IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ON A NOTICE OF APPEAL
FROM AN ORDER OF THE CIRCUIT COURT OF BERKELEY COUNTY
CIVIL ACTION NO.: CC-02-2021-C-359

C.S.,
PLAINTIFF BELOW, PETITIONER

v. No. 22-ICA-141

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
CHRIS AND SANDRA LEE JENSEN, MATTHEW WHITCOMB,
DON WYRE, ANTHONY NAEGLE, & CHRISTOPHER MICHAEL JENSEN
DEFENDANTS BELOW, RESPONDENTS

SUMMARY RESPONSE TO PETITIONER'S BRIEF BY GUARDIAN AD LITEM

Respectfully submitted,

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STANDARD OF REVIEW AND JURISDICTION

Respondent Christopher Michael Jensen, (referred to as Michael Jensen, in Petitioner's Brief,) acknowledges jurisdiction in this Court.

> In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.

Erps v. Meadows, 239 W. Va. 147, 799 S.E. 2d 578 (2017); citing Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank,* 198 W. Va. 329, 480 S.E. 2d 538 (1996).

STATEMENT OF THE CASE

For clarification, please note that the Petitioner was voluntarily dismissed from the original suit (Appendix Record ("AR") P. 247-258), known as Jane Doe -1 [the 2013 litigation] by his mother, as guardian and next friend, after he testified that Christopher Michael Jensen never abused him. (AR P. 251). Now, eight years later, Petitioner/Plaintiff alleges the same abuse that was alleged in the prior action styled Jane Doe -1. (AR P. 016-048).

After Petitioner/Plaintiff filed his Complaint on November 9, 2021, each of the Respondents/Defendants filed a Motion to Dismiss stating that Petitioner/Plaintiff was bound by the terms of the Arbitration Agreement. The Circuit Court of Berkeley County, West Virginia allowed all parties to brief the issues and set the matter for a hearing on May 16, 2022, wherein the parties would be given time for oral argument "on the issue of whether the Arbitration Agreement was ambiguous as drafted and who is bound by same." (AR P. 1210)

The circuit court first heard arguments from all of the defense attorneys and the Guardian *ad Litem*. Counsel for the Church argued that the arbitration agreement was a contract, in and of itself, and was not controlled by a prior contract. It was negotiated and drafted by Petitioner/Plaintiff's prior lawyer and Counsel for the Church. Negotiations regarding the arbitration agreement involved where it should happen and how it could be done efficiently and more cheaply than litigation as Plaintiff was a party in the 2013 litigation that resulted in a mistrial after 10 weeks of trial and 3300 pages of trial transcripts. (AR P. 1238)

Each of the Defendants, now Respondents, argued that the present claims against them were or could have been asserted in Jane Doe-1, the 2013 litigation, and, based on paragraph four (4) of the Arbitration Agreement, should be dismissed.

Paragraph 4 of the Arbitration Agreement entered into by the Plaintiff states:

> NOW, THEREFORE, for these reasons and in consideration of the mutual promises in the Agreement, the Parties mutually **consent to the resolution by arbitration of all [C.S.'] claims or controversies that were or could have been asserted in the Jane Doe-1,** et. al. v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, et. al., Civil Action No. 13-C-656, Circuit Court of Berkeley County, West Virginia ("Claims"). [Emphasis added.]

(AR P. 278).

In their Motion to Dismiss, Counsel for the Church provided a chart showing the allegations made in the current Complaint "raise the same issues, based on the same evidence, related to the same conduct" as those allegations made in Jane Doe-1 and in arbitration. (AR080, 087-093)

Counsel for the Plaintiff argued that new Defendants were added to the current litigation (AR P. 1258) that were not named in the 2013 litigation and that paragraphs 82-96 were added to the Complaint regarding allegations against these Defendants (AR 1260). The Court then asked Counsel for the Plaintiff if these facts could have been considered in 2013 and Counsel for the Plaintiff admitted that they could have been considered in the earlier litigation. (AR 1260)

The circuit court in its *Order From May 16, 2022 Hearing Granting Defendants' Motions to Dismiss and Denying Motions for Sanctions* entered on June 7, 2022, found it:

> compelling, persuasive and dispositive that all the allegations raised by C.S. in the current complaint could have been raised in prior litigation, i.e., Jane Doe-1, filed in 2013. Although there are some new factual allegations and individual defendants in the newly filed complaint, the allegations and identification of other defendants could have been made in the original litigation. Indeed, Plaintiff'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.

