IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-49

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AMPLER BURGERS OHIO LLC, d/b/a BURGER KING, LESLIE McLAUGHLIN, SHEILA SPAULDING, AND TERESA STEPHENS,

Defendants-Petitioners,

v.

KENNA BISHOP,

Plaintiff-Respondent.

RESPONDENT'S BRIEF

Counsel for Respondent

Rodney A. Smith (WVSB # 9750)
M. Alex Urban (WVSB # 13480)
Rod Smith Law PLLC
108½ Capitol Street, Suite 300
Charleston, West Virginia 25301
rod@lawwv.com
aurban@lawwv.com

Counsel for Petitioners

Gregory W. Guevara, *Pro Hac Vice*
Tyler J. Moorhead, *Pro Hac Vice*
BOSE McKINNEY & EVANS, LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5000; (317) 684-5173 (Fax)
gguevara@boselaw.com
tmoorhead@boselaw.com

Larry J. Rector (WVSB # 6418)
Amy M. Smith (WVSB # 6454)
STEPTOE & JOHNSON
400 White Oaks Boulevard
Bridgeport, West Virginia 26330
(304) 933-8000 – Main
(304) 933-8151 – Direct
larry.rector@steptoe-johnson.com
amy.smith@steptoe-johnson.com

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I. INTRODUCTION

This case is about the importance of recognizing the formal distinctions between two separate entities that elected to operate as separate enterprises – for better or worse. Petitioner ***Ampler Burgers Ohio, LLC*** ("Ampler Burgers Ohio") chose to have an employee, Ms. Kenna Bishop, execute an arbitration agreement used by an affiliated company, ***Ampler Burgers, LLC***. That arbitration agreement makes no reference to Ampler Burgers Ohio and is executed by Ampler Burgers, LLC and *not* Ampler Burgers Ohio. As could be expected in such circumstances, the arbitration agreement makes clear that it applies only to claims arising from employment with Ampler Burgers, LLC. Now, when Ampler Burgers Ohio is faced with claims that a known sexual harasser sexually harassed Ms. Bishop, it seeks to enforce the arbitration agreement entered by Ampler Burgers, LLC. Ampler Burgers Ohio and Ampler Burgers, LLC chose to operate as separate entities – and as a non-signatory to the arbitration agreement, Ampler Burgers Ohio has no rights under it to compel the arbitration of Ms. Bishop's claims.

This case is also about whether a sophisticated entity can sit on a claimed contractual right, act contrary to that claimed right for nearly a year, and then seek to enforce that right when it becomes strategically advantageous to do so. Ampler Burgers Ohio played an active role in the underlying litigation for more than 300 days and then, after receiving a large volume of confidential documents in response to its written discovery requests, sought to enforce the arbitration agreement executed by Ampler Burgers, LLC. Under such circumstances, even if Ampler Burgers Ohio had any right to arbitrate as a non-signatory, it waived that right.

II. COUNTERSTATEMENT OF THE CASE

This case arises from sexual harassment and retaliation suffered by the Respondent, Kenna Bishop, during her employment with ***Ampler Burgers Ohio, LLC*** ("Ampler Burgers Ohio"). On

March 23, 2021, Respondent received and signed a "Dispute Resolution and Arbitration Policy" (the "Agreement" or "Arbitration Agreement"). (Agreement, Appx. at 73-76). The Agreement expressly defines the disputes subject to the Agreement as follows: "[A]ll disputes relating to or arising out of an employee's employment with the Company or the termination of employment." (*Id.* at 74). The Agreement defines the term "Company" as meaning "***Ampler Burgers LLC***." (*Id.*). Petitioner Ampler Burgers Ohio is not even mentioned in the Agreement. Although the parties do not dispute that Ampler Burgers Ohio was Ms. Bishop's employer, the Agreement identifies Ampler Burgers, LLC as the counterparty and is executed by a representative of Ampler Burgers, LLC. (*Id.* at 76). The parties agree that Ms. Bishop's employer, Ampler Burgers Ohio, is ***not*** a signatory to the Agreement.[1] (Pet. Brief, p. 1).

The Agreement contains a host of other material terms that purportedly bind Respondent and the Company (Ampler Burgers, LLC) but not Petitioners. For example, the Agreement requires Ms. Bishop and the Company to maintain the confidentiality of any arbitration proceedings and to surrender their rights to a jury trial. (Agreement, Appx. at 73-76). The Agreement identifies the Company (Ampler Burgers, LLC) no fewer than 29 times. (*Id.* at 73-76). Ms. Bishop's employer, Ampler Burgers, Ohio, is not mentioned a single time. (*Id.*).

As Petitioners articulate, the Agreement does provide that Ms. Bishop must arbitrate certain claims against entities "affiliated" with Ampler Burgers, LLC. However, nothing in the Agreement expands the claims that must be arbitrated against "affiliates" to include claims other than those

[1] Important to the Court's analysis of the issues, Petitioners have confused the identity of the entities in their Brief by identifying Petitioner Ampler Burgers Ohio as "Ampler Burgers" even though that term is used interchangeably in the Arbitration Agreement with the terms "the Company" and "Ampler Burgers, LLC." In their Memorandum in Support of their Motion to Compel Arbitration, Petitioners similarly confused the identity of the entities by defining Ampler Burgers Ohio as "Ampler Burgers" and then stating that "Ampler Burgers agreed to be bound by the [Agreement]" without informing the circuit court that Ampler Burgers Ohio was not a signatory to the Agreement. (Memo. in Support of Motion, Appx. at 4-5).

"relating to or arising from employment with the Company" (meaning Ampler Burgers LLC). (*See id.*).

On September 15, 2021, Ms. Bishop filed her Complaint naming as a defendant Ampler Restaurant Group instead of Ampler Burgers Ohio.[2] (Complaint, Appx. 1-23). She served the Complaint on October 12, 2021. (Service doc, Appx. at 200). After numerous extensions to answer the Complaint and Discovery, Petitioners (including Ampler Burgers Ohio) filed their Answer on January 5, 2022. (Answer, Appx. at 24-57). In Petitioner's Civil Cover Sheet, they checked the "jury demand" box. (Case Info. Sheet, Appx. at 59). Additionally, in their Answer, Petitioners (1) identified Ampler Burgers Ohio as the proper corporate defendant and (2) represented that Ampler Burgers Ohio had employed Ms. Bishop. (Answer, Appx. at 24-25). As an Affirmative Defense, Petitioners stated, "Bishop's purported claims against Defendants are or may be governed by a mandatory arbitration provision." (Answer, Appx. at 55).

From the time Petitioners filed their Answer, Petitioner Ampler Burgers Ohio actively participated in written discovery, both answering Ms. Bishop's discovery requests and propounding discovery requests of its own as Ampler Burgers Ohio. The following list details the extensive litigation steps taken by the parties for nearly a year before Ampler Burgers Ohio first attempted to compel arbitration:

- February 9, 2022- Ampler Burgers Ohio answered discovery identifying itself as Ampler Burgers Ohio and producing the Arbitration Agreement. (Discovery Responses, Appx. at 141-78).
- February 22, 2022 – Ampler Burgers Ohio served discovery on Ms. Bishop seeking several broad categories of documents and information. (Discovery Requests, Appx. at 212-38).

[2] Ms. Bishop also named other individual employees, including managers and the harasser. The defendant-managers are also Petitioners in this matter.

