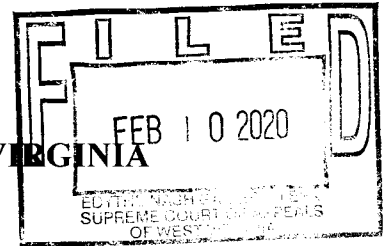


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**HOME INSPECTIONS
OF VA AND WV, LLC,**

Petitioner,

v.

JESSE HARDIN,

Respondent.

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

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Petitioner, Home Inspections of VA and WV, LLC (“Home Inspections” or “Petitioner”), has filed this interlocutory appeal from the Order Denying Defendant’s, Home Inspections of VA and WV, LLC’s, Motion to Dismiss, or Alternatively, Stay Further Judicial Proceedings and Compel Arbitration entered on September 13, 2019 by The Honorable Michael Lorensen, Judge of the Circuit Court of Berkeley County. App. 190-199.

This civil action involves the purchase by the Respondent, Jesse Hardin (“Mr. Hardin”), from the defendants, William and Sharon Paxson (the “Paxsons”) of two parcels of real estate situate in Berkeley County (the “Property”) and improved with a main house, a guest house and other structures (the “Structures”). App. 6. The sales contract for the purchase of the Property was contingent upon a home inspection being performed. App. 7. Home Inspections performed the inspection of the Structures on the Property on June 23, 2017 and generated a report of the condition of the Structures on June 25, 2017 (the “Inspection Report”). *Id.* After performing the inspection, Home Inspections had Mr. Hardin sign a contract dated June 23, 2017 (the “Inspection Contract”) which contains the provision at the heart of this appeal. App. 169. The provision in question states:

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

App. 76. The font size used above is the same font size as used in the Inspection Contract. *Id.* Further, contrary to Petitioner’s assertions, Pet. Br. at 10, the word “ARBITRATION”

does not appear to be in bold script.

After purchasing the Property, Mr. Hardin learned of significant issues as respects the construction, condition, and functional use of the Structures; items which were not disclosed to him by the Paxsons and/or which were not reported, or inadequately reported, in the Inspection Report. App. 7-16. The civil action ensued with Mr. Hardin filing his Complaint against the Paxsons and Home Inspections on June 21, 2019. App. 5. As to Home Inspections, the Complaint contains counts for professional negligence and breach of contract. App. 18-21.

In response to the Complaint, on August 9, 2017, Home Inspections filed its “Defendant’s Motion to Dismiss, or, Alternatively, Stay Further Judicial Proceedings and Compel Arbitration.” App. 143-51. In its motion, Home Inspections claimed that Mr. Hardin’s complaint should be dismissed because the Circuit Court lacked jurisdiction to hear the dispute between Mr. Hardin and Home Inspections, and that Mr. Hardin had failed to state a claim against Home Inspections, given the existence of its claimed “arbitration provision” in the Inspection Contract. *Id.* Alternatively, Home Inspections sought an order of the Circuit Court compelling Mr. Hardin to submit his claims against Home Inspections to arbitration and staying any further proceedings in the civil action pending the conclusion of the arbitration. *Id.*

After entry of a Trial Court Rule 22 Scheduling Order, App. 152-54, Mr. Hardin filed his timely response in opposition to Home Inspection’s motion on August 26, 2019. App. 155-78. Mr. Hardin claimed then, as he does now, that no enforceable agreement to

arbitrate had been formed between Home Inspections and Mr. Hardin, and that the alleged “arbitration provision” was nothing more than an agreement that if a dispute arose between Home Inspection and Mr. Hardin involving the home inspection or the Inspection Report, that such a dispute would be “resolved informally between the parties.” *Id.* Mr. Hardin further argued that because the Inspection Contract was drafted by Home Inspections, any ambiguity in that contract should be construed most strongly against Home Inspections. App. 166. Mr. Hardin supplemented his response with an affidavit of Mr. Hardin clarifying Mr. Hardin’s understanding of the alleged arbitration provision in the event the Circuit Court were to find that provision ambiguous. App. 168-177. As more fully set forth below, such evidence is contemplated by the FAA.

In its reply to Mr. Hardin’s response in opposition to Home Inspections’ motion, Home Inspections claimed that the attachment of Mr. Hardin’s affidavit was an attempt to “muddy the waters,” App. 180, yet Home Inspections otherwise did not contradict any of the claims made in that affidavit. *Id.* Home Inspections further argued that the circuit court should look beyond the alleged “arbitration provision” to other provisions of the Inspection Contract to determine the meaning of that alleged “arbitration provision.” App. 182.