(AR P. 1210) The Court then found:

> that the arbitration agreement, read in its totality, and with plain meaning given the language, is not ambiguous. The Court notes that [Plaintiff] was represented by counsel at all stages of the litigation, including arbitration, and that [Plaintiff] entered into mediation voluntarily. The Court further finds that a final disposition of [Plaintiff's] claims through arbitration was the intent of the parties at the time as set forth in the arbitration agreement which clearly states '[W]hereby the parties recognize and desire the benefits of a speedy, impartial, final and binding dispute resolution procedure."

(AR P. 1210-1211). Having found that the arbitration agreement was not ambiguous, the Court found it was not necessary to rule on the issue of privity. The Court then granted all pending motions to dismiss. (AR P. 1211)

Thereafter, Petitioner/Plaintiff filed *Plaintiff C.S.'s Rule 59 (E) Motion to Alter the Court's Order of June 6, 2022 or, in the Alternative, Request for Certification Under Rule 54(B)* on June 21, 2022 (AR P. 1213-1222) arguing that the circuit court had not addressed the issue of whether a valid contract existed between Plaintiff and the non-Church Defendants. The Arbitration Agreement had not named or referenced these non-Church individuals. (AR P. 1214) Based on the foregoing, Plaintiff argues that the Arbitration Agreement should only apply to the two named parties (i.e., the Plaintiff and the Church) and any claims that could have been raised between them. (AR P. 1216)

The lower court in its *Order Denying in Part and Granting in Part Plaintiff's Rule 59 (e) Motion to Alter the Court's Order of June 7, 2022, or, in the Alternative, Request for Certification Under Rule 54(b)* (AR P. 49-52) denied Plaintiff's Motion to change its ruling, stating that:

> C.S. consented to resolve by arbitration all his claims or controversies that were or could have been asserted in the 2013 case and no other parties were necessary for C.S. to waive those rights. C.S. entered into the arbitration agreement, had the opportunity to present his claims and was unsuccessful in his arguments. As the Court noted at the hearing and in its prior Order, Plaintiff's counsel 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 recognized that acknowledgment

> as an undisputed finding of fact. The parties agreed that arbitration would be a final and binding resolution of all claims or controversies that were or could have been asserted by C.S. in Jane Doe – I [the 2013 litigation]. C.S.' argument that the language does not include individuals is unsupported given the plain, unambiguous language of the agreement amongst the parties. Finally, with respect to the arbitration agreement itself, it was undisputed that C.S. was represented by counsel at all stages of the litigation, including arbitration, that C.S. participated in arbitration voluntarily, and that it fulfilled the intent on the parties to the arbitration agreement.

(AR P. 51)

ARGUMENT IN RESPONSE

In Petitioner's brief, he alleges an assignment of error that can be broken into two parts: 1) that the Circuit Court improperly found that the Arbitration Agreement was unambiguous and should be enforced along its clear terms; and 2) that the Circuit Court improperly found that the Arbitration Agreement included protections for non-signatories where no language from the agreement indicates any intent to benefit any third party. Put another way, the Court found that the plain language of the Arbitration Agreement precluded any additional litigation regarding claims or controversies that could have been brought in the prior litigation in 2013. This preclusion could benefit non-signatories to the Arbitration Agreement.

I. The Circuit Court did not err in finding that the Arbitration Agreement was unambiguous.

The West Virginia Supreme Court:

> adheres to the basic principle that '[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.

HN 7, *New v. GameStop, Inc.*, 232 W. Va. 564, 753 S.E. 2d 62 (2013), citing *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E. 2d 626 (1962), Syl. Pt. 1.

Here, there was a clear intent by both parties to arbitrate their dispute. The Church wanted all C.S.'s claims to be resolved once and for all. C.S. wanted a quick and expeditious proceeding. Petitioner/Plaintiff could have named all of the Non-Church Defendants as parties or in the alternative, indicated that the arbitration was solely for claims that were or could have been brought against the Church in the prior litigation. The Church agreed to provide the current non-Church Defendants, except for Christopher Michael Jensen[1], as witnesses if C.S. would arbitrate with just the Church. (A.R. P. 1275-1276) Plaintiff was willing to arbitrate with just the Church as the Church had deep pockets and would be liable for any viable claim committed by an agent of the Church. C.S. had counsel during all stages of arbitration, including the drafting of said agreement. The Agreement was signed by C.S. and a representative of the Church as well as counsel for both C.S. and the Church. (AR P. 281)

The sole purpose of the Arbitration was to resolve:

> **by arbitration of all [C.S.'] claims or controversies that were or could have been asserted in the Jane Doe-1,** et. al. v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, et. al., Civil Action No. 13-C-656, Circuit Court of Berkeley County, West Virginia ("Claims"). [Emphasis added.]