- March 30, 2022 – Ms. Bishop's counsel sought to confirm that Ampler Burgers Ohio is the correct entity, which Ampler Burgers Ohio's counsel confirmed. (Email, Appx. at 277-78).
- April 8, 2022 – Ms. Bishop served discovery on Petitioners Stephens and McLaughlin. (Certs. of Serv., Docket Nos.10 and 12).[3]
- April 8, 2022 – Ms. Bishop served her answers and responses to Ampler Burgers Ohio's first set of discovery. (Discovery Responses, Appx. at 238-76).
- April 12, 2022 – Ms. Bishop's counsel sent a proposed *Agreed Order for Substitution of Party* substituting Defendant Ampler Burgers Ohio, LLC as the appropriate corporate party. (Proposed Order, Appx. at 279).
- April 19, 2022 –Ampler Burgers Ohio sent Ms. Bishop proposed revisions to the *Agreed Order for Substitution of Party.* The nine (9) substantive proposed edits identify the appropriate corporate defendant as Ampler Burgers Ohio, LLC. (Proposed Rev., Appx. at 280-81).
- June 1, 2022 – The Court entered an *Agreed Protective Order* identifying Ampler Burgers Ohio, LLC as a party. Ampler Burgers Ohio was aware that Petitioners Spaulding and Stephens were named as defendants in *Yoxtheimer v. RMS Inc.,* C.A. No. 20-C-41 (Kanawha Cnty., W.Va. 2020), and testified in that case. Therefore, the *Agreed Protective Order* provided for the disclosure of documents or information from that matter and the opportunity to designate such evidence as confidential. (Agreed Protective Order, Docket No. 24).

[3] Pursuant to Rule 7(d) of the West Virginia Rules of Appellate Procedure, the Petitioner is required to prepare and file an appendix containing a complete docket sheet from the clerk in the lower tribunal. The Appendix in this case does not include a docket sheet. Respondent will notify Petitioner of this issue and cooperate with Respondent to file a Motion to Supplement the Appendix with the Docket Sheet.

- June 2, 2022 – Ampler Burgers Ohio's counsel stated that he is "going to look back to the Agreed Order to Substitute Parties . . . and finish negotiating those terms . . . ." (Email, Appx. at 282).
- June 23, 2022 – The Court conducted a Second Scheduling Conference in this matter in which Petitioners participated without addressing the Arbitration Agreement. (Notice of Sched. Conf., Docket No. 25).
- July 22, 2022 – Ampler Burgers Ohio sent the Court the proposed Scheduling Order identifying itself as Ampler Burgers Ohio in its cover letter to the Court. (Sched. Order, Appx. at 283-86).
- August 15, 2022 – Ms. Bishop sent Petitioners' counsel an email checking on the status of the proposed Agreed Order to Substitute Parties. (Email, Appx. at 287-88).
- August 31, 2022 – The Court entered the *Agreed Order of Substitution of Party*. (Agreed Order, Docket No. 31).
- September 1, 2022 – Ms. Bishop sent a second set of discovery to Ampler Burgers Ohio. (Disc. Req., Appx. at 289-298).
- September 2, 2022 – Ms. Bishop supplemented her Responses to Ampler Burgers Ohio's First Set of Discovery. (Supp. Disc. Resp., Appx. at 299-314).
- September 15, 2022 – Petitioners and Ms. Bishop filed their respective Fact Witness Disclosures. (Certs. of Serv., Docket Nos. 37; 38)
- September 16, 2022 – Ms. Bishop served a second supplement to Petitioner Ampler Burgers Ohio's Discovery. (Supp. Disc. Resp., Appx. at 315-32).
- September 16, 2022- Ms. Bishop sent an extensive meet-and-confer letter addressing deficiencies in Ampler Burgers Ohio's discovery responses and inquiring into the Answers

and Responses to the first sets of discovery served upon Petitioners Spaulding, Stephens, and McLaughlin. (Letter, Appx. at 190-97).

- October 12, 2022 – Petitioners' counsel reiterated that they refused to have Petitioners Spaulding, McLaughlin, and Stephens produce discovery responses until 30 days after Ms. Bishop produced the extensive deposition transcripts from the *Yoxtheimer* matter. (Letter, Appx. at 202-06).
- October 28, 2022 –Ampler Burgers Ohio supplemented its Answers and Responses to Ms. Bishop's First Set of Discovery. (Supp. Disc. Resp., Appx. at 333-47).
- November 1, 2022 – Ms. Bishop provided 1271 pages of deposition transcripts and 635 pages of exhibits from the *Yoxtheimer v. RMS, Inc.* matter, which were marked as confidential and include highly prejudicial testimony by each of the individual Defendants in this case. (Order, Appx. at 456).
- November 4, 2022 – Ampler Burgers Ohio served responses to Ms. Bishop's second set of discovery. (Disc. Resp., Appx. at 350-57).
- November 9, 2022 – almost 400 days after Ampler Burgers Ohio was served with the Complaint and only eight days after it received the confidential transcripts, Petitioners filed their *Motion to Dismiss or Stay and Compel Arbitration*. (Motion, Appx. at 60-69).

After the parties fully briefed the Motion to Compel Arbitration and the Circuit Court conducted a hearing on the matter, the Circuit Court correctly entered an Order denying the Motion to Compel Arbitration. (*See* Order, Appx. at 451-71). The Circuit Court found: (1) the Petitioners waived any claimed right to arbitrate through its active litigation for more than 300 days; (2) Petitioners cannot enforce the Agreement because they are not parties to the Agreement; (3) Petitioners cannot enforce the Agreement because Respondent's claims do not fall within the scope

of claims subject to the Agreement; (4) Petitioners cannot enforce the Agreement due to a lack of mutual consideration; and (5) the Agreement is unenforceable because it is a procedurally and substantively unconscionable adhesion contract. (*Id.*).

On January 18, 2023, Petitioners filed a Notice of Appeal of the Circuit Court's order.

III. SUMMARY OF ARGUMENT

Each of Petitioners' five Assignments of Error is summarized below.

First, Petitioners contend that the Circuit Court erred by finding that Ms. Bishop's claims are not subject to the Arbitration Agreement. (Pet. Brief at 10). Ms. Bishop's sexual harassment claims against Petitioners, however, are not subject to the Agreement. "Parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate." Syl. Pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds)). (Emphasis added). "The Agreement expressly limits claims subject to the Agreement as including "disputes relating to or arising out of an employee's employment with the Company or the termination of employment." (Agreement, Appx. at 74). The Agreement defines "Company" as meaning Ampler Burgers, LLC, which is separate and distinct from Ampler Burgers Ohio and the other Petitioners. (*Id.*). Therefore, Ms. Bishop's claims against Petitioners are not subject to arbitration.

Second, Petitioners claim that the Circuit Court erred by finding that they are not granted any rights under the Agreement to compel arbitration of Ms. Bishop's claims. (Pet. Brief at 10). However, because Petitioners are non-signatories, and the Agreement limits claims to employment-related claims arising from Ms. Bishop's employment with the "Company," Petitioners have no express right to enforce the Arbitration Agreement. Additionally, there is no equitable basis to grant Petitioners' rights under the Agreement. Under an equitable theory, "a non-

signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement." *Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 702, 805 S.E.2d 805, 813 (2017). Because Ms. Bishop's claims do not reference, presume the existence of, or otherwise rely on the Agreement, there are not sufficient grounds for the Court to compel arbitration on equitable grounds.

