IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2024 Term

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No. 23-49

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FILED

June 12, 2024

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AMPLER BURGERS OHIO LLC d/b/a BURGER KING, LESLEY MCLAUGHLIN, SHEILA SPAULDING, and TERESA STEPHENS,
Defendants Below,
Petitioners,

v.

KENNA BISHOP,
Plaintiff Below,
Respondent.

Appeal from the Circuit Court of Kanawha County
The Honorable Tera L. Salango, Judge
Case Number: 21-C-820

REVERSED AND REMANDED WITH INSTRUCTIONS

Submitted: February 21, 2024
Filed: June 12, 2024

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CHIEF JUSTICE ARMSTEAD delivered the Opinion of the Court.

JUSTICE BUNN concurs and reserves the right to file a separate opinion.

JUSTICE HUTCHISON dissents and reserves the right to file a separate opinion.

JUSTICE WOOTON dissents and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is de novo." Syllabus Point 1, *West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 796 S.E.2d 574 (2017).

2. "Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract." Syllabus Point 6, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *overruled in part on other grounds by Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012).

3. "Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement." Syllabus Point 9, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *overruled in part on other grounds by Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012).

4. “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.” Syllabus Point 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

5. “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.” Syllabus Point 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).

6. “A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a ‘sliding scale’ in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.” Syllabus Point 20, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *overruled in part on other grounds by Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012).

7. “The right to arbitration, like any other contract right, can be waived. To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right,

or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language. There is no requirement that the party asserting waiver show prejudice or detrimental reliance." Syllabus Point 6, *Parsons v. Halliburton Energy Services, Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016).

Armstead, Chief Justice:

Ampler Burgers Ohio LLC d/b/a Burger King, Lesley McLaughlin ("McLaughlin"), Sheila Spaulding ("Spaulding"), and Teresa Stephens ("Stephens")[1] (collectively, "Petitioners") appeal the order of the Circuit Court of Kanawha County denying their motion to compel arbitration of the claims alleged by Kenna Bishop ("Respondent") in her complaint,[2] all arising from her employment at the Elkview, West Virginia Burger King franchise. In its order denying the motion to compel, the circuit court found five independent reasons why arbitration could not be compelled: (1) Petitioner Ampler Burgers Ohio LLC is not a party to the arbitration agreement; (2) the arbitration agreement is unenforceable because it lacks mutual consideration; (3) the parties' dispute is not subject to the arbitration agreement; (4) the arbitration agreement is procedurally and substantively unconscionable; and, (5) Petitioners waived their right to arbitration.

[1] Robert Falls ("Falls") is a self-represented defendant below. He is not a party to this appeal.

[2] Respondent's complaint alleges ten violations of The West Virginia Human Rights Act. ("WVHRA"). *See* W. Va. Code § 16B-17-1 to 21. The West Virginia Human Rights Act was previously codified in West Virginia Code § 5-11-1 to 21. During the 2024 Regular Session of the Legislature, the West Virginia Human Rights Act was recodified in Chapter 16B. *See* Acts 2024, S.B. 300, eff. Feb. 8, 2024. This recodification has no impact on this matter. The causes of action in the complaint contain allegations of a hostile work environment/sexual harassment, retaliation, and constructive discharge and are detailed below.

After review, we find that the circuit court erred in denying Petitioners' motion to compel arbitration, and we reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 23, 2021, Respondent began working at the Burger King location in Elkview, West Virginia. As a part of her hiring process, Respondent was presented with and signed a "Dispute Resolution and Arbitration Policy." ("Arbitration Agreement" or "Agreement"). The terms of the Arbitration Agreement required "all disputes relating to or arising out of an employee's employment with the Company or the termination of employment [be arbitrated]." Additionally, the Arbitration Agreement further detailed that all "claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under . . . any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations" were also to be arbitrated.

