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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0487

STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *Petitioner,*

v.

RENE G. DENISE, *Respondent*

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Honorable Tera L. Salango, Judge
Circuit Court of Kanawha County
Civil Action No. 19-C-1045

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BRIEF OF THE PETITIONER

Counsel for Petitioner

Jan L. Fox, Esq. (WVSB #1259)
Mark C. Dean, Esq. (WVSB #12017)
Michelle E. Gaston, Esq. (WVSB#7494)
Steptoe & Johnson PLLC
Chase Tower, Seventeenth Floor
707 Virginia Street, East
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000 telephone
(304) 353-8180 facsimile
Jan.Fox@Steptoe-Johnson.com
Mark.Dean@Steptoe-Johnson.com
Michelle.Gaston@Steptoe-Johnson.com

Counsel for Respondent

Todd S. Bailess, Esq.
Rodney A. Smith, Esq.
BAILESS SMITH PLLC
108 ½ Capitol Street, Suite 300
Charleston, WV 25301
(304) 342-0550 telephone
(304) 344-5529 facsimile
tbailess@bailesssmith.com
rsmith@bailesssmith.com

Michael P. Addair, Esq.
Addair Law Office PLLC
P.O. Box 565
Hurricane, WV 25526
(304) 881-0411 telephone
(304) 881-0342 facsimile
maddair@addairlawoffice.com

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2. The Circuit Court erred as a matter of law in ruling that equitable estoppel does not apply to allow DHHR, a non-party to the contract, to enforce the arbitration agreement Denise entered into as Denise's claims are employment-related and, therefore, are intertwined with, rely on, and/or arise out of and relate to her employment contract with Sunbelt Staffing, LLC, from which she benefited.

3. The Circuit Court erred as a matter of law in ruling that Denise's West Virginia Human Rights Act ("WVHRA") claims are outside the scope of the arbitration agreement Denise entered into, because employment-related claims are clearly within the scope of an employment agreement, and any question regarding the scope of arbitrable issues must be resolved in favor of arbitration.

4. The Circuit Court erred as a matter of law in determining that the arbitration Denise entered into was procedurally and substantively unconscionable as Denise, a Registered Nurse, understood the terms of the 22 paragraph employment contract; DHHR agreed to arbitrate in Charleston, West Virginia; and the fee-shifting provision of the agreement is both inapplicable and severable.

II. STATEMENT OF THE CASE

The crux of this case is that Respondent, Rene G. Denise, seeks to pursue employment-related claims against DHHR, while not being bound to the arbitration agreement in her employment contract. This action arises out of Denise's employment with Sunbelt Staffing, LLC

("Sunbelt"), and placement at the William R. Sharpe, Jr. Hospital ("Sharpe Hospital") operated by DHHR. [*See* Compl.; Am. Compl., Appx at JA0024-JA0043; JA0107-JA0116.]. Denise brings claims for hostile work environment and reprisal under the West Virginia Human Rights Act ("WVHRA"). [*See generally id.*].

On August 25, 2017, Denise executed an Employment Agreement with Sunbelt, in which she agreed that disputes relating to her employment would be submitted to binding arbitration. [Appx. at JA0119]. In September 2017, Denise was assigned to work at Sharpe Hospital. [Am. Compl. at ¶ 13, Appx. at JA109]. Denise alleges that a former Defendant,[1] Scott Starcher, was a co-worker at Sharpe Hospital who made "unwelcomed comments and inappropriately" touched her, creating "an uncomfortable and hostile work environment" which she reported to Frances Stump, a "supervisor/agent of DHHR". [JA0109; JA0110].

In her Amended Complaint, Denise alleges that she was "jointly employed" by Sunbelt and DHHR and makes claims for "sexual harassment," "hostile work environment," "reprisal," "retaliation," and "retaliatory failure to rehire." [Am. Compl., JA0107-JA0116]. Subsequently, despite identifying him as the alleged bad actor, Denise voluntarily dismissed Scott Starcher. [JA0044]. Additionally, in apparent recognition of the arbitration provision in her employment contract with Sunbelt, Denise voluntarily dismissed Sunbelt. [JA0045].

