IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. WILLIAMS WPC – 1, LLC, and LEE DAWSON

Petitioners,

v.

THE HONORABLE JEFFREY CRAMER AND COTY LANTZ,

Respondents.

Case No. 21-0423
(Marshall County, Docket No. 21-C-6)

PETITION FOR A WRIT OF PROHIBITION

Arising from an Order Denying Defendants' Motion to Dismiss for Lack of Jurisdiction and Compel Arbitration Entered on May 4, 2021 in Civil Action No. 21-C-6 in the Circuit Court of Marshall County, West Virginia

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I. QUESTIONS PRESENTED

1. May an employee demonstrate his assent to the terms of an arbitration agreement through his conduct, rather than signature, when: (a) the employer provides the employee with a copy of the arbitration agreement by sending it directly to the employee's work email address, home mailing address, and posting it on the employer's intranet site; (b) the employer provides the employee advance notice that the arbitration agreement will be effective multiple months in the future based upon the employee's continued employment; and (c) the employee continues to be employed after the effective date, thereby communicating mutual assent?

2. Is a mutual agreement to arbitrate claims whereby the employer is also making concessions, i.e. no longer able to pursue claims in court, sufficient consideration to support an arbitration agreement, such that there is a quid pro quo?

3. Can an employer meet its *prima facie* burden of establishing the existence of an agreement to arbitrate claims by: (a) producing evidence that the employer provided the agreement to the employee; (b) the agreement by its express terms advises the employee that continued employment is the sole manner in which the employee can manifest his assent to the agreement; (c) the employee remained employed with the employer following the effective date of the agreement; and, (c) the agreement is signed by the employer?

4. May an employer rely upon the conduct of an employee after it communicated well in advance (through three separate reliable methods) that the employee's continued employment would bind the employee to arbitration regardless of whether the employee recalls reviewing or receiving an arbitration agreement?

Petitioners suggest that all of the Questions Presented be answered in the affirmative.

II. STATEMENT OF THE CASE

Mr. Lantz filed a Complaint on February 9, 2021 alleging retaliatory discharge. [Appendix Record ("AR") at pp. 5-9]. Following service of the complaint, Williams, through counsel, provided a copy of the Arbitration Agreement to Mr. Lantz's counsel on February 26, 2021 that was provided to Mr. Lantz by email and on Williams' intranet site on or about October 2, 2019 and by regular mail to his home address on or about October 17, 2019. [AR at pp. 34-35; 37-38; 47; 51; 55-56; 77-78; 90]. Mr. Lantz does not deny receiving the documents via email, mail or through access to the intranet. Rather, he claims he does not recall reviewing or receiving them. [104-105].

Defendants filed a Motion to Dismiss For Lack of Jurisdiction and Compel Arbitration. [AR at pp. 10-91]. Plaintiff filed a response objecting to Defendants' motion and a Proposed Order. [AR at pp. 92-107]. Defendants filed a Motion for Leave to File a Reply Brief following the Court's initial denial of Defendants' motion. [AR at pp. 108-124]. Defendants also filed their Objections to Plaintiff's Proposed Order. [AR at pp. 125-228]. The Circuit Court granted Defendants' Motion for Leave to File a Reply Brief. [AR at pp. 229-237]. The Circuit Court, upon reconsideration of Defendants' fully briefed arguments, denied the Defendants' Motion to Dismiss and Compel Arbitration on April 27, 2021 and directed Plaintiff's counsel to prepare a Proposed Order reflecting the Circuit Court's consideration of the additional materials. Defendants timely objected to the Proposed Order prepared by Plaintiff's counsel, renewing and preserving for appeal the previously filed objections. The Circuit Court entered the Order as prepared by Plaintiff's counsel on May 4, 2021. [AR at pp. 1-4].

This Petition for a Writ of Prohibition follows from the Circuit Court's May 4, 2021 Order denying Defendants' Motion to Dismiss for Lack of Jurisdiction and Compel Arbitration.

