IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0007

Ford Motor Credit Company, LLC,

Plaintiff-Petitioner,

v.

Ronald R. Miller,

Defendant-Respondent.

On Appeal from Order Denying
Plaintiff's Motion to Compel Arbitration
Circuit Court of Wyoming County, West Virginia
(The Honorable Micheal M. Cochrane)

BRIEF OF PLAINTIFF-PETITIONER FORD MOTOR CREDIT COMPANY, LLC

Michael Bonasso (WV Bar No. 394)
Bryan N. Price (WV Bar No. 8846)
Jason A. Proctor (WV Bar No. 12291)
FLAHERTY SENSABAUGH BONASSO PLLC
Post Office Box 3843
Charleston, WV 25338-3842
(304) 345-0200
MBonasso@flahertylegal.com
BPrice@flahertylegal.com
JProctor@flahertylegal.com

Jessica Ellsworth (admitted PHV)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5886
Jessica.ellsworth@hoganlovells.com

Counsel for Plaintiff-Petitioner

April 6, 2022

Table of Contents

Page

Table of Contents—Continued

Page

Table of Authorities

Page(s)

CASES:

Table of Authorities—Continued

Page(s)

Table of Authorities—Continued

Page(s)

STATUTES:

RULES:

Table of Authorities—Continued

STATEMENT OF JURISDICTION

Ford Motor Credit Company (Ford Credit) appeals the Circuit Court's denial of Ford Credit's Motion to Compel Arbitration and to Stay Action. "An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, *Schumacher Homes of Circleville, Inc. v. Spencer*, 774 S.E.2d 1 (W. Va. 2015); Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556 (W. Va. 2013).

ASSIGNMENT OF ERROR

1. The Circuit Court erred in holding that Ford Credit was required to produce an affidavit or deposition testimony to establish that an arbitration agreement existed between the parties, where Ford Credit attached the contract with the arbitration agreement to its motion to compel; the contract expressly assigned all rights, privileges, and remedies from the third-party dealership to Ford Credit; and Appellee Ronald Miller likewise submitted the contract to the court and agreed he entered into it and financed his vehicle through Ford Credit.

2. The Circuit Court abused its discretion by allowing Miller to raise a new argument for the first time at a hearing on Ford Credit's motion to compel and denying Ford Credit the opportunity to respond.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Cases involving "narrow" issues of law or "assignments of error in the application of settled law" are "suitable" for oral argument. W. Va. R. App. P. 19(a). This appeal satisfies both of those criteria.

This case also merits a written opinion to rectify any confusion as to how a party seeking to compel arbitration meets its initial burden to demonstrate an arbitration agreement exists between the parties—in particular, whether the memorandum decision in *Frontline Asset Strategies, LLC v. Rutledge*, No. 20-0395, 2021 WL 1972277, at *3–5 (W. Va. May 17, 2021) (memorandum decision) altered the ordinarily applicable burden-shifting framework this Court announced in *State ex rel. Troy Group, Inc. v. Sims*, 852 S.E.2d 270, 277 (W. Va. 2020).

The risk of circuit courts misapplying *Frontline* as the court did below has grave implications for a federal policy that favors enforcement of unambiguous arbitrations agreements. *See Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("[T]he Federal Arbitration Act . . . establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution."); *see also Parsons v. Halliburton Energy Servs., Inc.*, 785 S.E.2d 844, 852 (2016) ("Both federal and state laws reflect a strong public policy recognizing arbitration as an expeditious and relatively inexpensive forum for dispute resolution."). This Court should clarify in a published decision that *Frontline* neither displaces the test set forth in *Sims*, 852

S.E.2d at 277, nor categorically distinguishes assignees from other parties seeking to enforce their arbitration rights.

INTRODUCTION

The Circuit Court legally erred in denying Ford Credit's motion to compel arbitration. Ronald Miller signed a contract with Mountaineer Automotive (Mountaineer) to finance a portion of his purchase of a new truck. Just below his signature, the contract expressly assigns all of Mountaineer's "rights, privileges, and remedies" to Ford Credit. JA52. One of those rights was the right to choose at any time to have a claim related to the contract decided by arbitration. JA53. Miller then defaulted on his payment obligation to Ford Credit.

Ford Credit filed a collection action, attaching the contract. After Miller asserted a class action counterclaim, Ford Credit invoked the contract's arbitration clause. Ford Credit's motion to compel attached, quoted, and discussed the contract Miller had signed, which stated on its face that it was assigned to Ford Credit. Under *State ex rel. Troy Group, Inc. v. Sims*, 852 S.E.2d 270 (W. Va. 2020), Ford Credit thus "met [its] initial burden of proving the existence of an agreement to arbitrate by producing, as an attachment to [its] motion to [compel] arbitration, a written copy of the arbitration agreement containing [Miller's] signature." *Id.* at 277.

In his brief opposing Ford Credit's motion to compel, Miller did not challenge the validity of the contract or its assignment to Ford Credit. *See generally* JA184–

199. To the contrary, Miller's brief attached his own (identical) copy of the contract, JA201–202, and an affidavit from Miller in which he stated that he "financed [his] Lincoln MXK through Ford Motor Credit Company, LLC." JA204.

