No. 20-0487

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Petitioner,

v.

RENE G. DENISE,

Respondent,

From the Circuit Court of Kanawha County, West Virginia Civil Action No. 19-C-1045

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

This case arises from sexual harassment and retaliation suffered by the Respondent, Rene G. Denise, during her joint employment with Sunbelt Staffing, LLC ("Sunbelt") and the West Virginia Department of Health and Human Resources ("DHHR") while she was assigned to work at William R. Sharpe Jr. Hospital. *See Appx.* at JA0034-JA0043.

Ms. Denise began her employment with her joint employers as a Registered Nurse in September 2017. *See Appx.* at JA0036. Just prior to starting her employment, Ms. Denise signed a *Consultant Employment Agreement* (hereinafter "Agreement"). *See Appx.* at JA0069-JA0072. The only parties to the Agreement are Ms. Denise and Sunbelt. *See id.* Paragraph 15 of the Agreement contains the following arbitration provision:

Arbitration

> 15. Any dispute or difference ***between Sunbelt and Consultant*** arising out of or relating to this Agreement shall be finally settled by arbitration in accordance with the rules of the American Arbitration Association by a single arbitrator. The [*sic*] Sunbelt and Consultant shall agree on an arbitrator. If Sunbelt and the Consultant fail to agree on an arbitrator within thirty (30) days after notice of commencement of arbitration, the American Arbitration Association shall, upon request of either party, appoint the arbitrator to constitute the panel. Arbitration proceedings hereunder may be initiated by either Sunbelt or Consultant by making a written request to the American Arbitration Association, together with any appropriate filing fee, at the office of the American Arbitration Association in Jacksonville, Florida. ***All arbitration proceedings shall be held in Jacksonville, Florida.*** Any order or determination of the arbitral tribunal shall be final and binding upon the parties to the arbitration and may be entered in any court having jurisdiction.

Appx. at JA0071 (emphasis added). The arbitration provision is contained in a five-page document of small, single-spaced print. *See Appx.* at JA0069-JA0072. The text of the arbitration provision is not set off from the rest of the document by bolded typeface, enlarged print, "all caps," or any other method of ensuring that the provision is made to be conspicuous to the reader of the document. *See id.* The agreement also contains a unilateral fee-shifting provision requiring Ms.

Denise to pay Sunbelt's legal fees and costs if it prevails in arbitration to enforce any terms of the Agreement. *See Appx.* at JA0071.

At the outset of her employment, Ms. Denise was assigned to William R. Sharpe, Jr. hospital, which is operated under the direction of DHHR. *See Appx.* at JA0036. During her employment, Ms. Denise was subjected to sexual harassment by a co-worker, which she ultimately reported to the individual Defendant below, Frances Stump, who was a supervisor for DHHR at the hospital. *See Appx.* at JA0036 – JA0037. After reporting the sexual harassment to Defendant Stump, Ms. Denise was transferred to a less desirable shift. *See Appx.* at JA0038. On or about November 9, 2017, Ms. Denise learned that she had been terminated and her Agreement with Sunbelt had been canceled. *See id.*

Ms. Denise commenced the underlying action on October 22, 2019, naming Sunbelt, Scott Starcher,[1] Frances Stump, and Jane Doe as Defendants. *See Appx.* at JA0024 - JA0033. Ms. Denise Amended her Complaint on November 22, 2019 to name DHHR as a party Defendant after she had provided DHHR 30 days' notice of her claims as prescribed by *W. Va. Code* § 55-17-3. The Amended Complaint alleged the following causes of action: 1) Hostile Work Environment Sexual Harassment in Violation of the *West Virginia Human Rights Act* ("WVHRA"); 2) Reprisal in Violation of the WVHRA; 3) Retaliation in Violation of the WVHRA; and 4) Retaliatory Failure to Rehire in Violation of the WVHRA. *See Appx.* at JA0038 – JA0043.

On or about March 24, 2020, DHHR filed *Defendant West Virginia Department of Health and Human Resources' Motion to Dismiss or, In the Alternative, Compel Arbitration* along with a Memorandum of Law in support of the same. *See Appx.* at JA0046 – JA0074. In its motion, the

[1] Sunbelt and Scott Starcher have been voluntarily dismissed pursuant to Rule 41(a)(1)(i) of the *West Virginia Rules of Civil Procedure*. *See Appx.* at JA0044 - JA0045.

DHHR argued, among other things, that the court below should enter an Order compelling Ms. Denise to arbitrate her claims against DHHR pursuant to the arbitration agreement contained in the Agreement between Sunbelt and Ms. Denise to which DHHR is indisputably not a party and which unambiguously states that ***only*** disputes between Sunbelt and Ms. Denise fall within its scope. [2]

II. SUMMARY OF ARGUMENT

A. Ms. Denise's claims against DHHR fall outside the scope of arbitration agreement.

The very first sentence of the subject arbitration agreement is dispositive of this appeal. Specifically, the agreement plainly and unambiguously prescribes that "[a]ny dispute or difference ***between Sunbelt and Consultant*** arising out of or relating to this Agreement shall be finally settled by arbitration . . . ." *Appx.* at JA0071 (emphasis added). There is no language in the arbitration clause or elsewhere in the Agreement wherein the parties agree that claims between Ms. Denise and DHHR or, more generally, that all claims related to the Agreement regardless of parties, must be arbitrated. Rather, the plain and unambiguous language of the arbitration agreement explicitly limits arbitrable claims to claims between Sunbelt and Ms. Denise.

Because "a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate," *E.g., State ex rel. U-Haul Co. v. Zakaib,* 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013), and because an agreement to arbitrate certain claims cannot be extended by construction or implication to include additional claims, *See Syl. Pt. 2, Leckie v. Bray*, 91 W. Va. 456, 457, 113 S.E. 746, 747 (1922); *Gas Co. v. Wheeling*, 8 W. Va. 320, 350-51 (1875), the lower court correctly held that Ms. Denise cannot be compelled to arbitrate her claims against DHHR, which she clearly did not agree

[2] The Agreement unambiguously prescribes that "[a]ny dispute or difference ***between Sunbelt and Consultant*** arising out of or relating to this Agreement shall be finally settled by arbitration . . . ." *Appx.* at JA0071 (emphasis added).

to arbitrate according the plain and unambiguous terms and provisions of the subject arbitration agreement. *See also Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 299, 810 S.E.2d 286, 301 (2018) (the meaning and legal effect of clear and unambiguous contracts must be determined solely from its contents and given full force and effect according to its plain terms and provisions); *Certain Underwriters at Lloyd's v. PinnOak Res., LLC*, 223 W. Va. 336, 338, 674 S.E.2d 197, 199 (2008) (Per Curiam) (a written contract expressing "the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent").