A. Summary of the Facts

1. Williams provided Mr. Lantz with three months' advance notice of the Arbitration Agreement through multiple channels.

Mr. Lantz was an at-will employee at Williams' Marshall County, West Virginia facility from 2012 until January 6, 2021. [AR at p. 5]. Williams announced the implementation of the Arbitration Program for all employees in October 2019. [AR at pp. 31-32; 37-38]. As part of the announcement, Williams provided a summary of the Arbitration Program and the Arbitration Agreement to employees, including Mr. Lantz, by email and on Williams' intranet site on or about October 2, 2019 and by regular mail to his home address on or about October 17, 2019. [AR at pp. 34-35; 37-38; 47; 51; 55-56; 77-78; 90. [AR at pp. 34-35; 37-38; 47; 51; 55-56; 77-78; 90]. Williams provided all employees with approximately three months to review, negotiate, question, or reject the terms of the Arbitration Agreement. Williams encouraged employees to reach out to Williams' Senior Vice-President and General Counsel via email with any questions about the Arbitration Program or Arbitration Agreement. [AR at pp. 31-32; 37-38; 80-81].

After Williams' notification through the three different channels to each of its employees, on January 1, 2020, Williams and all Williams employees became subject to the terms of the Arbitration Agreement. [AR at p. 24]. From January 1, 2020 forward, Williams understood that all employees continuing to work for it had agreed to mutually arbitrate any covered claims consistent with the notice provided and the employees' continued employment. [AR at p. 24].

2. Williams made concessions as part of the Arbitration Agreement, and Mr. Lantz benefitted from the continued employment with Williams.

In exchange for the mutual agreement to arbitrate claims, Williams agreed to bear the costs of arbitration beyond the initial filing fee. [AR at pp. 24; 27]. Williams also agreed to conduct arbitration in the county in which an employee last worked instead of a location more convenient Williams. [AR at p. 27]. Williams' Senior Vice-President and General Counsel signed the

Arbitration Agreement on behalf of the company. [AR at p. 29]. As a result, Williams was bound by the Arbitration Agreement's terms and could not pursue claims in Court regardless of whether it found it more advantageous to do so. [AR at pp. 24-25].

Williams further offered Mr. Lantz, who was an at-will employee, continued employment with Williams as additional consideration to support the agreement. [AR at pp. 24; 32]. Mr. Lantz benefitted from this continued employment between January 1, 2020 and January 6, 2021. [AR at pp. 5; 401]

3. Mr. Lantz's conduct is dispositive – not his recollection.

Williams did not require its employees to sign the Arbitration Agreement to assent to its terms. [AR at p. 24]. Rather, in lieu of a signature line for employees, the Arbitration Agreement makes clear that employees' assent to the terms of the Arbitration Agreement was through their continued employment after the effective date of the Arbitration Agreement. The Arbitration Agreement contained the following key provision:

> This Agreement becomes effective on January 1, 2020 (the "Effective Date") and survives and continues to apply following termination of employment. This Agreement is a mandatory condition of your employment with the Company. **You are agreeing, affirmatively and unmistakably, to be bound by the terms and conditions in this Agreement by continuing employment with the Company on or after the Effective Date of January 1, 2020.**

[AR at p. 24].

Mr. Lantz testified by affidavit that he did not assent to the terms of the Arbitration Agreement because he did not recall receiving an email about the Arbitration Agreement or reviewing the Arbitration Agreement. [AR at pp. 104-105]. However, just as employees frequently do not recall signing agreements or the terms of them, Mr. Lantz remained employed between January 1, 2020, the effective date of the Arbitration Agreement and January 6, 2021, his

employment termination date, which manifested his assent to the Arbitration Agreement consistent with its terms. [AR at p. 24].

B. Timeline of Critical Facts

2012	Mr. Lantz begins working for Williams WPC - 1, LLC. [AR at pp. 5; 104].
October 1, 2019	Williams announces the Arbitration Program by providing existing employees with a copy of the Arbitration Agreement and a cover letter summarizing the terms of the Arbitration Program with an invitation for employees to reach out directly to Williams' Senior Vice-President and General Counsel at a dedicated email address with any questions. [AR at pp. 24-29; 31-32].
October 2, 2019	Williams posts the Arbitration Agreement and October 1, 2019 cover letter to the main page of Williams' intranet site. [AR at pp. 34-35; 49].
October 2, 2019	Williams posts the Arbitration Agreement and October 1, 2019 cover letter to the "Policies and Compliance" section of Williams' intranet site. [AR at pp. 34-35; 72].
October 2, 2019	Williams sends an email from "Williams News" to Mr. Lantz's assigned work email address, Coty.Lantz@williams.com, with the subject line "Mandatory Arbitration Program Effective Jan. 1, 2020" with the Arbitration Agreement and October 1, 2019 cover letter attached in a document entitled "Arbitration Agreement – Current Employees." [AR at pp. 34-35; 37-45; 47; 51; 53].
October 17, 2019	Williams sends the Arbitration Agreement and October 1, 2019 cover letter for mailing to Mr. Lantz's home address for delivery via the United States Postal Service. [AR at pp. 77-78; 80-87; 89-90].
January 1, 2020	The Williams Arbitration Program becomes effective for all current Williams employees and Williams. [AR at p. 24; 32].
January 6, 2021	Williams terminates Mr. Lantz's employment. [AR at p. 6].