Third, Petitioners assert that the circuit court erred by finding that Petitioners waived any right to arbitrate they may have had through their active litigation for nearly a year. (Pet. Brief at 18). "The right to arbitrate, like any contract right, can be waived." *Dan Ryan Builders, Inc. v. Williams*, No. 18-0579, 2020 WL 6538832, at *4–5 (W. Va. Nov. 6, 2020) (Memo. Dec.). The circuit court, however, correctly found that Petitioners waived any right to arbitrate they may have had by, over a period of nearly a year, serving multiple sets of discovery, participating in multiple scheduling conferences, responding to discovery, meeting and conferring on discovery issues, and disclosing fact witnesses. That extensive, active litigation conduct, all the while being aware of the Arbitration Agreement, constitutes a basis for waiver.

Fourth, Petitioners assert that the circuit court erred by finding that the Arbitration Agreement was unconscionable. (Pet. Brief at 13). Under the doctrine of unconscionability, a court may refuse to enforce a contract as written if there is "an overall and gross imbalance, one-sidedness or lop-sidedness in a contract." Syl. Pt. 3, *State ex rel. Richmond Am. Homes of W. Va., Inc v. Sanders,* 228 W. Va. 125, 717 S.E.2d 909 (2011). In this case, if the Agreement were to be interpreted as Petitioners suggest, Ms. Bishop would surrender her right to a jury trial and other fundamental rights. However, because Petitioners are not signatories to the Agreement, they would give up no rights. Additionally, because Ampler Burgers, LLC was not

Ms. Bishop's employer, any purported right it would have given up was illusory. This gross imbalance justifies a finding of unconscionability.

Fifth, Petitioners argue that the circuit court erred by finding that the Agreement lacked mutual consideration. (Pet. Brief at 11). Again, the Agreement was entered by Ms. Bishop and Ampler Burgers, LLC. The Agreement provides:

> Your decision to accept employment or continue employment with the **Company** [meaning Ampler Burgers, LLC] constitutes your agreement to be bound by this policy. Likewise, the **Company** [meaning Ampler Burgers, LLC] agrees to be bound by this policy. This mutual agreement to arbitrate claims means that both you and the Company are required to use arbitration as the only means of resolving employment-related disputes . . . and to forego any right either may have to a jury trial on issues covered by this policy.

(Agreement, Appx. at 74). Because Ms. Bishop was not employed by "the Company," any stated consideration was illusory. Without consideration, the Agreement is unenforceable.

Petitioners have not explained why they required Ms. Bishop to enter an Arbitration Agreement with an affiliated entity that was not her employer. However, at the end of the day, it does not matter. Ms. Bishop and Ampler Burgers, LLC entered the Agreement, and the Court is obligated to give plain meaning to the terms of the Agreement. When this is done, it is unenforceable by Petitioners against Ms. Bishop. Moreover, by actively litigating the case for hundreds of days and electing not to attempt to enforce the Agreement until eight days after receiving a large volume of prejudicial documents, Petitioners have waived any right they may have had to force Ms. Bishop to arbitrate her claims. For these reasons, Ms. Bishop respectfully requests that the Court uphold the circuit court's Order denying the Motion to Compel Arbitration.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves assignments of error in the application of settled law to unique facts and circumstances. The questions presented are therefore appropriate for oral argument in accordance with Rule 19(a) of the West Virginia Rules of Appellate Procedure. Respondents

believe that oral argument would benefit the Court and significantly aid the decisional process. As such, none of the criteria for deciding this appeal without oral argument, set forth in Rule 18(a), are applicable.

V. STANDARD OF REVIEW

A. Review Standard

Appellate review of an Order denying a Motion to Dismiss and Compel Arbitration is *de novo*. *See Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013); *Citizens Telcoms. Co. v. Sheridan*, 239 W. Va. 67, 71, 799 S.E.2d 144, 148 (2017). This Court's review is also plenary to the extent it is required to examine the Agreement between Ms. Bishop and Ampler Burgers, LLC. *See Zimmerer v. Romano*, 223 W. Va. 769, 777, 679 S.E.2d 601, 609 (2009).

B. The Court Must Apply Standard Rules of Contract Interpretation and Not a "Strong Presumption" in Favor of Arbitration.

Petitioner incorrectly relies extensively on a "strong presumption of arbitrability pursuant to federal policy." As set forth in the Order and briefing below, no such presumption exists for purposes of interpreting arbitration agreements. The United States Supreme Court recently clarified that the Federal Arbitration Act's ("FAA"), 9 U.S.C. § 2, "policy favoring arbitration" is "merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). In other words, the "policy" is "to place such agreements upon the same footing as other contracts, but not more so." *Id.* (citation omitted).

West Virginia law is also clear that "[a]rbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *State ex rel. U-Haul Co. v. Zakaib,* 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013). "Nothing in the [FAA] overrides normal

rules of contract interpretation." Syl. Pt. 3, *State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. 125, 717 S.E.2d 909 (2011). Further, "parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate." Syl. Pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds). Therefore, for there to be a valid, binding contract compelling arbitration, Petitioner must show a clear manifestation of an agreement between the parties to arbitrate the dispute at issue. *See U-Haul,* 232 W. Va. at 439; 752 S.E.2d at 593.

Accordingly, in this Court's *de novo* review of the arbitration issues before it, the Court must neutrally interpret the Agreement and apply normal rules of contract interpretation and not a "strong presumption" in favor of arbitration.

VI. ARGUMENT

A. Petitioners Cannot Enforce the Arbitration Agreement Because the Dispute is Not Subject to the Arbitration Agreement.

Petitioners contend in Assignment of Error Two that the circuit court erred in finding that Ms. Bishop's claims do not fall within the scope of arbitrable claims. The circuit court, however, correctly found that the dispute is not subject to the Agreement because it limits the scope of arbitrable claims to those "relating to or arising out of an employee's employment with [Ampler Burgers, LLC]." (Agreement, Appx. at 74). Because Ms. Bishop was an employee of Ampler Burgers Ohio (and not Ampler Burgers, LLC), her claims do not fall within the scope of arbitrable claims under the Agreement.

1. Parties are Only Required to Arbitrate Claims that by Clear and Unmistakable Writing They have Agreed to Arbitrate.

The United States Supreme Court has counseled that "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Because arbitration is a matter of contract, a party cannot be required to arbitrate "'any

dispute which he has not agreed so to submit.' This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648 - 49 (1986) (emphasis added) (quoting *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582 (1960) (Douglas, J.)*; Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 570 – 71 (1960) (Brennan, J.)); s*ee also e.g., State ex rel. U-Haul Co. v. Zakaib,* 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013) ("Arbitration is a matter of contract and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate."). Accordingly, "[u]nder the [FAA] parties are only bound to arbitrate those issues that by ***clear and unmistakable*** writing they have agreed to arbitrate." *Id.* (Emphasis added).

The FAA does not override normal rules of contract interpretation. *See State ex rel. U-Haul Co.,* 232 W. Va. at 439, 752 S.E.2d at 593. It merely ensures that contracts to arbitrate are enforced according to their terms. *See id* at 439, 593. Thus, in interpreting the scope of the subject arbitration agreement, this Court must be guided by traditional state law principles of contract interpretation. *See id.; see also Richmond Am. Homes of W. Va., Inc,* 228 W. Va. at 134, 717 S.E.2d at 918.

"[I]t has long been the law in West Virginia that '[w]hen a written contract is clear and unambiguous its meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions.'" *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 299, 810 S.E.2d 286, 301 (2018) (quoting Syl. Pt. 3, in part, *Kanawha Banking & Trust Co. v. Gilbert*, 131 W. Va. 88, 46 S.E.2d 225 (1947)). "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."