Moreover, even ignoring the plain and unambiguous language of the subject arbitration agreement explicitly limiting the scope of arbitrable claims to claims against Sunbelt, Ms. Denise's claims against DHHR do not fall within the scope of the subject arbitration agreement because her claims are statutory employment discrimination claims and the subject arbitration agreement does not contain a clear and unmistakable requirement to arbitrate such claims.

Specifically, Ms. Denise's claims are employment discrimination claims brought pursuant to the WVHRA, *W. Va. Code* § 5-11-9, *et seq.* This Court very recently held that statutory and common law employment discrimination claims fall outside the scope of an arbitration provision contained in a collective bargaining agreement ("CBA") unless the requirement to arbitrate such claims are stated in clear and unmistakable terms. *See* Syl. Pt. 4, *AC&S Inc. v. George*, No. 19-0459 (W. Va. Nov. 17, 2020). Although this holding was delivered in the context of CBAs, the clear and unmistakable standard applies with equal force to arbitration of employment discrimination claims pursuant to individual employment agreements, as such an application of the standard outside the context of CBAs is consistent with this Court's prior arbitration jurisprudence, *see id.* at 18 n. 51 (citing *State ex rel. U-Haul Co.*, 232 W. Va. at 439, 752 S.E.2d

at 593), and the U.S. Supreme Court's instruction that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative," *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) (Thomas, J.).

The clear and unmistakable standard "is satisfied when a contract reflects that the parties agreed to waive an employee's right to a judicial forum for statutory/common law discrimination claims using clear and unmistakable language." *AC&S Inc.*, No. 19-0459 at 18. Reference to employment discrimination statutes, discussion of statutory or common law discrimination claims, explicit statements that employees must submit statutory or common law discrimination clams to arbitration, and explicit language regarding waiver of a judicial forum are examples of the type of language that meets the clear and unmistakable standard. *See id.* at 20 - 22.

As explained more fully *infra* the arbitration agreement at issue in this case contains no such language, but rather is couched in general language that does not meet the clear and unmistakable standard and is more susceptible to an interpretation that the arbitration agreement is applicable to disputes arising from contractual rights and not claims asserting statutory rights.

Because the plain and unambiguous language of the subject arbitration agreement explicitly limits the scope of arbitrable claims to claims between Sunbelt and Ms. Denise and because the Agreement does not clearly and unmistakably require arbitration of employment discrimination claims, Ms. Denise's employment discrimination claims against DHHR are not within the scope of arbitrable claims under the subject arbitration agreement..

B. DHHR cannot enforce the arbitration agreement as a non-signatory.

Even if Ms. Denise's statutory anti-discrimination claims against DHHR fall within the scope of arbitrable claims, DHHR cannot enforce the subject arbitration agreement because it is a non-signatory and the doctrine of equitable estoppel does not apply.

Generally, non-parties to an arbitration agreement cannot enforce the agreement against a party to the agreement. *See Bayles v. Evans*, 2020 W. Va. LEXIS 258 at 15-16 (Apr. 24, 2020). However, one exception, on which DHHR attempts to rely herein, is when the doctrine of equitable estoppel can be applied to make a non-signatory more akin to a signatory. *See id.* at 16 – 17; *Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 702, 805 S.E.2d 805, 813 (2017). Specifically, "[a] non-signatory to [a written arbitration agreement] 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." *Bluestem Brands, Inc.*, 239 W. Va. at 702, 805 S.E.2d at 813.

Unlike in this Court's estoppel cases cited by DHHR, Ms. Denise is not attempting to rely upon, enforce, or benefit from the terms of her Agreement with Sunbelt. Specifically, Ms. Denise has not made a claim for breach of any of the terms of the Agreement; she is not seeking to recover any direct benefits promised under the Agreement; and she is not seeking enforcement of any of the Agreement's terms. Rather, Ms. Denise's claims are based upon rights, duties, and obligations imposed by statute pursuant to the WVHRA, such that her claims do not rely upon, reference, or presume the existence of the contract. *See Wright, 525 U.S. 70* (distinguishing a statutory employment discrimination claim from a claim arising from contractual obligations). In fact, the existence of the subject Agreement is of no consequence whatsoever to Ms. Denise's claims because she could recover from DHHR under the WVHRA even if the Agreement did not exist. *See id.*

Additionally, unlike the plaintiffs in the cases cited by DHHR, Ms. Denise is not attempting to selectively enforce favorable provisions of the Agreement upon DHHR, a non-signatory. In fact, rather than seeking enforcement of the contractual terms, Ms. Denise is merely seeking to vindicate

her rights to be free from sexual harassment and retaliation in the workplace, which are guaranteed to her by the WVHRA and not by the Agreement. Accordingly, this case does not represent a "compelling case" that requires the application of estoppel in the interests of justice, morality, or common fairness.

Based upon the foregoing, this case does not present the compelling circumstances necessary for the application of equitable estoppel to allow DHHR, a non-signatory, to enforce the subject arbitration agreement against Ms. Denise.

C. The subject arbitration agreement is not enforceable because it is unconscionable.

Finally, the lower court correctly refused to enforce the arbitration agreement on grounds of unconscionability. Under the doctrine of unconscionability, a court may refuse to enforce a contract as written if there is "an overall and gross imbalance, one-sidedness or lop-sidedness in a contract." Syl. Pt. 3, *State ex rel. Richmond Am. Homes of W. Va., Inc v. Sanders,* 228 W. Va. 125, 717 S.E.2d 909.(2011) (quoting Syl. Pt. 12, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds)). A contract term is unenforceable only if it is both procedurally and substantively unconscionable, although both do not have to be present to the same degree. *See id.* at 136, 920.

The subject arbitration agreement is procedurally unconscionable. Specifically, there was a gross imbalance in bargaining power between Ms. Denise, a perspective employee, and Sunbelt, her potential employer. Sunbelt is a large, sophisticated company that, based upon its business model, likely drafts and negotiates employment agreements like the one at issue herein on a routine basis. In contrast, Ms. Denise is a registered nurse seeking to become employed with Sunbelt, with no legal background or training and little resources to hire counsel to negotiate employment agreements on her behalf. As a result, Ms. Denise had little choice but to sign a ***boilerplate,***

preprinted, adhesion contract with no opportunity to negotiate or edit the terms if she wished to be employed with Sunbelt.

Moreover, the terms of the arbitration agreement are not set forth conspicuously. Specifically, the Agreement between Sunbelt and Ms. Denise consists of 5 pages of small, ***single-spaced*** text. The terms of the arbitration agreement are not set off from the other text in the Agreement with bold type, "all caps," larger print, or any other method of making the provision conspicuous and noticeable. Rather, Sunbelt buried the arbitration agreement in Paragraph 15 of the agreement in the same small, single-spaced, inconspicuous text as the remainder of the agreement.