III. SUMMARY OF THE ARGUMENT

Mr. Lantz agreed to arbitrate his claim against Williams. The Circuit's Court ruling is clearly erroneous as a matter of law for the following reasons:

(1) Mr. Lantz's conduct – continuing his employment with Williams following the effective date of the Arbitration Agreement – is sufficient evidence of his assent to the terms of the Arbitration Agreement;

(2) The Arbitration Agreement is supported by adequate consideration in the forms of (a) mutuality, (b) Williams' concessions in the Arbitration Agreement and (c) continued at-will employment;

(3) Williams met its *prima facie* burden of establishing the existence of an agreement through the production of affidavits showing that Williams provided the Arbitration Agreement, signed on behalf of Williams, to Mr. Lantz and notified Mr. Lantz of the date it became effective along with the sole manner by which Mr. Lantz could accept the agreement -- through his continued employment, and Mr. Lantz remained employed with Williams following the effective date of the agreement; and,

(4) Mr. Lantz's assertion that he cannot recall receipt or review of the agreement is a red-herring that has no bearing on the analysis of the validity or enforceability of the Arbitration Agreement.

Williams provided Mr. Lantz with multiple copies of the Arbitration Agreement for his review three months prior to the effective date of the program. [AR at pp. 24-29; 32-32; 34-35; 43-45; 47; 49; 51; 53; 55-56; 72; 77-78; 80-87; 89-90]. The key facts demonstrate that Mr. Lantz had an opportunity to respond, review, object, reject, or negotiate the terms of the Arbitration Agreement prior to the effective date, and that he continued his employment following the effective date of the Agreement. [AR at pp. 31-32; 34-35; 37-38; 47; 49; 72; 80-87; 90; 5]. The

Arbitration Agreement, signed by Williams and accepted by Mr. Lantz, clearly and unmistakably binds both parties to arbitrate covered claims when an employee evidences his assent to the terms of the agreement by remaining employed with Williams. [AR at pp. 24-29].

IV. STATEMENT REGARDING ORAL ARGUMENT

Petitioners respectfully request oral argument pursuant to Rules 16(d)(6), 18(a), and 20 of the *Revised West Virginia Rules of Appellate Procedure*. This case is appropriate for Rule 20 argument because the petition involves an issue of first impression as no decision of this Court has addressed the validity and enforceability of an arbitration agreement wherein continued employment is the sole method for an employee to evidence assent to the terms of the arbitration agreement. Moreover, this case involves the unresolved question of whether a party can meet its *prima facie* burden of establishing the existence of an agreement between the parties by producing evidence that the employer provided the agreement to the employee, afforded the employee sufficient notice of the effective date of the agreement, and the agreement is signed by the employer.

V. ARGUMENT

A. Williams Meets Multiple Factors of the Legal Standard for issuance of a Writ of Prohibition.

The review of circuit court orders adjudicating arbitration motions falls squarely within this Court's original jurisdiction. This Court affirmed that a "petition for a writ of prohibition is an appropriate method to obtain review by this Court of a circuit court's decision to deny or compel arbitration." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, 492, 729 S.E.2d 808, 814 (2012). In determining whether a writ is a proper remedy, this Court has established five (5) relevant factors:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be

> damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Id.

In evaluating the above factors to determine whether a writ is proper, the Court need not find that all factors are present. *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 21, 483 S.E.2d 12, 21 (1996). Rather, it may use a combination of the factors to grant the writ. *Id.* This Court has noted that "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.* As explained more fully below, the issuance of a writ of prohibition in this matter is proper because Petitioners satisfy the requirements established for the grant of the requested relief.

B. Williams has no other adequate means, such as a direct appeal, to obtain relief and Williams will be damaged and prejudiced in a way that is not correctable on appeal if the case is allowed to proceed.