Nevertheless, the Circuit Court concluded that Ford Credit failed to meet its burden to submit evidence that it possessed an enforceable arbitration agreement and denied Ford Credit's motion to compel arbitration. JA396. The Circuit Court held that this Court's memorandum decision in *Frontline Asset Strategies, LLC v. Rutledge*, No. 20-0395, 2021 WL 1972277 (2021), controlled and compelled denial of Ford Credit's motion. JA393–394. That was legal error.

Besides being legally flawed, the Circuit Court's decision was the culmination of a fundamentally unfair process. In Miller's brief opposing Ford Credit's motion to compel, he acknowledged the parties' arbitration agreement and only challenged its *enforceability*. Two hours before the hearing on Ford Credit's motion to compel arbitration, he provided—devoid of context—a document titled "Miller Exhibit 1" that included six affidavits from cases that appear to involve defaults on credit card payments and a mortgage loan. Then, at the hearing, Miller invoked for the first time the months' old memorandum decision in *Frontline* to make a brand new argument that Ford Credit's motion should be denied for insufficient evidence demonstrating the *existence* of an arbitration agreement. JA262–263, 265–269. The Circuit Court overruled Ford Credit's objection to the late-filed "Miller Exhibit 1"

and denied Ford Credit the opportunity to brief Miller's late-raised invocation of *Frontline*. JA263–264, 294. And when Ford Credit sought to supplement its motion to compel arbitration, the court suddenly took the view that "[p]ermitting a party to present evidence that [the opposing party] has no chance to rebut . . . would be inherently unfair." JA395. Relying on *Frontline*, the Circuit Court then denied Ford Credit's motion to compel arbitration. JA396.

This was legally wrong and procedurally unfair. *Frontline* did nothing to disrupt the low burden of production for parties seeking to compel arbitration. The Circuit Court erred by holding otherwise and by entertaining the untimely argument which led to that wrong result.

STATEMENT OF THE CASE

A. Factual Background

In 2017, Ronald Miller visited Mountaineer, traded in a 2013 Toyota, and bought a 2016 Lincoln. *See* JA52. Miller paid the down payment up front and financed the remaining $46,060.00 through an agreement with the dealership. JA52–53. The 2-page contract ("the Retail Contract") bears Miller's signature and sets out the terms of the agreement. JA52.

The front page of the Retail Contract contained several sections, each boxed off by subject and labeled with bold, capitalized titles: Itemization of Amount Financed, Insurance, Federal Truth-in-Lending Disclosures, Balloon Contract

Provisions, Notice to the Buyer, Assignment. *Id.* The Notice to the Buyer section included several notices and instructions:

- YOU ACKNOWLEDGE THAT YOU HAVE READ AND AGREE TO BE BOUND BY THE ARBITRATION PROVISION ON THE REVERSE SIDE OF THIS CONTRACT.
- The Seller may assign this contract and may retain its right to receive a portion of the Finance Charge.
- Do not sign this contract before you read it or if it contains any blank spaces. You are entitled to an exact copy of the contract you sign.

Id. As indicated, the reverse side of the contract defined arbitration and detailed the terms of the parties' arbitration agreement. *See* JA53 ("READ THIS ARBITRATION PROVISION CAREFULLY AND IN ITS ENTIRETY"). Miller signed on the Buyer line in the Notice to the Buyer box; a Mountaineer representative signed as Seller. JA52.

The same representative signed as Seller in the Assignment section directly underneath the Notice to the Buyer signatures. The assignment read:

> Seller may transfer this contract to another person. That person will then have *all* Seller's rights, privileges, and remedies. By signing below, the Seller assigns this contract to Ford Motor Credit Company ("Assignee"). To contact Assignee about this contract, call 1-800-727-7000, or visit their website at www.fordcredit.com.

Id. (emphasis added). Miller made payments to Ford Credit for nine months. JA10–11. But then Miller stopped making payments. *See* JA11–12. Ultimately, Ford Credit took possession of the vehicle and sold it at auction to recuperate its losses. *See* JA6–7.

B. Procedural History

Ford Credit filed suit in Wyoming County Circuit Court to recover Miller's remaining debt. *See* JA1, 415–417. In answering the complaint, Miller asserted a number of counterclaims relating to Ford Credit's efforts to pursue collection actions in West Virginia. JA21–28. Ford Credit moved to compel arbitration and invoked its contractual right "to have any Claim related to th[e] contract decided by arbitration." JA53; *see generally* JA32–53. In response to the extensive discovery requests that Miller sent Ford Credit, Ford Credit objected to them as premature given its pending motion to compel arbitration (among other reasons) and moved for a protective order staying discovery. *See generally* JA158–181.

Miller filed a written opposition to the motion to compel arbitration. It acknowledged that the Retail Contract reflected his 2017 purchase, JA183; that he signed the Retail Contract attached to Ford Credit's complaint, *id.*; that his failure to make payments under the Retail Contract led to both parties' claims, JA184; and that the Retail Contract contained the arbitration clause Ford Credit sought to enforce, JA183–184. Miller opposed arbitration, however, on the basis that the arbitration agreement was unenforceable—either because it was unconscionable, JA190–197, or because Ford Credit waived the right to enforce it, JA185–190. Miller never disputed that he had entered into the agreement with Ford Credit and made payments for many months to Ford Credit.