The subject arbitration agreement is also substantively unconscionable. Specifically, this Court has recognized that forum selection provisions in an employment agreement that require arbitration in a remote jurisdiction would be troubling. *See State ex rel. Clites v. Clawges*, 224 W. Va. 299, 307 n.4, 685 S.E.2d 693, 701 (2009) (Per Curiam).

The subject arbitration provision requires Ms. Denise to arbitrate this case in the remote jurisdiction of Jacksonville, Florida, a jurisdiction with no connection to this case. Requiring Ms. Denise to arbitrate this case in Jacksonville, Florida would impose unreasonable costs upon her and could otherwise deter her from prosecuting her claims. Specifically, the subject arbitration provision would require her to unreasonably expend the time, money, and resources necessary to travel to a location approximately 743 miles and nearly 11 hours from her home to litigate her claims, which arise solely from events occurring in West Virginia.

In addition to expenditure of significant additional resources, a requirement to arbitrate in Jacksonville, Florida would significantly hamper Ms. Denise's ability to prosecute her

claims because many of the witnesses who may be called to testify are West Virginia residents who are not likely to be willing to travel more than 700 miles to testify in an arbitration.

Moreover, the terms of the arbitration agreement are further rendered substantively unconscionable by a fee-shifting provision that requires Ms. Denise to pay Sunbelt's costs and expenses if it prevails regarding any action to enforce the terms of the agreement. Not only is this fee shifting provision generally unfair, but it is also commercially unreasonable because it lacks mutuality of obligation, as the Agreement does not contain a similar provision requiring Sunbelt to pay Ms. Denise's attorneys' fees if she prevails in an arbitration to enforce the terms of the agreement. *See State ex rel. Richmond Am. Homes of W. Va., Inc.,* 228 W. Va. at 137, 717 S.E.2d at 921 ("In assessing substantive unconscionability, the paramount consideration is mutuality. Agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability.").

Additionally, enforcement of arbitration agreements like the one at issue herein would completely frustrate West Virginia's public policy interest in protecting its citizens from sexual harassment and discrimination by allowing significant burdens to be imposed upon victims of sexual harassment that will discourage them from vindicating their rights under the WVHRA.

Based upon the foregoing, the lower court was correct in refusing to enforce the arbitration agreement pursuant to the doctrine of unconscionability.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is proper under Rule 20 of the *West Virginia Rules of Appellate Procedure* because this case involves an issue of first impression as to whether the clear and unmistakable standard is applicable to arbitration agreements that are not contained in a CBA. W. VA. R. APP. PRO. 20(a) (2020).

Ms. Denise further submits that this appeal should be disposed of by a full opinion.

IV. ARGUMENT

A. Standard Of Review

Appellate review of an Order denying a Motion to Dismiss and Compel Arbitration is *de novo*. *See Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013); *Citizens Telcoms. Co. v. Sheridan*, 239 W. Va. 67, 71, 799 S.E.2d 144, 148 (2017). This Court's review is also plenary to the extent it is required to examine the Agreement between Ms. Denise and Sunbelt. *See Zimmerer v. Romano*, 223 W. Va. 769, 777, 679 S.E.2d 601, 609 (2009).

B. Ms. Denise's claims fall outside the scope of arbitrable claims.

Section 2 of the *Federal Arbitration Act* ("FAA") prescribes as follows:

> 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.

9 U.S.C.S. § 2 (2019). In determining whether to refer a case to arbitration pursuant to the FAA, a court must first resolve the fundamental questions of whether 1) a valid arbitration agreement exists and 2) the plaintiff's claims fall within the substantive scope of the arbitration agreement. *See State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 133-34, 717 S.E.2d 909, 917-18 (2011); *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 255, 692 S.E.2d 293, 298 (2010).[3]

[3] DHHR relies, in part, upon Section 2 of the FAA and the FAA's establishment of federal policy favoring arbitration. *See Pet. Brief* at 5-8. However, it should be noted that the policy favoring arbitration is applicable only "when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (Ginsburg, J.). As argued more fully, *infra*, Ms. Denise did not contract to arbitrate any claims against DHHR pursuant to the plain and unambiguous language of the subject arbitration agreement. *See Appx.* at JA0071.

This Court has recognized that the purpose of the FAA is not to elevate the importance of arbitration agreements above other types of contracts, but rather to ensure that arbitration agreements are treated the same as any other contract and enforced ***according to their terms***.[4] *See State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. 125, 717 S.E.2d 909 at Syl. Pt. 2. *See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Scalia, J.) ("[c]ourts must place arbitration agreements on equal footing with other contracts . . . and enforce them according to their terms.") In other words, "'arbitration agreements are [as much] enforceable as other contracts, ***but not more so***.'" *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000) (emphasis added) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).

Accordingly, the FAA does not override normal state law rules of contract interpretation, such that the questions of whether an arbitration agreement was formed and whether a plaintiff's claims fall within the scope of the arbitration agreement are decided pursuant to state law. *See State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. at 134, 717 S.E.2d at 918. State courts may also apply their "[g]enerally applicable contract defenses such as laches, estoppel, waiver, fraud, duress, or unconscionability to invalidate an arbitration agreement." *Id.*

Moreover, it should be noted that the issue as to whether Ms. Denise's claims fall within the scope of the subject arbitration agreement is an issue of intent to arbitrate a particular claim and not an issue as to validity (i.e., whether it is legally binding due to issues of fraud, duress, unconscionability, or other generally applicable contract defenses). *Rent-A-Center, W., Inc. v. Jackson,* 561 U.S. 63, 69 n. 1 – 2. (2010) (Scalia, J.) Unlike the question of validity, Section 2 of the FAA does not govern a court's interpretation of whether it was, in fact, agreed by the parties to arbitrate a particular claim in the first instance. *See id.*

[4] As explained more fully below, the plain and unambiguous terms of the subject arbitration agreement purports to require the arbitration of only disputes or differences between Ms. Denise and Sunbelt and not Ms. Denise and DHHR. *See Appx.* at JA0071 ("Any dispute or difference ***between Sunbelt and Consultant*** arising out of or relating to this Agreement shall be finally settled by arbitration . . . .") (emphasis added).

1. The plain and unambiguous language of the subject arbitration agreement excludes Ms. Denise's claims against DHHR from the scope of arbitrable disputes.

The very first sentence of the subject arbitration agreement is dispositive of this appeal because it unambiguously limits the scope of arbitrable claims to disputes or differences between Sunbelt and Ms. Denise to the exclusion of claims against DHHR: "Any dispute or difference ***between Sunbelt and Consultant*** arising out of or relating to this Agreement shall be finally settled by arbitration . . . ." *Appx.* at JA0071 (emphasis added). Thus, pursuant to the plain and unambiguous language of the arbitration agreement, Ms. Denise only agreed to arbitrate disputes or differences with Sunbelt arising out of or relating to the Agreement. She did not agree to arbitrate any disputes, differences, claims, or other matters with DHHR.