DHHR sought to compel arbitration of Denise's employment related claims in accordance with the arbitration agreement in Denise's Employment Contract. Rather than proceed in arbitration, Denise sought to again amend her amended complaint in order to assert that recovery was sought only from the State of West Virginia's insurance carrier. [JA0132-0135]. DHHR opposed yet another amendment as futile. [JA0262-JA0270].

[1] Having been voluntarily dismissed from this case by Denise. [JA0044].

On or about June 8, 2020, despite the arbitration agreement, the Circuit Judge denied DHHR's Motion to Compel Arbitration. Rather, the Circuit Judge retained jurisdiction over this matter, granting Denise leave to file a Second Amended Complaint against DHHR and Francis Stump. [JA0001-JA0023].

The Circuit Judge erred in failing to compel Denise to arbitrate her employment-related claims pursuant to the valid arbitration agreement in her employment contract. DHHR asks that the Circuit Judge's "Order Denying Defendants' Motion to Dismiss or, in the Alternative, Compel Arbitration And Granting Plaintiff's Leave to File a Second Amended Complaint" be reversed, and Denise compelled to arbitrate her claims.

III. SUMMARY OF ARGUMENT

This Court has recognized that "[i]n determining whether the language of an agreement to arbitrate covers a particular controversy, the federal policy favoring arbitration of disputes requires that a court construe liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration." *State ex rel. City Holding Co. v. Kaufman*, 216 W.Va. 594, 609 S.E.2d 855, 859 (2004) (citing 9 U.S.C. § 1, *et seq.; Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 385 (2d Cir.1961); *Accord Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir.1971); *Coudert v. Paine Webber Jackson & Curtis*, 543 F.Supp. 122 (D.Conn.1982), *overruled on other grounds by Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78 (2d Cir.1983); *PAS–EBS v. Group Health, Inc.*, 442 F.Supp. 937 (S.D.N.Y.1977); *State ex rel. Wells v. Matish*, 215 W.Va. 686, 693, 600 S.E.2d 583, 590 (2004) (per curiam)). Irrespective of that well-established principle, the Circuit Judge found that DHHR could not enforce the arbitration agreement because Denise "did not agree to arbitrate claims between her and DHHR." [JA0013 at ¶ 49]. It is well-established that "the doctrine of equitable

estoppel allows a court to prevent a nonsignatory from embracing a contract, but then turning his, her, or its back on the portions of the contract (such as an arbitration clause) that the nonsignatory finds 'distasteful.'" *Bayles v. Evans*, 243 W.Va. 31, ___, 842 S.E.2d 235, 245 (2020) (citing *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)). Thus, where as here, "the nonsignatory knowingly exploits the contract containing the arbitration clause and obtains a direct benefit from that contract, '[c]ourts have applied direct benefits estoppel to bind a non-signatory to an arbitration agreement[.]'" *Id.* (citing *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010)). Nevertheless, despite the fact that Denise explicitly alleged employment-related claims against DHHR, an entity Denise alleges was her "joint employer," [JA0024 at ¶ 2; JA0035 at ¶ 4] the Circuit Judge erroneously found that Denise was "not attempting in this case to rely upon, enforce, or benefit from the terms of her employment agreement" which contained the arbitration provision. [JA0014 at ¶ 54].