This Court has held that a writ of prohibition is appropriate where "both parties would be compelled to go through an expensive, complex trial and appeal from final judgment" and where "there is high likelihood of reverse on appeal." *State ex rel. Wiseman v. Henning*, 212 W.Va. 128, 132, 569 S.E2d 204, 208 (2002) (per curium). In these situations, "[t]he remedy of appeal is usually deemed inadequate...and prohibition is therefore allowed." *Id.*

If this matter were to proceed in the Circuit Court, the parties would be required to engage in the expensive and time-consuming process of discovery under the West Virginia Rules of Civil Procedure as opposed to the discovery rules and procedures under the American Arbitration Association, which is the procedure set forth in the Arbitration Agreement. [AR at p. 26]. This exercise would likely require the participation and attendance of out-of-state witnesses and travel

for both parties. Such a process would also be in contravention of the Federal Arbitration Act that encourages arbitration when there is a valid, enforceable agreement as is the case here. The aim of arbitration is to "arrive at a just determination of the matters in dispute" in a speedy and inexpensive way. *Boomer Coal & Coke Co. v. Ostenton*, 101 W.Va. 683, 693, 133 S.E. 381, 385 (1926). Forcing the parties to proceed in West Virginia state court would result in exactly the protracted litigation the Arbitration Agreement seeks to avoid.

The parties further risk going through both the trial and appellate process, only to be required to proceed with arbitration if this Court ultimately determines that a valid arbitration agreement existed between the parties and further orders that this matter should proceed to arbitration. The prejudice Williams would suffer if it is forced to appeal the orders following a trial would be exceptionally worse than that suffered by a defendant in a conventional lawsuit.

In sum, in the absence of review through this Petition, Williams is certain to incur damages and prejudice that cannot be corrected through a conventional appeal.

C. The Circuit Court's decision to deny arbitration despite the existence of a signed Arbitration Agreement that Mr. Lantz received well in advance of its effective date and to which he demonstrated his assent by continuing his at-will employment after the effective date raises a new and important issue of law for employers and employees throughout West Virginia.

The Circuit Court ruled that the Mr. Lantz's conduct did not evidence his mutual assent to the terms of the Arbitration Agreement. [AR at p. 3, ¶ 3-4]. This Court has not answered the question of whether the act of continuing employment is sufficient evidence of assent to the terms of an arbitration agreement when continuation of employment (i.e., not quitting) is the only manner of acceptance identified within the terms of an arbitration agreement provided to an employee with a sufficient notice period.

D. The Circuit Court's Order is clearly erroneous as a matter of law.

1. A party can meet its *prima facie* burden of establishing the existence of an arbitration agreement without both parties having signed it.

The Circuit Court erred by imposing a requirement on a party to produce an arbitration agreement signed by both parties as the sole manner by which a party can meet its *prima facie* burden. [AR at p. 3, ¶ 2]. The Circuit Court specifically ruled that as follows:

> West Virginia contract law requires mutual assent to form a valid contract. [*New v. Gamestop, Inc.*, 232 W.Va. 564, 572, 753 S.E.2d 62, 69]. A party meets its burden of establishing prima facie evidence of an arbitration agreement by producing a copy of a "written and signed agreement to arbitrate." *State ex rel. Troy Group, Inc. v. Sims*, 2020 W.Va. Lexis 814, 852 S.E.2d 270, 278 (November 20, 2008)."

[AR at p. 3]. In doing so, the Circuit Court relies upon this Court's ruling in *State ex rel. Troy Group, Inc. v. Sims*. 852 S.E.2d 270, 2020 W.Va. LEXIS 814 (2020). [AR at p. 3, ¶ 2]. Such reliance in misplaced because *State ex rel. Troy Group, Inc. v. Sims* does not hold that a party must produce a signed arbitration agreement to meet its *prima facie* burden. Rather, it recognizes that the production of a signed arbitration agreement is ***one way*** in which parties can meet their *prima facie* burden. *Id.* at 276, 13.

State ex rel. Troy Group, Inc. v. Sims involved a wrongful termination claim in which the plaintiff challenged the authenticity of her signature on the arbitration agreement in an effort to invalidate the agreement. *Id.* at 273, 4. This Court held that the employer's production of a signed arbitration agreement – regardless of whether the signature was forged or authentic – was sufficient to make a *prima facie* showing that an agreement existed between the employee and employer. *Id.* at 273, 13. Thus, the existence of a signature, even one that the employee denies is her own, is simply a method and not the exclusive method for establishing the relatively light burden of a *prima facie* case.