Three months later, the Circuit Court held a hearing on the motion, and Miller argued an entirely new theory—that an assignee must produce an affidavit to demonstrate an assignment before it can enforce a contract's arbitration clause.[1] JA262, 264–267. Less than two hours before the hearing, Miller's counsel sent some affidavits to Ford Credit's counsel (without any context or briefing) that Miller then raised at the hearing. *See* JA263–264. The court's rules required any response be filed two days before the hearing. W. Va. R. Civ. P. 6(d)(2)(B) ("[A]ny response to a written motion, including any supporting brief or affidavits, shall be served . . . at least 2 days before the time set for the hearing, if served by hand delivery or by fax"). And to be clear, the affidavits were solely in support of this new surprise affidavit-is-required argument that bore no relation to the opposition brief's arguments. *See generally* JA185–197.

Miller asked the Circuit Court, over Ford Credit's objection, to "[t]ake it back a step" from the arguments Miller *actually* made and instead analyze whether Ford Credit had proved that an arbitration agreement existed in the first place. JA262 ("You don't start with a[n] . . . unconscionability argument. To get there[,] you at

---

[1] Miller's theory continued to transform. By a later hearing in November 2021, Miller was arguing that *all* contracting parties, not merely assignees, must present affidavits or deposition testimony to establish an agreement to arbitrate between two parties. JA366–367; *contra* JA318 (arguing that assignees are required to "prove[] a chain of assignment" as "required" by *Frontline*); JA284 (similar). In either form, the theory is both wrong and untimely. *See infra*, at 14–24.

least have to prove an arbitration agreement."); *see also* JA263 (Ford Credit's objection), JA263–264 (arguing that Miller's affidavits were untimely and did not support any part of the original response). Miller then argued that a case not cited in his opposition brief, *Frontline*, 2021 WL 1972277, required the court to deny Ford Credit's motion. JA265–269.

These surprise tactics led to confusion on timing and substance. Even as Miller painted the case as an "extremely recent" decision, JA265—a case so new that counsel "only ha[d] the West[Law] cite," *id.*—he pointed the finger at Ford Credit as derelict for not submitting evidence with *Frontline* in mind. JA283 (accusing Ford Credit of "talk[ing] a lot of . . . smack" without "know[ing] the most recent case law" and purporting to "educat[e]" Ford Credit on "what the law is in this case"). The reality: this Court decided *Frontline* on May 17, 2021—over a month *after* Ford Credit filed its motion to compel arbitration, *see* JA50, nearly a month *before* Miller filed his opposition, *see* JA200, and nearly four months before the deadline for Miller to supplement his opposition brief, *see* W. Va. R. Civ. P. 6(d)(2). The only party who could have accounted for *Frontline* in their briefing was Miller. And he didn't.

The absence of full and fair briefing also permitted Miller to present the Circuit Court with a lopsided view of the substance. Ford Credit prepared for the hearing under a mistaken belief that the parties would discuss the arguments raised

in their briefs—i.e., the *enforceability* of the arbitration agreement. Meanwhile, Miller prepared for argument on his untimely challenge to the *existence* of an arbitration agreement. *See generally* JA260–293. Tellingly, the only party who addressed the arguments Miller raised in his brief was Ford Credit. *Compare* JA235–243 (Ford Credit's arguments against waiver), *and* JA243–260 (Ford Credit's arguments against unconscionability), *with* JA260–274 (Miller's argument against arbitration).

Even the court seemed to recognize that Miller had presented a "new case" and that his late-breaking theory marked a significant departure from the one he had previously claimed. JA294. Yet, when Ford Credit requested the opportunity to review *Frontline* and "submit a brief based upon its review of the case," the Circuit Court denied it. *Id.* The Circuit Court's reason for denying Ford Credit's request was that it wanted to "read [*Frontline*]," put its "own take" on the decision, and "go from there." *Id.* Accordingly, Ford Credit understood this ruling to be a limited one, barring only a brief on the *Frontline* decision. JA338–339, 356–357. The Court did not give any indication that other filings were prohibited. JA294 (addressing Ford Credit's request to file a supplemental brief on the *Frontline* decision)[2].

---

[2] The Circuit Court later said that it had "specifically instructed that it would rule on the record with no further filings" and that Ford Credit had acted "contrary to the Court's ruling," but that the transcript of the earlier hearing shows the Circuit Court must have misremembered aspects of its colloquy with counsel. JA388–389.

And so Ford Credit filed a supplement to its motion to compel on two points.[3] First, it quoted this Court in pointing out the light burden of production on a motion to compel arbitration: "A party meets the prima facie burden by providing copies of a written and signed agreement to arbitrate." JA299 (quoting *State ex rel. Troy Grp., Inc. v. Sims*, 852 S.E.2d 270, 277 (W. Va. 2020) (cleaned up)). And second, out of an abundance of caution, Ford Credit filed an affidavit by its Director of Business Center Operations, who attested that (1) he had access to Ford Credit business records pertaining to Ronald R. Miller, including the Retail Contract, JA303; (2) Ford Credit makes these records "at or near the time of the events which they reflect" and keeps them "in the ordinary course of business," *id.*; (3) Mountaineer assigned the Retail Contract to Ford Credit, JA304; and (4) Ford Credit accepted the assignment, *id.*

---

[3] West Virginia law imposes on counsel a duty of candor to disclose all controlling legal authority to the court. W. Va. R. Prof. Cond. 3.3. "A lawyer is not required to make a disinterested exposition of the laws, but *must* recognize the existence of pertinent legal authorities." *Id.* at cmt. 5 (emphasis added). This rule of professional conduct reflects the sound principle that "legal argument is a discussion seeking to determine the legal premises properly applicable to the case." *Id.* When Miller raised his new argument at the September 21 hearing, he triggered Ford Credit's duty to identify all controlling legal authority pertaining to that challenge. The Circuit Court's ruling that Ford Credit could not present argument on *Frontline* or the implications of that decision had no bearing on the requirement that Ford Credit otherwise satisfy its duty of candor to the court.