Certain Underwriters at Lloyd's v. PinnOak Res., LLC, 223 W. Va. 336, 338, 674 S.E.2d 197, 199 (2008). Thus, "[n]o addition to the terms of a written contract, or transposition or modification thereof, can be made by construction, unless it has foundation in the written words of the paper or in a reasonable and fair implication arising out of such words or some provision thereof or purpose expressed by it." *Syl. Pt. 2, Leckie v. Bray*, 91 W. Va. 456, 457, 113 S.E. 746, 747 (1922).

An arbitration contract is no different than any other contract. Therefore, an agreement to arbitrate certain claims cannot be extended by construction or implication to include additional claims. *See id.*; *see also Gas Co. v. Wheeling*, 8 W. Va. 320, 350-51 (1875) ("Though courts wish to have [an arbitration] submission and award terminate as many disputes as are reasonably and rightfully within its scope, still disputes obviously not included, though so cognate that their annexation would have been highly natural and proper, will not be added by a forced construction.").

2. The Signatories to the Agreement Did Not Agree to Arbitrate Claims Arising from Respondent's Employment with Ampler Burgers Ohio.

In this case, the plain and unambiguous language in the "Application and Coverage" section of the Agreement leaves no doubt that Ms. Bishop only agreed to arbitrate disputes and differences arising from her employment with Ampler Burgers, LLC: "The [Agreement] . . . covers all disputes relating to or arising out of an employee's employment with ***the Company***." (Agreement, Appx. at 74). As explained *supra*, the Agreement is signed by Ampler Burgers, LLC (and not any Petitioner) and defines "the Company" to mean ***Ampler Burgers, LLC***. (Agreement, Appx. at 74, 76). Based on the foregoing, there can be no dispute that the scope of arbitrable claims under the Agreement is limited to disputes relating to or arising from Ms. Bishop's employment with Ampler Burgers, LLC.

Indeed, the Agreement makes no reference to claims arising from Ms. Bishop's employment with Petitioner Ampler Burgers Ohio. If the signatories to the Agreement (Ampler Burgers, LLC and Ms. Bishop) desired to include the arbitration of claims arising from Respondent's employment with Petitioner Ampler Burgers Ohio, they could have expressly stated so or, in the very least, removed the term "Ampler Burgers, LLC" so that the arbitration agreement could arguably be read to require arbitration of "disputes relating to or arising out of an employee's employment." But they did not.

Petitioners fail to acknowledge the importance of this plain, unambiguous language in the Agreement and instead rely on the following language in the opening paragraph of the Agreement: "Bishops . . . claims are expressly covered by the Agreement, which requires her 'to submit to final and binding arbitration any and all claims and disputes that are related in any way to [her] employment or the termination of her employment[.]'" (Pet. Brief at 10). Petitioners, however, fail to include the language immediately following that language stating, "with Ampler Burgers." (*See* Agreement, Appx. at 73). Thus, even the language selected by Petitioners makes clear that the only claims Ms. Bishop is required to submit to arbitration are claims involving her "employment or the termination of her employment with Ampler Burgers."[4] (*Id.*).

Although the term Ampler Burgers is not expressly defined in the Agreement, its use throughout the Agreement makes clear that "Ampler Burgers" refers to Ampler Burgers, LLC. For instance, Ampler Burgers, LLC's representative who signed the Agreement identified himself as "Kevin M. Fernandez, President & CEO of Ampler Burgers." (*Id.* at 76).

[4] As noted, Petitioners unnecessarily confuse the identities of the parties in their Brief by identifying Ampler Burgers Ohio as "Ampler Burgers" even though this is a term used interchangeably with Ampler Burgers, LLC in the Agreement.

Additionally, the paragraph in the Agreement defining the terms "QSR Burgers" and "Company" as meaning Ampler Burgers, LLC, states as follows:

> **Ampler Burgers** sincerely hopes that you will never have a dispute relating to your employment with the **Company**. However, **QSR Burgers** recognizes that disputes sometimes arise between an employer and its employees relating to the employment relationship. **Ampler Burgers** believes that it is in the best interests of both its employees and the **Company** to resolve those disputes in a forum that provides the fastest, least expensive and fairest method for resolving them.

(*Id.* at 74) (Emphasis added). This language makes crystal clear that the term "Ampler Burgers" is used interchangeably with both "QSR Burgers" and "Company," which are both defined to mean Ampler Burgers, LLC. This conclusion is consistent with the more detailed definition of arbitrable claims contained in the "Application and Coverage" section that unambiguously states that only employment claims arising from Ms. Bishop's employment with the "Company," or Ampler Burgers, LLC, are subject to arbitration. (*Id*.).

After failing to cite the pertinent language in the Agreement defining the claims subject to the Agreement, Petitioner erroneously relies on a claimed strong presumption in favor of arbitration. As previously explained, West Virginia law—as with federal law—does not recognize a strong presumption in favor of arbitration. Rather, the "policy favoring arbitration" is "merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022); *see also See State ex rel. U-Haul Co.,* 232 W. Va. at 439, 752 S.E.2d at 593 ("[a]rbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate."); Syl. Pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds)) ("Parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate."). Petitioners' erroneous assertion regarding the legal standard ignores the

"clear and unmistakable" standard adopted in West Virginia as well as the federal abandonment of the "strong presumption" in favor of arbitration when evaluating contractual terms.

West Virginia law requires that the subject arbitration agreement be enforced according to its plain and unambiguous terms without addition to, or modification of, the same. And because Ms. Bishop clearly and unambiguously only agreed to arbitrate claims arising from employment with Ampler Burgers, LLC, she cannot be forced to arbitrate her claims against Petitioners that arise from her employment with Ampler Burgers Ohio.

For all these reasons, the circuit court correctly found that Ms. Bishop's claims against Petitioners are not subject to the Arbitration Agreement.

B. <u>Petitioners Are Not Entitled to Enforce the Arbitration Agreement.</u>

Petitioners contend in Assignment of Error Number One that the circuit court erred in finding that Petitioners are not entitled to enforce the Agreement. However, the circuit court correctly found that Petitioners do not meet the high threshold for non-parties to an arbitration agreement to use it to compel arbitration.

1. Petitioners do Not Have an Express Right to Enforce the Agreement.

As an initial matter, as explained, the Agreement provides no express right for Petitioners to compel the arbitration of Ms. Bishop's claims against them. It is undisputed that Ampler Burgers, LLC, and not any of the Petitioners, is a signatory to the Agreement. (Agreement, Appx. at 76). Further, to the extent "affiliated entities, and each of their employees," have the right to bring certain claims, those claims are limited to the disputes the signatories agreed would be arbitrated – "disputes relating to or arising out of [Petitioner's] employment with [Ampler Burgers, LLC]." (*Id*. at 74). Ms. Bishop does not assert claims against Ampler Burgers, LLC. Therefore, Petitioners have no third-party contractual right to compel arbitration.

2. Petitioners do Not Have an Equitable Right to Enforce the Agreement.

Because Petitioners have no express right to compel Ms. Bishop to arbitrate her claims asserted against them, they must rely on an equitable theory to compel arbitration. Non-parties to arbitration agreements generally have no rights to compel a signatory to arbitrate claims. *Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 702, 805 S.E.2d 805, 813 (2017). However, this Court has adopted the Fourth Circuit's estoppel theory of arbitration enforcement by a non-signatory. Under that equitable theory, "a non-signatory to a written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement." *Id*. As could be expected, West Virginia courts are reluctant to compel arbitration through an equitable theory unless circumstances clearly warrant doing so. In *W. Va. Dep't of Health and Human Resources v. Denise*, 858 S.E.2d 866 (W. Va. 2021), the Court cautioned:

> The case for applying the doctrine must be very compelling[,] and interests of justice, morality and common fairness [must] clearly dictate the course.
>
> As we have long held, the doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done.