Clearly, the Circuit judge erred and, in doing so, deprived DHHR of the benefit of arbitration. *See Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556, 563 (2013) ("The purpose of arbitration is to avoid litigation in favor of a quicker and less costly method of dispute resolution.") (citations omitted). The "Order denying Defendants' Motion to Dismiss, or in the Alternative, Compel Arbitration and Granting Plaintiff's Leave to File A Second Amended Complaint" must be reversed, and Denise compelled to arbitrate.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

W.Va. R. App. P. 19(a)(1) oral argument is appropriate in this case as it involves an "assignment[ ] of error in the application of settled law". Alternatively, to the extent that this appeal involves issues of fundamental public importance, Appellant requests oral argument

pursuant to Rule 20. There is public interest in this matter because if the Circuit Judge is permitted to compel the Appellant's further participation in this case in Circuit Court, the State and its taxpayers will incur prohibitive and unnecessary expenditures of costs and resources. DHHR submits that the ten (10) minutes of argument afforded under *W.Va. R. App. P.* 19(e) is sufficient. DHHR does not anticipate the resolution of this matter be through Memorandum Decision as a reversal is requested and, per the Rules of Appellate Procedure, "[a] memorandum decision reversing the decision of a circuit court should be issued in limited circumstances."

V. ARGUMENT

A. THE STANDARD OF REVIEW FOR THE DENIAL OF A MOTION TO COMPEL ARBITRATION.

This Court noted in *Citizens Telecomms. Co. of W. Va. v. Sheridan* that " '[w]hen an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo*.'" 239 W.Va. 67, 799 S.E.2d 144, Syl. pt. 2 (2017) (quoting *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W.Va. 465, 796 S.E.2d 574 (2017)). This Court's "review is also plenary to the extent [the Court's] analysis requires [the Court] to examine the circuit court's interpretation of the parties' agreement." *Hampden Coal, LLC v. Varney*, 240 W.Va. 284, 290, 810 S.E.2d 286, 292 (2018) (citing *Zimmerer v. Romano*, 223 W.Va. 769, 777, 679 S.E.2d 601, 609 (2009)).

B. THE CIRCUIT COURT ERRED IN RULING THAT DENISE IS NOT REQUIRED TO ARBITRATE HER CLAIMS.

Without even acknowledging statements made in DHHR's Reply brief,[2] the Circuit Court erroneously denied DHHR the benefit of Denise's contractual obligation to arbitrate her claims.

[2] The Circuit Judge's Order holds "[t]he subject arbitration agreement is also substantively unconscionable. The agreement requires Plaintiff to arbitrate her claims in Jacksonville, Florida which is approximately 743 miles and nearly 11 hours from her home in Elkins, West Virginia. This will impose unreasonable costs and burdens upon her and could deter her from prosecuting her claims. Moreover, such a far flung jurisdiction will significantly hamper Plaintiff's ability to prosecute her claims due to the unavailability and/or unwillingness of witnesses who live in West

The "Order Denying Defendants' Motion to Dismiss or, in the Alternative, Compel Arbitration and Granting Plaintiff[ ] Leave to File a Second Amended Complaint" must be reversed.

In 1925, Congress enacted the Federal Arbitration Act ("FAA") to reverse decades of judicial hostility toward arbitration agreements and to place those agreements on the same footing as other contracts. *See Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991) (holding that lower court erred by not ordering age discrimination claim to arbitration); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 225-26 (1987). The United States Supreme Court has admonished that the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer,* 552 U.S. 346, 349 (2008). Congress enacted the FAA "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined . . . by state courts or legislatures." *Southland Corp. v. Keating,* 465 U.S. 1, 13 (1984).

Under the FAA, courts must direct the parties to proceed to arbitration on issues as to which an arbitration agreement exists, and courts are afforded no discretion on this issue. 9 U.S.C. §§ 3-4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract.

Virginia to travel to Jacksonville, Florida to testify in an arbitration." [JA0021 at ¶ 76]. Respectfully, DHHR stated in the briefing "The DHHR has no intention of enforcing that location. Rather, the DHHR is more than willing to arbitrate this matter in Charleston, West Virginia." [JA0174].

9 U.S.C. § 2 (emphasis supplied). The FAA requires the rigorous enforcement of arbitration agreements because, as the United States Supreme Court has recognized, the FAA embodies:

> [A] liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policy to the contrary. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.

Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see also American Express Co. v. Italian Colors Restaurant*, 270 U.S. 228, 233 (2013) (reminding lower courts to "rigorously enforce arbitration agreements according to their terms . . . including terms that specify *with whom* [the parties] choose to arbitrate their disputes . . . and the rules under which that arbitration will be conducted."). Indeed, this Court has issued numerous decisions upholding contractual arbitration agreements. *See, e.g., Family Dollar Stores of W. Va., Inc. v. Tolliver*, No. 17-0236, 2018 WL 1074947 (W. Va. Feb. 27, 2018); *Hampden Coal, LLC v. Varney*, 810 S.E.2d 286 (2018); *Kirby v. Lion Enterprises, Inc.*, No. 16-1175, 2017 WL 5513619 (W. Va. Nov. 17, 2017); *Employee Resource Group v. Harless*, LLC, No. 16-0493, 2017 WL 1371287 (W. Va. Apr. 13, 2017); *Nationstar Mortg., LLC v. West*, 785 S.E.2d 634 (2016); *Navient Solutions, Inc. v. Robinette*, No. 14-1215, 2015 WL 6756859 (W. Va. Nov. 4, 2015); *Toney v. EQT Corp.*, No. 13-1101, 2014 WL 2681091 (W. Va. June 12, 2014); *New v. Game Stop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62 (2013); *State ex rel. Oowen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d. 372 (W. Va. 2013).

The enforcement of an arbitration agreement is required if that agreement is: (1) part of a contract or transaction involving commerce; and (2) valid under general principles of contract law. 9 U.S.C. § 2; *see also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). A matter "involves" commerce under the FAA if it merely "affects" commerce, a standard commonly applied by the court to situations in which it is clear that Congress intended to exercise its Commerce Clause powers to the fullest extent. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 268, 273-74 (1995). The validity of Denise's arbitration agreement is addressed hereafter.

1. **The Circuit Judge Erred in ruling that Denise's agreement was only enforceable by Sunbelt and that, because DHHR is not a signatory to the arbitration agreement, Denise was not estopped from avoiding arbitration.**

Inexplicably, the Circuit Judge has allowed Denise to sue for employment-related claims, yet not comply with her employment agreement, which requires arbitration. As more fully established herein, it is without question that DHHR can enforce Denise's employment agreement and compel arbitration of this employment suit.

The Circuit Judge's Order appealed from herein states that Denise "clearly did not agree to arbitrate claims between her and DHHR." However, the "Consultant Employment Agreement" Denise signed states she "agrees and understands he or she will provide services under the direction and supervision of" DHHR. [Employment Agreement at ¶ 6, JA0069]. In *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2nd Cir. 2010), the plaintiff make-up artist "knew from the date of her employment . . . that she would treat with [cable TV] personnel in the ordinary course of her daily duties. This knowledge that she would extensively treat with [cable TV] personnel is sufficient to demonstrate the existence of a relationship between the [make-up artist and cable TV company] that allows the latter to avail itself of the arbitration agreement" between the make-up artist and her employer. *Ragone, supra* at 125. Likewise, there can be no question

here that Denise knew from the date of her employment with Sunbelt she would work under the direction and supervision of DHHR and, therefore, DHHR must be permitted to avail itself of the arbitration agreement in the employment contract.

As this Court has repeatedly held, estoppel allows a non-signatory to enforce a contract's arbitration agreement. Analyzing the issue, this Court held in *Bluestem Brands, Inc. v. Shade*, 239 W.Va. 694, 702, 805 S.E.2d 805, 813 (2017) that "a non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement. Such claims sufficiently arise out of and relate to the written agreement as to require arbitration." *Bluestem* at 814. It is inconceivable to think that the employment-related suit brought by Denise here does not "arise out of and relate to" her employment agreement.

In the case at issue, Denise had a contractual employment relationship with Sunbelt. Denise was placed for work at Sharpe Hospital, operated by DHHR, by virtue of that contractual relationship. [*Id.*; Am. Compl. at ¶12-13, JA0036]. Indeed, Denise explicitly alleges that she was "jointly employed" by both Sunbelt and DHHR, and now brings causes of action related to that employment against DHHR. [*See generally* Compl., JA0024-0033 and Am. Compl., JA0034-0043]. Denise's employment-related claims in this lawsuit (whether against Sunbelt or DHHR) are clearly "intertwined" with, "rely on," and/or "arise out of and relate" to her employment contract with Sunbelt, and she should be estopped from avoiding arbitration.