Miller moved to strike Ford Credit's supplemental brief. Apparently failing to see the irony, Miller condemned Ford Credit's supplement as "late evidence," JA308, and baselessly accused Ford Credit of violating a court order. *Compare* JA318 ("It is clear that Ford Bank disobeyed this court's instruction entirely"), *and* JA355 (accusing Ford Credit of "filing things against [the Circuit Court]'s clear instruction."), *with* JA294 (denying only Ford Credit's request for "an opportunity to submit a brief based upon its review of [*Frontline*]"). Ford Credit opposed Miller's motion to strike, JA312–314; *see also* JA322–325. The Circuit Court held a hearing in November and denied Ford Credit's motion to compel shortly thereafter. Its decision relied entirely on Miller's forfeited argument about whether there was proof an arbitration agreement existed. JA393–394.

Ford Credit filed a timely notice of appeal. JA398–414.

SUMMARY OF ARGUMENT

The Circuit Court legally erred in finding *Frontline* applicable and *Sims* inapplicable when a party's arbitration rights are express on the face of a contract. In ruling on a motion to compel arbitration, circuit courts may ask only: (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement. W. Va. Code § 55-10-8(b). This Court has articulated a burden-shifting framework for the first inquiry, whether a valid arbitration agreement exists. *Sims*,

852 S.E.2d at 276. Under that framework, Ford Credit satisfied its initial burden "by providing copies of a written and signed agreement to arbitrate." *Id.* at 277 (cleaned up). The burden then should have shifted to Miller. But instead, the Circuit Court imposed a heightened evidentiary burden on Ford Credit—and then held that Ford Credit had not satisfied it. That was wrong.

The Circuit Court reached this wrong result by allowing Miller to raise novel arguments for the first time at the hearing, *contra* W. Va. R. Civ. P. 6(d), and prohibiting Ford Credit from providing a meaningful response. The prejudice was manifest: the Circuit Court disregarded the arguments Miller made in his brief, accepted the argument Miller offered for the first time at the hearing, and denied Ford Credit's motion to compel arbitration and stay the proceedings solely on the basis of that untimely argument. *See generally* JA392–396.

The answer to both threshold issues that courts in this State decide when ruling on a motion to compel—(1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement—is yes. As a result, this Court should vacate the Circuit Court's decision and remand with instructions to grant Ford Credit's motion to compel.

STANDARDS OF REVIEW

This Court reviews de novo an order denying a motion to compel arbitration. *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 796 S.E.2d 574, 578 (W. Va. 2017). "[T]o the extent that [the] resolution of [an] appeal necessitates . . . review of contractual issues," the Court exercises de novo review over matters of contract interpretation as well. *Id.*

A circuit court's procedural decisions, including those extending a deadline set forth in Rule 6(d), are generally reviewed for an abuse of discretion. Syl. Pt. 1, *McDougal v. McCammon*, 455 S.E.2d 788 (W. Va. 1995). A court abuses its discretion when it deprives one party of a meaningful opportunity to respond to a late-raised argument. Syl. Pt. 3, *State ex rel. Ward v. Hill*, 489 S.E.2d 24 (W. Va. 1997); *cf.* Syl. Pt. 5, *Nellas v. Loucas*, 191 S.E.2d 160 (1972). "The discretion that is normally given to a trial court's procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard." Syl. Pt. 5, *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 583 S.E.2d 80 (W. Va. 2003).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING FORD CREDIT'S MOTION TO COMPEL ARBITRATION UNDER AN AGREEMENT EXPRESSLY ASSIGNING IT ARBITRATION RIGHTS.

When a trial court rules upon a motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), its authority is confined to two threshold

issues: "(1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." *TD Auto Fin. LLC v. Reynolds*, 842 S.E.2d 783, 787 (W. Va. 2020) (citing Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 692 S.E.2d 293 (W. Va. 2010)); *see also* W. Va. Code § 55-10-8(b). This Court has distilled the requirement that a valid arbitration agreement exist between the parties into a burden-shifting test. *Sims*, 852 S.E.2d at 276. The moving party first bears the "light" burden of "establishing prima facie evidence of an agreement to arbitrate." *Id.* at 277. The burden then "shifts to the party seeking to avoid the agreement," *id.* at 276 (quoting *Empl. Res. Grp., LLC v. Collins*, No. 18-0007, 2019 WL 2338500, at *5 (W. Va. June 3, 2019) (memorandum decision))—who must either disprove the existence of an agreement between the parties, *id.*, or demonstrate that the agreement is unenforceable, *id.* at 276–277 (collecting cases).

Here, the Circuit Court declined to address the enforceability arguments that Miller raised in his brief and held that Ford Credit needed additional evidence beyond the agreement itself to show that an arbitration agreement between the parties exists. This decision cannot be squared with this Court's decision in *Sims*, 852 S.E.2d at 276–278, or with the face of the Retail Contract, *see* JA52–53. And *Frontline*, 2021 WL 1972277, at *3–5, neither compels nor justifies the result.