Id. at 871-72. (Quotations omitted).

3. This Court's Precedence Supports the Circuit Court's Finding that Equitable Relief is Not Appropriate.

Petitioners rely on this Court's opinions in *Denise and Bluestone Brands* in their effort to persuade the Court to compel arbitration for equitable reasons. For the reasons that follow, the reasoning in those opinions supports the circuit court's holding that compelling arbitration is not warranted.

In *Denise,* the Respondent-Plaintiff signed a Consulting Employment Agreement ("CEA") containing an arbitration clause. *Id.* at 858 S.E.2d at 868-869. Ms. Denise was employed by an

entity that contracted with and performed work for the West Virginia Department of Health and Human Resources ("DHHR"). *Id.* As a non-signatory, the DHHR attempted to compel arbitration. *Id. at* 871.

In applying the demanding equitable standard, as is required in West Virginia, the Court found that (1) the Respondent-Plaintiff was "not seeking to enforce the [arbitration agreement], nor is she pursuing tort claims that "presume the existence of [ ] or otherwise rely on" the [arbitration agreement] and (2) the arbitration agreement does not supply essential context for the signatories' claims. *Id.* at 871-72. (Citations omitted). In so finding, the Court held that the DHHR's claims, which were not identified in the arbitration agreement, were not arbitrable.

Similarly, in the instant case, Ms. Bishop is not seeking to enforce the Agreement, the Agreement does not supply "essential context" for her claims, and she is not pursuing claims that "presume the existence of or otherwise rely on" the Agreement. In these circumstances, as in *Denise,* clear equity does not compel the enforcement of the Agreement by non-signatories.

Bluestem Brands, Inc. v. Shade, 239 W. Va. 694, 805 S.E.2d 805 (2017), is also instructive on the limited circumstances in which the Court will use an equitable theory to permit a non-signatory to an arbitration agreement to compel arbitration. In *Bluestem Brands,* the plaintiff had been purchasing merchandise from Bluestem (a/k/a Fingerhut) on credit supplied by third-party lenders. *See Bluestem Brands, Inc.*, 239 W. Va. at 698, 805 S.E.2d at 809. The plaintiff had entered into credit agreements with the third-party lenders that included arbitration agreements. *See id*. Bluestem was not a party to any of those agreements. *Id.*

When the plaintiff's account became delinquent, the matter was turned over to a debt collector, which filed a lawsuit against her. The plaintiff then filed a third-party complaint against Bluestem, but none of the third-party lenders, alleging that the finance charges and interest rates

charged pursuant to the agreements with the lenders were in violation of the *West Virginia Consumer Credit and Protection Act*, W. Va. Code § 46A-1-101 *et seq.*

Because the plaintiff was relying upon the terms of the contracts with the lenders as the basis for her claim, the Court applied the doctrine of estoppel to hold that she was required to arbitrate pursuant to the terms of those same contracts. *See id.* at 703–04, 814–15. Essentially, the *Bluestem* Court applied the doctrine of estoppel to prevent the plaintiff from seeking to hold Bluestem liable for the interest rates charged pursuant to her agreements with the lenders, to which Bluestem was a non-signatory, while at the same time contending that Bluestem could not enforce the arbitration provision contained in ***the very same agreement*** due to its status as a non-signatory. The Court found that equitable estoppel was necessary in the interests of justice to prevent the plaintiff from using the agreements as a sword in its claims against Bluestem while at the same time disclaiming the application of the arbitration provision found in the same agreement.

Unlike in *Bluestem*, Ms. Bishop is not attempting to rely upon, enforce, or benefit from the terms of the Arbitration Agreement entered with Ampler Burgers, LLC. Specifically, Ms. Bishop has not made a claim for breach of any of the terms of the Agreement, she is not seeking to recover any direct benefits promised under the contract, and she is not seeking enforcement of any of the contract's terms. Rather, her claims are based upon rights, duties, and obligations imposed by law pursuant to the West Virginia Human Rights Act (WVHRA), W. Va. Code § 5-11-1 *et seq.*, such that her claims do not rely upon, reference, or presume the existence of the contract. *See Wright v. Universal Maritime Service Corp.,* 525 U.S. 70 (1998) (distinguishing a statutory anti-discrimination claim from a claim arising from contractual obligations). In fact, the existence of the subject Arbitration Agreement is of no consequence whatsoever to Ms. Bishop's claims because she could recover from Petitioners under the WVHRA even if no Agreement existed

between her and Ampler Burgers, LLC. Accordingly, the instant case does not represent a "compelling case" that requires the application of estoppel in the interests of justice, morality, or common fairness.

4. This Case Is Distinguishable from the Non-Binding Foreign Cases Relied Upon by Petitioners.

In addition to the West Virginia cases previously addressed, Petitioners rely on a litany of non-binding foreign cases that loosely address whether an entity can compel arbitration when an affiliated entity is a signatory to an arbitration agreement. Those cases, however, do not advance Petitioners' position. As an initial matter, the foreign cases cited by Petitioner predate the United States Supreme Court's ruling in *Morgan v. Sundance* and generally consider arbitrability through a lens assuming a strong presumption in favor of arbitration.

Even setting aside that issue, the cases relied upon by Petitioners simply do not support a finding that the non-signatory Petitioners can compel arbitration of Ms. Bishop's sexual harassment claims. For instance, in *Goer v. Jasco* Industries, Inc., 395 F. Supp.2d 308, 316 (D.S.C. 2005), a United States District Court in the District of South Carolina found that the plaintiff's employment claims "could not be adjudicated without interpreting, and potentially enforcing, the terms of the employment agreements" at issue. As a result, the court found that a non-signatory could enforce the arbitration agreement. Ms. Bishop's claims are readily distinguishable from those of the *Goer* Plaintiff because Ms. Bishop's claims (sexual harassment claims against Ampler Burgers Ohio) in no way reference or rely upon any employment agreement. Rather, she brings claims against non-signatories pursuant to the WVHRA.

In *Pritzker v. Lynch, Pierce, Fenner Smith*, 7 F.3d 110 (3d Cir. 1993), the Third Circuit examined whether a principal could be bound by an arbitration clause signed by an agent. *Id.* at 1122. Applying "traditional agency theory," the Court found that it could. Those circumstances

are likewise easily distinguishable because there is no evidence of record that Ampler Burgers, LLC is an agent or principal of Ampler Burgers Ohio or acting in such a role.

As is the case with *Goer* and *Pritzker*, none of the foreign cases cited by Petitioner stand for the proposition that a non-signatory has an automatic right to enforce an arbitration agreement entered by an affiliate. Rather, as could be expected, each of the cases applies a principle of contract law to find that an entity either can or cannot enforce an arbitration clause entered by an affiliate. In this case, no principle of contract law extends that right to the non-signatory Petitioners.