The named parties to the Arbitration Agreement were Respondent and Ampler Burgers LLC, who is not a party to the civil action. In fact, Respondent was not employed by Ampler Burgers LLC but by Petitioner Ampler Burgers Ohio LLC. Ampler Burgers LLC and Ampler Burgers Ohio LLC are affiliated companies who share the same employee handbook and the same Arbitration Agreement. The individual Petitioners are all employees of Ampler Burgers Ohio LLC. By its plain terms, the Arbitration Agreement

applies to "any such claim or dispute against [Ampler Burgers LLC] or any affiliated entities, and each of their employees, officers, directors or agents. . . ."

On September 15, 2021, Respondent filed suit in the Circuit Court of Kanawha County, naming an incorrect party, Ampler Restaurant Group, as a defendant. In that complaint, Respondent alleged that Falls touched her improperly, openly spoke about his sexual activity with young women, and showed pictures of himself engaged in sexual activity with young women to McLaughlin, who, was shift manager. McLaughlin, in turn, informed Respondent that everyone, including employees and management, were aware of Falls' online presence. It was further alleged that Falls' proclivity toward deviant sexual behavior had created a hostile work environment, where other employees openly spoke of their sexual wants and desires, including speculation about the sexual prowess of patrons of the restaurant. Respondent further averred that not only was McLaughlin aware of Falls' activities, but that Spaulding, the restaurant's general manager, and Stephens, the regional manager, were also aware but did nothing to protect Respondent.

From those facts, Respondent alleged ten separate violations of the WVHRA. These include allegations of (1) a hostile work environment/sexual harassment against Ampler Burgers Ohio LLC, Falls, Spaulding, McLaughlin, and Stephens, (2) aiding and abetting a hostile work environment against Spaulding, McLaughlin, and Stephens, (3) retaliation by Ampler Burgers Ohio LLC, Falls, Spaulding, McLaughlin, and Stephens

against Respondent, and (4) constructive discharge of Respondent by Ampler Burgers Ohio LLC, Falls, Spaulding, McLaughlin, and Stephens creating a hostile work environment.

After filing of the complaint, counsel for Petitioners and counsel for Respondent agreed to extend the time to answer the complaint and to answer discovery requests served upon Petitioners with the complaint. In its answer, filed on January 5, 2022, Petitioners identified Ampler Burgers Ohio LLC as the proper party to the action. Petitioners also asserted an affirmative defense in its answer: "[Respondent's] purported claims against [Petitioners] are or may be governed by a mandatory arbitration provision."

For nearly ten months, until November 9, 2022, Petitioners and Respondent proceeded with the civil action. This activity included serving and answering discovery requests, agreeing to a protective order for transcripts generated in a parallel proceeding, agreeing to substitute Ampler Burgers Ohio LLC as a party for Ampler Burgers LLC, participating in a scheduling conference, filing of fact witness disclosures, and exchanging letters regarding alleged deficiencies in discovery. On November 9, 2022, Petitioners filed their Motion to Dismiss or Stay and Compel Arbitration.

Following briefing and a hearing, the circuit court denied the motion, in total, making specific findings of fact and conclusions of law. The circuit court found that none of the Petitioners were signatories to the Arbitration Agreement and that they could not enforce it. Similarly, the circuit court found that there was no mutual consideration for the

Arbitration Agreement because Respondent did not accept employment with the signatory to the agreement, Ampler Burgers LLC, but was instead employed by Ampler Burgers Ohio LLC. Additionally, the circuit court found that because the Arbitration Agreement only applied to employment-related claims against Ampler Burgers LLC and Respondent was employed by Ampler Burgers Ohio LLC, any claims against Ampler Burgers Ohio LLC fell outside the scope of the Arbitration Agreement. Further, the circuit court determined that the Arbitration Agreement was both substantively and procedurally unconscionable, rendering the Arbitration Agreement unenforceable.[3] Finally, on the waiver issue, the circuit court found that Petitioners' "conduct shows that they had knowledge of the Arbitration Agreement, and instead of seeking to compel arbitration months ago elected to waive their rights under the Agreement and actively litigate in this Court." [4]

