IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0434

KRISTIN L. HUNNICUTT,

Defendant Below, Petitioner,

v.

SUSAN H. HUNNICUTT,

Plaintiff Below, Respondent.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent's Brief fails to provide the Court with any authority supporting the proposition that the arbitration agreement is unenforceable. Respondent does not dispute that a contract exists between the parties. Respondent does not dispute that the contract includes a valid and enforceable arbitration provision. Instead, Respondent attempts to elude her prior agreement with an unsubstantiated claim that Petitioner did not negotiate in good faith. This claim is baseless in fact and inapposite to controlling law. Of actual significance, the clear and unambiguous contract language requires arbitration of all claims, known or unknown, that had accured as of the date of the parties' agreement. The terms of the agreement, including the arbitration provision, were bargained for and accepted by both parties. The arbitration agreement is enforceable and the circuit court's order denying the motion to dismiss and compel arbitration should be reversed.

ARGUMENT

The narrow issue before the Court is whether the Arbitration Provision in a 2015 *Release and Settlement Agreement* should be enforced. Respondent does not challenge the validity or enforceability of the Arbitration Provision itself. Rather, Respondent argues, in effect, that it would be unfair to hold her to the terms of the contract even though she previously negotiated and agreed to it. Respondent has set forth three primary arguments in an attempt to persuade the Court that the Arbitration Provision should not be enforced:

(1) At the time Respondent entered into the *Release and Settlement Agreement*, she could not have contemplated the underlying trespass to timber claim.

(2) Enforcing the terms of the *Release and Settlement Agreement* against Respondent would assist Petitioner in "perpetrat[ing] a fraud."

(3) Enforcing the terms of the *Release and Settlement Agreement* would "create[] dangerous risk to litigants" and discourage compromise settlements.

[Resp't Br. at 4-5.]

None of these arguments support the contention that the Arbitration Provision is unenforceable as to Respondent, much less overcome the "heavy presumption of arbitrability." *See Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989). "[W]hen the scope of the arbitration clause is open to question, a court ***must*** decide the question in favor of arbitration." *Id.* (Emphasis added); *see also State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 598, 609 S.E.2d 858, 859 (2010). The Respondent's position—as well as the circuit court's ruling—undermines the "emphatic federal policy in favor of arbitration." *KPMG LLP v. Cocchi*, 565 U.S. 18, 21, 132 S. Ct. 236, 181 L.Ed 323 (2011).

I. The Contract Language at Issue is Clear, Unambiguous, and Should Be Enforced.

Respondent's first argument regarding what she knew (or did not know) at the time she entered into the *Release and Settlement Agreement* is not compelling. The parties' intent at the time of their agreement was reduced to a written contract that specifically contemplated and expressly included "unknown" claims. The written terms of the contract control—not a retrospective examination of what one party claims to have contemplated. Syl. pt. 5, *VanKirk v. Green Constr. Co.*, 195 W. Va. 714, 466 S.E.2d 782 (1995). "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. pt. 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). Where the terms of a written contract are clear and unambiguous, they must be applied and not construed. *See Fraley v. Family Dollar Stores*, 188 W. Va. 35, 422 S.E.2d 512 (1992); *see also* Syl. pt. 1, *Cotiga* 147 W. Va. 484, 128 S.E.2d 626 ("[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.").

The *Release and Settlement Agreement* and its attendant Arbitration Provision are clear and unambiguous. The agreement applies to "any and all claims ... whether now *known or unknown*, asserted or unasserted ... from the beginning of the world through the date of [Respondent's] receipt of the Settlement Payment[.]" [J.A. 36.; emphasis added.] The Arbitration Provision states that "any and all claims, causes of action, disputes, and/or controversies . . . shall be resolved exclusively . . . [through] mandatory participatory or in-person mediation . . . [and any remaining claims] shall be required to be submitted to mandatory, binding, and final arbitration[.]" [J.A. 37-38.] That is, the parties agreed to a "global release" of any and all claims, whether known or unknown, that accrued on or before the date of receipt of the settlement proceeds. As part of the parties' agreement, they negotiated and agreed to a mandatory alternative dispute resolution provision. What is more, the Respondent acknowledged that she was represented by counsel in negotiating and entering into the *Release and Settlement Agreement*, and "voluntarily accepted" it having "fully read and [] understood" its terms. [J.A. 38.]

Respondent does not dispute that the language of the *Release and Settlement Agreement* is clear and unambiguous. Respondent cannot dispute that she negotiated and understood the terms of the *Release and Settlement Agreement* at the time it was executed. She cannot dispute that she accepted $475,000.00 in exchange for this agreement. The Court should not alter, pervert, or destroy the clear meaning and intent of the parties as expressed in the *Release and Settlement Agreement* based Respondent's claim that she could not have contemplated the underlying trespass to timber claim when entering into this agreement. Respondent should be bound by the plain language of the agreement, which includes "unknown claims," and this Court should reverse the ruling of the circuit court.