5. The Handbook Does Not Support Applying Equitable Relief.

Finally, Petitioners place great weight on their claim that Ampler Burgers Ohio provided Ms. Bishop a Handbook that is "replete with references to multiple Ampler 'companies' to which it applies, including numerous usages of the plural possessive 'companies.'" (Pet. Brief at p. 7). This argument is similarly unavailing. The first sentence of the Handbook states, "It is our pleasure to welcome you to Ampler LLC d/b/a Burger King." (Handbook, Appx. at 362). Also, while the Handbook admittedly uses the term "companies" a number of times, it frequently uses the possessive tense with the remainder of the sentences referring to a singular entity. For instance, the Handbook states, "The companies' . . . reserves the right," (*Id.* at 362), and "The companies' is an equal opportunity employer, (*Id.* at 363)." Worth noting, the term "company" is used frequently in the same section, making it appear that the use of the term "companies" can be attributed to poor drafting.

Also, critically, the terms "companies" and "Ampler Burgers Ohio" are not used a single time in the Arbitration Agreement at issue. However, the defined term "Company" (meaning Ampler Burgers, LLC) is used at least 29 times to explain the signatories' rights and obligations

under the Agreement. (Agreement, Appx. at 73-76). For these reasons, the use of the term "companies" a handful of times in the Handbook falls far short of meeting the heightened standard required to compel arbitration through an equitable theory.

Accordingly, the circuit court correctly found that Petitioners, as non-signatories, have no right under the Agreement to compel arbitration of Ms. Bishop's claims.

C. Petitioners Waived their Right to Arbitrate by Actively Engaging in Discovery, Participating in Court Proceedings, and Waiting Nearly Fourteen Months Before They Attempted to Enforce the Agreement.

Petitioners contend in Assignment of Error Number Six that the circuit court erred in finding that Petitioners waived their right to arbitrate. The circuit court, however, correctly found that Petitioners waived their right to arbitrate through their active litigation of the case for more than 300 days before they elected to file their Motion to Compel Arbitration.

1. The Right to Arbitrate can be Waived in West Virginia.

"Under section 3 of the FAA, a party loses its right to stay a course of proceedings in order to arbitrate if it is 'in default in proceeding with such arbitration.'" *Coleman-Reed v. Ocwen Loan Servicing LLC,* Nos. 2:15-13687, 2:15-13708, 2016 WL 6469329 (S.D.W. Va. Oct. 28, 2016) (citing *Forrester v. Penn Lyon Homes, Inc.,* 553 F.3d 240 (4th Cir. 2009). This is because "[n]othing in the Federal Arbitration Act . . . overrides normal rules of contract interpretation" and thus "[g]enerally applicable contract defenses . . . such as . . . waiver . . . may be implied to invalidate an arbitration agreement." *Schumacher Homes of Circleville, Inc. v. Spencer*, 235 W. Va. 335, 774 S.E.2d 1, 5 (2015) (emphasis added), *cert. granted, judgment vacated,* 136 S. Ct. 1157 (2016).

The West Virginia Supreme Court has held:

> 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.

Dan Ryan Builders, Inc. v. Williams, No. 18-0579, 2020 WL 6538832, at *4–5 (W. Va. Nov. 6, 2020) (citation omitted) (Memo. Dec.); *see also Williams v. Tucker,* 239 W. Va. 395, 801 S.E.2d 273 (2017) (holding that waiver "may be implied from the conduct of the party who is alleged to have waived a right.").

Importantly, as noted, the United States Supreme Court has recently found that courts evaluating whether a party waived its right to arbitrate ***cannot consider prejudice*** but instead must focus on conduct. *Morgan v. Sundance*, 142 S. Ct. 1708 (2022). In other words, "Did [Petitioners] knowingly relinquish the right to arbitrate by acting inconsistently with that right?" *Id.*; *see also Parsons v. Halliburton Energy Servs., Inc.,* 237 W. Va. 139, 148, 785 S.E.2d 844, 853 (2016) ("There is no requirement that the party asserting waiver show prejudice or detrimental reliance.").

2. Petitioners Misconstrue the Circuit Court's Order Regarding Waiver.

Petitioners state:

> The Circuit Court erred in holding that the Ampler Defendants waived their right to arbitrate based on the passage of time between the date of service of the Complaint and the date of filing this Motion. The Circuit Court found that delay was an "independent basis" in which to find waiver, because "the Defendants waited more than a year to file their Motion."

(Pet. Brief at 19-20). In so stating, Petitioners quote paragraphs 50 and 58 of the Order. (*Id.*). Petitioners fail to recognize, however, that the circuit court identified a lengthy series of litigation activities undertaken by the parties. (Order, Appx. at 451-71). Additionally, in Paragraph 53 (which is between the two paragraphs quoted by Petitioners), the circuit court found:

> From January 5, 2022, until November 9, 2022—308 days—Defendants collectively engaged in extensive litigation, including answering and responding to two sets of discovery, supplementing discovery, responding to meet-and-confer emails and letters, entering an *Agreed Protective Order*, attending two scheduling conferences, negotiating an *Agreed Order for Substitution of Parties*, participating

> in several emails and phone calls, asking for deadline extensions, and making repeated requests for all of the deposition transcripts in the earlier matter.

(Order, Appx. at 459). Then, in Paragraph 58, the circuit court summarized the relevant section of its Order stating, "The Court holds that this conduct constitutes waiver under West Virginia law and is an independent basis to deny the [Petitioners'] Motion." (*Id.* at 460). The circuit court did not find that delay alone was a sufficient basis. Rather, a fair reading of the circuit court's order is that it considered the totality of the Petitioners' conduct identified throughout the Order in support of its finding that "this conduct constitutes waiver."

3. Petitioners Unreasonably and Unjustifiably Delayed Filing Their Motion to Compel with the Court Despite Awareness of its (Alleged) Right to Arbitrate.

As the circuit court found, even if Petitioners had a right to arbitrate, such right was waived through their voluntary and active litigation for more than 300 days all the while knowing of the Arbitration Agreement it now seeks to enforce.

Respondent served discovery on Petitioner Ampler Burgers Ohio along with her Complaint on October 12, 2021, and filed its Answer on January 5, 2022, in which it raised the Affirmative Defense of "Bishop's purported claims against Defendants are or may be governed by a mandatory arbitration provision."[5] (Answer, Appx. at 55). Notably, in their civil cover sheet, Petitioners

[5] Petitioner may assert that it preserved its right to arbitrate through this affirmative defense. However, courts have consistently found that parties that assert a right to arbitrate as an affirmative defense but then act inconsistently with an intent to arbitrate waive the right to arbitrate. *See, e.g., Wheeling Hospital, Inc. v. Ohio Valley Health Services,* C.A. No. 5:10-cv-67 (N.D.W.Va. Jun 6, 2011) (Holding defendant waived arbitration after defendant raised the right to arbitrate as an affirmative defense but then litigated for six months before filing motion to compel arbitration); *Garcia v. Wachovia Corp.,* 699 F.3d 1273, 1276-8 (11th Cir. 2012) (Holding defendant waived right to arbitrate after asserting right to arbitrate as an affirmative defense but then actively litigating for eight months before filing motion to compel arbitration); *Robin v. Food Service of Belton, Inc.,* 415 F. Supp.2d 1221 (D. Kan. 2005) (Holding defendants waived right to arbitrate, even though they asserted it as an affirmative defense, because defendant substantially invoked the "litigation machinery" by using it to obtain information that it would not be privy to under the rules of arbitration and then filing a motion to compel arbitration after ten months of litigation).

checked the box indicating they wanted a jury trial. (Case Info. Sheet, Appx. at 59). As a result, Petitioners clearly knew of the Arbitration Agreement, but chose not to seek to compel arbitration at that time and instead expressed that they wanted a jury trial. On February 9, 2022, Petitioner Ampler Burgers Ohio confirmed its knowledge of the Arbitration Agreement by producing it along with its first discovery responses (all Petitioners were represented by the same counsel in the proceedings below). (Discovery Resp., Appx. at 141-78). Again, Petitioners did not seek to compel arbitration at that time but instead continued to litigate this matter.

