IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-305

Credit Acceptance Corporation,

Plaintiff-Petitioner,

v.

Kenneth E. Stanley and Kerry J. Stanley,

Defendant-Respondents.

On Appeal from Order Denying
Plaintiff's Motion to Dismiss and Compel Arbitration
Circuit Court of Jackson County, West Virginia
(The Honorable Lora A. Dyer)

BRIEF OF PLAINTIFF-PETITIONER CREDIT ACCEPTANCE CORPORATION

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June 7, 2024

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ASSIGNMENT OF ERROR

The circuit court erred when it denied Credit Acceptance Corporation's ("Credit Acceptance") motion to compel arbitration on the ground that it waived its right to compel arbitration by initiating a collection action in the Circuit Court of Jackson County, West Virginia. This ruling was erroneous because the circuit court's findings and conclusions regarding waiver ignored the plain language of the agreement and the binding precedent of *Citibank, N.A. v. Perry*, 797 S.E.2d 803 (W. Va. 2016). Pursuant to such precedent, the circuit court's decision is directly at odds with the elements necessary to establish implied waiver.

STATEMENT OF THE CASE

I. Introduction

This appeal arises out of the circuit court's failure to enforce the plain language of a valid arbitration clause in a Retail Installment Contract and Security Agreement ("Contract"). In February 2020, Credit Acceptance initiated a debt collection action against Respondents Kenneth E. Stanley and Kerry J. Stanley ("Borrowers") in the Circuit Court of Jackson County, West Virginia. In response, Borrowers filed a pro se Answer acknowledging the debt was owed. Over three years later, Borrowers filed a Motion to Amend their Answer and file a Counterclaim ("Counterclaim") alleging, among other things, common law fraud, violations of the West Virginia Consumer Credit and Protection Act, and violation of the Truth-in-Lending Act. When Credit Acceptance immediately sought to compel arbitration, the circuit court denied the motion, ruling that Credit Acceptance waived its right to arbitration by initiating the collection action in circuit court. However, the circuit court's ruling is reversible error because (1) under the arbitration agreement's binding terms, either party may submit to arbitration "before or after a lawsuit has been started over the Dispute"; (2) either party may submit to arbitration, "with respect to other

Disputes or counterclaims brought later in the lawsuit"; and (3) implied waiver requires an intentional relinquishment of a known right, evidence of which was not reflected in the record.

II. The Account and Binding Arbitration Agreement

Borrowers entered into the Contract with Charleston Mitsubishi ("Dealership" or "Dealer") on April 17, 2018 to finance the purchase of a 2008 Ford Escape, VIN 1FMCU93168KA18539 ("Vehicle"). (A.R 207). Thereafter, the Contract was assigned to Credit Acceptance. (A.R. 204). The Contract contains a conspicuous, valid, and binding Arbitration Clause, which broadly provides that any dispute between Borrowers and Credit Acceptance arising out of or in any way relating to the Contract is subject to binding arbitration at either party's election. (A.R.211).

The Arbitration Clause that Borrowers agreed to is unambiguous. It provides that:

> Either You or We may require any Dispute to be arbitrated and **may so do before or after a lawsuit has been started over the Dispute or with respect to other Disputes or counterclaims brought later in the lawsuit**. If You or We elect to arbitrate a Dispute, this Arbitration Clause applies. A Dispute shall be fully resolved by binding arbitration.

(A.R. 211) (emphasis added). "Dispute" is defined as *any* controversy or claim:

> [A]rising out of or in any way related to this Contract, including, but not limited to, any default under this Contract, the collection of amounts due under this Contract, the purchase, sale, delivery, set-up, quality of the Vehicle, advertising for the Vehicle or its financing, or any product or service included in this Contract.

(A.R. 211). Under the terms of the Arbitration Clause, "Dispute" "shall have the broadest meaning possible, and includes contract claims, and claims based on tort, violations of laws, statutes, ordinances or regulations or any other legal or equitable theories." *Id.* The crux of the claims asserted by Borrowers are rooted in the Contract. Specifically, Borrowers claim that Credit Acceptance and the Dealer breached the contract by failing to accurately represent the mileage and

value of the Vehicle. These are precisely the types of claims that are covered by the Arbitration Clause Borrowers signed.