[3] Specifically, the circuit court found that the Arbitration Agreement was procedurally unconscionable because Respondent did not have "a 'reasonable opportunity to understand' that she was entering an Agreement with Petitioner Ampler Burgers Ohio LLC to litigate claims against it." The circuit court also found the Arbitration Agreement was substantively unconscionable because it required complete confidentiality, did not allow for depositions unless ordered by the arbitrator, and required Respondent to arbitrate "all disputes relating to or arising out of [her] employment" while carving out exceptions allowing Ampler Burgers LLC the ability to seek injunctive relief "for unfair competition and/or the unauthorized disclosure of trade secrets or confidential information."

[4] The circuit court found that Petitioners waived arbitration by:

(1) Obtaining extensions to answer the complaint;
(2) Obtaining extensions to answer discovery served with the complaint;
(3) Demanding a jury trial in their answers, by checking a box on the civil cover sheet;

(continued . . .)

It is from the order denying Petitioners' motion to compel arbitration that Petitioners appeal.

II. STANDARD OF REVIEW

We have held that "[w]hen an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is de novo." Syl. Pt. 1, *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc*., 238 W. Va. 465, 796 S.E.2d 574 (2017). Additionally, decisions of circuit courts regarding arbitration agreements are immediately appealable under the collateral order doctrine. *See* Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013). This is because arbitration offers "a more efficient and cost-effective alternative to court litigation." W. Va. Code § 55-10-2. *Accord Parsons v. Halliburton Energy Servs., Inc*, 237 W. Va. 138, 146, 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

(4) Alleging arbitration as an affirmative defense in their answers;
(5) Answering multiple discovery requests;
(6) Serving multiple discovery requests;
(7) Submitting an agreed order substituting Ampler Burgers Ohio LLC as the correct corporate entity;
(8) Submitting an Agreed Protective Order;
(9) Participating in at least one Scheduling Conference; and,
(10) Exchanging communications regarding discovery issues.

resolution."). Keeping the standard of review in mind, we move to the assignments of error raised in this appeal.

III. ANALYSIS

Arbitration is a contractual process to which parties may turn to resolve their disputes. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes - but only those disputes - that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). By its terms, the Arbitration Agreement at issue falls under the provisions of the Federal Arbitration Act. In such cases:

> Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.

Syl. Pt. 6, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *overruled in part on other grounds by Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012).

An agreement to arbitrate, however, like other contractual agreements, is subject to our rules of contract interpretation. "Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be

applied to invalidate an arbitration agreement." Syl. Pt. 9, *Id.* Thus, we are compelled to apply the plain language of the arbitration provision at hand. "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." Syl. Pt. 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). "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, *Id*.

The first four issues raised in the petition for appeal hinge on whether the Arbitration Agreement may be enforced by Ampler Burgers Ohio LLC. Thus, we begin our discussion with that issue.

A. Enforceability of the Arbitration Provision

The first issue raised in this appeal is whether the Arbitration Agreement applies to Petitioners. The circuit court found, and Respondent argues, that the Arbitration Agreement is unenforceable because it only applies to Ampler Burgers LLC, the signatory to the agreement. However: "[w]ell-established common law principles dictate that in an appropriate case a non[-]signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000) (footnote omitted). Here, there is no question Respondent signed the Arbitration Agreement. In an attempt to avoid its

provisions, Respondent argues that she was an employee of the non-signatory, affiliated entity, Ampler Burgers Ohio LLC, and because that entity did not sign the Arbitration Agreement, it cannot be enforced as to Respondent.