The United States Supreme Court has counseled that "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (Scalia, J.). Because arbitration is a matter of contract, ***a party cannot be required to arbitrate "'any dispute which he has not agreed so to submit.'*** This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances arbitration." *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648 - 49 (1986) (White, J) (emphasis added) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (Douglas, J.)*; Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 – 571 (1960) (Brennan, J.)). *See also e.g., State ex rel. U-Haul Co. v. Zakaib,* 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013) ("Arbitration is a matter of contract and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate."). Accordingly, "[u]nder the [FAA] parties are ***only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate.***" *Id.* (emphasis added).

Thus, the Court must interpret the terms of the subject arbitration agreement to determine what claims Ms. Denise agreed to arbitrate and determine if the claims she has asserted in this case fall within such claims. *See AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. at 651.

The FAA does not override normal rules of contract interpretation. *See State ex rel. U-Haul Co.*, 232 W. Va. at 439, 752 S.E.2d at 593. It merely ensures that contracts to arbitrate are ***enforced according to their terms***.[5] *See id* at 439, 593. Thus, in interpreting the scope of the subject arbitration agreement, this Court must be guided by traditional state law principles of contract interpretation. *See id.; Richmond Am. Homes of W. Va., Inc,* 228 W. Va. at 134, 717 S.E.2d at 918.

"[I]t has long been the law in West Virginia that "'[w]hen a written contract is clear and unambiguous its meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions.'" *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 299, 810 S.E.2d 286, 301 (2018) (quoting Syl. Pt. 3, in part, *Kanawha Banking & Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947)). "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *Certain Underwriters at Lloyd's v. PinnOak Res., LLC*, 223 W. Va. 336, 338, 674 S.E.2d 197, 199 (2008). Thus, "[n]o addition to the terms of a written contract, or transposition or modification thereof, can be made by construction, unless it has foundation in the written words of the paper or in a reasonable and fair implication arising out of such words or some provision thereof or purpose expressed by it." *Syl. Pt. 2, Leckie v. Bray*, 91 W. Va. 456, 457, 113 S.E. 746, 747 (1922).

An arbitration contract is no different than any other contract. Therefore, an agreement to arbitrate certain claims cannot be extended by construction or implication to include additional

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[5] *See* note 4, *supra*.

claims. *See id.*; *Gas Co. v. Wheeling*, 8 W. Va. 320, 350-51 (1875) ("Though courts wish to have [an arbitration] submission and award terminate as many disputes as are reasonably and rightfully within its scope, still disputes obviously not included, though so cognate that their annexation would have been highly natural and proper, will not be added by a forced construction.")).

In this case, the plain and unambiguous language of the arbitration agreement leaves no doubt that Ms. Denise only agreed to arbitrate disputes and differences with Sunbelt and not disputes, differences, claims, or any other matters against the DHHR:

> Any dispute or difference ***between Sunbelt and Consultant*** arising out of or relating to this agreement shall be finally settled by arbitration in accordance with the rules of the American arbitration Association by a single arbitrator. . . .

Appx. at JA0071 (emphasis added). Based on the foregoing, there can be no dispute that the scope of arbitrable claims under the subject arbitration agreement are limited to disputes or differences between Sunbelt and Ms. Denise. No reference to the arbitration of claims, disputes, or differences between Ms. Denise and DHHR can be found in the subject Agreement. If the parties to the Agreement desired to include arbitration of claims between Ms. Denise and DHHR within the scope of the subject arbitration agreement, they would have expressly stated so or, at the very least, removed the phrase "between Sunbelt and Consultant" so that the arbitration agreement could arguably be read to require arbitration of "any dispute or difference arising out of or related to this agreement." But they did not, such that the inescapable conclusion is that there is no agreement to arbitrate claims against Ms. Denise and DHHR.

West Virginia law requires that the subject arbitration agreement be enforced according to its plain and unambiguous terms without addition to, or modification of the same. And because Ms. Denise clearly and unambiguously only agreed to arbitrate claims against Sunbelt, she cannot be forced to arbitrate her claims against DHHR.

2. Ms. Denise's statutory employment discrimination claims do not fall within the scope of the subject arbitration agreement because the agreement does not clearly and unmistakably require arbitration of such claims.

The claims asserted by Ms. Denise are statutory employment discrimination claims brought pursuant to the WVHRA. This Court very recently held that statutory and common law employment discrimination claims fall outside the scope of an arbitration provision contained in a CBA unless the requirement to arbitrate such claims are stated in clear and unmistakable terms. *See* Syl. Pt. 4, *AC&S Inc. v. George*, No. 19-0459 (W. Va. Nov. 17, 2020).[6] The clear and unmistakable standard "is satisfied when a contract reflects that the parties agreed to waive an employee's right to a judicial forum for statutory/common law discrimination claims using clear and unmistakable language." *Id.* at 18. Although this Court did not explicitly adopt a bright-line test for identifying such clear and unmistakable language, it did express disfavor for general language such as language providing for arbitration of "matters under dispute" or "any dispute or difference." *See id* at 20-21 (citing *Wright*, 525 U.S. at 80-82; *Jonites v. Exelon Corporation*, 522 F.3d 721 (7th Cir. 2008)). Moreover, in holding that the arbitration agreement in *AC&S* did not contain a clear and unmistakable agreement to arbitrate employment discrimination claims, this Court found it important that the arbitration provisions therein mentioned no statutes; did not discuss statutory or common law discrimination claims; did not state that employees must submit statutory or common law discrimination clams to arbitration; and contained no mention of waiver of a judicial forum. *See id.* at 21. Moreover, the Court further illustrated its analysis by drawing a contrast between the general language of the *AC&S* arbitration agreement and the much more specific language determined by the United States Supreme Court to be clear and unmistakable in

[6] The Court's ruling was based primarily upon two cases from the United States Supreme Court, *Wright v. Universal Maritime Service Corporation, et al.*, 525 U.S. 70 (1998) and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009), which held the same. *See AC&S Inc, No. 19-0459.*

14 Penn Plaza. See id. at 22 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 at 252). Specifically, the Court observed that the arbitration agreement at issue in *14 Penn Plaza* "explicitly incorporated a variety of statutory anti-discrimination provisions into the agreement and provided that '[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *See id.* at 22 (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 at 252). Conversely, the Court pointed out, the *AC&S* arbitration agreement contained no such language.

Although the holdings in *AC&S, Wright, and 14 Penn Plaza* were handed down in the context of CBAs, the United States Supreme Court instructed in *14 Penn Plaza* that:

> Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.