By its Order entered on September 13, 2019, Home Inspections’ motion to dismiss or compel arbitration was denied by the circuit court which found that the provision in question in the Inspection Contract did not require arbitration. App. 190-99.

Home Inspections thereafter requested the circuit court to stay the civil action

pending its appeal to this Court by motion filed September 18, 2019. App. 200-03. Mr. Hardin did not oppose that motion and by order entered October 4, 2019, the circuit court stayed all proceedings in the civil action pending this interlocutory appeal. App. 207-09.

SUMMARY OF ARGUMENT

Where the parties have agreed to arbitrate a dispute between them, this Court has recognized that federal and state law will uphold such an agreement inasmuch as this conclusion is supported by strong public policy. To that end, arbitration agreements are construed no differently than any other contract. However, this Court cannot order arbitration unless it is satisfied, by application of state law to the purported arbitration agreement, that the parties have agreed to arbitrate. In this instance, the language of the Inspection Contract reveals that there was no such clear intent to arbitrate.

Here, Home Inspections claimed that its contract provision required dismissal and arbitration; Mr. Hardin disagreed. Severing the alleged arbitration clause from the contract, and applying state contract law, including giving the words used their plain and ordinary meaning, results in inconsistent terms. The word “arbitration”, no matter how large or bold the type-face used, is totally inconsistent with the remaining language of that provision whereby disputes between Home Inspections and Mr. Hardin were agreed to be “resolved informally between the parties.” Case law from other jurisdictions reveals that such language in an arbitration provision requiring disputes to be “resolved informally between the parties” was but a first step to be taken prior to the arbitration of those disputes as more fully explained in the arbitration provision. Home Inspections obviously chose not to

proceed beyond the initial attempt at informal resolution since nothing more was contained within its contract. To find otherwise, would, as found by the circuit court result in an absurd result.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent believes that oral argument is not necessary under Rule 18(a) inasmuch as the facts and legal argument can be adequately presented in the parties' briefs and the record and the Court's decisional process would not be significantly aided by oral argument. However, should this Honorable Court be of the opinion that oral argument would significantly aid its decisional process, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

A. STANDARD OF REVIEW

“When an appeal from an order denying a motion to dismiss and compel arbitration is properly before [the Supreme Court of Appeals], the [Supreme Court of Appeals'] review is *de novo*.” Syl. Pt. 1, *W. Va. CVS Pharmacy LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 795 S.E.2d 574 (2017). Further, this Court has the authority to “examine the circuit court’s interpretation of the parties’ Agreement.” *Hamden Coal, LLC v. Varney*, 240 W.Va. 284, 810 S.E.2d 286, 292 (2018) (citing *Zimmerer v. Romano*, 223 W. Va. 769, 777, 679 S.E.2d 601, 609 (2009) for the proposition that the Supreme Court of Appeals applies “a *de novo* standard of review to [a] circuit court’s interpretation of [a] contract.”).

B. THE CIRCUIT COURT PROPERLY FOUND THAT THE PROVISION IN DISPUTE WAS NOT ONE REQUIRING ARBITRATION AND PROPERLY REFUSED TO ENFORCE THE SAME

The circuit court properly stated the roles of the FAA and state contract law in its August 27, 2019 Order which is the subject of this interlocutory appeal.

In determining whether the claimed “arbitration clause” is enforceable, the Court first looks to Section 2 of the Federal Arbitration Act (the “FAA”) which this Court has interpreted as follows:

Under the Federal Arbitration Act, 9 U.S.C. § 2, 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.