However, by the Agreement's plain language it is applicable to "any affiliated entities, and each of their employees, officers, directors or agents[.]" *Black's Law Dictionary* defines affiliate as "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." *Black's Law Dictionary* (11th ed. 2019). It is undisputed that Ampler Burgers Ohio LLC is an affiliated entity of the signatory to the agreement, Ampler Burgers LLC. Further, Petitioners McLaughlin, Spaulding, and Stephens were all employees of Ampler Burgers Ohio LLC. There is also no dispute that Respondent contracted for employment at a Burger King restaurant owned by Ampler Burgers Ohio LLC. The employee handbook given to Respondent when she began work at Burger King is shared by Ampler Burgers LLC and Ampler Burgers Ohio LLC. Indeed, even though Ampler Burgers LLC is the party to the agreement, Respondent was never employed by that entity. "[T]he primary goal of a court construing a contract is to ascertain and give effect to the parties' intent." *Antero Res. Corp. v. Directional One Servs. Inc. USA*, 246 W. Va. 301, 311, 873 S.E.2d 832, 842 (2022). Thus, it is clear that Respondent's actual intent was to enter into a contract with Ampler Burgers Ohio LLC to work at Burger King. *See* Syl. Pt. 1, *Cotiga*. Reading the plain language of the Arbitration Agreement, it clearly applies to all affiliated entities of Ampler Burgers LLC. Therefore, Ampler Burger Ohio LLC can, by resorting to the

explicit language of the Arbitration Agreement, can enforcerce such Agreement as it relates to Respondent's claims.

B. The Arbitration Agreement Is Supported By Consideration

The next issue raised by Petitioners is whether the Arbitration Agreement is supported by consideration. The circuit court found, and Respondent argues, that the Arbitration Agreement lacks consideration because Respondent entered a contract with Ampler Burgers LLC, rather than Ampler Burgers Ohio LLC. Petitioners counter that the Arbitration Agreement is supported by sufficient consideration. We agree with Petitioners.

Respondent contends that because her employment was with Ampler Burgers Ohio LLC, she received no consideration from Ampler Burgers Ohio LLC to form a contract. However, we have already determined that Ampler Burgers Ohio LLC is bound by the Arbitration Agreement because Petitioners are either affiliated entities of Ampler Burgers LLC or employees of that affiliated entity. Under the plain language of the Arbitration Agreement, there are mutual promises to arbitrate: "I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration." We have already held that Ampler Burgers Ohio LLC may enforce the Arbitration Agreement against Respondent because Ampler Burgers Ohio LLC is an affiliated entity of Ampler Burgers

LLC. Therefore, as discussed above, there were mutual obligations necessary for an enforceable contract.

We have said that "a mutual agreement to arbitrate is sufficient consideration to support an arbitration agreement." *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 291, 810 S.E.2d 286, 293 (2018). *See also Toney v. EQT Corp.*, No. 13-1101, 2014 WL 2681091 at *3 (W. Va. June 13, 2014) (memorandum decision) ("[T]he mutual commitments to arbitrate alone constitute sufficient consideration to support the contract."); *Citizens Telecomms. Co. of W. Va. v. Sheridan*, 239 W. Va. 67, 75, 799 S.E.2d 144, 152 (2017) ("[T]he mutual commitment to arbitrate is sufficient consideration for the modification" of a contract that added an arbitration provision); *Evans v. TRG Customer Solutions, Inc*., No. 2:14-00663, 2014 WL 12659420 at *4 (S.D. W. Va. July 29, 2014), ("Under West Virginia law, a mutual agreement between an employer and employee to arbitrate their claims establishes adequate consideration."). Accordingly, the agreement to arbitrate is supported by mutual consideration.

C. Disputes Covered by the Arbitration Agreement

The circuit court found, and Respondent now argues, that because the only company signatory to the Arbitration Agreement was Ampler Burgers LLC, its language applying to "any and all claims and disputes that are related in any way to my employment