A. Ford Credit met its prima facie burden by producing a contract signed by Miller that contained an arbitration agreement and was assigned on its face to Ford Credit.

Sims did not mince words: A party seeking to compel arbitration "'me[ets] the prima facie burden by providing copies of [a] written and signed agreement[] to arbitrate.'" 852 S.E.2d at 277 (quoting *MHC Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906 (Ky. 2013)) (emphasis omitted). Ford Credit did just that. It attached the Retail Contract to its motion to compel arbitration. JA52–53. The face of the contract memorialized Miller's signature, JA52, contained an arbitration agreement, JA53, and assigned of "all" rights from Mountaineer to Ford Credit, JA52. Still, the Circuit Court held that Ford Credit failed to make even the "light" prima facie showing that this Court has described. JA396 (denying Ford Credit's motion "due to Ford Bank's failure to prove the existence of a valid arbitration agreement").

The order denying Ford Credit's motion to compel arbitration inverted the burden-shifting test that this Court carefully crafted. Indeed, the Circuit Court made no mention of *Sims*' test in its 11-page ruling. *See generally* JA387–397. Nor did the court give any indication that it applied the framework *sub silencio*. To the contrary, all signs suggest that the court believed Ford Credit bore the sole burden of proving an agreement to arbitrate under the same standards that would apply at trial. *See, e.g.*, JA393 ("Ford Bank did not move for the admission of any evidence,

provide any witness testimony, or provide an affidavit prior to or during its hearing to compel arbitration."); *id.* ("Ford Bank failed to provide evidence that an arbitration agreement exists or was transferred with the right to collect the original debt."); JA395 (insinuating that a party must participate in discovery as a prerequisite to compelling arbitration); JA396 (similar).

The Circuit Court's description of *Sims* also betrays its misunderstanding of the test this Court set forth. The order denounced Ford Credit's reliance on *Sims* as "fatally flawed" because the *Sims* movant "actually proved it possessed arbitration rights and even submitted to a Rule 30(b)(7) corporate deposition to authenticate and prove its documents." JA395. That is wrong for at least two reasons. First, the *Sims* respondent, in opposing a motion to compel arbitration, asked for discovery on issues surrounding the creation and execution of the arbitration agreement, which the court granted, and the Rule 30(b)(7) corporate deposition that this Court referred to in its decision was taken during that court-ordered discovery. Here, Miller did not identify any issues requiring discovery in opposing Ford Credit's motion to compel arbitration, and the court did not order any such discovery. Second, this Court analyzed the Rule 30(b)(7) deposition in determining *whether the party opposing arbitration had overcome* the moving party's prima facie evidence of an arbitration agreement—not in assessing whether the moving party had met its prima facie burden in the first place. As this Court explained:

> Petitioners met their initial burden of proving the existence of an agreement to arbitrate by producing, *as an attachment to their motion to dismiss/compel arbitration*, a written copy of the arbitration agreement containing Ms. Willis' signature. Ms. Willis *then* challenged the admissibility and authenticity of the arbitration agreement . . . under the West Virginia Rules of Evidence.

Sims, 852 S.E.2d at 277 (emphases added); *see also id.* at 279–280 (explaining that Ms. Willis "failed to meet her burden," in part, because the movant's Rule 30(b)(7) representative credibly undermined Ms. Willis' affidavit). Far from being distinguishable, *Sims* squarely foreclosed the path that the Circuit Court took. *Id.* at 276–277. After Ford Credit met its initial burden by attaching the agreement to its motion, *Miller* bore the burden of *disproving* it.

Miller failed to do so. As preliminary matter, Miller did not even purport to challenge the authenticity of the Retail Contract until the time to do so had passed, W. Va. R. Civ. P. 6(d)(2); Miller forfeited that argument and the Circuit Court was wrong to consider it. *See infra*, at pp. 24–27. Timing aside, Miller can no more disprove the Retail Contract's authenticity here than Ms. Willis could disavow her signature in *Sims*, 852 S.E.2d at 278–280. Miller appended the same Retail Contract to his opposition brief that Ford Credit submitted with its complaint and motion to compel. *Compare* JA201–202 (Exhibit A to Miller's brief in opposition to Ford Credit's motion to compel arbitration), *with* JA52–53 (Exhibit 1 to Ford Credit's motion to compel arbitration), *and* JA4–5 (Exhibit A to Ford Credit's complaint). Miller then identified his signature on the Retail Agreement. JA183 ("Mr. Miller

signed a contract as part of the purchase of the MKX. *See* Retail Installment Contract and Security Agreement, attached to Complaint."). Miller cannot credibly disavow the contract that he has already claimed.