In reviewing the lower court's findings, Petitioner cannot argue that they are clearly erroneous as counsel for the Petitioner:

> 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 recognize[d] that acknowledgement as an undisputable finding of fact.

(AR P. 1210).

[1] Allegations against Christopher Michael Jensen were heard in the 2013 case and were dismissed after Plaintiff stated he was not sexually abused by Mr. Jensen. (AR P. 251).

In reviewing the lower court's final order, Respondent Christopher Michael Jensen argues that the circuit court did not abuse its discretion in finding that:

> C.S. consented to resolve by arbitration all his claims or controversies that were or could have been asserted in the 2013 case and no other parties were necessary for C.S. to waive those rights. C.S. entered into the arbitration agreement, had the opportunity to present his claims and was unsuccessful in his arguments. As the Court noted at the hearing and in its prior Order, Plaintiff's counsel 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 recognized that acknowledgment as an undisputed finding of fact. The parties agreed that arbitration would be a final and binding resolution of all claims or controversies that were or could have been asserted by C.S. in Jane Doe – 1 [the 2013 litigation].

Order Denying in Part and Granting in Part Plaintiff's Rule 59 (e) Motion to Alter the Court's Order of June 7, 2022, or, in the Alternative, Request for Certification Under Rule 54(b) (AR P. 51)

Based on the foregoing, the Court did not abuse its discretion in denying *Plaintiff C.S.'s Rule 59(e) Motion to Alter the Court's Order of June 6, 2022* finding that Plaintiff did not provide a legally sufficient basis to do so. *Order Denying in Part and Granting in Part Plaintiff's Rule 59 (e) Motion to Alter the Court's Order of June 7, 2022, or, in the Alternative, Request for Certification Under Rule 54(b)* (AR. P. 51)

II. The Circuit Court did not err in finding the Arbitration Agreement included protections for non-signatories based upon the plain language of the Arbitration Agreement negotiated between the parties.

Petitioner/Plaintiff argued in his Motion to Alter under Rule 59 (e) that the circuit court had failed to address arguments made in his previous response on motion to dismiss that there was no valid contractual agreement between Petitioner and the individually named Respondents/Defendants. (*Petitioner's Brief in Support of Appeal* P. 4)

In Footnote 5 of Petitioner's Brief in Support of Appeal, he states that:

> The Arbitration Agreement between C.S. and COP does not specify whether it is being made pursuant to the Federal Arbitration Act, 9 USC §1 et seq., or the West Virginia Revised Uniform Arbitration Act, W. Va. Code §55-10-1 et. seq. However, given that COP and Plaintiff C.S. were diverse parties from different states, federal jurisdiction ... would apply.

(*Petitioner's Brief in Support of Appeal* P. 7)

Petitioner/Plaintiff cites *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E. 2d 550 (2012) for the proposition that arbitration agreements should be treated like any other contract, meaning that there should be an offer and an acceptance supported by consideration. *Id.* at 556 citing Syllabus Point 1, *First Nat. Bank of Gallipolis v. Marrietta Mfg. Co.*, 151 W. Va. 636, 153 S.E. 2d 172 (1967); Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559, 131 S.E. 253 (1926). "The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration, and mutual assent." *Dan Ryan* at 556.

The Arbitration Agreement had competent parties (C.S. and the Church), legal subject matter (all C.S.' claims or controversies that were or could have been asserted in the Jane Doc-1), valuable consideration (The Church would make available as witnesses a list of non-Church Defendants in exchange for this being the final determination of C.S.'s claims. C.S. would in return get a speedy hearing before a lawyer that had not been involved in the previous litigation where C.S.'s father had caused a mistrial), and mutual assent (both sides were represented by counsel and both C.S. and a representative of the Church signed the Agreement along with both attorneys.)