or the termination of my employment with Ampler Burgers," means only Respondent's disputes with Ampler Burgers LLC must be arbitrated.[5] However, above, we resolved the question of whether Ampler Burgers Ohio LLC could enforce the Arbitration Agreement. Because we concluded it can, all of the claims raised in the complaint fall within the plain language of the Agreement as they are "related . . . to [Respondent's] employment" with Ampler Burgers Ohio LLC. "In determining whether the language of an agreement to arbitrate covers a particular controversy, the federal policy favoring arbitration of disputes requires that a court construe liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration." *State ex rel. City Holding Co. v. Kaufman*, 216 W.Va. 594, 598, 609 S.E.2d 855, 859 (2004); *Salem International University, LLC v. Bates*, 238 W. Va. 229, 235, 793 S.E.2d 879, 885 (2016); *SWN Production Company, LLC v. Long*, 240 W. Va. 1, 7, 807 S.E.2d 249, 255 (2017); *Hampden Coal*, 240 W. Va. at 298, 810 S.E.2d at 300; *C.S. v. Grow*, No. 22-ICA-141, 2023 WL 7410618, at *5 (W. Va. Ct. App. Nov. 8, 2023) (memorandum decision).

[5] We note that amendments made to the Federal Arbitration Act have ended the use of arbitration in claims such as those in this matter. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 banned the use of arbitration in sexual harassment claims. Pub. L. 117-90, § 2(a), Mar. 3, 2022, 136 Stat. 26., adding Chapter 4 to the Federal Arbitration Act and amending 9 U.S.C. § 3, eff. Mar. 3, 2022. No party argues this amendment is applicable to this case and we did not consider it because the date of the Arbitration Agreement and both the start and end date of Respondent's employment were before the effective date of the amendments.

The claims pleaded are plainly covered by the language of the Arbitration Agreement that states, "all disputes relating to or arising out of an employee's employment with the Company or the termination of employment [shall be arbitrated]." The disputes subject to the Arbitration Agreement include "claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under . . . any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations." Factually, Respondent alleged that Falls engaged in wholly inappropriate workplace behavior and that McLaughlin, Spaulding, Stephens, and Ampler Burgers Ohio LLC were all aware of Falls' actions but turned a blind eye. Thus, the dispute was within the purview of the Arbitration Agreement.[6]

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[6] Specifically, the Arbitration Agreement:

> [C]overs all disputes relating to or arising out of an employee's employment with the Company or the termination of employment. The only disputes or claims not covered by this policy are those listed in the 'Exclusions and Restrictions' section[.]"

The Exclusions and Restrictions section provides certain issues may not be submitted to arbitration:

> Any non-waivable statutory claims, which may include wage claims within the jurisdiction of a local or state labor commission or administrative agency[,] charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration. This means that you

(continued . . .)

D. Unconscionability

Petitioners' next assignment of error alleges that the circuit court erred in finding the Arbitration Agreement to be a contract of adhesion that is both procedurally and substantively unconscionable. "A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it." Syl. Pt. 18, in part, *Brown*. Although the circuit court found the Arbitration Agreement to be a contract of adhesion, even if we accept such conclusion, our inquiry does not end there. "[F]inding that there is an adhesion contract is the beginning point for analysis, not the end

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> may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you decide to use arbitration to resolve them. However, if such an agency completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action. Arbitration also does not apply to claims by the Company for injunctive relief and/or other equitable relief for unfair competition and/or the use of unauthorized disclosure of trade secrets or confidential information, relief for which may be sought in court.
>
> . . . .
>
> *Sexual Harassment Complaints*: Due to the sensitive nature of claims of sexual harassment, you are allowed to follow the steps in the Company's policy prohibiting sexual harassment. *If you are not satisfied with the Company's response to a claim for sexual harassment, then you must use final and binding arbitration to resolve the claim or dispute*.

(emphasis to last sentence added).

of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 557, 567 S.E.2d 265, 273 (2002). To do so, we have said that "[p]rocedural and substantive unconscionability often occur together, and the line between the two concepts is often blurred. For instance, overwhelming bargaining strength against an inexperienced party (procedural unconscionability) may result in an adhesive form contract with terms that are commercially unreasonable (substantive unconscionability)." *Brown*, 228 W. Va. at 681, 724 S.E.2d at 285. Indeed, under West Virginia law, we have held that:

> A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a "sliding scale" in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.

