IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

C.S.,

Plaintiff Below, Petitioner,

v. **No. 22-ICA-141**

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, CHRIS AND SANDRALEE JENSEN, MATTHEW WHITCOMB, DON WRYE, ANTHONY NAEGLE, AND CHRISTOPHER MICHAEL JENSEN,

Defendants Below, Respondents

BRIEF ON BEHALF OF THE RESPONDENTS CHRIS JENSEN AND SANDRALEE JENSEN

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I. STATEMENT OF THE CASE

A. Factual Background

Respondents Chris Jensen[1] and Sandralee Jensen are the parents of Christopher Michael Jensen ("Michael Jensen"), who is also a defendant below and a Respondent in this appeal.[2] *See Complaint* ¶¶ *17, 19.* (APP REC at 19-20.) The Jensens are members of the Church of Jesus Christ of Latter-day Saints.[3] *Id.*

The Jensen family moved to Martinsburg, West Virginia in the summer of 2005. After moving to Martinsburg, both Chris and Sandralee had various Church "callings" within their local ward and stake for certain limited time periods. *See* Jane Doe-1 v. Corp. of President of The Church of Jesus Christ of Latter-day Saints, 239 W. Va. 428, 436, 801 S.E.2d 443, 451 (2017). Neither

[1] The Petitioner's Complaint sued Christopher Jensen as a defendant. (APP REC at 19.) The Petitioner's Notice of Appeal named Chris Jensen as one of the Respondents and uses that name in the style of this appeal. Christopher Jensen and Chris Jensen are one and the same person.

[2] The undersigned counsel only represents Respondents Chris Jensen and Sandralee Jensen. Counsel does not represent, Michael Jensen. Michael Jensen's interests in this action are being represented by a Guardian ad Litem appointed by the Circuit Court. (APP REC at 558-560.) References herein to "the Jensens" are only to Chris Jensen and Sandralee Jensen.

[3] On January 5, 2022, an Order Confirming Joint Stipulation 1 was entered by the Circuit Court which confirmed that:

> In 2019, the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints has been renamed The Church of Jesus Christ of Latter-day Saints, a Utah corporation sole and, in 2020, the Corporation of the President of The Church of Jesus Christ of Latter-day Saints was merged into the newly named corporate entity. As a result of this corporate restructuring, The Church of Jesus Christ of Latter-day Saints, a Utah corporation sole assumed any and all potential liabilities for the claims raised by Plaintiffs M.S. and C.S. in this action from the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints.

(APP REC at 54-55.) For the sake of simplicity, the Jensens will refer to these organizational entities as "the Church."

Chris Jensen's calling as a member of the Stake High Council nor Sandralee Jensen's calling as a ward Relief Society President made them a part of the Church's clergy.[4]

Michael Jensen resided with his parents until 2010 when he was told by his parents to leave the family home. Michael was then 18 years old and he did not thereafter reside with his parents. (APP REC at 351.) *See also* Jane Doe-1, 239 W. Va. at 440, 801 S.E.2d at 455.

Michael Jensen is currently incarcerated, after being convicted of criminal offenses in the Circuit Court of Berkeley County, West Virginia arising from the sexual abuse of two minor children. *See Complaint ¶ 5.* (APP REC at 17.) In deciding an appeal of a habeas petition filed by Michael Jensen, the Supreme Court of Appeals laid out the following facts relevant to Michael's conviction: "[I]n 2007, the mother of two infant boys asked [Michael Jensen] to babysit them. [Michael Jensen] was sixteen years old at the time. While babysitting the two children, [Michael Jensen] sexually abused both of them. The two children did not report the sexual abuse to their parents until 2012." Christopher J. v. Ames, 241 W. Va. 822, 825, 828 S.E.2d 884, 887 (2019). *See also* State v. Jensen, No. 13-1088, 2014 WL 2681229 (W. Va. June 13, 2014), where the Court affirmed Michael's conviction, noting that, "[f]ollowing a trial by jury beginning on February 5, 2013, [Michael Jensen] was … found guilty of sexual assault in the first degree regarding W.T. and two felony counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust, one for each of [W.T. and J.T]." Id. at *1.

[4] As noted by the Supreme Court of Appeals, "[t]he Church is divided into 'wards,' which encompass defined geographic territories. Church members belong to the ward associated with his or her residence. Several wards in a geographical area form a 'stake.' The clergyman of each ward is a bishop, and the clergyman of each stake is a president. These positions are held by volunteers for a number of years." Jane Doe-1, 239 W. Va. at 436 n. 9, 801 S.E.2d at 451 n. 9.