As explained, from January 5, 2022 until November 9, 2022— ***308 days***—Petitioners collectively engaged in extensive litigation, including all of the conduct identified by the circuit court – they answered and responded to multiple sets of discovery, supplemented discovery, responded to meet-and-confer emails and letters, entered an *Agreed Protective Order*, attended two scheduling conferences, negotiated an *Agreed Order for Substitution of Party,* participated in countless emails and telephone calls, asked for deadline extensions, and made repeated requests for all of the deposition transcripts in the earlier matter. (*See supra* at pp. 4-6).

Ms. Bishop relied on Petitioners' extensive litigation in this matter by actively engaging in written discovery (both propounding and responding to discovery requests), engaging in extensive fact witness development, and producing ten deposition transcripts with exhibits from the *Yoxtheimer* matter. (*See id.*). Petitioners willingly accepted those transcripts. Although Ms. Bishop is not required to show prejudice, her active litigation of this matter is relevant because Petitioners were aware of it all along and laid in wait without seeking to compel arbitration as Plaintiff actively worked the case.

The timing of Petitioners' filing of its *Motion to Compel Arbitration* is certainly suspect. Only eight days after Ms. Bishop responded to discovery and produced 1,271 pages of confidential

deposition transcripts and 635 pages of exhibits, Petitioners filed their *Motion to Compel Arbitration* without any explanation as to why it waited more than a year to seek arbitration. Petitioners' active litigation for more than 300 days constitutes waiver.

Petitioners place great reliance on two West Virginia cases that are easily distinguishable. First, Petitioners claim that *Citibank, N.A. v. Perry,* 238 W. Va. 662, 664, 797 S.E.2d 803 (2016), supports a finding that Petitioners did not waive any right they may have had to arbitrate. It does not. In *Perry*, Citibank filed a simple debt collection case. *Id.* at 807. In response, Mr. Perry admitted that he owed the debt. *Id.* Citibank filed a motion for summary judgment that was not ruled upon. *Id.* After four and one-half years, Mr. Perry obtained counsel and filed a class counterclaim that "significantly changed the character of the proceedings." *Id.* Less than two months after Mr. Perry filed his class counterclaim, Citibank filed its motion to compel arbitration. *Id.* The Court found that Citibank did not waive its right to arbitrate "in light of the fact that [Mr. Perry] delayed more than four and one-half years before asserting his counterclaim." *Id.* at 808. Because neither Petitioners nor Ms. Bishop sat idly by for extended periods of time in the litigation in the court below, this case is easily distinguishable from *Perry*.

Petitioner also relies on *Cabot Oil & Gas Corp. v. Beaver Coal Co., Ltd.,* No. 16-0904, 2017 WL 5192490 (W. Va. Nov. 9, 2017). However, this case is also easily distinguishable due to the "rather unique circumstances" in that case. In *Cabot Oil*, the Court was confronted with whether a party had waived its right to arbitrate due to the passage of time. Complicating the waiver issue, however, was the fact that the parties had already arbitrated a related dispute and had a "final and binding" decision following that arbitration. Considering the then "strong policy favoring arbitration," and in light of the "rather unique circumstances," the Court found that the

Cabot Defendants did not waive their right to arbitrate. *Id.* at *11. *Cabot Oil* has no bearing here because no such "unique circumstances" exist in this case.

For all these reasons, Petitioners' conduct shows that they had full knowledge of the Arbitration Agreement but chose to march on and actively litigate in the circuit court for more than 300 days. As the circuit court properly found, Petitioners' active litigation conduct constitutes waiver under West Virginia law.

D. <u>The Agreement Is Unconscionable.</u>

The Petitioners assert through Assignment of Error Number Four that the circuit court erred in concluding that the Agreement is procedurally and substantively unconscionable. As explained below, the circuit court was correct due to the one-sided nature of the Agreement and Petitioners taking on no obligation to arbitrate or foregoing any other substantive rights.

1. Legal Standard

Unconscionability is a legitimate reason for invalidating an arbitration agreement. *See e.g.,* Syl. Pt. 3*, State ex rel. Richmond Am. Homes of W. Va., Inc.,* 228 W. Va. 125, 717 S.E.2d 909. Under the doctrine of unconscionability, a court may refuse to enforce a contract as written if there is "an overall and gross imbalance, one-sidedness or lop-sidedness in a contract." *Id*. at 136, 920 (quoting Syl. Pt. 12, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds)).

A court considering the unconscionability of an arbitration agreement must weigh the fairness of the contract as a whole, take into consideration all of the facts and circumstances relevant to the entire contract, and apply the concept of unconscionability in a flexible manner. See *id*. at 134–35, 918–19. "If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract." *Id*. at 135, 919.

In West Virginia, unconscionability is analyzed in terms of procedural unconscionability and substantive unconscionability. A contract term is unenforceable only if it is both procedurally and substantively unconscionable, although both do not have to be present to the same degree. *See id.* at 136, 920. Rather, courts must apply a sliding scale to evaluate unconscionability, such that "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." *Id.*

2. Enforcing the Arbitration Agreement Against Plaintiff Would be Procedurally Unconscionable.

The Court has set forth the following guidelines for determining procedural unconscionability:

> 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.

Id. (quoting Syl. Pt. 17*, Brown*, 228 W. Va. 646, 724 S.E.2d 250 (overruled on other grounds)). Based upon these factors, "courts are more likely to find unconscionability in consumer contracts and ***employment agreements*** than in contracts arising in purely commercial settings involving experienced parties." *Id.* (Internal quotations omitted) (emphasis added).

When Ms. Bishop purportedly entered the Arbitration Agreement, she was a high school student applying for a fast-food job, had just reached the age of majority, and was presented a series of documents identifying Ampler Burgers, LLC as her employer. (*See* Handbook, Appx. at 358-409). She was then presented with an Arbitration Agreement explaining that Ampler Burgers,

LLC was her employer (including one such document submitted to the federal government) and that if she desired to assert claims arising from her employment with Ampler Burgers, LLC, then she would have to arbitrate those claims. (*See* W-4, Appx. at 405-408). As has been explained, Ampler Burgers, LLC was ***not*** Ms. Bishop's employer. Even if this Court were to construe the Agreement as Petitioners suggest, Ms. Bishop in no way had a "reasonable opportunity to understand" that she was entering an Agreement with Defendant Ampler Ohio, LLC to litigate claims against it. This is a textbook example of procedural unconscionability, and the circuit court correctly found it was so.

3. The Arbitration Agreement Is Substantively Unconscionable.

This Court has also provided guidelines for analyzing substantive unconscionability:

> 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.

See State ex rel. Richmond Am. Homes of W. Va., Inc., 228 W. Va. at 137, 717 S.E.2d at 921.