This Court relied on its memorandum decision in *Employee Resource Group, LLC v. Collins* to reach this conclusion. No. 18-0007, 2019 W.Va. LEXIS 262, 2019 WL 2338500, at *2 (W.Va. June 3, 2019). In *Collins*, this Court applied Kentucky law to determine whether the plaintiff's digital signature sufficiently evidenced her assent to the terms of the agreement. *Id.* at 276, 13-14. This Court acknowledged that a party could meet its *prima facie* burden by producing a digitally signed arbitration agreement. *Id.* at 276, 12-13 (citing *MHC Kenworth-Knoxville/Nashville v. M&H Trucking, LLC*, 392 S.W3d 903, 906, 2013 Ky. LEXIS 12, 7 (Ky. 2013)).

This Court did not hold that the only way to establish *prima facie* evidence of the existence of agreement between the parties is the production of a signed arbitration agreement. Rather, this Court acknowledged that "[t]he burden of establishing *prima facie* evidence of an agreement to arbitrate is a light one." *State ex rel. Troy Group, Inc. v. Sims*, 852 S.E.2d 270, 277, 2020 W.Va. LEXIS 814, 16 (2020). To meet its *prima facie* burden, a party is not required to establish that an agreement is enforceable, "merely that one existed." *Id.* (citing *Chang v. United Healthcare*, No. 19-CV-3529 (RA), 2020 U.S. Dist. LEXIS 40457, 2020 WL 1140701, at *3 (S.D.N.Y. Mar. 9, 2020) (quoting *Begonja v. Vornado Realty Tr.*, 159 F. Supp. 3d 402, 409 (S.D.N.Y. 2016)).

Williams met this burden before the Circuit Court. Williams established that it provided Mr. Lantz with notice of the Arbitration Program terms and Arbitration Agreement approximately three months in advance of the effective date of the Arbitration Agreement. [AR at pp. 24-29; 32-32; 34-35; 43-45; 47; 49; 51; 53; 55-56; 72; 77-78; 80-87; 89-90]. The Arbitration Agreement required Mr. Lantz to demonstrate his assent to its terms solely by his continued employment after the effective date of the Arbitration Agreement. [AR at p. 24].

As consideration for his acceptance of the terms of the Arbitration Agreement (signed on behalf of Williams), Williams offered Mr. Lantz the mutual agreement to arbitrate, the payment of fees and costs in excess of the capped $300 filing fee, arbitration at a location convenient for Mr. Lantz, and continued employment. [AR at pp. 24; 27]. Mr. Lantz demonstrated his acceptance of the terms of the Arbitration Agreement by continuing his employment with Williams for more than one (1) year following the effective date of the Arbitration Agreement (January 1, 2020 to January 6, 2021). [AR at pp. 5; 24].

2. Continued employment is evidence of mutual assent to the terms of an arbitration agreement and the manner of acceptance identified within an arbitration agreement is central to the resolving questions regarding assent.

The Circuit Court's ruling effectively departs from this Court's precedent regarding how a party can demonstrate assent to the terms of an agreement and adds a signature requirement to the Arbitration Agreement. [AR at p. 3, ¶ 2-3]. As explained more fully below, this Court held in *Bailey v. Sewell Coal Co.* that mutual assent may be evidenced by word, act, or conduct. 190 W.Va. 138, 140-141, 437 S.E.2d 448, 450-451 (1993). Here, the court committed clear legal error by finding that Mr. Lantz's conduct did not demonstrate his assent to the terms of the Arbitration Agreement. [AR at p. 3, ¶ 3-4].

Rules of contract interpretation govern arbitration agreement validity questions. *New v. Gamestop, Inc.*, 232 W.Va. 564, 571, 753 S.E.2d 62, 70 (2013). Competent parties, legal subject matter, consideration, and mutual assent are the fundamental requirements for contract formation in West Virginia. *Id.* at fn.3, citing *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E.2d. 253 (1926). There must be an offer by one party and acceptance by another for mutual assent to exist. *Id.* at 572, 70.