14 Penn Plaza LLC, 556 U.S. at 258. Accordingly, the clear and unmistakable standard for requirements to arbitrate employment discrimination claims is equally applicable in the context of individual employment agreements.

In fact, this Court signaled as much in *AC&S*. Specifically the Court noted that it had not previously addressed whether the clear and unmistakable standard applies to the arbitrability of state law employment discrimination claims when the arbitration provision is in a CBA, but that "[it has] held that an arbitration clause in an employment contract entered directly between an employer and employee (not in a CBA) is enforceable when it specifically addressed the statutory claims at issue." *See AC&S Inc,* No. 19-0459 at 16 n. 47 (citing *Hampden Coal, LLC*, 240 W. Va. 284, 810 S.E.2d 286.). Moreover, application of the clear and unmistakable standard outside the context of a CBA is consistent with this Court's prior arbitration jurisprudence. *See id.* at 18 n. 51 (citing *State ex rel. U-Haul Co.,* 232 W. Va. at 439, 752 S.E.2d at 593).

Based upon the foregoing authority, the Court should apply the clear and unmistakable standard to determine whether the subject arbitration agreement requires arbitration of Ms. Denise's employment discrimination claims.

And there can be no doubt based upon this Court's decision in *AC&S* that the subject arbitration provision fails to require arbitration of employment discrimination claims in clear and unmistakable language.[7] Specifically, like the disfavored language in the arbitration agreements in *Wright*, *AC&S*, and *Jonites*, the subject arbitration agreement is couched in general language requiring arbitration of "any dispute or difference .... arising out of or relating to this Agreement." *Appx.* at JA0071. In fact, the language in the subject arbitration agreement is virtually identical to the language in *Jonites* that this Court used as a prime example of language failing to meet the clear and unmistakable standard. Such language is not sufficient to compel arbitration of a statutory anti-discrimination claim. *See AC&S Inc,* No. 19-0459 at 21 (citing *Jonites*, 522 F.3d 721). *Like in AC&S, Wright, and Jonites*, and in contrast to *14 Penn Plaza*, the Agreement at issue herein contains no language requiring arbitration of "all causes of action"; no mention of employment discrimination statutes or claims; no explicit statement that Ms. Denise must submit statutory or common law discrimination clams to arbitration; and no mention of waiver of a judicial forum.

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[7] The Petitioner's brief cites *New v. GameStop, Inc.,* 232 W. Va. 564, 753 S.E.2d 62 (2013) (Per Curiam) as an example of this Court upholding an arbitration agreement included in an employment contract. However, *New* is not on point to the case at bar. Specifically, the issue of whether there was a clear and unmistakable requirement to arbitrate was not raised by the parties. And perhaps more importantly, the arbitration agreement under consideration in *New* was written in more specific and comprehensive terms requiring arbitration of "all workplace disputes or ***claims***," indicating more clearly that statutory or common law ***claims*** would be subject to arbitration and not just contractual disputes. *New*, 232 W. Va. at 578, 753 S.E.2d at 76 (emphasis added). As venerated Justice Antonin Scalia observed in *Wright*, arbitration agreements written in general terms (i.e., disputes or differences) like the one at issue herein could be interpreted to apply only to disputes regarding contractual rights which are distinct from statutory employment discrimination rights conferred under statutes such as the WVHRA. *See Wright*, 525 U.S. at 80.

Based upon the foregoing, the lower court was correct in ruling that the subject arbitration agreement does not contain a clear and unmistakable requirement to arbitrate Ms. Denise's WVHRA claims and in refusing to compel this case to arbitration on that basis.

C. DHHR cannot enforce the arbitration agreement as a non-signatory because this is not an appropriate case for application of equitable estoppel.

1. Ms. Denise's claims do not make reference to, presume the existence of, or otherwise rely on her Agreement with Sunbelt.

There is no dispute that DHHR is not a party to the subject arbitration agreement. Generally, non-parties to an arbitration agreement cannot enforce the agreement against a party to the agreement. *See Bayles v. Evans*, 2020 W. Va. LEXIS 258 at 15-16 (Apr. 24, 2020). Only in very limited circumstances can a non-signatory be bound by or enforce an arbitration agreement against a signatory. *See id.* at 16 – 17; *Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 702, 805 S.E.2d 805, 813 (2017). Specifically, the terms of an arbitration agreement cannot be enforced against or in the favor of a non-signatory unless some traditional theory of contract or agency law applies making the non-signatory akin to a signatory of the agreement. *See Bayles*, 2020 W. Va. LEXIS 258 at 17.

DHHR relies upon the theory of equitable estoppel to argue that it should be permitted to enforce the subject arbitration agreement against Ms. Denise even though it is not a signatory of the agreement. "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." *Bluestem Brands, Inc.*, 239 W. Va. at 702, 805 S.E.2d at 813. However, this Court has recognized that courts must be wary when asked to enforce the terms of an arbitration agreement as to non-signatories. *See Bayles*, 2020 W. Va. LEXIS 258 at 17.

"The inquiry into whether estoppel applies is fact specific, but essentially involves a review of 'the relationships of persons, wrongs and issues, in particular whether the claims . . . [asserted are] intimately founded in and intertwined with the underlying contract obligations." *Bayles*, 2020 W. Va. LEXIS 258 at 18. (quoting *Choctaw Generation Ltd. P'ship v. Am. Home Assur. Co.*, 271 F.3d 403, 406 (2d Cir. 2001)). This Court has cautioned that the doctrine of estoppel should be applied cautiously and only "'in ***very compelling circumstances, where the interests of justice, morality and common fairness clearly dictate that course***.'" *Id.* at 18-19 (quoting *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 948 (3d Cir. 1998)). Thus, estoppel should only be applied where it is necessary to prevent a party from "cherry picking" certain favorable terms in a contract to rely upon for his claims or claiming entitlement to direct benefits of a contract, while at the same time avoiding the contract's burdens. *See id.* at 19-21.

For instance, in *Bluestem Brands, Inc. v. Shade*, a principal case relied upon by DHHR, Plaintiff Shade had been purchasing merchandise from Bluestem (a/k/a Fingerhut) on credit supplied by third-party lenders. *See Bluestem Brands, Inc.*, 239 W. Va. at 698, 805 S.E.2d at 809. Plaintiff Shade had entered into credit agreements with the third-party lenders that included arbitration agreements. *See id.* Bluestem was not a party to any of those agreements.