Syl. Pt. 20, *Brown*.

Thus, we first examine procedural unconscionability, which focuses upon the actions of the parties in the formation of the Arbitration Agreement:

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

> formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

Syl. Pt. 17, *Id.* "Procedural unconscionability may be found in contracts of adhesion when there is an imbalance in bargaining power, absence of meaningful choice, unfair surprise, or sharp or deceptive practices[.]" *Brown*, 228 W. Va. at 682, 724 S.E.2d at 286.

At the time the Arbitration Agreement was signed, Bishop was an eighteen-year-old adult. There is no evidence that she could not read or understand the Agreement. The Arbitration Agreement terms were never hidden from her and she signed it electronically on the day she began her employment. This Court has recognized that "[a] court can assume that a party to a contract has read and assented to its terms, and absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted." *New v. GameStop, Inc.*, 232 W. Va. 564, 578, 753 S.E.2d 62, 76 (2013) (internal quotation omitted). Respondent had a reasonable opportunity to understand the terms of the Arbitration Agreement, thus we do not believe it to be procedurally unconscionable.

We next look at substantive unconscionability which delves into the terms of the contract itself:

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

> reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

Syl. Pt. 19, *Id.* The circuit court found that the Arbitration Agreement was substantively unconscionable because its terms were "exceptionally one-sided with an overly harsh effect," which, (1) required complete confidentiality; (2) imposed extreme limitations on discovery; (3) prohibited taking depositions unless ordered by the arbitrator; (4) limited written discovery to a "reasonable request for copies of relevant documents from each other"; and, (5) required Ms. Bishop to arbitrate all disputes yet "carved out 'claims for the Company for injunctive relief and/or other equitable relief for unfair competition and/or the unauthorized disclosure of trade secrets or confidential information, relief for which may be sought in court.'" We disagree with the circuit court's findings.

Although the Arbitration Agreement required complete confidentiality and contained discovery limitations, these constraints apply mutually to all parties.[7]

[7] As for confidentiality, the Arbitration Agreement provides that, "[a]ll statements and information made or revealed during arbitration are confidential, and *neither you nor the Company may reveal any such statements or information*, except on a 'need to know' basis or as permitted or required by law." (emphasis added).

Discovery protocols in the Arbitration Agreement provide:

> If a dispute is submitted to arbitration, *either you or the Company may make a reasonable request for copies of relevant documents from each other, and both parties shall provide each other with a list of the witnesses they intend to*

(continued . . .)

"Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability." *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 137, 717 S.E.2d 909, 921 (2011) (footnote omitted). Because these requirements apply equally to all parties, the agreement reflects, at a minimum, a "modicum of bilaterality." "Any limits will apply equally to both parties." *Cottonwood Fin., Ltd. v. Estes*, 339 Wis.2d 472, 485, 810 N.W.2d 852, 859 (Wis. Ct. App. 2012). There are mutual limitations on confidentiality and discovery which are constraints upon all parties, not just Respondent. Thus, these provisions are not one-sided in any sense of the word.

Additionally, the circuit court's order finds that because Petitioners have carve-outs for "claims by the Company for injunctive relief and/or other equitable relief for unfair competition and/or the unauthorized disclosure of trade secrets or confidential information," the Arbitration Agreement is "exceptionally one-sided." We disagree, We examined a similar arbitration provision in *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372 (2013). In that case, the arbitration agreement excluded certain claims by Ocwen from arbitration. The excluded claims revolved around Ocwen's ability to accelerate payments, to protect their rights under a security agreement,

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> *call to testify* at the arbitration at least ten days before the arbitration, unless otherwise provided by the arbitrator. *No depositions or other discovery shall be taken unless ordered by the arbitrator*. Disputes submitted for resolution under this policy may be amended as provided by the AAA rules.