This Court has previously considered the manner of acceptance identified within the terms of an arbitration agreement in the analysis of contract formation questions and evaluated the concept of conduct as assent. *See New v. Gamestop, Inc.*, 232 W.Va. 564, 571, 753 S.E.2d 62, 70 (2013); *Emple. Res. Grp., LLC v. Collins*, No. 18-0007, 2019 W.Va. LEXIS 262, 2019 WL 2338500, at *2 (W.Va. June 3, 2019).

In *New v. Gamestop, Inc.* 232 W.Va. 564, 753 S.E.2d 62 (2013). Gamestop, Inc. presented New with an arbitration agreement when she was hired. *Id.* at 570, 68. The arbitration agreement specified two methods by which New could demonstrate her assent to the terms of the agreement: (1) her digital signature and (2) her continued employment. *Id.* at 575, 73. This Court held that the unambiguous language of the arbitration provisions, New's signature as required by the terms of the agreement, and her continued employment demonstrated that the parties mutually assented to arbitrate all covered claims. *Id.* at 573, 72.

The holding in *New* recognizes that the manner of acceptance as specified within the terms of an arbitration agreement is significant in the analysis of whether continued employment is evidence of the intent to be bound by the agreement. *Id.* This Court has not addressed whether continued employment alone, when specified as the sole manner of acceptance within the terms of an arbitration agreement, is evidence of mutual assent. But there is no reason that it should not be as evidenced by the Court of Appeals for the Eleventh Circuit's decision. It, in a case factually similar to the one at hand, resolved this question in favor of the employer, finding continued employment to be sufficient as the means of demonstrating assent to the arbitration agreement. *Caley v. Gulfstream Aero. Corp.* 428 F.3d 1359, 1364, 2005 U.S.App. LEXIS 23518, 1 (11th Cir. 2005).

In *Caley*, Gulfstream announced the implementation of an arbitration program in July 2002. *Id.* at 1364, 2. Gulfstream, through an outside company, mailed to all of the workers employed at its Savannah facility by first-class mail a copy of the Dispute Resolution Program ("DRP"), an explanatory cover letter, and a question-and-answer form. *Id.* Gulfstream placed the DRP and accompanying documents on the company intranet accessible to the employees. *Id.* Gulfstream also emailed the DRP information to approximately 1,000 employees. *Id.* Gulfstream also posted notices relating to the DRP's implementation, but not the DRP itself, on bulletin boards throughout the Savannah, Georgia facility. *Id.*

The cover letter sent with the communications about the DRP further advised employees that the DRP was effective as of August 1, 2002 and that the policy "will be a *condition of continued employment*." *Id.* at 1364, 3. The agreement noted that continued employment evidenced the employees' acceptance of the agreement and that a signature was not required. *Id.* at 1365, 3.

The plaintiffs in *Caley* challenged the enforceability of the arbitration agreement because it was not signed by the parties. *Id.* at 1368, 13. The arbitration agreement at issue in *Caley*, like the Arbitration Agreement here, contained a specific provision notifying employees that their continued employment would evidence their assent to the terms of the agreement. *Id.* at 1366, 7; [AR at p. 24]. The Court in *Caley* concluded that the plaintiffs' continued employment "after receipt of the [Dispute Resolution Program] and accompanying clear notice" constituted mutual assent to the terms of the arbitration program. *Id.* at 1376, 37.

In this case, Williams provided notice to Mr. Lantz regarding the effective date of the program through email, posts on the intranet site, and mailing a cover letter summary and the Arbitration Agreement to his home address. [AR at pp. 24-29; 32-32; 34-35; 43-45; 47; 49; 51;

53; 55-56; 72; 77-78; 80-87; 89-90]. The key difference between *Caley* and the case at bar is that the Eleventh Circuit found a two week notice period to be sufficient notice to employees, whereas Williams provided a three month notice period. *Id.*

The Circuit Court's Order is also clearly erroneous as a matter of law because it imposes a signature requirement upon the parties. [AR at p. 3]. Neither a written signature nor a written acknowledgement is a requirement under the laws governing arbitration agreements. The Federal Arbitration Act and the West Virginia Revised Uniform Arbitration Act only require that the arbitration agreement be in writing. W.Va. Code § 55-10-8(a) and 9 U.S.C. § 2. The Court further instructed in a recent case that "the phrase 'agreement contained in a record' means that, in some manner, the initial arbitration agreement must be in writing and must be agreed to by the parties. *Golden Eagle Res. II, L.L.C. v. Willow Run Energy, LLC,* 242 W.Va. 372, 377,836 S.E.2d 23, 29 (2019). There is no signature requirement imposed by law or statute.