When Plaintiff Shade's account became delinquent, the matter was turned over to a debt collector, which filed a lawsuit against her. Plaintiff Shade then filed a third-party complaint against Bluestem, but none of the third-party lenders, alleging that the finance charges and interest rates charged pursuant to the agreements with the lenders were in violation of the *West Virginia Consumer Credit and Protection Act*. Plaintiff Shade's claim against Bluestem was based upon a theory that Bluestem was liable for violating the WVCCPA with the interest rates prescribed by

the contracts with the lenders because it was the real lender and was merely engaging in a "rent-a-bank" scheme to avoid licensure and regulatory requirements. *See id.*

Because Plaintiff Shade was relying upon the terms of the contracts with the lenders as the basis of her claim, this Court applied the doctrine of estoppel to hold that she was required to arbitrate pursuant to the terms of those same contracts. *See id.* at 703 – 704, 814 – 815. Essentially, the *Bluestem* Court applied the doctrine of estoppel to prevent Plaintiff Shade from seeking to pin responsibility on Bluestem for the interest rates charged pursuant to her agreement with the lenders, to which Bluestem was a non-signatory, while at the same time disclaiming that Bluestem could not enforce the arbitration provision contained in the very same agreement due to its status as a non-signatory. Thus, estoppel was necessary in the interests of justice and common fairness to prevent Plaintiff Shade from using certain terms of her contacts with the lenders as a sword against Bluestem while at the same time disclaiming the application of the arbitration provision found in the same agreement.

In *Bayles v. Evans*, this Court was faced with the inverse but similar issue where Defendant Ameriprise, a signatory to an arbitration agreement, was attempting to enforce it against Plaintiff Bayles, a non-signatory. In *Bayles*, the plaintiff was the widow of a party to investment contracts with Ameriprise. Plaintiff Bayles was initially the beneficiary of the contracts before the beneficiary was changed without notice to her. Upon her husband's death, she filed fraud claims against Ameriprise seeking to enforce certain favorable terms in the contracts and seeking recovery of the direct benefits due under the contracts. Accordingly, the *Bayles* Court applied the doctrine of estoppel to prevent Plaintiff Bayles from seeking direct benefits of the contract as a non-signatory while at the same time disavowing enforcement of the arbitration clause based upon her status as a non-signatory. *See Bayles*, 2020 W. Va. LEXIS 258 at 22-23. Like in *Bluestem*, justice

and common fairness required application of the estoppel theory to prevent her from "cherry picking" the terms of the agreements that she wanted enforced.

Unlike in *Bluestem* and *Bayles*, Ms. Denise is not attempting to rely upon, enforce, or benefit from the terms of the Agreement with Sunbelt. Specifically, Ms. Denise has not made a claim for breach of any of the terms of the Agreement; she is not seeking to recover any direct benefits promised under the contract; and she is not seeking enforcement of any of the contract's terms. Rather, Ms. Denise's claims are based upon rights, duties, and obligations imposed by law pursuant to the WVHRA, such that her claims do not rely upon, reference, or presume the existence of the contract. *See Wright, 525 U.S. 70* (distinguishing a statutory anti-discrimination claim from a claim arising from contractual obligations). In fact, the existence of the subject agreement is of no consequence whatsoever to Ms. Denise's claims because she could recover from DHHR under the WVHRA even if no contract existed between her and Sunbelt. *See id.*

Quite simply, Ms. Denise's claims against DHHR do not reference,[8] presume the existence of, or otherwise rely upon the Agreement with Sunbelt. Additionally, this case is distinguishable from *Bluestem* and *Bayles* because, unlike the plaintiffs in those cases, Ms. Denise is not attempting to selectively enforce favorable provisions of the Agreement upon DHHR, a non-signatory. In fact, rather than seeking enforcement of the contractual terms of the Agreement, Ms. Denise is merely seeking to vindicate her rights to be free from sexual harassment and retaliation in the workplace, which are guaranteed to her by the WVHRA and not by the subject contract. Accordingly, this case does not represent a "compelling case" that requires the application of

[8] The Amended Complaint does make one factual reference to the agreement in Paragraph 24 merely to illustrate the fact that Ms. Denise's employment at DHHR had been separated. *See Appx.* at 0038. Ms. Denise's actual claims (i.e., causes of action) reference only rights, duties, and obligations prescribed by the WVHRA and not any prescribed by the contract. *See Appx.* at 0038 – 0043.

estoppel in the interests of justice, morality, or common fairness. Therefore, the lower court was correct in refusing to apply the doctrine of estoppel to allow DHHR to enforce the subject arbitration provision.

2. This case is distinguishable from the non-binding foreign cases cited by the DHHR.

DHHR cites a few cases from foreign jurisdictions for the proposition that this case is appropriate for the application of equitable estoppel. However, such cases are not binding precedent on this Court[9] and they are not persuasive because they are distinguishable from the instant case.

For instance, three of the cases cited by DHHR, *Begole v. N. Miss. Med. Ctr.,* 761 F. App'x 248, 253 (5th Cir. 2019) (Per Curiam), *Garcia v. Pexco, LLC*, 11 Cal. App. 5th 782, 217 Cal. Rptr. 3d 793 (2017), and *Ragone v. Atl. Video*, 595 F.3d 115 (2d Cir. 2010), were all decided by applying different, less exacting tests for the application of equitable estoppel.

In *Begole* the 5th Circuit affirmed a district court's application of equitable estoppel under Mississippi law. The Mississippi test for estoppel applied by the 5th Circuit is completely different than the test prescribed by this Court. Specifically, the test used by the 5th Circuit inquired as to whether the claims asserted by the signatory to an arbitration agreement raise allegations of substantially interdependent and concerted misconduct between a non-signatory and one or more signatories. *See id.* at 253. Finding that the Complaint in fact alleged such conduct between the

[9] In fact, the *Begole* case cited by DHHR is not even precedent in the 5th Circuit where it was decided because it is an unpublished opinion. *See Begole v. N. Miss. Med. Ctr.,* 761 F. App'x 248, 250 n.* (5th Cir. 2019) ("Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4."). *See also* 5TH CIR. R. 47.5.4 ("Unpublished opinions . . . are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like").

non-signatory and the signatory defendants, the 5th Circuit applied equitable estoppel. *See id.* However, this is not the test set forth by this Court for the application of equitable estoppel. Moreover, it should be noted that *Begole* is factually distinguishable from the instant case because the Complaint in *Begole* alleged claims that were directly reliant upon the contracts at issue therein and centered upon the contractual relationships, including intentional interference with contract and intentional interference with business relations. *See id.* at 250. Ms. Denise's claims are all statutory claims that do not rely upon or even require the existence of a contractual relationship.

The *Ragone* and *Garcia* cases utilize the same test that ultimately focus on whether there is any factual intertwining of the claims against the non-signatory with claims against signatories. Specifically, the test used in *Ragone* simply asked whether "the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Ragone*, 595 F.3d at 127 (internal quotation ommitted). In applying this test to find equitable estoppel proper, the *Ragone* Court focused upon whether the subject matter of the claims against signatories and the subject matter of claims against non-signatories were ***factually*** intertwined. *See id.* at 128. ("In this case, there is . . . no question that the subject matter of the dispute between Ragone and AVI is factually intertwined with the dispute between Ragone and ESPN.").