Borrowers signed page 2 of the Contract and initialed pages 2 and 4. (A.R. 207-211). They also initialed page 1 of the Contract underneath a paragraph which notified them that the Contract contains an arbitration clause:

> **ARBITRATION:** This Contract contains and Arbitration Clause that states You and We may elect to resolve any dispute by arbitration and not by court action. See the Arbitration Clause on Page 5 of this Contract for the full terms and conditions of the agreement to arbitrate. By initialing below, you confirm that you have read, understand and agree to the terms and conditions in the Arbitration Clause.
> . . .
> **ADDITIONAL TERMS AND CONDITIONS:** THE ADDITIONAL TERMS AND CONDITIONS, INCLUDING THE ARBITRATION CLAUSE SET FORTH ON THE ADDITIONAL PAGES OF THIS CONTRACT ARE A PART OF THIS CONTRACT AND ARE INCORPORATED HEREIN BY REFERENCE.

(A.R. 207) (bold and caps in original). Borrowers were provided ample notice of the Arbitration Clause, which is governed by the FAA.[1] (A.R. 211)

Not only is the Arbitration Clause unambiguous, it provided Borrowers the right to reject the arbitration forum within thirty (30) days of signing the contract:

> **Your Right to Reject: If You don't want this Arbitration Clause to apply, You may reject it by mailing Us at P.O. Box 5070, Southfield, Michigan 48086-5070 a written rejection notice that describes the Contract and tells Us that You are rejecting this Arbitration Clause. A rejection notice is only effective if it is signed by all buyers, co-buyers and cosigners and the envelope that the rejection notice is sent in has a post mark of 30 days or less after the date of this Contract. If You reject this Arbitration Clause, that will not affect any other provision of this Contract or the status of Your Contract. If You don't**

[1] The Arbitration Clause expressly states that it is governed by the FAA. (A.R. 211). Notwithstanding this, the Contract involves interstate commerce and thus, the FAA applies. Borrowers purchased and operated the Vehicle in West Virginia. Credit Acceptance is a Michigan corporation with its principal place of business in Michigan. It accepted assignment of the Contract in Michigan. Credit Acceptance has no offices in West Virginia.

reject this Arbitration Clause, it will be effective as of the date on this Contract.

Id. (bold in original). Borrowers did not exercise their right to reject the Arbitration Clause. Moreover, in signing page 2 of the Contract, Borrowers affirmed that they read, understood, and agreed to the terms of the Contract. (A.R.).

III. Procedural Background

Borrowers eventually defaulted on their payment obligations under the Contract. The Vehicle was repossessed but the sale was insufficient to satisfy the debt. On February 20, 2020, Credit Acceptance filed a collection action against Borrowers to collect the balance owed on the Contract. (A.R. 2). In response, on or about March 3, 2020, Borrowers filed a pro se Answer acknowledging the debt was owed. (A.R. 2). The Borrowers and Credit Acceptance engaged in discovery, Credit Acceptance filed a Motion for Summary Judgment and the circuit court heard oral arguments regarding the Motion for Summary Judgment but never rendered a ruling. A trial was scheduled for December 6, 2023.

Over three years after the Borrower's filed an Answer, in June 2023, attorneys with Mountain State Justice, Inc. filed a Notice of Appearance on behalf of the Borrowers. (A.R. 2). In the same month, the Borrowers filed a Motion for Leave to submit an Amended Answer and Counterclaim Complaint and propounded written discovery requests. (A.R. 2-15). The Counterclaim challenges Credit Acceptance's right to recover the outstanding balance on the Contract based on newly alleged claims. Credit Acceptance denies any wrongdoing set forth in the Counterclaim and further maintains that Borrowers expressly agreed to arbitrate any dispute arising out of, or related to the Contract, upon election by either party.