The Circuit Court reached the opposite conclusion through misplaced reliance on *Frontline*, 2021 WL 1972277, at *3, *5. JA393–394 (concluding that *Frontline* "addressed th[e] very scenario [presented] in this case"); *see also infra*, at pp. 20–24. *Frontline* did nothing to disrupt settled law surrounding a moving party's burden to establish an arbitration agreement. It did not overrule *Sims* or undermine the standard *Sims* articulated. 2021 WL 1972277, at *3–5. Nor could it. *State v. McKinley*, 764 S.E.2d 303, 311 (W. Va. 2014). While "there is no question that memorandum decisions are pronouncements on the merits . . .[,] [i]t is equally clear that [they] occupy a lower station on the scale of precedent when compared to published opinions." *Id.* [4]

The other cases relied on by the Circuit Court are just as distinguishable and even less controlling. For example, in *Pearson v. United Debt Holdings, LLC*, 123 F. Supp. 3d 1070, 1073–74 (N.D. Ill. 2015), the court found a party moving to compel arbitration had not established the existence of an arbitration agreement by attaching a document without a physical signature to its motion, especially since the

---

[4] To the extent this Court perceives a conflict between *Sims*, a published opinion, and *Frontline*, a memorandum decision, the published opinion controls. Syl. Pt. 5, *McKinley*, 764 S.E.2d 303.

opposing party disagreed that the document attached to the motion was the agreement he had entered into. In *Bazemore v. Jefferson Capital Systems, LLC*, 827 F.3d 1325, 1329–30 (11th Cir. 2016), the court found that a collection company moving to compel arbitration had not sufficiently demonstrated that an individual's internet application for a credit card, which was submitted to another entity, included an arbitration agreement. And in *Starr v. Hameroff Law Firm, P.C.*, No. CIV 06-520 TUC FRZ (GEE), 2007 WL 3231988, at *2 (D. Ariz. Oct. 31, 2007), *report and recommendation adopted*, No. CV06-520 TUC FRZ (GEE), 2008 WL 906822 (D. Ariz. Mar. 31, 2008), the party seeking to compel arbitration claimed to be an agent or assignee of an entity that had acquired a debt owed on a credit card for which an amended credit card agreement contained an arbitration clause, but nothing in the record substantiated that was true.

None of those cases are anything like this one, where both sides agree that Miller and Mountaineer entered into a purchase contract with an arbitration clause, both sides submitted that contract to the court, and the face of the contract expressly assigns all of Mountaineer's rights to Ford Credit.

B. *Frontline* does not establish a different burden of proof for assignees seeking to compel arbitration.

The Circuit Court appeared to read *Frontline* as imposing a heightened burden of proof applicable when an assignee seeks to compel an original creditor's right to compel arbitration. JA393–394. And the court faulted Ford Credit for objecting to

participating in discovery while its motion to compel arbitration was pending. JA395–396; *see also* JA318 (arguing that Ford Credit was required to engage in discovery to "prove[] a chain of assignment" as "required" by *Frontline*). The court was wrong twice over. *Frontline* involved a situation where there was no link between the signatory and the party claiming to be an assignee in the contract itself. 2021 WL 1972277, at *4. Here, the link is express in the agreement. And unlike the non-moving party in *Frontline*, Miller never argued that discovery was needed into whether a contract existed. Instead, he submitted his own copy of the contract with his opposition brief, JA201–202, provided an affidavit stating that he financed his vehicle "through Ford Motor Credit Company, LLC," JA204, and focused the brief solely on whether the arbitration agreement was enforceable, JA184–198.

It bears emphasis that *Frontline* involved very different facts from this case. There, one individual opened a personal line of credit from a bank and another obtained a credit card from a different bank, and both individuals defaulted on their payment obligations. The debt was sold to third-parties who then allegedly hired Frontline to collect on it, and Frontline sent collection letters to them. The two individuals filed suit claiming the debt collection letters were a violation of the West Virginia Consumer Credit and Collection Act, and Frontline moved to compel arbitration based on the terms of the individuals' agreements with their original creditors—i.e., the banks that opened the personal line of credit and issued the credit

card. The individuals "opposed Frontline's motion, arguing that Frontline failed to prove that it was ever assigned the right to arbitrate claims with [them]." *Frontline*, 2021 WL 1972277 at *3. This Court agreed that in that case, where Frontline claimed to be an agent of the assignees of the original creditor but was not the original creditor or the purchaser of the individuals' debt, Frontline had to prove that the original creditors had assigned their right to compel arbitration to it. Unless it did so, there was nothing to link Frontline to the arbitration agreement, and thus not clear that an arbitration agreement existed "between the parties." *Id.*

Unlike in *Frontline*, where there was no "documentation" that "establish[ed] a link between [Frontline] and the original lender" or set forth the terms of the assignment, *id.* at *4, the link between Ford Credit and the original lender is explicit. Mountaineer assigned its rights to Ford Credit in the very same contract that Miller signed to finance his truck. JA52. The provision fell directly below Miller's signature. *Id.* Nor is there any doubt that the assignment gave to Ford Credit the "particular right" to arbitrate. *Contra Frontline*, 2021 WL 1972277, at *3. The assignment conferred "all" of Mountaineer's "rights, privileges, and remedies." JA52. "All" includes Mountaineer's arbitration rights. Syl. Pt. 7, *Benson v. AJR, Inc.*, 698 S.E.2d 638 (W. Va. 2010) ("Where the terms of a contract are clear and unambiguous, they must be applied and not construed.") (internal quotation marks omitted); *Jackson v. Belcher*, 753 S.E.2d 11, 17 (W. Va. 2013) (deeming "any" and

"all" to be "inclusive term[s]"); *see also* JA53 (detailing the parties' arbitration rights).