Although presented in terms of the non-signatory rather than the signatory, this Court eloquently summed up the issue in *Bayles v. Evans*. "As a general rule, the doctrine of equitable estoppel allows a court to prevent a nonsignatory from embracing a contract, but then turning his, her, or its back on the portions of the contract (such as an arbitration clause) that the nonsignatory

finds 'distasteful.'" 243 W.Va. 31, ___, 842 S.E.2d 235, 245 (April 24, 2020) (citation omitted). Stated otherwise, "[e]stoppel 'prevents a non-signatory from 'cherry-picking' the provisions of a contract that it will benefit from and ignoring other provisions that don't benefit it or that it would prefer not to be governed by (such as an arbitration clause).'" *Id.* (citations omitted).

As noted previously, the contract at issue is entitled "Consultant Employment Agreement". [JA0069-0072]. According to the agreement, signed by Denise, Sunbelt Staffing "desires to employ" Denise "as a healthcare . . . professional servicing" DHHR and Denise "desires to work for Sunbelt under the terms of this Agreement". [*Id.* at ¶ 2]. Also according to the Agreement, "[t]he duties, location, compensation and certain other terms and conditions with respect to each assignment under this Agreement will be set forth in a written Assignment Confirmation entered into by the parties hereto and incorporated herein by reference". [*Id.* at ¶ 7]. The contract states that Denise was "due no pay or compensation under this Agreement except as set forth in an effective Assignment Confirmation". [*Id*]. Denise was assigned "to Client facilities". [*Id.* at ¶ 10]. Moreover, "Sunbelt's rights and obligations under" the employment agreement "shall inure to the benefit of and be binding upon Sunbelt's assigns . . . ." [*Id.* at ¶ 20].

Denise was paid, albeit not by DHHR. Denise benefitted from the employment agreement, which placed her at Sharpe Hospital, a DHHR facility. Denise simply cannot "cherry pick" terms of that employment agreement in order to reap its benefits, such as being paid, yet avoid arbitration. *See also Boucher v. Alliance Title Co., Inc.*, 25 Cal.Rptr.3d 440 (Cal. Ct. App. 2005) (Suit by former employee regarding the failure to pay wages and benefits and intentional interference with prospective economic advantages "are intimately founded in and intertwined with the . . . employment agreement" such that Plaintiff was equitably estopped from avoiding the arbitration provision in suit against employer and non-signatory who acquired employer's assets); *Begole v.*

North Miss. Med. Ctr., Inc., 761 Fed.Appx. 248 (5th Cir. 2019) (unpublished) (Physician's supervisor, a nonsignatory to an employment agreement, can compel physician to arbitrate employment-law claims against supervisor pursuant to agreement's arbitration clause[3]); *Garcia v. Pexco, LLC*, 217 Cal.Rptr.3d 793 (Cal. Ct. App. 2017) (Employee of temporary staffing agency required to arbitrate wage and hour claims it brought against staffing agency and non-signatory customer pursuant to equitable estoppel); *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2nd Cir. 2010) (Cable TV sports producer, and non-signatory, could enforce arbitration agreement, and compel arbitration of Title VII claims of sexual harassment, between make-up artist and her employer). The arbitration agreement in Denise's employment contract is properly enforced by DHHR and the Circuit Judge's decision to the contrary erroneous.