IV. The Motion to Dismiss and Compel Arbitration

In August 2023, Credit Acceptance promptly filed the Motion to Dismiss and Compel Arbitration, citing the plain language of the Arbitration Agreement. (A.R. 108-149). In response, Borrowers offered no evidence to rebut either the existence or terms of the Arbitration Agreement as established by affidavit. (A.R. 242). Nor did Borrowers provide evidence that the Arbitration Agreement was procedurally or substantively unconscionable or that the claims set forth in the Counterclaim fell outside of its scope. (A.R. 295 ¶12). On September 27, 2023, the Court heard oral arguments from both parties in support and opposition to Credit Acceptance's Motion to Dismiss and Compel Arbitration, including direct arguments regarding the application of the precedent found in *Citibank, N.A. v. Perry*, 797 S.E.2d 803 (W. Va. 2016).

Following a hearing, on January 18, 2024, the circuit court embraced the Borrowers' waiver argument and denied Credit Acceptance's motion, stating:

> When applying the totality of circumstances, this Court concluded that CAC waived its right to arbitrate due to the significant passage of time before moving this Court to compel arbitration. Instead of timely exercising that right, CAC only chose to exercise that right when Counterclaimants retained counsel. This Court further notes CAC had no qualms litigating this matter, including engaging in discovery and moving this Court for summary Judgment when Counterclaimants were pro se.

(A.R. 299, ¶ 13). Although the circuit court heard substantial argument regarding the application of *Perry* in briefs and oral arguments, the circuit court's denial does not address these arguments whatsoever. It is from this order, which displays open hostility to arbitration, that Credit Acceptance now appeals.

SUMMARY OF ARGUMENT

Arbitration agreements are binding contracts that must be enforced pursuant to the Federal Arbitration Act ("FAA"). As binding contracts, courts are not permitted to disregard their terms

or rewrite the provisions to change their meaning. Instead, courts are permitted to only determine the threshold issues of whether the agreement is valid and whether the dispute falls within its scope.

Here, the circuit court erred in denying the Motion to Dismiss and Compel Arbitration on the ground that Credit Acceptance waived its right to arbitrate by initiating the lawsuit in circuit court. In addressing the question, the circuit court ignored the clear language of the Arbitration Agreement which specifically provides:

> Either You or We may require any Dispute to be arbitrated and may so do before or **after a lawsuit has been started** over the Dispute or with respect to other Disputes or **counterclaims brought later in the lawsuit**. If You or We elect to arbitrate a Dispute, this Arbitration Clause applies. A Dispute shall be fully resolved by binding arbitration.

(A.R. 211) (emphasis added). Under this clear and unambiguous provision, Credit Acceptance had a contractual right to initiate a collection action and later seek arbitration when Borrowers filed the Counterclaim. Indeed, the Arbitration Agreement further contains a non-waiver provision that provides that Credit Acceptance may file a claim in arbitration "before or after a lawsuit has been started over a Dispute or with respect to other Disputes." *Id*. (emphasis added).

The circuit court was required, under the FAA, to apply ordinary state law principles that govern the formation of contracts. Consequently, the court was also required to treat the Arbitration Agreement like any other contract. When contract terms are clear and unambiguous, they are to be applied and not ignored. The circuit court failed to follow these basic contract principles and as a result, violated Section 2 of the FAA, which mandates that binding Arbitration Agreements and contracts "evidencing a transaction involving interstate commerce. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The circuit court's order was also contrary to well established federal authority which does not lightly infer waiver given the strong federal policy favoring arbitration. A party asserting waiver is required to shoulder a heavy burden and must demonstrate that the party invoking arbitration so substantially utilized the litigation process that to permit arbitration would prejudice the opposing party, including a showing of actual prejudice. Here, such a showing was not and could not be made. More significantly, arbitration was immediately sought as soon as the Counterclaim was filed. It is the Counterclaim which is the essence of the action, and the invocation of arbitration will not impede Borrowers' ability to timely resolve their claims.