Likewise, the equitable estoppel test applied in *Garcia* holds that "a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations." *Garcia*, 11 Cal. App. 5th at 786, 217 Cal. Rptr. 3d at 795 (internal quotations omitted) The *Garcia*Court also focused on the factual relationship between the claims against signatories and non-signatories: "The doctrine applies where the claims

are based on the same facts and are inherently inseparable from the arbitrable claims against signatory defendants." *Id.* (internal quotations omitted).

Converse to the tests used in the foreign cases discussed above, the test for equitable estoppel prescribed by this Court is more specific and exacting, and requires the proof of elements that focus on whether the existence of the contract is a necessary predicate of the claims against the non-signatory:

> 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.

See Syl. Pt. 4, Bluestem Brands, Inc., 239 W. Va. 694, 805 S.E.2d 805. This test makes perfect sense considering this Court's recognition that the ultimate aim of equitable estoppel is to prevent a signatory from relying on or enforcing favorable provisions of a contract while disclaiming less advantageous provisions. *See Bayles*, 2020 W. Va. LEXIS 258 at 19 – 21.

Another case cited by DHHR, *Boucher v. All. Title Co., Inc.*, 127 Cal. App. 4th 262, 263, 25 Cal. Rptr. 3d 440, 441 (2005), while employing a test more similar to this Court's test for equitable estoppel, is entirely factually distinguishable from the instant case. In *Boucher* the court applied estoppel where the plaintiff brought claims against a non-signatory defendant for breach of the contract, breach of implied covenant of good faith, and fair dealing in the contract, and interference with his contractual relationship with the other signatory. *See id.* at 265-66, 441-42. These claims quite obviously make reference to, rely upon, and presume the existence of the contract containing the arbitration clause and, in fact, would not exist if Plaintiff was just an at-will employee without the contract. Thus, it was only fair that estoppel be applied to prevent the plaintiff from basing liability of the non-signatory on breaching terms of the agreement while also

disclaiming the arbitration clause in the same agreement. Obviously, *Boucher* is distinguishable from this case where Ms. Denise's claims are based exclusively on DHHR's obligations under West Virginia statutorily law and would exist even if the contract between Sunbelt and Ms. Denise did not.

Based upon the foregoing, this Court should not find the above foreign cases persuasive.

D. The lower court was correct in refusing to enforce the subject arbitration agreement based upon its procedural and substantive unconscionability.

Unconscionability is a legitimate reason for invalidating an arbitration agreement. *See e.g., State ex rel. Richmond Am. Homes of W. Va., Inc.,* 228 W. Va. 125, 717 S.E.2d 909 at Syl. Pt. 3. Under the doctrine of unconscionability, a court may refuse to enforce a contract as written if there is "an overall and gross imbalance, one-sidedness or lop-sidedness in a contract." *Id.* at 136, 920 (quoting Syl. Pt. 12, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds)).

A court considering the unconscionability of an arbitration agreement must weigh the fairness of the contract as a whole, take into consideration all of the facts and circumstances relevant to the entire contract, and apply the concept of unconscionability in a flexible manner. See *id.* at 134 – 135, 918 – 919. "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." *Id.* at 135, 919.

In West Virginia, unconscionability is analyzed in terms of procedural unconscionability and substantive unconscionability. A contract term is unenforceable only if it is both procedurally and substantively unconscionable, although both do not have to be present to the same degree. *See id.* at 136, 920. Rather, courts must apply a sliding scale to evaluate unconscionability, such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." *Id.*

1. The subject arbitration clause is procedurally unconscionable.

This court has set forth the following guidelines for determining procedural unconscionability:

> 'Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.'

Id. (quoting *Brown*, 228 W. Va. 646, 724 S.E.2d 250 at Syl. Pt. 17 (overruled on other grounds)). Based upon these factors, "courts are more likely to find unconscionability in consumer contracts and ***employment agreements*** than in contracts arising in purely commercial settings involving experienced parties." *Id.* (internal quotations omitted) (emphasis added).

The subject arbitration agreement is contained in an employment agreement. And just like in most situations involving employment contracts, Sunbelt, as an employer, occupied a far superior bargaining position to Ms. Denise. Specifically, Sunbelt is a large, sophisticated company.[10] Upon information and belief, based upon its business model, it routinely negotiates agreements of the same kind as the one at issue herein with nurses and other medical personnel like Ms. Denise.[11]

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[10] According to the company's LinkedIn profile, it employs more than 500 employees and has been in the medical staffing business for nearly 3 decades. *See* https://www.linkedin.com/company/sunbelt-staffing/about/.

[11] *See* note 10, *supra*.

In contrast, Ms. Denise is a registered nurse with no legal background or training and little resources to hire counsel to negotiate on her behalf. As a result, Ms. Denise had no choice but to sign a ***boilerplate, preprinted, adhesion contract*** with no opportunity to negotiate or edit the terms if she wished to be employed with Sunbelt/DHHR.

Additionally, the subject arbitration provision is procedurally unconscionable because it is not conspicuously set forth in the agreement. Specifically, the contract between Sunbelt and Ms. Denise consists of 5 pages of small, ***single-spaced*** text. Rather than conspicuously and prominently set forth such an important provision by setting off its text from the other provisions with bold type, all caps, larger print, or some other method of making the arbitration agreement conspicuous and noticeable, Sunbelt buried the provision in Paragraph 15 of the agreement in the same small, single-spaced, inconspicuous text as the remainder of the Agreement.

Because of the disparity in sophistication and bargaining strength between Sunbelt and Ms. Denise and because the subject arbitration provision was inconspicuously buried in a lengthy, single-spaced contract, there was significant procedural unconscionability in the formation of the subject arbitration provision.

2. The subject arbitration agreement is substantively unconscionable.

This Court has also provided guidelines for analyzing substantive unconscionability:

> Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

See State ex rel. Richmond Am. Homes of W. Va., Inc., 228 W. Va. at 137, 717 S.E.2d at 921. For instance, if an arbitration agreement imposes unreasonably high costs on a litigant that might deter him from bringing a claim, a court may consider such costs in determining whether the agreement is substantively unconscionable:

> Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

State ex rel. Dunlap v. Berger, 211 W. Va. 549, 551, 567 S.E.2d 265, 267 (2002). *See also State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. at 137 -138, 717 S.E.2d at 921-922. "[I]t is not only the costs imposed on the claimant but the *risk* that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." *Id.* at 137, 921 (internal quotations omitted).

For example, this Court has recognized that forum selection provisions or choice of law provisions in an employment agreement that require arbitration in a remote jurisdiction would be troubling:

> A forum selection clause in an employment contract, contained in a contract of adhesion, which requires an employee to arbitrate or litigate his or her employment claims in far-away jurisdictions, remotely removed from the employee's actual place of employment or residence, would be troubling to this Court. It would also be troubling if such an employment contract required the employee to be subject to the substantive law of a far-away jurisdiction.

