capitalized word clearly evidences the parties' agreement to arbitrate disputes, like this one, arising out of the

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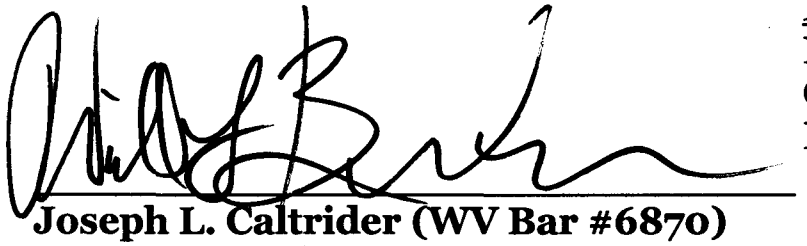
to avoid a contract because he failed to carefully read its terms. "A court can assume that a party to a contract has read and assented to its terms, and absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted." *New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 76 (2013) (quoting *Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628, 638 (S.D. W. Va. 2001)). Moreover, "The person who fails to read a document to which he places his signature does so at his peril." *Sedlock v. Moyle,* 222 W. Va. 547, 551, 668 S.E.2d 176, 180 (2008) (quoting *Reddy v. Cmty. Health Found. of Man,* 171 W. Va. 368, 373, 298 S.E.2d 906, 910 (1982)).

inspection and report. It is enforceable, especially when one considers State and Federal law explicitly favoring judicial enforcement of 1) the entirety of any contract; and 2) arbitration provisions in a contract. The circuit court clearly erred by overlooking these strong public policies, removing the term "**ARBITRATION**" from the parties' arbitration provision, rewriting the parties' contract, then finding ambiguity and concluding there is no enforceable arbitration provision.

WHEREFORE, Home Inspections respectfully requests this Honorable Court to: 1) reverse the circuit court's erroneous September 13, 2019 Order; 2) dismiss Mr. Hardin's claims against Home Inspections; and 3) compel Mr. Hardin to submit his claims against Home Inspections to arbitration should he desire further resolution.

DATED the 27th of December 2019.



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