> Both federal and state laws reflect a strong public policy recognizing arbitration as an expeditious and relatively inexpensive forum for dispute resolution...The Federal Arbitration Act, 9 U.S.C.S. §2 is a congressional declaration of a liberal federal policy favoring arbitration agreements...W. Va. Code §55-10-2

> (acknowledging 'a well-established federal policy in favor of arbitral dispute resolution' because arbitration offers in many instances a more efficient and cost-effective alternative to court litigation.')

Parsons v. Halliburton Energy Servs., 237 W. Va. 138, 146, 785 S.E. 2d 844 (2016); Federal Arbitration Act, 9 U.S.C.S. §2, et. seq.; W. Va. Code §55-10-2.

Petitioner argues that as the Non-Church Defendants were not parties to the Arbitration Agreement, they cannot benefit from the Arbitration Agreement. Respondent Christopher Michael Jensen disagrees and asserts that the Non-Church Defendants could have been named parties to the Arbitration Agreement. According to the oral argument held on May 16, 2022, there was some discussion by Plaintiff's previous counsel as whether or not to name them as parties to the arbitration. (AR. P. 1275-1276) A decision, as evidenced by the Arbitration Agreement itself, was made to name the Church only, and have the individuals voluntarily agree to be deposed and testify as witnesses at the out-of-state arbitration in exchange for resolution of all claims C.S. had against them (AR. P. 84). All of the Non-Church Defendants, with the exception of Christopher Michael Jensen, were agents of the Church. The 2013 litigation and this litigation name them as agents of the Church and not as individuals. Christopher Michael Jensen was not an agent of the Church.

In looking at the wording of Paragraph 4 of the Arbitration Agreement:

> NOW, THEREFORE, for these reasons and in consideration of the mutual promises in the Agreement, the Parties mutually consent to the resolution by arbitration **of all [C.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.,** Civil Action No. 13-C-656, Circuit Court of Berkeley County, West Virginia ("Claims"). [Emphasis added.]

(AR P. 278) C.S. agreed to resolve by arbitration all of his claims that were or could have been asserted against the Church, *et. al.*, meaning all of the other Defendants involved in *Jane Doe-1*.

In that capacity, the Non-Church Defendants would be third party intended beneficiaries of the Arbitration Agreement. Petitioner chose to name the Church as the opposing party as the Church had deep pockets and would be able to pay a meaningful award. In return, Petitioner gained a clear benefit as "he saved time, expense, and uncertainty of attempting to compel the arbitration of third-party witnesses in an [out-of-state] arbitration." (AR P. 84) "Nowhere does the [Federal Arbitration Act] grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during pre-hearing discovery." *COMSAT Corp. v. NSF*, 190 F.3d 269 (4th. Cir. 1999).

Petitioner argues that the Non-Church Defendants had to be parties to the Arbitration Agreement in order to benefit from the agreement. The *Restatement 2d of Contract, §302* disagrees. Under the Restatement, which would apply in federal cases, there are two types of beneficiaries: intended and incidental.

> §302 Intended and Incidental Beneficiaries:
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
> (a) The performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or
> (b) The circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement 2d of Contracts §302.

The West Virginia Supreme Court has also addressed the concept of intended and incidental beneficiaries. According to the West Virginia Supreme Court,

> third party beneficiaries under a contract, although not parties to it, may be divided into three classes: (1) Such person is a donee beneficiary if the purpose of the

> promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary, or to confer upon him or her a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary, (2) such person is a creditor beneficiary if no intention to make a gift appears from the terms of the promise, and performance of the promise satisfies an actual or supposed or asserted duty of the promisee to the beneficiary, (3) such person is an incidental beneficiary if the benefits to him or her are merely incidental to the performance of the promise and if he or she is neither a donee beneficiary nor a creditor beneficiary.

HN 6, *Simmons v. Fussell*, 241 W. Va. 565, 827 S.E. 2d 35 (2019), citing *Pettus v. Olga Coal Co.*, 137 W. Va. 492, 497, 72 S.E. 2d 881, 884 (1952), *2 Williston on Contracts, §356.*

Here, the Non-Church Defendants were agents of the Church, except for Christopher Michael Jensen. The Church paid for the agents' defense in the 2013 litigation and are currently paying for their defense in the current 2021 litigation. As such, it would make no sense for the Church to arbitrate with C.S. and then turn around and pay litigation expenses and judgments if C.S. sued their agents and won. It seems clear that all Non-Church Defendants, except for Christopher Michael Jensen, would be deemed creditor beneficiaries where there was no intent to make a gift and performance of the promise satisfies the Church's duty to protect and indemnify its agents. Clearly, the Agreement to resolve "all claims or controversies that were or could have been asserted in Jane Doe -1 [the 2013 litigation]" (AR P. 084) was without limitation as to the Church, and therefore, included its agents.