Syl. Pt. 4, *Parsons v. Halliburton Energy Services, Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016) (quoting Syl. Pt 6, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) (“*Brown I*”), overruled on other grounds by *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012); *see also State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 228 W. Va. 125, 129, 717 S.E.2d 909, 913 (2011) (same). In *Parsons*, this Court acknowledged that under both federal and West Virginia law, a “strong public policy” exists which recognizes “arbitration as an expeditious and relatively inexpensive forum for dispute resolution.” *Parsons*, 237 W. Va. at 146, 785 S.E.2d at 852. The *Parsons* Court noted that it was “Congress’s goal in enacting the Federal Arbitration Act” to “place arbitration agreements ‘upon the same

footing as other contracts, where [they] belong.” *Id.*, 237 W. Va. at 147, 785 S.E.2d at 853, citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The goal under the FAA “is for an arbitration agreement to be treated by courts like any other contract, nothing more, and nothing less. The FAA has no talismanic effect; it does not elevate arbitration clauses to a level of importance above all other contract terms.” *Brown I*, 228 W. Va. at 671, 724 S.E.2d at 275. Further, “[w]hile the Supreme Court has acknowledged a liberal federal policy favoring arbitration, it has also consistently held that § 2 of the FAA reflects the fundamental principle that arbitration is a matter of contract. Thus, a court may order arbitration only when it is satisfied that the parties agreed to arbitrate...[which is] resolved by application of state contract law.” *Lorenzo v. Prime Communications*, 806 F.3d 777, 781 (4th Cir. 2015) (citations omitted).

As this Court made clear in *G & G Builders, Inc. v. Lawson*, 238 W. Va. 280, 794 S.E.2d 1 (2016), another case relied upon by the circuit court, the Court must be “cognizant that a party cannot be compelled to arbitrate a claim or dispute absent an agreement to arbitrate.” *Id.*, 238 W. Va. at 284, 794 S.E.2d at 5. The *G & G Builders* Court further noted that under Section 2 of the FAA, “parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.” *Id.*, citing Syl. Pt. 10, *Brown I*. As set forth by this Court in *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013), the reason that parties are only bound to arbitrate what they have clearly and

unmistakably agreed in writing to arbitrate “is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a **clear intent**[.]” *Id.*, 232 W. Va. at 439, 752 S.E.2d at 593 (emphasis added), citing *In re. Marlene Indus. Corp.*, 45 N.Y.2d 327, 333-34, 380 N.E.2d 239,242, 408 N.Y.S.2d 410 (1978); see also *Mercury Constr. Corp. v. Moses H. Cone Mem’l Hosp.*, 656 F.2d 933, 939 (4th Cir. 1981) (to prevail on a motion to compel arbitration, the party seeking to arbitrate bears the burden of showing: “(1) [t]he making of the agreement and (2) the breach of the agreement to arbitrate.”); *State ex rel. United Asphalt Suppliers, Inc. v. Sanders*, 204 W. Va. 23, 28, 511 S.E.2d 134, 139 (1998) (“The policy favoring arbitration does not compel the court to require arbitration of disputes if arbitration was not the intent of the parties.”) (citation omitted). Thus, “the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.” *G & G Builders*, 238 W. Va. at 284, 794 S.E.2d at 5, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

Although Home Inspections invokes the FAA and the attendant public policy in favor of enforcing agreements to arbitrate, Pet. Br. at 17-20, the law is clear that whether an arbitration agreement exists at all is a question of state law. See Syl. Pt. 4, *Ruckdeschel v. Falcon Drilling Co., LLC*, 225 W. Va. 450 (2010) (“When a trial court is required to rule upon a motion to compel arbitration pursuant to 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.” (quoting Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250 (2010)).

As respects the first issue, whether a valid arbitration agreement exists as between the parties, the court’s task centers around the agreement’s existence and not its substantive validity. *See Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 699, 810 S.E.2d 749, 753 (2017) (“[A]n agreement to arbitrate must contain the elements required for proper formation of any contract.”). As noted in *Citizens Telecomm. Co. of W. Va. v Sheridan*, 239 W. Va. 67, 799 S.E.2d 144 (2017), while “arbitration provisions may not be subject to heightened scrutiny or notice requirements,...arbitration provisions are not entitled to standards more lax than any other contract provisions.” *Id.*, 239 W. Va. at 72, 799 S.E.2d at 149, citing Syl. Pt. 7, in part, *Brown I. Citizens Telecomm. Co. of W. Va. v Sheridan*, 239 W. Va. 67, 73. As this Court simplistically explained in *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016) (“Schumacher II”), “[t]he general tools for examining contracts are familiar to any first-year law student: **ambiguity**, coercion, duress, estoppel, fraud, impracticality, laches, lack of capacity, misrepresentation, mistake, mutuality of assent, unconscionability, undue influence, waiver, or even lack of offer, acceptance or consideration. If the contract defense exists under general state contract law principles, then it may be asserted to counter the claim that an arbitration agreement or a provision therein binds the parties.” *Id.*, 237 W. Va. at 391-92, 787 S.E.2d at 662-63 (emphasis added).