B. Petitioner and Others Sue the Jensens and the Church in 2013

After Michael Jensen's February 2013 criminal conviction, Petitioner C.S. was one of several plaintiffs who initiated the case of Jane Doe-1, et al. v Corp. of the President of Church of Jesus Christ of Latter-day Saints et al., Civil Action No. 13-C-656 in the Circuit Court of Berkeley County, West Virginia ("Jane Doe-1"). The complaint in Jane Doe-1 was filed on September 16, 2013 and alleged that multiple children, including C.S. and two of his brothers, had been abused by Michael Jensen. The plaintiffs in Jane Doe-1 sought to hold the Church responsible for their alleged injuries. Respondents Chris Jensen and Sandralee Jensen were among the defendants sued in Jane Doe-1 by C.S. and his fellow plaintiffs. *Complaint in Jane Doe-1*. (APP REC at 97-162.)

The plaintiffs in Jane Doe-1 asserted multiple claims against Chris and Sandralee Jensen in the 2013 litigation. The Amended Complaint in Jane Doe-1 included claims against the Jensens, both as alleged agents of the Church and as individuals. Throughout the Amended Complaint in Jane Doe-1, the plaintiffs (including C.S.) alleged that Chris Jensen and Sandralee Jensen were acting as agents of the Church with respect to the "acts and omissions" asserted in the pleading. *Amended Complaint in Jane Doe-1, ¶¶ 44, 45, 64, 67, 68, 69, 71, 76, 77, 133, 144, 155, 165, 193 and 212.* (APP REC at 176-77, 184-186, 188, 208, 212, 215, 218, 231, 238.) However, C.S. and his fellow plaintiffs also alleged in Jane Doe-1 that the Jensens acted as and had potential liability as individuals. *Id. at ¶¶ 44 (Chris Jensen failed to take any action "on his own"), 45 (Sandralee Jensen failed to take any action "on her own"), 74 (Chris and Sandralee Jensen had knowledge of Michael Jensen's "propensity" as parents of Michael Jensen)*. (APP REC at 176-77, 187.)

The Jane Doe-1 plaintiffs also alleged a claim of Civil Conspiracy against the defendants. The allegations of paragraph 204 of the Amended Complaint were specifically made against Chris and Sandralee Jensen in their individual capacities. (APP REC at 233-34.) That paragraph was

one of three alternatively plead allegations of a conspiracy. The other two alternatively plead allegations, contained in paragraphs 203 and 205-206 of the Amended Complaint, alleged that Chris and Sandralee Jensen participated in the alleged conspiracy as agents of the Church.[5] (APP REC at 233-36.)

C.S. was a minor at the time of the Jane Doe-1 suit and his claims were asserted by his mother and next friend who was designated in that lawsuit as Jane Doe-5. (APP REC at 104, 172.) C.S. remained a party to the Jane Doe-1 lawsuit for nineteen months. However, he was voluntarily dismissed as a plaintiff in Jane Doe-1 (without prejudice) by Order dated April 16, 2015. (APP REC at 247-258.)

After several years of discovery, pre-trial motions and an interlocutory appeal,[6] the case in Jane Doe-1 went to trial in January 2018. Before reaching a verdict, however, all of the remaining plaintiffs, including C.S.'s brothers who were still parties to the lawsuit, reached settlements. (APP REC at 273.)

C. Petitioner Initiates and Loses an Arbitration Proceeding in 2019

After the settlements in Jane Doe-1, Petitioner C.S. decided to reassert his claims. He obtained new counsel and (with the advice of his new counsel) chose to forego filing a new lawsuit. Instead, C.S. and his attorney agreed to execute an Arbitration Agreement with the Church in March 2019. (APP REC at 278-281.) The Arbitration Agreement specifically provided that "the Parties mutually consent to the resolution by arbitration of all [C.S.'s] claims or controversies that were or could have been asserted in Jane Doe-1 ...." *Id.* (APP REC at 278.)

[5] The Jane Doe-1 plaintiffs were permitted to plead in the alternative under Rule 8(e)(2) of the West Virginia Rules of Civil Procedure.

[6] *See* Jane Doe-1 v. Corp. of President of The Church of Jesus Christ of Latter-day Saints, 239 W. Va. 428, 801 S.E.2d 443 (2017).