State ex rel. Clites v. Clawges, 224 W. Va. 299, 307 n.4, 685 S.E.2d 693, 701 (2009).

The arbitration provision at issue in the instant motion is substantively unconscionable because it purportedly requires Ms. Denise to arbitrate this case in the remote jurisdiction of Jacksonville, Florida, a jurisdiction with no connection to this case.

First, requiring Ms. Denise to arbitrate this case in Jacksonville, Florida would impose enormous, unreasonable costs upon her and could otherwise deter her from prosecuting her claims. Specifically, Ms. Denise is a resident of Elkins, West Virginia. Accordingly, the subject arbitration provision would require her to travel to a location approximately 743 miles and nearly 11 hours from her home to litigate her claims. Such a remote forum would impose significant and unreasonable travel and lodging expenses upon Ms. Denise and her counsel in the prosecution of her claims.

Moreover, the imposition of such burden and expense is completely unreasonable, as the facts of this case and the contract at issue have no connection whatsoever to Jacksonville, Florida. Specifically, the contract at issue concerns the provision of nursing services that were performed exclusively in West Virginia. Moreover, all the facts at issue in this case occurred in West Virginia and many (if not all) of the likely fact witnesses reside in West Virginia.

In addition to expenditure of significant additional time, money, and other resources, a requirement to arbitrate Ms. Denise's claims in Jacksonville, Florida would significantly hamper Ms. Denise's ability to prosecute her claims. Specifically, many of the witnesses who may be called to testify are West Virginia residents who are not likely to be willing to travel more than 700 miles to testify in an arbitration.

In addition to the requirement that Ms. Denise litigate her claims in a remote, far-away jurisdiction with no connection to this case, the subject arbitration is further rendered unconscionable by the fee shifting provision found in the employment agreement, which provides as follows:

> [if] Sunbelt prevails in any action to enforce any provision(s) in this Agreement in an arbitration proceeding pursuant to Section 13 above or in a court of competent jurisdiction and secures any relief, consultant shall pay to Sunbelt all

> costs and expenses Sunbelt incurs in enforcing this agreement, including Sunbelt's court costs and attorney's fees.

Appx. at JA0071. Not only is this fee shifting provision generally unfair, but it is also commercially unreasonable because it lacks mutuality of obligation. *See State ex rel. Richmond Am. Homes of W. Va., Inc.,* 228 W. Va. at 137, 717 S.E.2d at 921 ("In assessing substantive unconscionability, the paramount consideration is mutuality. Agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability."). Specifically, the contract contains a fee shifting provision requiring Ms. Denise to pay Sunbelt's attorneys' fees and costs if Sunbelt prevails on *any* arbitration it brings against Ms. Denise to enforce the terms of the agreement, but does not contain a similar provision requiring Sunbelt to pay Ms. Denise's attorneys' fees if she prevails in an arbitration to enforce the terms of the agreement.[12]

In the aggregate, the result of the subject arbitration provision is completely one-sided because it places all burdens and risks of arbitration on Ms. Denise, as it requires her to litigate in a remote, far away jurisdiction[13] even though this jurisdiction has no connection to this case, and contains a fee shifting provision in favor of Sunbelt without a similar fee shifting provision in favor of Plaintiff.

Additionally, enforcement of arbitration agreements like the one at issue herein would completely frustrate West Virginia's public policy interest in protecting its citizens from unlawful discrimination as prescribed by the WVHRA by allowing significant burdens to be imposed upon victims that will discourage them from vindicating their rights under the Act.

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[12] Although Ms. Denise would be able to recover attorney fees pursuant to the WVHRA if she prevails on the claims alleged herein, the contractual fee-shifting provision blanketly allows Sunbelt to recover attorney fees for any claims it brings under the terms of the contract while failing to allow for Ms. Denise's recovery of fees for claims to enforce the provisions of the contract as opposed to her current statutory claims.

[13] Sunbelt is located in Florida. *See Appx.* at JA0069 - JA0073.

Based upon the foregoing, the subject arbitration agreement is procedurally and substantively unconscionable, such that the lower court was correct in refusing to enforce it.

V. CONCLUSION

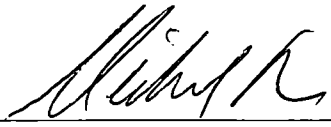
In conclusion, the very first sentence of the subject arbitration agreement is dispositive of this appeal because it makes it crystal clear that Ms. Denise agreed to arbitrate only disputes or differences between she and Sunbelt and not claims against the DHHR. Additionally, Ms. Denise's employment discrimination claims are not included within the scope of the subject arbitration agreement because the agreement does not contain language from which a clear and unmistakable agreement to arbitrate such claims can be found.

Moreover, DHHR is a non-signatory to the subject arbitration agreement and this case does not present the very compelling circumstances, where the interests of justice, morality and common fairness clearly dictate the application of equitable estoppel to allow DHHR to enforce the subject arbitration agreement.

Finally, the subject arbitration agreement is unconscionable due to 1) the imbalance in bargaining power; 2) the adhesive nature of the contract; 3) the inconspicuous and hidden nature of the arbitration provisions; 4) the immense costs and burdens of arbitrating this case in Jacksonville, Florida which could discourage Ms. Denise from vindicating significant statutory rights to be free of sexual harassment; and 5) a unilateral fee shifting provision to the advantage of Sunbelt.

Based upon the foregoing, the lower court did not err in refusing to compel this case to arbitration.

RENE G. DENISE,
By Counsel:



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VERIFICATION

I, Michael P. Addair, Esquire, Being first duly sworn, state that I have read the foregoing ***Respondent's Brief***, that the factual representations contained therein are true, except so far as they are stated to be on information and belief; and that insofar as they are stated to be on information and belief, I believe them to be true.

Taken, subscribed, and sworn before me this 23rd day of November, 2020.

My Commission expires: September 5, 2022

Notary Public

OFFICIAL SEAL
NOTARY PUBLIC, STATE OF WEST VIRGINIA
Brian Harper
916 Glen Way
Charleston, WV 25309
My Commission Expires September 05, 2022

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 2020, I caused to be served a true and correct copy of the forgoing ***Respondent's Brief*** by depositing the same in the United States Mail, postage prepaid, upon the parties in their counsel of record as follows:

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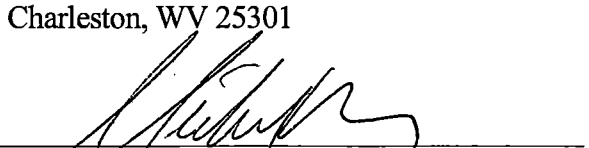

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