The circuit court's ruling also violated well established state law principles with respect to implied waiver. For implied waiver to occur, a party must intentionally relinquish a known right. Here, Credit Acceptance did not relinquish any rights under the Arbitration Agreement because the agreement clearly permitted either partyto invoke arbitration even after a lawsuit was filed and expressly if a Counterclaim is filed. This Court has expressly upheld these arbitration rights in *Citibank, N.A. v. Perry*, 797 S.E.2d 803 (W. Va. 2016). Credit Acceptance was entitled to rely on such binding precedent. Thus, when the original action was initiated in 2020 and even when the counterclaim was filed, there was an existent right for Credit Acceptance to invoke arbitration which had never been relinquished. In other words, Credit Acceptance could not waive its right to compel a counterclaim to arbitration before a counterclaim is even filed because it has an express contractual right to compel arbitration of a counterclaim.

Credit Acceptance requests that this Court reverse this circuit court's order denying the Motion to Compel Arbitration and remand the matter with instructions to permit the action to proceed to arbitration with a corresponding stay of proceedings pending the outcome of arbitration.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Credit Acceptance requests oral argument pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure.

ARGUMENT

I. UNDER THE FEDERAL ARBITRATION ACT THE ARBITRATION AGREEMENT IS VALID AND MUST BE ENFORCED

The law of arbitration has been extensively litigated in West Virginia. Indeed, *Perry* is a strikingly similar precedent to the facts of this case and this Court need only to affirm its ruling in order to rule in Credit Acceptance's favor. 797 S.E.2d 803 (W. Va. 2016). Thus, this Court is well aware of the principles governing the application of the FAA and the recognition that it applies broadly to any transaction directly or indirectly affecting interstate commerce. *See, e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995). Indeed, this Court has recognized that "the federal policy favoring arbitration of disputes requires that a court construe liberally the arbitration clauses to find that they cover disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration." *See State ex rel. City Holding Co., v. Kaufman*, 216 W.Va. 594, 598, 609 S.E.2d 855, 859 (2004).

Moreover, as the U.S. Supreme Court repeatedly has emphasized, "[u]nderscoring the consensual nature of private dispute resolution . . . parties are 'generally free to structure their arbitration agreements as they see fit.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S. Ct. 1758 (2010) (citations omitted). Thus, "parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes." *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011) (citations omitted). Indeed, the "point of affording parties discretion in designing arbitration processes is to

allow for efficient, streamlined procedures tailored to the type of dispute . . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Id.* at 1749. Ultimately, "[i]t falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Stolt-Nielsen*, 130 S. Ct. at 1774-75; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).

It is within this framework that Credit Acceptance's Motion to Dismiss and Compel Arbitration must be analyzed and applied. Significantly, the issue presented is a limited one - was it appropriate for the circuit court to find that Credit Acceptance waived its right to compel arbitration despite clear contractual language permitting invocation of arbitration at any point prior to trial or judgment, particularly when arbitration was immediately sought once the Counterclaim was filed? There was no finding or challenge to the existence of the Arbitration Agreement and its terms. Nor was there any finding of unconscionability or that the Counterclaim fell beyond the scope of the Arbitration Agreement. Therefore, the issue is a straightforward question of basic contract application principles. Application of those contract principles yields the inescapable conclusion that the circuit court's finding of waiver was plainly wrong. *See, Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440 (2006) (recognizing that the FAA places arbitration agreements on equal footing with all other contracts). And, that failure by the circuit court has resulted in a decision which runs afoul of the FAA.

A. The trial court's finding of waiver was in error and must be reversed.

1. Under traditional rules of contract application, Credit Acceptance has a clear contractual right to seek arbitration after a lawsuit has been started or with respect to counterclaims brought later in the lawsuit.

As discussed above, the FAA "places Arbitration Agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 1207 (2006). For this reason, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995). West Virginia recognizes these rules and, when followed, they require that the clear provisions of the Arbitration Agreement be given full effect.