C. THE CIRCUIT COURT PROPERLY CONSIDERED ALL PORTIONS OF THE ALLEGED “ARBITRATION PROVISION”

In the instant case, Home Inspections claimed that the alleged “arbitration provision” in the Inspection Contract required the dismissal of the civil action as to it to permit the issues raised by Mr. Hardin to proceed by arbitration. Mr. Hardin opposed arbitration. Given these opposing arguments, the circuit court properly looked to *Schumacher II* for guidance. There this Court found that

[w]hen a lawsuit is filed implicating an arbitration agreement, and a party to the agreement seeks to resist arbitration, the Supreme Court has interpreted the FAA to require application of the doctrine of ‘severability’ or ‘separability.’ The gist of the doctrine is that an arbitration clause in a larger contract must be carved out, severed from the larger contract, and examined separately. The doctrine ‘treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the ‘container contract.’ Under the doctrine, arbitration clauses must be severed from the remainder of a contract, and must be tested separately under state contract law for validity and enforceability.

Schumacher II, 237 W.Va. at 387-88, 787 S.E.2d at 658-659. The *Schumacher II* Court further noted that “only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole” does Article 2 of the FAA and the doctrine of severability permit a trial court “to consider the challenge to the arbitration clause.” *Id.*, 237 W. Va. at 388, 787 S.E.2d at 659 (citing to *Richmond American Homes*, 228 W. Va. at 129, 717 S.E.2d at 913). Mr. Hardin has only challenged the validity of the alleged “arbitration clause” in the Inspection Contract. His complaint incorporates the contract and that contract is the basis for his breach of contract claim against Home Inspections as well as, in part, his professional

negligence claim. Accordingly, the Petitioner's reliance upon the doctrine of equitable estoppel, App. Br. at 23, is misplaced and ignores *Schumacher II*.

In examining the alleged "arbitration clause" in the Inspection Contract, the circuit court properly looked to the "arbitration clause" in its entirety. The court did not "excise a key term", Pet. Br. at 8, from the Inspection Contract as Home Inspections contends. The circuit court found that the provision in question "anticipates that any disputes between the parties 'shall be resolved informally between the parties.'" App. 197. The circuit court did not ignore the word "arbitration." While the circuit court did note that "[o]nly the heading of the [alleged arbitration provision] alludes to arbitration", the court continued on to say that "[n]owhere in the above-quoted provision do the parties agree to an 'arbitration' of future disputes between them." *Id.* The circuit court further noted that "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 is binding or appealable. The clause does not say that the informal resolution between the parties would be binding and exclusive of any other remedy." *Id.*

Home Inspections argues that it was incumbent upon the circuit court "to give effect to the plain meaning" of the Inspection Contract and to "construe all parts of the document together" rather than re-writing those terms as it claims was done by the circuit court. Mr. Hardin acknowledges that this fundamental rule of contract construction is evidenced by cases such as *Payne v. Weston*, 195 W. Va. 502, 466 S.E.2d 161 (1995), to which the

Petitioner has cited. Pet. Br. at 9. "A contract must be considered as a whole, effect being given, if possible, to all parts of the instrument." *Wood Coal Co. v. Little Beaver Mining Co.*, 145 W. Va. 653, 657, 116 S.E. 2d 394, 397 (1960). Further, "it is the safest and best mode of construction to give words, **free from ambiguity**, their plain and ordinary meaning." *Bass v. Coltelli-Rose*, 207 W. Va. 730, 733, 536 S.E.2d 494,497 (2000) (emphasis added) (quoting Syl. Pt. 3, *Bennett v. Dove*, 166 W. Va. 772, 774, 277 S.E.2d 617, 619 (1981)). See also *Nisbet v. Watson*, 162 W. Va. 522, 530, 251 S.E.2d 774, 780 (1979) ("the language of a contract must be accorded its plain meaning.").

If the Court construes the alleged arbitration provision as a whole, then what is the plain meaning to be given two very contradictory terms as appear in this provision? While the word "arbitration" is used in the heading, the words which follow it clearly do not impart an intent that arbitration was intended. Rather, the remainder of the provision evidences an intent that the parties would resolve any dispute "informally between the parties."