When a party to a contract assigns its rights to an assignee in the same contract that establishes the right to arbitrate, there is no basis for imposing a greater burden of proof on the assignee than would have existed for the assignor. Justice Hutchison recently explained that when a prospective assignee views arbitration as "material and important," it should either refuse to accept the assignment of a contract which lacks an arbitration provision or "insist[] that [the dealership] place an arbitration provision into its [retail contract] form" on the front end. *Reynolds*, 842 S.E.2d at 797 (Hutchison, J., concurring). Ford Credit heeded that guidance. Its assignee status should thus be "of no consequence," *id.* at 792 (majority opinion)—"the common law puts the assignee in the assignor's shoes, whatever the shoe size." *Id.*; *see also* Syl. Pt. 10, *Lightner v. Lightner*, 124 S.E.2d 355 (W. Va. 1962) (recognizing that an assignment neither expands nor contracts the rights originally possessed by the assignor).

By contrast, imposing an assignee-specific heightened burden of proof where the same contract containing the arbitration agreement also effectuates the assignment would improperly diminish arbitration rights conferred by assignment. The right to arbitrate goes hand in hand with the right to "realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability

to choose expert adjudicators to resolve specialized disputes." *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)). If an assignor could have established its right to arbitrate without exposing itself to protracted discovery, *see Sims*, 852 S.E.2d at 277, but an assignee is not permitted do so, the assignee would lack the same right that the assignor possessed. Nothing in West Virginia law justifies such a disconnect between the assignor's and assignee's rights when a contract includes an arbitration agreement, identifies the assignee of the contract, and specifies that the assignee's rights are co-extensive with the original contracting party's.

* * *

When Ford Credit moved to compel arbitration, settled law provided that it could satisfy its prima facie burden by providing a copy "of [a] written and signed agreement[] to arbitrate." *Sims*, 852 S.E.2d at 277. That standard was satisfied here. The Circuit Court erred in holding otherwise, and its decision should be vacated.

II. THE CIRCUIT COURT ABUSED ITS DISCRETION BY ALLOWING MILLER TO RAISE AN UNTIMELY ARGUMENT AND DENYING FORD CREDIT THE OPPORTUNITY TO RESPOND.

Unless otherwise provided, Rule 6(d) requires that "any response to a written motion, including any supporting brief or affidavits" be served "at least 2 days before the time set for the hearing, if served by hand delivery or by fax to the opposing attorney." W. Va. R. Civ. P. 6(d). The rule's timing requirements are "to prevent a

party from being prejudicially surprised" by a party's eve-of-hearing arguments. *See Truman v. Auxier*, 647 S.E.2d 794, 797 (W. Va. 2007) (per curiam). And while circuit courts enjoy some discretion to modify the timelines Rule 6 sets forth, *Cremeans v. Goad*, 210 S.E.2d 169, 195 (W. Va. 1974), it cannot leave either party without notice of the issues raised or without time to prepare. *Hill*, 489 S.E.2d at 30 (party lacked adequate time to prepare for a hearing when given only 24-hours' notice); *see also Cremeans*, 210 S.E.2d at 195 (recognizing that Rule 6's concerns of unfair prejudice pertain to both the moving and non-moving party).

Miller had the opportunity to respond to Ford Credit's motion from the day it was filed until two days before the September 21 hearing. He did so—and presented only arguments about the enforceability of the arbitration agreement. Then, less than two *hours* before the hearing, Miller's counsel emailed Ford Credit's counsel a purported compilation of affidavits from other cases. *See* JA264. And ignoring that Miller's opposition brief itself attached a copy of the contract with the arbitration agreement, Miller invoked those affidavits at the hearing to make a brand new argument that Ford Credit had not demonstrated an arbitration agreement existed.[5]

---

[5] It is undisputable that Miller's late-raised *Frontline* argument deviated completely from the arguments he raised in his opposition brief. There, Miller argued that Ford Credit waived its right to arbitrate, JA185–190, 198, and that the arbitration agreement was unconscionable, JA190–197. He made no mention of authenticity, admissibility, affidavits, or *Frontline*. *See generally* JA185–198.

See supra, at pp. 8–10. The Circuit Court should not have permitted Miller to do orally what Rule 6 prohibits in writing: respond to a party's motion after the time to do so has passed. *See* W. Va. R. Civ. P. 6(d). As this Court has repeatedly emphasized: "The law aids those who are diligent, not those who sleep upon their rights." *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 934 (W. Va. 2010) (quoting *Dimon v. Mansy*, 479 S.E.2d 339, 347 (1996) (internal quotation marks omitted)). And the law aids least of all those who pursue "unfair advantage." *Id.* (quoting *Wimer v. Hinkle*, 379 S.E.2d 383, 386 (W. Va. 1989)).

Nevertheless, the Circuit Court permitted Miller's untimely argument over Ford Credit's objection. JA263–264; *see also* JA297–298. The court gave no reason for overruling Ford Credit's objection, did not refer to Rule 6, and did not require Miller to show good cause for his untimely argument. *See State ex rel. U.S. Fid. & Guar. Co. v. Canady*, 460 S.E.2d 677, 685 (W. Va. 1995) ("The discretion that is normally given to a trial court's [procedural] decisions does not apply where the trial court makes no findings or applies the wrong legal standard." (cleaned up)). Worse still, the court then deprived Ford Credit of any meaningful opportunity to discuss the central case in Miller's new argument, JA294—again, with no discussion of the relevant legal standard, and no explanation of why fairness permits one party to raise an issue for the first time at oral argument but prohibits the other party from responding.