When it comes to interpreting contract language, under West Virginia law, "[t]he court is to enforce and give effect to the unambiguous language and terms of the contract." *JAS Enters., Inc. v. BBS Enters., Inc.*, 2013 SD 54, P24, 835 N.W.2d 117,125 (S.D. 2013); Syl. Pt. 2, *Citynet, LLC v. Toney*, 235 W. Va.79, 772 S.E.2d 36 (2015) ("Where the terms of a contract are clear and unambiguous, they must be applied and not construed."). "Unless the language is ambiguous or a different intention is manifested, the language in a contract is to be given its plain and ordinary meaning." *American State Bank v. Adkins*, 458 N.W.2d 807, 809 (S.D. 1990). In applying unambiguous contract language, "the Court must avoid rewriting the contract; rather, it will be [the Court's] endeavor to establish the intention of the parties at the time the agreement was made." *FMB BankShares, Inc. v. Hajek*, 2003 SD 103, p.10, 668 N.W.2d 715, 717 (S.D. 2003); Syl. Pt. 3, *Citynet, LLC*, ("It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them."). To this end, "[a]ll of the contract provisions must be given

meaning if that can be consistently and reasonably done." *Hajek, Id*.; Syl. Pt. 6, *Columbia Gas Transmission Corp. v. E. I. Du Pont de Nemours & Co*., 159 W. Va. 1, 217 S.E.2d 919 (1975) (same).

Within the arbitration clause, the Agreement specifically provides: "Either You or We may require any Dispute to be arbitrated and may do so before or **after a lawsuit has been started** over the Dispute or with respect to other Disputes or **counterclaims brought later in the lawsuit**." (A.R. 211) (emphasis added). Under this provision, Credit Acceptance had the contractual right to initiate the collection action in the Circuit Court of Jackson County, and then seek arbitration when Borrowers filed their Counterclaim.

The only way to affirm the findings and conclusions of the circuit court is to patently rewrite the Arbitration Agreement by deleting the words "after a lawsuit has been started" and "counterclaims brought later in the lawsuit." This language is clear and unambiguous and must be applied. Indeed, it is impossible to find that Credit Acceptance waived its right to compel counterclaims by the actions that took place *before* the Borrowers filed their Counterclaim because Credit Acceptance had no knowledge of the Counterclaim prior to that time and therefore could not have waived a *known* right. Indeed, the American Arbitration Association's ("AAA") continued moratorium on debt collection arbitrations prevents Credit Acceptance from initiating arbitration with them when the only claims at issue were Credit Acceptance's debt collection claims.[2]

[2]Notice on Consumer Debt Collection Arbitrations, AAA (Feb. 15, 2024, 2:26 PM), https://www.adr.org/sites/default/files/document_repository/Notice%20on%20Consumer%20Debt%20Collection%20Arbitrations%20(1).pdf

Despite the clear precedent requiring the lower court to apply this contractual language, the circuit court failed to analyze this language, nor was it even cited or referenced anywhere in the circuit court's order denying arbitration. Indeed, this language with respect to counterclaims was emphasized in Credit Acceptance's initial brief. (A.R 110). This language was expressly quoted and argued at oral arguments. (A.R. 305). The court simply failed to give these contract clauses any force and rendered the express language of an enforceable agreement meaningless. The result is clear error that this Court must reverse and correct.

2. Under state law implied waiver doctrine, Credit Acceptance did not waive its right to seek arbitration because it did not intentionally relinquish its right to seek arbitration later in the lawsuit or when a counterclaim had been filed.

Instead of applying the Arbitration Agreement's express terms regarding non-waiver and counterclaims, the circuit court chose to rely on implied waiver. As this Court has noted before, "[a]n implied contract and an express one covering the identical subject matter cannot exist at the same time." *Evans v. United Bank, Inc*., 235 W. Va. 619, 628, 775 S.E.2d 500, 509 (2015) (citing Syl. Pt. 3, *in part, Rosenbaum v. Price Construction Company*, 117 W. Va. 160, 184 S.E. 261 (1936)).

In addition to the express contractual terms allowing Credit Acceptance to seek arbitration at any time prior to trial, or to delay enforcing its rights without waiving them, the trial court's application of general waiver law was wholly inconsistent with West Virginia precedent. Under West Virginia law:

> [T]o establish waiver there must be evidence demonstrating that a party has intentionally relinquished a **known** right. This intentional relinquishment, or waiver, may be expressed or implied. However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right. Furthermore, the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.