2. Denise's claims against DHHR are within the scope of the agreement to arbitrate.

The Circuit Judge incorrectly ruled that Denise's "anti-discrimination claims do not fall within the scope of the subject arbitration agreement". [JA0013 at ¶ 50]. Denise brings claims for harassment and retaliation under the WVHRA. [*See* Compl., JA0024-0033]. These claims arise from Denise's employment and termination of employment with Sunbelt and placement at Sharpe Hospital, and are therefore a "dispute or difference . . . arising out of or relating to" her Consultant Employment Agreement with Sunbelt. As the *Boucher v. Alliance Title Co., Inc.* Court noted:

> The focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant. (*Sunkist, supra*, 10 F.3d at pp. 757–758; *see Metalclad, supra*, 109 Cal.App.4th at p. 1717, 1 Cal.Rptr.3d 328.) That the claims are cast in tort rather than contract does not avoid the arbitration clause. (*Sunkist, supra*, 10 F.3d at p.

[3] Denise essentially seeks to be rewarded for her procedural gamesmanship. Denise initially brought suit against her employer, Sunbelt, in order to allege she was a "joint employee" of both Sunbelt and DHHR, [JA0034-0043], only to voluntarily dismiss Sunbelt in an attempt to avoid arbitration. [JA0045]. Rewarding such behavior flies in the face of the applicable law and the intent of the parties entering into contracts expressly containing an arbitration agreement.

> 758.) Moreover, the federal decisional authority is not limited, as plaintiff suggests, to cases in which a contract with a subsidiary corporation is relied upon to compel arbitration with a parent entity. The fundamental point is that a party may not make use of a contract containing an arbitration clause and then attempt to avoid the duty to arbitrate by defining the forum in which the dispute will be resolved. (*Metalclad, supra*, 109 Cal.App.4th at p. 1714, 1 Cal.Rptr.3d 328; *NORCAL Mut. Ins. Co. v. Newton, supra*, 84 Cal.App.4th at p. 84, 100 Cal.Rptr.2d 683.)

25 Cal. Rptr. at 447.

Additionally, the Federal Arbitration Act ("FAA") includes within its scope employment contracts with the exception, not applicable here, of those covering workers engaged in transportation. *See New v. GameStop, Inc.*, 232 W. Va. 564, 753 S.E.2d 62 (2013) (applying the FAA to an employment arbitration agreement and upholding the agreement under West Virginia law). Discrimination claims can be arbitrable. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Moreover, as commentators have noted:

> When reviewing a case involving a motion to compel arbitration, a court's first task is to determine whether parties agreed to arbitrate the dispute. Two questions guide the analysis: is there a valid agreement to arbitrate the claims and does the dispute fall within the scope of that arbitration agreement? Since arbitration is a matter of contract between the parties, the strong federal policy favoring arbitration does not apply to the initial determination of whether there is a valid agreement to arbitrate the dispute. That inquiry is governed by state contract law principles. ***It is during the second step in the process, determining the scope of the agreement, that the court will apply federal policy and resolve ambiguities in favor of arbitration.***

2 *Emp. Discrim. Coord. Analysis of Federal Law* § 55:17 (footnote omitted) (emphasis added). Any question relating to the scope of arbitrable issues must be resolved in favor of enforcing the agreement to arbitrate. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 576-77 (6th Cir. 2003). Indeed, it is more than a little disingenuous for Denise to argue, and the Circuit Judge to accept,

that the scope of the arbitration agreement found in her employment contract does not include employment-related claims.[4]

3. The Arbitration Agreement is not unconscionable.

i. The Agreement is not procedurally unconscionable.

Again, with no recognition of DHHR's statements in the written record, the Circuit Judge stated she "will not enforce the subject arbitration clause because it is procedurally and substantively unconscionable." [JA0020 at ¶ 74]. The Circuit Judge's erroneous decision must be reversed.