Ford Credit was plainly prejudiced by this deviation from the orderly course of presenting arguments in the Circuit Court. *See* Syl. Pt. 2, *Boggs v. Settle*, 145 S.E.2d 446 (W. Va. 1965) (an error involving the rules of civil procedure is only harmless if it "does not affect the substantial rights of the parties"). The Circuit Court's ruling is solely based on the argument that Miller raised for the first time at oral argument. JA393–395. And it denies Ford Credit's motion by misreading a case that Ford Credit had no opportunity to brief and no advanced notice would be discussed at the hearing. JA393–394. Rule 6's promise of notice and an opportunity to prepare provides cold comfort if it allows the type of gamesmanship that occurred below. The Circuit Court abused its discretion by arbitrarily allowing Miller to raise an untimely argument, then unfairly denying Ford Credit the opportunity to respond. For this reason as well, this Court should vacate the order denying Ford Credit's motion to compel arbitration.

III. THIS COURT SHOULD REMAND WITH INSTRUCTIONS TO GRANT FORD CREDIT'S MOTION TO COMPEL ARBITRATION BECAUSE MILLER'S REMAINING ARGUMENTS ARE FORECLOSED BY LAW.

The Circuit Court's errors require vacatur of its order denying Ford Credit's motion to compel arbitration. Moreover, this Court should instruct the Circuit Court to grant Ford Credit's Motion to Compel Arbitration and Stay Action because Miller's remaining waiver and unconscionability arguments squarely conflict with binding precedent.

Miller's waiver argument fails without question following this Court's decision in *Citibank, N.A. v. Perry*, 797 S.E.2d 803, 807 (W. Va. 2016). There, this Court held that Citibank had not waived its right to enforce an arbitration agreement even though it had (1) filed a collection action, (2) moved for judgment on the pleadings, (3) waited for over three years, and (4) agreed to a scheduling order before filing a motion to compel arbitration. *Id.* Miller's claim of waiver here—where Ford Credit moved to compel arbitration less than a month after Miller filed his answer and counterclaim, *see* JA415—is irreconcilable with that decision. *Perry*, 797 S.E.2d at 807 ("Once Mr. Perry's counterclaim was filed, Citibank responded in a reasonable time, less than two months, by filing its motion to compel arbitration.").

Miller's unconscionability arguments fare no better. It is undisputable that the parties' arbitration agreement includes a delegation clause that reserves all "[c]laims regarding the interpretation, scope, or validity of [the agreement], or arbitrability of any issue except for class certification" for the arbitrator. JA53. And it is well-settled that courts "must enforce" valid delegations such as this one and "leav[e] any challenge to the validity of the Agreement as a whole for the arbitrator."[6] *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (where a party

---

[6] Miller tried to evade settled law below by invoking a provision within the arbitration agreement that permits a court to resolve any challenge to "[t]he validity

fails to "challenge[] [a] delegation provision specifically," courts "must treat [the provision] as valid" and "must enforce it").

Miller has no colorable objection to Ford Credit's motion to compel arbitration. There is nothing left for the Circuit Court to do on remand but compel arbitration without further delay.

CONCLUSION

For the foregoing reasons, this Court should vacate the Circuit Court's order denying Ford Credit's motion to compel arbitration and remand with directions to compel arbitration, or at a minimum, to rule on the waiver and enforceability questions raised in Miller's opposition brief.

April 6, 2022

Respectfully submitted,

Michael Bonasso (WV Bar No. 394)
Bryan N. Price (WV Bar No. 8846)
Jason A. Proctor (WV Bar No. 12291)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301

---

and scope of the [arbitration agreement's] waiver of class action rights." JA53; *see also* JA261–262. But resolving a challenge to an arbitration agreement's class action waiver requires there to actually be a challenge to an arbitration agreement's class action waiver. Here, there is none. *See generally* JA184–199; JA322–325. And understandably so—this Court has long held that "the inclusion of [a class action] waiver does not automatically render the arbitration agreement unenforceable." *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 752 S.E.2d 372, 390 (W. Va. 2013) (per curiam); *see also State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 924 (W. Va. 2011); *State ex rel. AT&T Mobility, LLC v. Wilson*, 703 S.E.2d 543, 550 (W. Va. 2010) (per curiam).

Telephone: (304) 345-0200
Facsimile: (304) 345-0260

Jessica L. Ellsworth (*admitted PHV*)
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
jessica.ellsworth@hoganlovells.com
Counsel for Plaintiff-Petitioner

CERTIFICATE OF SERVICE

I, Jason A. Proctor, certify that on April 6, 2022, the foregoing was served upon all counsel of record via U.S. Postal Service, postage pre-paid, to the following counsel of record:

Troy N. Giatras, Esq.
Matthew Stonestreet, Esq.
The Giatras Law Firm, PLLC
118 Capitol Street, Suite 400
Charleston, WV 25301
Fax: (304) 343-2942
Counsel for Ronald R. Miller

E. Jenelle Coulter
Weber & Olcese, P.L.C.
2700 Stanley Gault Parkway, Suite 130
Louisville, KY 40223
Fax: (502) 560-6800
Counsel for Ford Motor Credit Company LLC

April 6, 2022

Michael Bonasso (WV Bar No. 394)
Bryan N. Price (WV Bar No. 8846)
Jason A. Proctor (WV Bar No. 12291)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301
Telephone: (304) 345-0200
Facsimile: (304) 345-0260

Jessica L. Ellsworth (*admitted PHV*)
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Telephone: (202) 637-5600
Facsimile: (202) 637-5910
jessica.ellsworth@hoganlovells.com
Counsel for Plaintiff-Petitioner