The Arbitration Agreement is clear and unambiguous regarding the sole manner of an employee's acceptance of the agreement – continued employment by the employee after the effective date of the Arbitration Agreement. [AR at p. 24]. In other words, not quitting after being told about and given the Arbitration Agreement is assent.

The issuance of a Writ of Prohibition in this matter to address this issue is consistent with this Court's prior precedent and established contract formation principles, and requiring a written signature by the employee amounts to imposing new legislative requirements that do not exist under federal or West Virginia law.

3. A mutual agreement to arbitrate covered claims is sufficient consideration for an arbitration agreement.

The Circuit Court's ruling conflicts with this Court's established precedent regarding the consideration required for arbitration agreements. [AR at pp. 3-4, ¶ 5]. The mutual agreement to

arbitrate claims is sufficient consideration to support an arbitration agreement, as explained more fully below.

This Court, in *Hampden Coal, LLC. v. Varney*, addressed the issue of consideration in the arbitration agreement context. 240 W.Va. 284, 290, 810 S.E.2d 286, 293 (2018). The plaintiff in *Hampden Coal LLC* argued, as Mr. Lantz does here, that his continued employment in exchange for signing the arbitration agreement was insufficient consideration because "promising to perform what a party is already bound to do is insufficient consideration." *Id.*

This Court rejected that argument and held that "a mutual agreement to arbitrate is sufficient consideration to support an arbitration agreement." *Id. See also Toney v. EQT Corp.*, No. 13-1011, 2014 W.Va. 757, 2014 WL 2681091, at *10 (W.Va. June 13, 2014) (memorandum decision) (holding that the "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) (relying upon *Toney* and ruling that "the mutual commitment to arbitrate is sufficient consideration for the modification" of contract that added arbitration provision); *Evans v. TRG Customer Solutions, Inc.*, No. 2:14-00663, 2014 U.S. Dist. LEXIS 199262, 2014 WL 12659420, at *10 (S.D. W.Va. July 29, 2014) ("[u]nder West Virginia law, a mutual agreement between an employer and employee to arbitrate their claims establishes adequate consideration").

The Circuit Court relies upon the analysis regarding non-compete agreements as contained in *Environmental Prods. Co. v. Duncan* to support its ruling that the Arbitration Agreement is not supported by adequate consideration. 68 W.Va. 349, 285 S.E.2d 889 (1981; [AR at pp. 3-4, ¶ 5]. *Environmental Prods. Co. v. Duncan* expressly holds that "[i]f a covenant not to compete is contracted after employment has commenced without restriction, there must be new consideration

to support it." *Id.* at 351, 890. It does not address the consideration required to support an arbitration agreement. The Circuit Court's application of *Environmental Prods. Co. v. Duncan* to the facts of the instant case is a clear error of law.

Arbitration agreements are presumed to be valid, enforceable, and irrevocable, absent grounds to invalidate the agreement. 9 U.S.C. § 2. *See also* W.Va. Code § 55-10-2 ("[t]he United States has a well-established federal policy in favor of arbitral dispute resolution"). Conversely, non-compete agreements are disfavored under the law as restraints on trade. *Pemco Corp. v. Rose*, 163 W.Va. 420, 431, 257 S.E.2d 885, 891 (1979).

There is well-established federal policy in favor of arbitral dispute resolution, as identified by both the Federal Arbitration Act, 9 U.S.C. § 1, et seq. and the decisions of the Supreme Court of the United States. W.Va. Code § 55-10-2(2). The West Virginia Legislature, in enacting the West Virginia Revised Uniform Arbitration Act, noted that

> Arbitration already provides participants with many of the same procedural rights and safeguards as traditional litigation, and ensuring that those rights and safeguards are guaranteed to participants will ensure that arbitration remains a fair and viable alternative to litigation and guarantee that no party to an arbitration agreement or provision.

WVa Code § 55-10-2(3).