(emphasis added).

and to require payment in full in certain situations. *See id.*, 232 W. Va. 363-4, 752 S.E.2d 394-5. We held that "the exclusions from arbitration reserved by Ocwen grants it the ability to utilize the court system to protect its security interest in the Currys' home." *Id.*, 232 W. Va. 365, 752 S.E.2d 396.

Similarly, the right of Petitioners to certain carve-outs allows Petitioners to seek emergency relief from a court to protect trade secrets and unfair competition. Injunctive relief is not something an arbitrator can grant. Allowing Petitioners to seek relief in court in such circumstances does not "create[ ] a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to" Petitioners. Syl. Pt. 10, in part, *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012).

E. Waiver of Arbitration

The final issue raised in this appeal is whether Petitioners' participation in the litigation process constituted a waiver of the Arbitration Agreement. Specifically, as noted above, the circuit court found waiver because Petitioners had: (1) obtained extensions to answer the complaint; (2) obtained extensions to answer discovery served with the complaint; (3) demanded a jury trial in their answers, by checking a box on the civil cover sheet; (4) alleged arbitration as an affirmative defense in their answers; (5) answered multiple discovery requests; (6) served multiple discovery requests; (7) submitted an agreed order substituting Ampler Burgers Ohio LLC as the correct corporate entity; (8)

submitted an Agreed Protective Order; (9) participated in at least one Scheduling Conference; and, (10) exchanged communications regarding discovery issues.

We have held that engagement in litigation activities *can* waive an otherwise valid arbitration agreement. *See Parsons*. In *Parsons*, the question of whether arbitration was waived rested upon an analysis of active participation in the litigation, stemming from "volunteering to produce class-wide discovery and by repeatedly seeking extensions of time to file a responsive pleading." *Id.*, 237 W. Va. at 144, 785 S.E.2d at 850. We discussed how a waiver occurs in *Parsons*, concluding:

> Waiver of a contract right may be made by an express statement or agreement, or it may be implied from the conduct of the party who is alleged to have waived a right. "Waiver may be established by express conduct or impliedly, through inconsistent actions." *Ara*, 182 W. Va. at 269, 387 S.E.2d at 323. "Of course[,] a waiver may be express or it may be inferred from actions or conduct, but all the attendant facts, taken together, must amount to an intentional relinquishment of a known right, in order that a waiver may exist." *Blue v. Hazel–Atlas Glass Co.*, 106 W. Va. 642, 650, 147 S.E. 22, 25–26 (1929).

Id. As a result of that analysis, we found that the right to arbitrate had not been waived in that case by participation in litigation and we clarified that:

> The right to arbitration, like any other contract right, can be waived. To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right, or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language. There is no requirement that the party asserting waiver show prejudice or detrimental reliance.

Syl. Pt. 6, *Id.*

When assessing waiver, we are mindful that there is a strong public policy favoring arbitration agreements and that the party asserting waiver carries a heavy burden. One legal treatise has explained that:

> [I]n view of the strong public policy favoring arbitration agreements, the courts are required to resolve any doubt concerning waiver in favor of arbitration. Close questions whether a waiver of the obligation to arbitrate has occurred are to be resolved in favor of arbitration. Moreover, there is a strong presumption against the waiver of contractual arbitration rights. The burden of persuasion lies with the party claiming that the right to demand arbitration has been waived. The burden on one seeking to prove a waiver is a heavy one.

21 Williston on Contracts § 57:16 (4th ed. 2023) (internal footnotes omitted).

Thus, the question in this matter turns on whether Respondent met her heavy burden of showing that Petitioners acted inconsistently with their right to arbitrate. We find that she did not. *See J & S Const. Co., Inc. v. Travelers Indem. Co.*, 520 F.2d 809, 809 (1975) (defendant did not waive its right to invoke arbitration after filing an answer, demanding a jury trial, answering interrogatories, participating in depositions, and waiting more than one year before demanding arbitration.).