Potesta v. U.S.F. & G., Co., 202 W. Va. 308, 504 S.E.2d 135, 142 (1998) (emphasis added, internal citations and quotations omitted); *see also Citibank, N.A. v. Perry*, 797 S.E.2d 803, 807 (W. Va. 2016) ("Less than two months after Mr. Perry filed his counterclaim, Citibank filed its motion to compel arbitration and to stay the court action. Under these particular circumstances, we do not find evidence that Citibank's conduct demonstrated an intent to relinquish a known right.")

Waiver requires an act inconsistent with a known right. Here, Credit Acceptance was operating completely consistent with its contractual rights. There was no finding by the circuit court that this conduct was "inconsistent" with a known contractual right. To the contrary, Credit Acceptance operated entirely consistently with the express terms of the arbitration provision. The lower court's order found that Credit Acceptance waived its right, even though under the express terms of the Arbitration Agreement, Credit Acceptance had no set timeframe to enforce a contractual right before the right was waived and expressly had a right to compel arbitration of a counterclaim such as the one filed here. Credit Acceptance had the right to invoke arbitration after it filed the collection action. Credit Acceptance had the option to invoke its right up until the start of trial or final judgment. Credit Acceptance had a right to invoke arbitration once the Borrowers filed their counterclaim. These rights had not expired.

In support of its holding regarding implied waiver, the circuit court "relied heavily" on a West Virginia case, *Hoffman v. Wheeling Sav. & Loan Ass'n*, for the principle that a party can waive its right to arbitrate by acting inconsistently with that right. 133 W. Va. 694, 713, 57 S.E.2d 725, 735 (1950). (A.R. 299, ¶ 11). However, the facts of that case are clearly distinguishable. There, the action involved an arbitration agreement with neither a non-waiver clause nor a right to arbitrate counterclaims. Moreover, *Hoffman* does not relate to any arbitration agreement or "right

to arbitrate" at all. *Hoffman* is not relevant to this case. It contains no question of law for this Court.

The circuit court found a waiver due to the "significant passage of time" and that Credit Acceptance "only chose to exercise that right when [Borrowers] retained counsel." (A.R. 299, ¶ 13). However, this analysis completely ignores that Credit Acceptance has the express ability to invoke arbitration "after lawsuit has been started" and with respect to "counterclaims brought later in the lawsuit." (A.R. 211). Indeed, the circuit court ignored the fact that Credit Acceptance filed its Motion to Dismiss and Compel Arbitration promptly after Borrowers' Motion for Leave to submit an Amended Answer and Counterclaim Complaint. Here, Credit Acceptance timely elected to pursue arbitration as expressly permitted under the terms of the Arbitration Agreement.

3. The *Perry* matter is directly on point, binding against the circuit court, and instructive here.

Although, the *CitiBank, N.A. v. Perry* decision is strikingly similar to the matter at hand, was argued extensively in briefs and at oral arguments, and even cited by the circuit court in its order, the circuit court ignored its reasoning in its ruling. 797 S.E.2d 803 (W. Va. 2016). The circuit court's order directly contradicts the precedent found in *Perry*. The circuit court should not be permitted to ignore such binding precedent.

Both this case and *Perry* were initiated as "a simple debt collection action in the circuit court" where the borrowers filed a pro-se response. *Perry*, 797 S.E.2d at 807. Both creditors filed a dispositive motion which "never was ruled upon by the circuit court." *Id*. Then "[a]fter a long period of about three and one-half years of inactivity in the case, [both borrowers] ultimately obtained counsel" with whom both borrowers filed a counterclaim. *Id*. Indeed, the borrower in *Perry* filed his counterclaims "more than four and one-half years after Citibank initiated its debt

collection action against him." *Id*. In addition, both cases even have counterclaims which bring claims under the West Virginia Consumer Credit and Protection Act ("WVCCPA"). Then both creditors promptly filed their motions to compel arbitration within two months of the counterclaims.