The goal of arbitration is to "arrive to a just determination in matters of dispute" in a speedy and inexpensive way. *Boomer v. Coal & Coke Co. v. Osenton*, 101 W.Va. 683, 693, 133 S.E. 381, 385 (1926). The parties have control over the selection of the arbitrators and the location of the arbitration hearings. *Id.* Speed, efficiency, and the just resolution of disputes by a neutral, knowledgeable arbitrator are the foundations of the Arbitration Agreement at issue here. [AR at pp. 24-29; 31-32].

Williams offered Mr. Lantz more than the mutual agreement to arbitrate claims as consideration in support of the Arbitration Agreement. [AR at pp. 24; 27]. Williams agreed to

bear the costs of arbitration beyond the initial filing fee and to conduct arbitration in the county in which an employee last worked instead of in a location more convenient Williams. [AR at p. 27]. Williams further offered continued employment with Williams as additional consideration to support the agreement. [AR at p. 24]. The Arbitration Agreement is supported by sufficient consideration. This Court should issue a Writ of Prohibition to correct the Circuit Court's clearly erroneous ruling.

4. The inability to recall receipt or review of an arbitration agreement provided through means reasonably likely to reach an employee is not a valid ground upon which to invalidate an otherwise enforceable, valid agreement.

Any contention regarding Mr. Lantz's denial of receipt or review of the Arbitration Agreement is a red herring. An arbitration agreement is presumed to be valid, enforceable, and irrevocable, absent grounds to invalidate the agreement. 9 U.S.C. § 2; W.Va. Code § 55-10-2. The Circuit Court abandoned the presumption of the validity and enforceability of arbitration agreements by giving weight to Mr. Lantz's testimony that he did not receive or review the agreement.

The issue here is whether Williams provided notice and an opportunity to review to Mr. Lantz, not whether Mr. Lantz can recall reading his work email, checking the mail at his home, or staying informed about his employer's workplace policies. [AR at p. 104-105]. The "ostrich defense" advanced by Mr. Lantz and considered by the Circuit Court should not allow Mr. Lantz to evade his responsibilities under the Arbitration Agreement.

Williams has affirmatively established that Williams provided the Arbitration Agreement directly to Mr. Lantz through multiple channels for his review and consideration three months prior to the effective date. [AR at pp. 24-29; 32-32; 34-35; 43-45; 47; 49; 51; 53; 55-56; 72; 77-78; 80-87; 89-90]. This Court would set a dangerous precedent if it were to allow Mr. Lantz to

escape the terms of an agreement that he was subject to by virtue of his conduct through a simple denial that he cannot recall receiving or reviewing multiple, direct communications from his employer.

VI. CONCLUSION

Williams respectfully prays for the issuance of a Writ of Prohibition barring the Circuit Court from enforcing its Order Denying Defendants' Motion to Dismiss and Compel Arbitration. Williams further asks that this Court direct the Circuit Court to refer this matter to an arbitrator and dismiss the Complaint.

PETITIONERS
By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
WILLIAMS WPC – 1, LLC, and
LEE DAWSON

Petitioners,

v.

THE HONORABLE JEFFREY CRAMER
AND COTY LANTZ,

Respondents.

Case No. _____
(Marshall County, Docket No. 21-C-6)

VERIFICATION

I, Jaime S. Tuite, counsel for Petitioners, being duly sworn, depose and say that I have reviewed the foregoing Petition for Writ of Prohibition and believe the factual information contained therein to be true and accurate to the best of my information, knowledge and belief.

Jaime S. Tuite

Jaime S. Tuite

Taken, subscribed and sworn to before me this 20th day of May, 2021

My commission expires: 2/16/2024

Teena M. Leydig

Notary Public

Commonwealth of Pennsylvania - Notary Seal
Teena M. Leydig, Notary Public
Allegheny County
My commission expires February 16, 2024
Commission number 1267376
Member, Pennsylvania Association of Notaries

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. WILLIAMS WPC – 1, LLC, and LEE DAWSON *Petitioners,* v. THE HONORABLE JEFFREY CRAMER AND COTY LANTZ, *Respondents.*	Case No. _____ (Marshall County, Docket No. 21-C-6)

CERTIFICATE OF SERVICE

I, Jaime S. Tuite, counsel for Petitioners, hereby certify that service of the foregoing PETITION FOR A WRIT OF PROHIBITION and the accompanying APPENDIX RECORD was made upon all parties, or their counsel of record, by United States mail, postage pre-paid to the following on this 20th day of May, 2021.

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The Honorable Jeffrey Cramer
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