C.S. asserted his claims in the arbitration through a Notice of Arbitration (APP REC at 291-317) and an Amended Notice of Arbitration. (APP REC at 319-345.) While neither the Jensens nor any other individuals were parties to the arbitration, C. S.'s claims in the arbitration proceeding made factual allegations regarding Chris and Sandralee Jensen and other individuals and relied primarily on principles of agency to assert liability on the part of the Church.

In a section of his Amended Notice of Arbitration, C.S. alleged that: "At All Relevant Times the COP Agents Were Acting Within the Scope of Their Authority." *See Amended Notice of Arbitration at 7.* (APP REC at 325.) Specifically with regard to the Jensens, C.S. alleged in that section of the Amended Notice that, "[o]ther leaders within the Hedgesville Ward and the Martinsburg, West Virginia, Stake, *including Stake High Councilmen and the Ward Relief Society,* knew or reasonably should have known that Michael Jensen had abused young children and posed a danger to children, including [C.S.], yet failed to take any action to protect or warn [C.S.] or his family." *Id. at ¶ 24, emphasis added. See also id. at ¶ 28* (allegations against "Michael Jensen's Father who had leadership positions in the Church, including Stake High Councilor, and his mother who was a long tenured Relief Society President"); *id. at ¶ 29.f.* (allegations against "Stake High Councilor Jensen and Relief Society President Jensen"); *id. at ¶ 29.g.* (allegations against "Relief Society President Jensen"); *id. at ¶ 29.h. (*allegations against "Stake High Councilor Jensen and Relief Society President Jensen"); *id. at ¶ 29.l. (*allegations against "Relief Society President Jensen"). (APP REC at 326-31.)

Additionally, the Amended Notice alleged that, "[i]n their capacities as … Stake High Councilor, Relief Society President and other leadership positions, the COP Agents were held out by the Church as its local leaders and placed in positions of responsibility and authority over Church members." *Id. at ¶ 45.* (APP REC at 335-36.) The Amended Notice further alleged that

these positions established "a special relationship with members of the congregation, including [C.S.]." *Id. See also id. at ¶¶ 77-78* (alleging special relationship between "agents and representatives of the Church" and C.S.). (APP REC at 343-44.)

C.S. did not prevail in the arbitration proceeding as the arbitrator issued a ruling on February 4, 2020, holding that C.S. "ha[d] not carried his burden of proving, by a preponderance of the evidence, all the required elements of his claims." (APP REC at 284.) The arbitrator's decision indicated that it was "in full settlement of all claims, defenses, allegations and counterclaims which were, or could have been, submitted to this Arbitration." (Id.)

D. Petitioner Brings the Instant Lawsuit in 2021

Notwithstanding his loss in the arbitration proceeding, C.S. obtained yet another lawyer and brought the current action in the Circuit Court of Berkeley County, West Virginia on November 9, 2021. (APP REC at 13-48.) Once again, Chris Jensen and Sandralee Jensen were named as defendants.[7] The claims that C.S. alleged against Chris Jensen and Sandralee Jensen in his current lawsuit are once again primarily based on allegations of agency. C.S. alleged that Chris Jensen was "a member of the Stake High Council" and that the "Stake High Council is an instrument of the Church." *See Complaint ¶ 17.* (APP REC at 19.) C.S. alleged that Sandralee Jensen "served as Relief Society President for the Martinsburg West Virginia Stake from

[7] In this action, Petitioner C.S. alleged that Michael Jensen began to stay in C.S.'s family's home "[i]n approximately May of 2012" and that Michael Jensen "began living with [C.S.'s] family full time" by "approximately June 2012." *See Complaint ¶ 87* (APP REC at 39.) At that point, Michael Jensen was a twenty-year old emancipated adult. *See* Christopher J., *supra* (noting that Michael Jensen was sixteen years old in November 2007 when he committed the offenses against W.T and J.T.); *see also April 16, 2015 Order in Jane Doe-1, ¶ 10* ("From approximately May 2012 until late August 2012, when C.S. was 12 and [Michael] Jensen was 20, Jensen lived with the Doe-5 family."). (APP REC at 250.)

approximately 2006 to 2009 and had subsequent leadership positions within the Church thereafter." *See Complaint ¶ 19.* (APP REC at 19-20.)[8]