II. There is No Evidence of Fraud or Fraudulent Intent.

Although there are certain avenues by which a party may vitiate a release and settlement agreement like the one at issue here, this case does not present such an opportunity to Respondent. A "settlement is conclusive upon the parties thereto as to the correctness thereof in absence of accident, mistake or fraud in making the same." Syl. pt. 2, *Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 590 S.E.2d 641 (2003) (quoting Syl. pt. 3, in part, *Calwell v. Caperton's Adm'rs*, 27 W. Va. 397 (1886), Syl. pt. 8, *Devane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999)).

Respondent's Brief does not suggest that the *Release and Settlement Agreement* should be invalidated based on accident or mistake. Rather, Respondent has alleged that enforcing the *Release and Settlement Agreement* "would permit Petitioner to carry out a fraud." [Resp't Br. at 7.] Merely alleging fraud or fraudulent intent is insufficient to vitiate a settlement agreement. *See Peters v. Cook*, 152 W. Va. 634, 165 S.E.2d 818 (1969). The party asserting fraud in a settlement "must distinctly allege and by clear and convincing evidence prove the particular facts" constituting fraud. Syl. pt. 3, *Burdette v. Burdette Realty Improvement, Inc.*, 214 W. Va. 448, 590 S.E.2d 641 (2003) (quoting Syl. pt. 3, in part, *Calwell v. Caperton's Adm'rs*, 27 W. Va. 397 (1886), Syl. pt. 8, *Devane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999)).

No particular facts supporting the allegations of fraud have been distinctly alleged, much less proven by clear and convincing evidence. Respondent baselessly makes this unsubstantiated allegation in an effort to avoid her contractual agreement to settle "unknown" claims. Therefore, the Court should not be persuaded by the argument that enforcement of the Arbitration Provision here would permit Petitioner to perpetrate a fraud.

III. Litigants Will Not Be Discouraged from Compromise if the Parties' *Release and Settlement Agreement* is Enforced.

Respondent's argument that enforcing the Release and Settlement Agreement "would create a dangerous risk to litigants seeking to resolve and compromise claims" is as unpersuasive as the argument regarding fraud. The Respondent's argument is, in effect, that the Court should not enforce the unambiguous terms of the *Release and Settlement Agreement* because it will make other litigants fearful that they may be bound by the terms of an agreement they enter to resolve a claim. The argument fails on its own logic.

The Court's enforcement of her agreement would not "squelch the law of this state favoring resolution" because litigants are free to negotiate the terms of their settlements as they see fit.[1] Litigants can enter into a global release or limit the scope of a release. They can agree to arbitrate future disputes or reject an arbitration clause. In this case, Respondent was afforded with the same opportunities to negotiate her release and settlement agreement. With the benefit of counsel, she negotiated and agreed to a global release of claims and an Arbitration Provision. Again, she is bound by those terms.

IV. It is Undisputed that the Arbitration Provision is Valid and Enforceable.

As noted above, Respondent has not argued the validity or enforceability of the Arbitration Provision beyond the claim that the Release and Settlement Agreement does not apply. Respondent similarly failed to address the validity or enforceability of the Arbitration Provision in response to the underlying motion to dismiss and compel arbitration. Therefore, it remains undisputed that the Arbitration Provision is valid and enforceable.

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[1] It is just as likely that the Court's enforcement of the *Release and Settlement Agreement* will have the opposite effect of "squelch[ing] the law of this state favoring resolution of controversies by contracts[.]" [Resp't Br. at 4.] Enforcement of the *Release and Settlement Agreement* will demonstrate to other litigants that they can rely on courts to uphold their settlement agreements if subject to a later dispute.

The law on this issue is clear: private agreements to arbitrate are to be enforced according to their terms. *See Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682, 130 S. Ct. 1758, 176 L. Ed. 605 (2010). The policy in favor of arbitration leaves "no place for the exercise of discretion" but commands courts to "rigorously enforce" arbitration agreements. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 158 (1985); *see also Perry v. Thomas*, 482 U.S. 483, 489-90, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987), *Southland Corp. v. Keating*, 465 U.S. 1, 12, 103 S. Ct. 2199, 76 L. Ed. 372 (1984). This case is no exception; the circuit court should have enforced the parties' agreement to arbitrate and its failure to do so was erroneous.

CONCLUSION

The Randolph County Circuit Court is not the appropriate forum for the underlying claim because it is to be resolved exclusively through the Arbitration Provision bargained for and agreed to by the parties. Respondent has not provided the Court with any controlling authority that would suggest otherwise. Accordingly, Petitioner respectfully requests that this Court reverse the circuit court's order denying the motion to dismiss and remand the matter with instructions to refer this action to arbitration.

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CERTIFICATE OF SERVICE

I, Jason D. Bowles, counsel for Petitioner, hereby certify that on November 9, 2022, service of ***Petitioner's Reply Brief*** was made upon the following counsel of record by mailing a true and exact copy thereof via First Class United States Mail, postage prepaid, and electronic mail to:

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