It is an examination of the language following the word "arbitration" which the circuit court undertook. The circuit court looked to language in other cases similar to that in the Inspection Contract here – that disputes "shall be resolved informally between the parties" to show that the inclusion of such language in other actual arbitration agreements was only a first step prior to any arbitration of those disputes. Specifically, the circuit court looked to *Kramer v. Eagle Eye Home Inspections, Inc.*, 14 Neb. App. 691, 716 N.W.2d 749 (2006) (Home inspection contract contained the following language: "*In the event a*

dispute or claim should arise from the inspection or inspection report, it is agreed that this dispute or claim shall be resolved informally between the parties or by binding Arbitration under the ‘Construction Industry Arbitration Rules’ of the American Arbitration Association, and use as a gauge of performance the ‘Standards-of-Practice’ of the American Society of Home Inspectors (ASHI tm)’) (emphasis in original); *CUNA Mut. Ins. Soc’y v. Office & Prof’l Emples. Int’l Union, Local 39*, 2004 U.S. Dist. LEXIS 24120* (W.D., Wisc. 2004) (procedure in a collective bargaining agreement “required several attempts at informal resolution and, if these attempts were unsuccessful, allowed either party to appeal the grievance to arbitration”); *G&G Closed Circuit Events, LLC v. Castillo*, 2017 U.S. Dist. LEXIS 42022*; 2017 WL 1079241 (N.D. Ill. 2017) (a DirecTV customer agreement contained an “Informal Resolution” which read “We will first try to resolve any Claim informally....neither of us may start a formal proceeding....for at least 60 days...” followed by a “Formal Resolution” which provided that if not resolved informally, any claim “will be resolved only by binding arbitration....conducted under the rules of JAMS...”).

Case law is replete with such examples of initial efforts to “resolve informally” prior to any resort to “binding arbitration”. However, in none of these cases did the provision there involved use simply the word “arbitration” and then follow that word with language indicating, as here, that “any dispute....shall be resolved informally between the parties.” See *Coulter v. Anadarko Petroleum Corp.*, 296 Kan. 336, 292 P.3d 289 (2013) (requiring disputes to be “resolved informally” and where not successful to be “submitted

to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association); *Dallas Cardiology Assocs., P.A. v. Mallick*, 978 S.W.2d 209 (Tex. App. 1998) (Any dispute under an employment contract “which the parties are unable to resolve informally between themselves or by mediation shall be submitted...to arbitration under the appropriate rules of the American Arbitration Association”); *Sanchez v. Western Pizza Enterprises, Inc.*, 90 Cal. Rptr 3d 818 (Cal App. (2009) (Employment contract stated that “any dispute that the parties are unable to resolve informally will be submitted to binding arbitration before an arbitrator selected from the ...Employment Arbitration panel of the Dispute Eradication Services...”); *Thibodeau v. Comcast Corp*, 912 A.2d 874 (Pa. Super 2006) (Provision in an employment contract entitled “MANDATORY AND BINDING ARBITRATION” and providing that if the parties were “UNABLE TO RESOLVE INFORMALLY ANY CLAIM OR DISPUTE....WE HAVE AGREED TO BINDING ARBITRATION...”).

The circuit court did not excise the word “arbitration” from the Inspection Contract”, it did not ignore it, nor did it improperly alter the terms of the Inspection Contract. Instead, it construed that provision together with the words following it - that “any dispute....shall be resolved informally between the parties” - in a manner which ultimately led to a finding that the use of the word “arbitration” was inconsistent with the balance of the provision, undisputably drafted by Home Inspections.

D. THE CIRCUIT COURT CORRECTLY FOUND THAT THE DISPUTED PROVISION WAS AMBIGUOUS.

“A contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction.” *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va.97, 101, 468 S.E.2d 712, 716 (1996) (citation omitted). As the circuit court correctly found, whether or not a contract, here the severable alleged arbitration provision, is ambiguous, has been held to be a question of law to be determined by the court. *Syl. Pt. 1, Berkeley Co. Pub. Serv. Dist. v. Vitro Corp.*, 152 W.Va. 252, 162 S.E.2d 189 (1968). In looking at whether the alleged arbitration provision in the Inspection Contract was ambiguous, the circuit court referred to *SWN Prod. Co., LLC v. Long*, 240 W. Va. 1, 807 S.E.2d 249 (2017) which relied upon *Salem International University, LLC v. Bates*, 238 W. Va. 229, 235, 793 S.E.2d 879, 885 (2016) wherein this Court stated:

‘[c]ontract language is considered ambiguous where an agreement’s terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.’ *Syl Pt. 6, State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002). Also, ‘[t]he term ‘ambiguity’ is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.’ *Syl. Pt. 4, Estate of Tawney v. Columbia Nat. Res.*, 219 W. Va. 266, 633 S.E.2d 22 (2006).