The current complaint goes on to allege that "High Councilor Chris Jensen [and] Relief Society President Jensen … *each operated as supervisory agents* or leaders within the Church …" and that "in their capacities as … high councilor, and Relief Society President, they *were held out by the Church as its agents*…" *See Complaint ¶ 49, emphasis added.* (APP REC at 26-27.) *See also Complaint ¶ 55* ("the Church and its agents" created danger and risk); *id. ¶¶ 113, 121* ("All named Defendant's *[sic]* maintained a special relationship to [C.S.'s] family *via their leadership roles* within the strict hierarchy of the church…" *Emphasis added.*). (APP REC at 29, 45-46.) The complaint repeatedly alleges conduct by Chris Jensen as "High Councilor" and by Sandralee Jensen as "Relief Society President." *Id. ¶¶ 51-54, 58, 60, 61, 64, 71-75, 77, 78, 129.* (APP REC at 27-32, 35-37.)

The current complaint also asserted claims for Civil Conspiracy. The conspiracy claims in the instant action are the same conspiracy claims that were asserted by C.S. and his fellow plaintiffs in Jane Doe-1, including the alternatively plead allegation that Chris and Sandralee Jensen acted in their individual capacities in conspiring with the Church and its agents. S*ee Complaint ¶¶ 127-131.* (APP REC at 46-47.)

All of the Respondents, including the Jensens, moved to dismiss C.S.'s claims as barred by the prior arbitration proceeding. Like the other Respondents, the Jensens argued that C.S.'s claims were barred by the terms of the Arbitration Agreement and by the doctrine of res judicata. (APP REC at 347-361.) After reviewing the parties' briefing on the motions, the Circuit Court

[8] C.S.'s allegations in this regard are not correct. Sandralee Jensen was only the Relief Society President for the Mill Creek Ward (one of several wards in the Martinsburg Stake) and she was released from that calling in the fall of 2007. (APP REC at 354.)

set the matter for hearing on May 16, 2022, desiring "to hear oral arguments on the issue of whether or not the arbitration agreement is ambiguous as drafted in regard to who was bound by it." (APP REC at 1319-20.)

By Order entered on June 6, 2022, the Circuit Court granted "all pending motions to dismiss C.S.'s Complaint" and dismissed his claims with prejudice. Specifically, the Circuit Court concluded that the language of the Arbitration Agreement "is not ambiguous, as it is not reasonably susceptible to different meanings." (APP REC at 1208-1212.)

On June 21, 2022, C.S. filed a motion to alter or amend the Circuit Court's order pursuant to Rule 59(e). The Respondents opposed the motion and the Circuit Court denied the motion by order entered on July 20, 2022, finding that C.S. had not met the standards for relief under Rule 59(e) and that he had not provided the Court with a legally sufficient basis to change its prior ruling. (APP REC at 49-52.) The July 20, 2022 Order also certified the Circuit Court's June 6, 2022 Order as a final order under Rule 54(b).[9]

C.S. then filed his Notice of Appeal as required by Rule 5(b) of the Rules of Appellate Procedure. The Notice of Appeal only referenced the Circuit Court's July 20, 2022 Rule 59(e) Order in response to question 6 ("Date of Entry of Judgment on Appeal") and only attached the July 20, 2022 Order to the Notice (which requires the attachment of "a copy of the lower tribunal's decision or order from which you are appealing").[10] This Court's October 5, 2022 Scheduling

[9] At that point, C.S.'s brother M.S. was still a party plaintiff to the current lawsuit. M.S. subsequently dismissed his claims against all defendants, without prejudice. (*See* Petitioner's Brief at 4, n. 4.)

[10] *See* Campbell v. CSX Transportation, Inc., No. 17-1034, 2019 WL 4257173, at *3 n.8 (W. Va. Sept. 9, 2019) ("To the extent petitioners seek to challenge the October 21, 2016, CSX dismissal order, that order was not attached to the notice of appeal and is, therefore, not properly before this Court."); McGowan v. Timberline Ass'n, Inc., No. 19-0403, 2020 WL 1243271, at *1 n. 1 (W. Va. Mar. 13, 2020) (finding that a petitioner failed to appeal an order because he did not attach that order to the notice of appeal and he did not file a separate notice of appeal regarding that order.).