In *New, supra* this Court examined the doctrine of unconscionability, stating "[o]ur analysis of whether the arbitration agreement at issue is ' 'unconscionable necessarily involves an inquiry into the circumstances surrounding [its] execution and the fairness of [it] as a whole.'" *New*, 753 S.E.2d at 74 (citations omitted). In making its determination, this Court focuses " 'on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the 'existence of unfair terms in the contract.'" *Id.* (citations omitted). There are two (2) aspects to unconscionability, procedural and substantive. *Id.* The Circuit Court here took issue with Denise's arbitration agreement because it "was a pre-printed 'take it or leave it' adhesion contract". [JA0020 at ¶ 74]. As this Court has recognized, however, contracts of adhesion, all "form contracts", are not "automatically invalidated" as to do

[4] The Circuit Judge cites *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331-32 (4th Cir. 1999) for the proposition that an arbitration agreement has to be a "clear and unmistakable" waiver of a judicial forum. [JA0017 at ¶ 63]. Courts have noted, however, that the *Carson* decision pertained to a Dispute Resolution Policy "as part of a collective bargaining agreement," which is subject to a "stricter standard." *Skyrnnkov v. Federal Nat. Mortg. Ass'n*, 943 F.Supp.2d 172, 177 (D. D.C. 2013) (citations omitted). As in *Skrynnkov*, the subject agreement was a contract executed by an *individual* and, therefore "not unenforceable simply because it uses broad and inclusive language." *Id.* (citations omitted); *see also McGuire v. Lord Corp.*, No. 5:19-CV-25, 2019 WL 4858850 (E.D. N.C. Sept. 30, 2019).

so "would be completely unworkable" because such contracts are " 'the bulk of contracts signed in this country'". *New, supra* at 74 (citations omitted).

Indeed, in the instant case, Denise, a Registered Nurse, can undoubtedly navigate a 22-paragraph contract she executed. As this Court stated in *New*:

> Notwithstanding her assertions to the contrary, the petitioner has failed to offer any evidence that she was incapable due to age, literacy or lack of sophistication to understand the clear terms of the arbitration agreement or the Acknowledgment she signed upon her employment. *See Brown II*, 229 W.Va. at 386, 729 S.E.2d at 221, syl. pt. 10. She has also failed to offer any evidence that the arbitration agreement's terms were hidden from her or were couched in unduly complex terms. The petitioner's bald assertions that the arbitration agreement is procedurally unconscionable because the agreement was not subject to negotiation and because she was unemployed and had no other 'meaningful alternatives available to her' other than to sign the Acknowledgment are simply not sufficient. *See Montgomery v. Applied Bank*, 848 F.Supp.2d 609, 616 (S.D.W.Va.2012) (concluding that where plaintiff failed to offer evidence 'that she had no other alternative but to enter into a credit card agreement with ... defendant[,] ... [she] wholly fail[ed] to put forth any evidence that the Agreement was procedurally unconscionable other than her assertion that [it] was a contract of adhesion, which ... does not in itself make a contract procedurally unconscionable.'); *Clites*, 224 W.Va. at 306, 685 S.E.2d at 700 (finding that although arbitration agreement entered into upon plaintiff's employment was a contract of adhesion because the 'entire Agreement is boiler-plate language that was not subject to negotiation and there is no contention ... that the Petitioner had any role or part in negotiating [its] terms[,]' the agreement was not unconscionable). There is simply no evidence in the record to show that the manner or setting in which the petitioner signed the Acknowledgment prevented her from having a reasonable opportunity to understand the terms of the agreement.

Id. at 77.

The *New* Decision is also instructive in that it points out that " 'absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the

contract as drafted.'" *Id.* (citing *Adkins v. Labor Ready, Inc.*, 185 F.Supp.2d 628, 638 (S.D.W. Va. 1982)). In short, the agreement is not procedurally unconscionable.

ii. The Agreement is not substantively unconscionable.

Likewise, the Circuit Judge erroneously determined that "[t]he subject agreement is . . . substantively unconscionable." [JA0021 at ¶ 76]. The Circuit Court made its determination, at least in part, because "[t]he agreement requires Plaintiff to arbitrate her claims in Jacksonville, Florida." *Id.* However, as stated above, the Circuit Court completely ignored the DHHR's advisement to the court in its briefing that it has no intention of enforcing that location. Rather, the DHHR is more than willing to arbitrate this matter in Charleston, West Virginia. [JA0174].