Christopher Michael Jensen may not have been an intended beneficiary of the Arbitration Agreement but is arguably an incidental beneficiary. The comments for *Restatement of Contracts, §315 Effect of a Promise of Incidental Benefit* states that "An incidental beneficiary is a person who will be benefited by performance of a promise but who is neither a promisee nor an intended beneficiary." The Church wanted to resolve "all claims or controversies that were or could have

been asserted in Jane Doe-1 [the 2013 litigation] and put this behind them once and for all. (AR P. 084). At the time of the Arbitration, Christopher Michael Jensen was already incarcerated. However, Respondent Christopher Michael Jensen should benefit from C.S.' promise to resolve **all** claims or controversies **that were or could have been asserted in Jane Doe -1.** [Emphasis added.]

This is the second time that Petitioner/Plaintiff has filed a civil action seeking recovery for the same injury involving the same non-Church Defendants.

Petitioner/Plaintiff contends that the circuit court "still largely refused to address the legal issues regarding contractual validity of the Arbitration Agreement as applied to the individually named Defendants." (Petitioner's Brief in Support of Appeal p. 10) Respondent Christopher Michael Jensen respectfully disagrees citing the circuit court's ruling in its *Order Denying in Part and Granting in Part Plaintiff's Rule 59(e) Motion to Alter the Court's Order of June 7, 2022, or in the Alternative, Request for Certification under Rule 54(b)* wherein the Court stated:

> C.S.' argument that the language does not include individuals is unsupported given the plain, unambiguous language of the agreement amongst the parties. Finally, with respect to the arbitration agreement itself, it was undisputed that C.S. was represented by counsel at all stages of the litigation, including arbitration, that C.S. participated in arbitration voluntarily, and that it fulfilled the intent of the parties to the arbitration agreement.
>
> C.S. moves the Court to change its ruling without providing a legally sufficient basis to do so. The Court declines C.S.' motion to do so.

Id. at (AR P. 51). Based on this, the circuit court denied Plaintiff's Rule 59(e) Motion to Alter and granted the Rule 54(b) Motion for Certification. *Id.* at (AR P. 51)

Petitioner/Plaintiff has requested this Honorable Court to reverse the decision of the Berkeley County Circuit Court and remand the matter for trial. This Respondent replies that none of the assertions constitute reversible error.

Based on the foregoing, the Intermediate Court of Appeals should find that the Berkeley County Circuit Court did not abuse its discretion in denying Plaintiff's Rule 59(e) Motion to Alter and affirm that the *Order from May 16, 2022 Hearing Granting Defendants' Motions to Dismiss and Denying Motion for Sanctions* stands as the Final Order.

CONCLUSION

Based upon the foregoing recitations of fact and arguments of law, the Respondent Christopher Michael Jensen respectfully requests this Honorable Court to affirm the decision rendered by the Berkeley County Circuit Court determining that the arbitration agreement is not ambiguous. While there are some new factual allegations and individual defendants in the newly filed complaint, Plaintiff's counsel admitted and acknowledged that the facts alleged in the current complaint could have been raised in the initial complaint filed in 2013. Petitioner/Plaintiff has presented no newly discovered evidence. Therefore, the *Order from May 16, 2022 Hearing Granting Defendants' Motions to Dismiss and Denying Motions for Sanctions* should be upheld.

Respectfully submitted,

CHRISTOPHER MICHAEL JENSEN
Defendant Below, Respondent

By Guardian *ad litem*

/s/ Teresa Nicole Saunders-Meske, Esquire – Guardian *ad litem*
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CERTIFICATE OF SERVICE

I, Teresa Nicole Saunders-Meske, Esquire, Guardian ad litem for the Respondent Christopher Michael Jensen, do hereby verify that I served a true copy of the SUMMARY RESPONSE TO PETITIONER'S BRIEF BY GUARDIAN *AD LITEM* on behalf of the Respondent Christopher Michael Jensen upon all counsel via the WV Intermediate Court of Appeals File and ServXpress e-filing system this 3rd day of February, 2023.

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