Order only identifies the July 20, 2022 Order as the order from which C.S. is appealing.[11]

II. SUMMARY OF ARGUMENT

The petitioner has only properly appealed the Circuit Court's July 20, 2022 Order which denied his Rule 59(e) motion. That Order was correctly decided by the Circuit Court because the Petitioner did not meet the standards for relief under Rule 59(e) and merely presented arguments that were or could have been made in his previous response to the Respondents' motions to dismiss.

Even if this Court considers the Circuit Court's June 6, 2022 Order which dismissed the Petitioner's claims, that Order should also be affirmed. The Circuit Court correctly concluded that the Arbitration Agreement executed by the Petitioner and the Church was not reasonably susceptible to different meanings and was not ambiguous. The Agreement to resolve all of C.S.'s claims and controversies that were or could have been asserted in Jane Doe-1 through the arbitration proceeding meant exactly what it plainly said. As such, the Agreement barred C.S. from instituting yet another lawsuit alleging those same claims and controversies after he had lost in the arbitration proceeding.

A party challenging a contract on the basis of unconscionability must establish both substantive and procedural unconscionability before the Agreement can be deemed unenforceable. The Petitioner has failed to meet the requirements to establish either and his claim that the Arbitration Agreement is unconscionable is without merit.

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[11] *See* Limer v. Raleigh County Cmty. Action Ass'n, No. 21-1030, 2023 WL 245340 (W. Va. Jan. 18, 2023), where the Supreme Court's scheduling order identified the order denying relief under Rule 60(b) as the final order from which the petitioner appealed because the petitioner listed the date of entry of judgment as the date on which the circuit court denied relief under Rule 60(b). Id. at *2 n. 5.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case because the dispositive issues in this appeal have already been authoritatively decided in prior opinions of the Supreme Court of Appeals. However, if this Court believes that oral argument is necessary, the Court should schedule argument under Rule 19 because any assignment of error by the Petitioner involves only the application of settled law.

IV. ARGUMENT

A. Standard of Review

"The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus Point 1, Wickland v. Am. Travelers Life Ins. Co., 204 W. Va. 430, 431, 513 S.E.2d 657, 658 (1998). "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995).

B. Petitioner Failed to Satisfy the Standards of Rule 59(e)

As noted above, the only order attached to Petitioner's Notice of Appeal and the only order referenced in this Court's Scheduling Order is the Circuit Court's July 20, 2022 Order which denied the Petitioner's Rule 59(e) motion to alter or amend the Circuit Court's June 7, 2022 Order which dismissed his claims. The July 20, 2022 Order concluded that Petitioner had failed to provide the Court with any legally sufficient reason to alter its prior ruling. That order was correct.

The Supreme Court of Appeals has held that, "[a] motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued." Mey v. Pep Boys-Manny, Moe & Jack, 228 W. Va. 48, 56, 717 S.E.2d 235, 243 (2011). In addition to being wrong, all of C.S.' arguments in support of his motion to alter or amend either were or could have been made in his previous response to the Respondents' motions to dismiss. Petitioner's brief admits that "the contractual validity issue" on which he based his Rule 59(e) motion "had been submitted previously" in response to the motions to dismiss. *See* Petitioner's Brief at 11. For this reason alone, his motion to alter or amend the Court's Order of June 7, 2022 was properly denied.

C. The Arbitration Agreement Was Not Ambiguous

Even if this Court sees fit to review the Circuit Court's June 7, 2022 Order, that order was clearly correct. In resolving the motions to dismiss, the Circuit Court focused on the issue of "whether the Arbitration Agreement is ambiguous as drafted in regard to who was bound by it." (APP REC at 1210.) This was appropriate because the determination of whether ambiguity exists in a contract is a legal question. Further, that determination is reviewed *de novo* at the appellate level. Pilling v. Nationwide Mut. Fire Ins. Co., 201 W. Va. 757, 759, 500 S.E.2d 870, 872 (1997). See also Syllabus Point 1, Berkeley Cnty. Pub. Serv. Dist. v. Vitro Corp. of Am., 152 W. Va. 252, 162 S.E.2d 189 (1968) ("The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.")

In Syllabus Point 6 of State ex rel. Frazier & Oxley, L.C. v. Cummings, 212 W. Va. 275, 569 S.E.2d 796 (2002), the Supreme Court of Appeals held that: "Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can

support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." *See also* Williams v. Precision Coil, Inc., 194 W. Va. 52, 65 n. 23, 459 S.E.2d 329, 342 n. 23 (1995) ("A contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction."). The Supreme Court has also stated that "[t]he term ambiguity is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995), *citations and quotations omitted.*

The Circuit Court's June 7, 2022 Order states:

> The arbitration agreement states that "the Parties mutually consent to the resolution of all [C.S.'s] claims or controversies that were or could have been asserted in Jane Doe-1, et al., v. Corporation of the President of The Church of Jesus Christ of Latter-Day Saints, et al. …." The Court concludes that this language is not ambiguous, as it is not reasonably susceptible to different meanings

(APP REC at 1210.) This conclusion was correct.