Additionally, the Circuit Court expressed displeasure with the "fee shifting provision" in the Agreement. [JA0021 at ¶ 77]. However, the actual text of the provision complained of is telling: "If Sunbelt *prevails in any action to enforce any provision(s) in this Agreement* . . . . [Plaintiff] shall pay to Sunbelt all costs and expenses Sunbelt incurs in enforcing this Agreement, including Sunbelt's court costs and attorney's fees." [Employment Agreement at ¶ 17, JA0071]. Sunbelt is not seeking to enforce the agreement. Thus, per the contract's plain and unambiguous language, this provision is inapplicable herein. *See CMC Enterprise, Inc. v. Ken Lowe Management Co.*, 206 W.Va. 414, 525 S.E.2d 295 (1999) (Clear and unambiguous contracts are applied, not construed). Regardless, the Agreement contains a severability provision. [Employment Agreement at ¶ 18, JA0071]. Accordingly, even if the fee-shifting provision (or any other provision of the Agreement) is applicable, and even if such provision be unconscionable, which DHHR disputes, it is severable and "the agreement to arbitrate remains enforceable." *Barach v. Sinclair Media III, Inc.*, 392 F.Supp.3d 645, 655 (S.D. W.Va. 2019) (citing *In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 292 (4th Cir. 2007) ("if the district court concludes that

the [provision] is unenforceable, the district court must then consider whether severance of the ... provisions, rather than invalidation of the arbitration agreements, would be the appropriate remedy.").

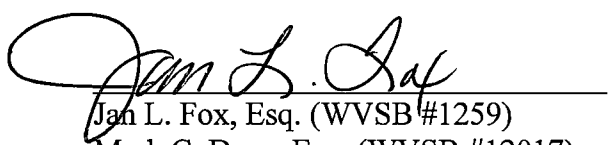
VI. CONCLUSION

The Circuit Court erred in failing to compel Denise to arbitrate her employment-related claims as she agreed to do in her Consulting Employment Agreement. Accordingly, the "Order Denying Defendant's Motion to Dismiss, or, in the Alternative, Compel Arbitration And Granting Plaintiff's Leave to File A Second Amended Complaint" must be reserved.

Respectfully submitted this 8th day of October, 2020.

STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

By Counsel,



Jan L. Fox, Esq. (WVSB #1259)
Mark C. Dean, Esq. (WVSB #12017)
Michelle E. Gaston, Esq. (WVSB #7494)
Chase Tower, Seventeenth Floor
707 Virginia Street, East
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000
(304) 353-8180 facsimile
Jan.Fox@Steptoe-Johnson.com
Mark.Dean@Steptoe-Johnson.com

STEPTOE & JOHNSON PLLC
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on 8th day of October, 2020, I caused to be served a true and correct copy of the ***"Brief of the Petitioner"*** by depositing the same in the United States Mail, postage prepaid, upon the Respondents and their counsel of record as follows:

Todd S. Bailess, Esq.
Rodney A. Smith, Esq.
BAILESS SMITH PLLC
108 ½ Capitol Street, Suite 300
Charleston, West Virginia 25301
(304) 342-0550
(304) 344-5529 facsimile
tbailess@bailesssmith.com
rsmith@bailesssmith.com
maddair@bailesssmith.com
Counsel for Plaintiff

Michael P. Addair, Esq.
Addair Law Office PLLC
P.O. Box 565
Hurricane, WV 25526
(304) 881-0411
(304) 881-0342 facsimile
maddair@addairlawoffice.com
Counsel for Plaintiff

William E. Murray, Esq.
Anspach Law
900 Lee Street East, Suite 1700
Charleston, WV 25301
(304) 205-8063
wmurray@anspachlaw.com
Counsel for Frances Stump

Hon. Tera Salango
Judge, Circuit Court of Kanawha County
Kanawha County Judicial Building
PO Box 2351
111 Court Street
Charleston, WV 25301
(304) 357-0361
(304) 357-0625 facsimile

Jan L. Fox, Esq. (WVSB #1259)