In this case, Petitioners were not contracting parties. Therefore, if they are permitted to stand in the shoes of Ampler Burgers Ohio's affiliate, Ampler Burgers, LLC, they will get all of the benefits of the contract without any reciprocal obligations. For instance, while Ms. Bishop would be forced to surrender her right to a jury trial, Petitioners would not be forced to do so under the Agreement. As noted, the Agreement states, "This mutual agreement to arbitrate claims means that both you and the Company are required to use arbitration as the only means of resolving employment-related disputes . . . and to forego any right either may have to a jury trial on issues covered by this policy." (Agreement, Appx. at 74). The Agreement further provides, "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 . . ." (*Id.* at 73). While this provision provides a reciprocal obligation for the Company (Ampler Burgers, LLC) to arbitrate, it contains no requirement that Petitioners surrender their right to a jury trial for any claims it may have against Petitioner. And the obligations of the "Company" are illusory. Because Ms. Bishop was not employed by Ampler Burgers, LLC, she could not possibly have any claims arising from her employment with that entity.

The Agreement also has a Confidentiality provision that would require Ms. Bishop and the Company (meaning Ampler Burgers, LLC) to keep the proceedings confidential. (*Id.* at 76). As non-signatories, Petitioners would have no obligation to keep the proceedings confidential. The importance of this confidentiality provision cannot be overstated. Indeed, the "winds of change" have swept over the realm of arbitration to the point that there is now a nationwide ban on arbitration of sexual harassment cases through the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFASASHC"). *See Public Law No:117-90* (03/03/22). While Ms. Bishop does not contend that the EFASASHC applies here, she makes the Court aware of this statute for the general proposition that current public policy does *not* favor arbitration for sexual harassment matters because "arbitration lacks the transparency and precedential guidance of the justice system, there is no guarantee that the relevant law will be applied . . . or that fundamental notions of fairness and equity will be upheld in the process. ***Due to the secretive nature of this system, these disputes are often shielded from public scrutiny***." *See* H.R. 4445, 117th Cong. Rep. 110234 (2022) at 3. (Emphasis added). In this case, if the Agreement is deemed enforceable by Petitioners, Ms. Bishop would be forced to keep the proceedings confidential while the non-signatory Petitioners could freely disseminate information.

Petitioner fails to recognize and address the one-sided nature of the Agreement should the Court find that Ampler Burgers Ohio is permitted to enforce the Agreement. While Petitioner cites to the previously cited language in the Agreement that requires the "Company" to arbitrate claims against the Respondent, it fails to address that the Agreement unambiguously defines the "Company" as Ampler Burgers, LLC, and not Ampler Burgers Ohio. To be clear, under this Agreement, Ampler Burgers Ohio is not a party and has ***no*** contractual obligations. Given the fundamental rights Ms. Bishop would be forced to surrender if compelled to arbitrate against Ampler Burgers Ohio, it is hard to imagine a more substantively unconscionable agreement.

In West Virginia, "a contract term is unenforceable if it is both procedurally and substantively unconscionable." Syl. Pt. 9, *Brown II*, 229 W. Va. 382, 729 S.E.2d 217 (2012). "However, both need not be present to the same degree." *Id.* Applying that standard here, the Court must consider both the circumstances under which Plaintiff purportedly entered the Arbitration Agreement and the terms of the Agreement. It is abundantly clear that the one-sided nature of the Agreement renders it unenforceable under the doctrine of unconscionability.

For the reasons stated, the court below correctly found that the Agreement is procedurally and substantively unconscionable and, therefore, should not be enforced.

E. <u>The Agreement Is Not Supported by Mutual Consideration.</u>

Petitioners assert in Assignment of Error Three that the court below erred by finding that the Agreement is not supported by mutual consideration. There is no mutual consideration in this case.

Petitioners rely almost exclusively on the reasoning of this Court in *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 810 S.E. 286 (2018), in support of its position that there is mutual consideration. The circumstances in *Hampden Coal*, however, are vastly different than the

circumstances here. In *Hampden Coal*, Mr. Varney began working for Hampden Coal. As a condition of his employment, he signed a mutual arbitration agreement. Importantly, the arbitration agreement was signed by Mr. Varney and a representative of Hampden Coal. Throughout the arbitration agreement, Hampden Coal waived certain rights, such as the right to go to court, in exchange for the right to arbitrate. The arbitration agreement also provided that the consideration for the agreement was the parties' mutual promises to arbitrate any disputes between them and Hampden Coal's employment of Mr. Varney. However, the "consideration" paragraph contained one "scrivener's error" that referenced Mr. Varney's continued employment with "Blue Diamond." This error was subsequently corrected in an addendum that the parties signed. *Id.* at 293. The Agreement is replete with inferences to Hampden Coal. The Court found that under these circumstances mutual consideration existed because, among other things, the single reference to "Blue Diamond" was a typographical error. *Id.* at 294.

The circumstances here are easily distinguishable. As noted, the only signatories to the Agreement are Ms. Bishop and Ampler Burgers, LLC. The Agreement provides as follows:

> Your decision to accept employment or continue employment with the **Company** [meaning Ampler Burgers, LLC] constitutes your agreement to be bound by this policy. Likewise, the **Company** [meaning Ampler Burgers, LLC] agrees to be bound by this policy. This mutual agreement to arbitrate claims means that both you and the Company are required to use arbitration as the only means of resolving employment-related disputes . . . and to forego any right either may have to a jury trial on issues covered by this policy.

(Agreement, Appx. at 74). Through this language, Ampler Burgers, LLC, created illusory consideration because Ms. Bishop was not employed by Ampler Burgers, LLC, so her "employment or continued employment" with the "Company" could not possibly be sufficient consideration for the enforcement of the Agreement. Additionally, because Ampler Burgers, LLC could not have employment claims against Ms. Bishop (who was not its employee), this provision

is likewise illusory. Ampler Burgers, LLC provided Ms. Bishop no real consideration in exchange for her purported surrendering of her right to a jury trial. These substantive issues caused by Ampler Burgers Ohio's decision to have Ms. Bishop execute an Arbitration Agreement with Ampler Burgers, LLC are far more prejudicial and "unfair" than a single scrivener's error.

Accordingly, the court below correctly found that the Agreement was unenforceable due to a lack of mutual consideration.

VII. CONCLUSION

For all of the reasons set forth above, Respondents respectfully request that this Court reject the instant appeal and affirm the circuit court's Order denying Petitioners' Motion to Compel Arbitration.

KENNA BISHOP,

By Counsel,

/s/ Rodney A. Smith
Rodney A. Smith (WVSB # 9750)
M. Alex Urban (WVSB # 13480)
ROD SMITH LAW PLLC
108 ½ Capitol Street, Suite 300
Charleston, WV 25301
(T) 304-342-0550
(F) 304-344-5529
rod@LawWV.com
aurban@LawWV.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July 2023, a copy of the foregoing ***"Respondent's Brief"*** was served on counsel of record via the Court's electronic filing system. I further certify that on this day, a copy of the same was served on counsel of record and the pro se litigant via U.S. Mail in postage-paid envelopes, addressed as follows:

Gregory W. Guevara, *Pro Hac Vice*
Tyler J. Moorhead, *Pro Hac Vice*
BOSE McKINNEY & EVANS, LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
gguevara@boselaw.com
tmoorhead@boselaw.com

Larry J. Rector (6418)
Amy M. Smith (6454)
STEPTOE & JOHNSON
400 White Oaks Boulevard
Bridgeport, WV 26330
larry.rector@steptoe-johnson.com
amy.smith@steptoe-johnson.com

Counsel for Petitioners

Robert Falls
70 Derby Drive
Elkview, WV 25071

Pro Se

/s/ Rodney A. Smith
Rodney A. Smith (WVSB # 9750)
M. Alex Urban (WVSB # 13480)
Rod Smith Law PLLC
108½ Capitol Street, Suite 300
Charleston, WV 25301
rod@lawwv.com
aurban@lawwv.com