In fact, the Petitioner appears to agree with the Circuit Court's conclusion. In his brief, the Petitioner quotes the portion of the Arbitration Agreement that contains this language and states: "This clause is clear and unambiguous." *See* Petitioner's Brief at 7. And indeed, it is.

The dictionary definition of the term "all" is "the whole amount, quantity, or extent of."[12] The "whole" extent of C.S.'s claims that "were or could have been asserted" in Jane Doe-1, includes every claim asserted against the Jensens in the current lawsuit, whether as alleged agents of the Church or as individuals. C.S. posited no alternative meaning of this provision of the Arbitration Agreement to the Circuit Court below nor does he do so in this appeal. As the Circuit

[12] *See* https://www.merriam-webster.com/dictionary/all.

Court's Order observed, "[Petitioner's] counsel admitted and acknowledged on the record that the facts alleged in the current complaint could have been raised in the initial complaint filed by C.S., and the Court recognizes that acknowledgement as an undisputable finding of fact. (APP REC at 1210.) The Circuit Court correctly concluded that the plain language of this provision of the Arbitration Agreement barred C.S.'s claims against all of the Respondents, including the Jensens.

Nor does it matter that the Jensens were not parties to the Arbitration Agreement. While it is true that "arbitration is simply a matter of contract between the parties, and is a way to resolve those disputes (but only those disputes) that the parties have properly agreed to submit to arbitration,"[13] it is equally true that C.S. and the Church properly agreed in their contract to resolve "all" of C.S.'s "claims or controversies that were or could have been asserted in Jane Doe-1" by the arbitration proceeding. Both C.S. and the Church were perfectly capable of agreeing to such a resolution.

Moreover, the reason why the Church would want the arbitration to resolve "all" of C.S.'s potential claims arising from his contact with Michael Jensen makes perfect sense. The Church would have wanted the Arbitration Agreement to end all disputes against all parties because even a claim against the Jensens or others *as individuals* would inevitably impose a burden on the Church by requiring testimony from and about the Church and Church leaders. One need only look to the "everything but the kitchen sink" conspiracy claims that were asserted against the Jensens in Jane Doe-1 to demonstrate this. In discussing these conspiracy claims, for example, the Supreme Court noted that, "[a]lthough a principal cannot conspire with its agent, the plaintiffs assert 'a corporation can act only through its agents or employees'; therefore, when the Jensen

[13] Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C., 242 W. Va. 372, 377, 836 S.E.2d 23, 28 (2019).

parents 'were not acting as Church agents ... they were members of the conspiracy in their own right, and ... could conspire with the Church[,]' and when they were 'acting as agents of the Church, then their acts were on behalf of the Church and [the Church's] participation in the conspiracy.'" Jane Doe-1, 239 W. Va. at 454–55, 801 S.E.2d at 469–70. Why would the Church want these potential claims to survive the arbitration proceeding? The answer, of course, is that it would not.

To the extent that the Jensens are alleged to be agents of the Church, they are undoubtedly in privity with the Church and entitled to all benefits of the Arbitration Agreement.[14] To the extent that the Jensens are alleged to have acted in any individual capacity, they are effectively third-party beneficiaries of the Church's contract with C.S. As the United States Supreme Court has pointed out, traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through third-party beneficiary theories. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902 (2009).