The United States Court of Appeals for the Tenth Circuit has posited several factors to consider if litigation has waived arbitration:

> In determining whether a party to an arbitration agreement, usually a defendant, has waived its arbitration right, federal courts typically have looked to whether the party has actually participated in the lawsuit or has taken other action inconsistent with his right; whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit by the time an intention to arbitrate was communicated by the defendant to the plaintiff; whether there has been a long delay in seeking a stay or whether the enforcement of arbitration was brought up when trial was near at hand.
>
> Other relevant factors are whether the defendants have invoked the jurisdiction of the court by filing a counterclaim without asking for a stay of the proceedings [and] whether important intervening steps had taken place[.]

Reid Burton Const., Inc. v. Carpenters Dist. Council of S. Colorado, 614 F.2d 698, 702 (10th Cir. 1980) (internal citations omitted).[8]

Applying these factors to the facts of this case, we conclude that Respondent failed to show that Petitioners waived the right to arbitrate this matter. First, the ten-month period between the time the complaint and the motion to compel arbitration were filed was not sufficient to establish a waiver under the totality of circumstances in this case, especially since Petitioners' answer specifically raised arbitration as an affirmative defense. Indeed, after the filing of the complaint, the parties spent two months ensuring

[8] We note that under West Virginia law, prejudice is not a factor we consider in this analysis. *See* Syl. Pt. 6, *Parsons*. Likewise, after *Reid Burton* was decided, the United States Supreme Court clarified that prejudice is not a factor in determining if a waiver has occurred under the Federal Arbitration Act. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 419 (2022).

the proper party, Ampler Burgers Ohio LLC, was named in the civil action. During that time, extensions to answer the complaint and the discovery served with the complaint were obtained by Petitioners.

Second, the litigation process had barely begun when the motion to compel was filed. No party had asked the circuit court to make a ruling on any issue. Petitioners did not seek any affirmative relief from the court until they filed their motion to compel arbitration. Indeed, although Petitioners had responded to and served discovery requests and exchanged communications regarding discovery issues, the case was still in its infancy when the motion to compel arbitration was filed. Third, although a scheduling conference had been held, the matter had not progressed to the point that it was near trial.

Fourth, Petitioners did not file a counterclaim and they took no other intervening steps, nor did they engage in a lengthy motions practice, prior to invoking their right to arbitration.[9] As we have previously stated, "[t]he delay [in filing a motion to compel arbitration] alone is meaningless; it is the circumstances surrounding the

[9] One issue that the circuit court points to in support of waiver is that Petitioners "demanded a jury trial." The circuit court found that the act of checking a box on the civil case information sheet was a jury demand. However, Petitioners neither filed a formal demand for a jury trial nor included such demand in their answer. *See* W. Va. R. C. P. 38(b). ("Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.").

defendant's acts and language that determine whether the defendant implicitly intended to waive the right to arbitrate." *Parsons*, 237 W. Va. at 149, 785 S.E.2d at 855.[10] Simply put, the actions taken by Petitioners were insufficient to constitute a waiver of Petitioners' right to enforce the Arbitration Agreement.

We therefore conclude that Petitioners did not waive their right to arbitration by engaging in limited litigation activities prior to the filing of the motion to compel.

IV. CONCLUSION

Accordingly, the circuit court's order denying the motion to compel arbitration is reversed and this matter is remanded for further proceedings consistent with this opinion.

Reversed and remanded with Instructions.

[10] In other cases, actions that do not constitute waiver of the right to arbitration include defending litigation seeking to enforce an arbitration award. *See Cabot Oil & Gas Corporation v. Beaver Coal Company, Limited*, Nos. 16-0904 and 16-0905, 2017 WL 5192490, at *7 (W. Va. Nov. 9, 2017) (memorandum decision). Further, the act of filing a debt collection action and then later responding to a counterclaim filed in that action four and a half years later with a motion to compel arbitration does not waive arbitration. *See Citibank, N.A. v. Perry*, 238 W. Va. 662, 666, 797 S.E.2d 803, 807 (2016).