SWN Prod. Co., 240 W. Va. at 7, 807 S.E.2d at 255. App. 196.

As more fully explored above, the word “arbitration” followed by language clearly imparting an intent to resolve disputes between Home Inspections and Mr. Hardin “informally between the parties” reveal such an inconsistency. One established rule of construction is that

“[e]ach word in a contract is presumed to have a unique meaning and, thus, no word or clause is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it.” Syl. Pt. 6, *Columbia Gas Transmission Corp. v. E. I. Du Pont de Nemours & Co.*, 159 W. Va. 1, 217 S.E.2d 919 (1975). In the alleged arbitration provision found in the Inspection Contract, the use of the word “arbitration” followed by language which clearly indicates that any dispute involving the home inspection or the Inspection Report is to be “resolved informally between the parties,” reveals no redundancy because the word “arbitration” is totally at odds with an informal resolution “between the parties.”

Petitioner argues that the circuit court erred in finding that “arbitration is not an informal method of resolving a dispute.” App. Br. at 12. Petitioner looks to the Supreme Court case of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) to support this contention by quoting this passage from the case: “the principal advantage of arbitration [is] its informality.” *Id.*, 563 U.S. at 348. However, additional language referenced in *AT&T Mobility* leads to a different conclusion. In looking at the District Court’s denial of AT&T’s motion to compel arbitration under its contract with the Concepcions, the Supreme Court noted that the District Court “described AT&T’s arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was ‘quick, easy to use,’ and likely to ‘promp[t] full or ...even excess payment to the customer without the need to arbitrate or litigate.’” *AT&T Mobility*, 563 U.S. at 338.

As the circuit court found, reading the provision in the Inspection Contract which requires “that any dispute involving the inspection or the report to be ‘resolved informally

between the parties” to “mean that the parties have agreed to a binding arbitration of their disputes leads to an absurd result.” App. 198. “Generally, this Court will not interpret a contract in a manner that creates an absurd result.” *Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar*, 218 W. Va. 239, 244, 624 S.E.2d 586, 591 (2005) (per curiam). See also *Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 221, 617 S.E.2d 760, 768 (2005) (recognizing that “[a] contract of insurance should never be interpreted to create an absurd result, but should instead receive a reasonable interpretation”). The circuit court refused to sanction such an absurd result.

E. PETITIONER’S ASSIGNMENT OF ERROR AS RESPECTS CONSIDERATION OF MATTERS OUTSIDE THE PLEADINGS FAILS INASMUCH AS THE CIRCUIT COURT DID NOT ADDRESS THE PETITIONER’S MOTIONS TO DISMISS HAVING FOUND THAT NO BINDING ARBITRATION AGREEMENT EXISTED

Where, as here, a severed arbitration clause is required by the FAA to be evaluated under general contract law, this Court has held that

[T]he trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.

Syl. Pt. 4, *Richmond American Homes*. Thus, even if the circuit court considered Mr. Hardin’s Affidavit, the court was well within its rights to do so given this Court’s holding in *Richmond American Homes*. The Petitioner had an opportunity to challenge Mr. Hardin’s statements, but chose not to do so in its reply in support of its motion. App. 179-189. It cannot now complain to this Court for its own oversight.

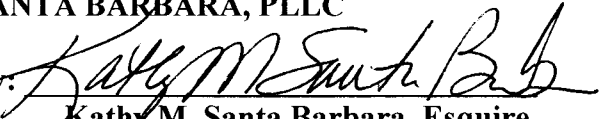
CONCLUSION

The circuit court correctly applied applicable law as set forth above and its order, to find that the Inspection Contract did not require disputes to be resolved by binding arbitration. Having so found, the circuit court had no need to address the Rule 12(b)(1) and (6) issues raised by the Petitioner. It is respectfully submitted that this Honorable Court should do likewise and affirm the circuit court's decision.

Respectfully submitted this 7th day of February, 2020.

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