In this regard, Judge Bailey has stated that a "contract does not need to be made only for the benefit of the third-party beneficiary; rather, a party may be a third-party beneficiary to a contract if the contract was made and intended to be for the benefit of a class of persons definitely and clearly shown to come within the terms of the contract and the third-party beneficiary party is a member of that class." Rogers v. Tug Hill Operating, LLC, 598 F. Supp. 3d 404, 427 (N.D.W. Va. 2022). The plain language of the Arbitration Agreement indicates that the Jensens were meant

[14] C.S.'s allegations against the individual defendants (including Chris and Sandralee Jensen) that are based on their alleged roles as representatives of the Church, would also create privity for the purposes of *res judicata*. Baker v. Chemours Co. FC, LLC, 244 W. Va. 553, 855 S.E.2d 344 (2021). Because this Court can affirm the judgment of the lower court when it appears that the judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment, this Court could also conclude that the Petitioner's claims are barred by *res judicata*. *See* Syllabus Point 3, Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E.2d 466 (1965).

to come within the terms of the Agreement. It matters not that they were not parties to the Agreement.[15]

D. The Arbitration Agreement Was Not Unconscionable

Petitioner was represented by counsel in 2019 when, with the advice of that attorney, he made the decision to forego litigation of his claims in the courts and instead, proceed to arbitration. The Arbitration Agreement was the result of arms-length negotiations and was agreed to and signed by both the Petitioner and his counsel. Notwithstanding these uncontested facts, the Petitioner now asserts that the Arbitration Agreement was unconscionable. This argument is easily disposed of.

The burden of proving that a contract term is unconscionable rests with the party attacking the contract. Nationstar Mortg., LLC v. West, 237 W. Va. 84, 785 S.E.2d 634 (2016). The party challenging the contract "must establish *both* substantive *and* procedural unconscionability before the Agreement can be deemed unenforceable." Hampden Coal, LLC v. Varney, 240 W. Va. 284, 295, 810 S.E.2d 286, 297 (2018) *emphasis in original.*

West Virginia law recognizes that "[p]rocedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract." Nationstar, 237 W. Va. at 88, 785 S.E.2d at 638. In this case, the Arbitration Agreement at issue was not a standardized form or an adhesion contract presented to C.S. on a take it or leave it basis. There was no unfair surprise or absence of meaningful choice on the part of C.S. At any point in the negotiation of the Agreement, C.S. could have walked away and filed a lawsuit instead (as he

[15] "Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Bayles v. Evans, 243 W. Va. 31, 40, 842 S.E.2d 235, 244 (2020), *quoting* Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000).

had done before in 2013). Significantly, he was represented by counsel throughout the entire process. C.S. simply cannot establish procedural unconscionability with regard to the Arbitration Agreement and his current arguments in this appeal do not do so.

Nor can C.S. establish that the Arbitration Agreement was substantively unconscionable. The focus of substantive unconscionability is on the nature of the contractual provisions rather than on the circumstances surrounding the contract's formation. "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." Nationstar, 237 W. Va. at 92, 785 S.E.2d at 642.

Once again, there was nothing substantively unconscionable about the Arbitration Agreement. Both C.S. and the Church agreed to give up their rights to a trial by jury. Both agreed to the speedy and efficient resolution of C.S. claims provided by the arbitration process. Both agreed to be bound by the results of the arbitration. This was clearly adequate and mutual consideration by both parties to the contract. *See* Reed v. Darden Restaurants, Inc., 213 F. Supp. 3d 813, 818 (S.D.W. Va. 2016) ("the only consideration required to enforce an arbitration agreement is that both parties are bound by the resolution format."); Toney v. EQT Corp., No. 13-1101, 2014 WL 2681091, at *3 (W. Va. June 13, 2014) ("the circuit court was correct in finding that the mutual commitments to arbitrate alone constitute sufficient consideration to support the contract.").

Petitioner has simply asserted that the Arbitration Agreement was unconscionable without making any reasonable attempt to establish procedural or substantive unconscionability under the standards articulated by West Virginia caselaw, either in the Circuit Court or here. Petitioner's argument that the Agreement was unconscionable fails on its face.

V. CONCLUSION

The Circuit Court's July 20, 2022 Order which denied the Petitioner's Rule 59(e) motion to alter or amend the Circuit Court's June 7, 2022 Order was correct and should be affirmed. To the extent that this Court reviews the Circuit Court's June 7, 2022 Order, it should also be affirmed as it was clearly correct. The dismissal of the Petitioner's complaint against all Respondents was appropriate.

CHRIS JENSEN AND
SANDRALEE JENSEN
Respondents
By Counsel,

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CERTIFICATE OF SERVICE

I, John J. Polak, counsel for Respondents Chris Jensen and Sandralee Jensen, do hereby certify that on the 6th day of February, 2023, I served the "BRIEF ON BEHALF OF THE RESPONDENTS CHRIS JENSEN AND SANDRALEE JENSEN" with the Clerk of Court via the File & ServeXpress e-filing system, which will send notice and copy to all counsel of record.

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