The circuit court in *Perry*, much like the circuit court here, erroneously found that the creditor waived its right to arbitration due to the significant time that had passed from the initiation of the litigation. However, this Court overturned the circuit court's ruling, finding CitiBank N.A. had not waived a *known* right because the agreement contained a non-waiver clause. Specifically, this Court found:

> It is undisputed that Citibank filed a simple debt collection action in the circuit court and that Mr. Perry filed a pro-se response wherein he conceded that the debt owed was his. Approximately six months later, Citibank filed a motion for judgment on the pleadings that never was ruled upon by the circuit court. After a long period of about three and one-half years of inactivity in the case, Mr. Perry ultimately obtained counsel, and the parties filed an agreed scheduling order allowing for a counterclaim. Mr. Perry filed his class counterclaim on May 1, 2010, which was more than four and one-half years after Citibank initiated its debt collection action against him. Markedly, Mr. Perry's counterclaim, which asserted a putative class action claiming, inter alia, violations of the West Virginia Consumer Credit and Protection Act, significantly changed the character of the proceeding from a simple debt collection action to a potential class action lawsuit. Less than two months after Mr. Perry filed his counterclaim, Citibank filed its motion to compel arbitration and to stay the court action. Under these particular circumstances, **we do not find evidence that Citibank's conduct demonstrated an intent to relinquish a known right**. Indeed, where Mr. Perry delayed more than four and one-half years before filing his counterclaim, we will not attribute the lengthy duration of inactivity in this case solely to Citibank. **Once Mr. Perry's counterclaim was filed, Citibank responded in a reasonable time, less than two months, by filing its motion to compel arbitration**.

Id.

Here, the exact same ruling is warranted. The only significant factual difference from this matter is that here the Arbitration Agreement's non-waiver clause is even *more* precise in the

circumstances. In *Perry*, the non-waiver clause did not expressly provide that counterclaims brought later were an express basis to compel arbitration. Here, Credit Acceptance has the express ability to invoke arbitration "after a lawsuit has been started" and with respect to "counterclaims brought later in the lawsuit." (A.R. 211). The language in this Arbitration Agreement is even *stronger* in favor of compelling arbitration than the language found in *Perry*.

However, here the circuit court did not provide any analysis with respect to the non-waiver clause or make any attempt to distinguish *Perry* from this matter. Instead, the circuit court "notes that [Credit Acceptance] had prior notice that it could potentially waive its right to arbitrate due to delay when the Wisconsin Court denied the motion to compel arbitration after the passage of 15 months." (A.R. 299, ¶ 9). Presumably, the circuit court was referring to *Kirk v. Credit Acceptance Corp*., 829 N.W. 2d 522, 533 (Wis. Ct. App. 2013). However, this ruling is inapposite to this case. No evidence suggests that it involved the same arbitration agreement nor did that court, applying Wisconsin contract law, provide any analysis regarding a non-waiver clause. The *Kirk* decision could not provide Credit Acceptance with any notice regarding West Virginia law where there is a non-waiver clause. Instead, this Court's decision in *Perry* gave Credit Acceptance notice that a non-waiver clause will be enforced by West Virginia courts and that it will not waive its right to compel a counterclaim to arbitration before a counterclaim had even been filed.

Accordingly, the *Perry* case is on point, binding against the circuit court, and instructive in this case. The circuit court failed to apply this Court's binding precedent. In considering this matter, the facts and law are so strikingly similar to be nearly undistinguishable. It would be impossible to affirm the circuit court's ruling without overruling *Perry* as well. Accordingly, this Court should reverse the circuit court's order which was clearly in error.

CONCLUSION

This Arbitration Agreement is a binding contract that must be enforced. Under the FAA, this Court must interpret the agreement within the framework of traditional contract rules, including the requirement to enforce clear and unambiguous contract terms. The agreement gave Credit Acceptance the right to file its collection action, and then later seek arbitration as soon as a counterclaim was filed. To deny Credit Acceptance that right requires the Court to effectively rewrite the contract between Borrowers and Credit Acceptance, overrule its own precedent, and, most importantly, it would be at odds with this Court's constitutional duty to apply arbitration clauses which involve interstate transactions. Credit Acceptance requests that this Court reverse the circuit court's order denying the Motion to Compel Arbitration, and remand the matter with instructions to permit the action to proceed to arbitration with a corresponding stay of proceedings pending its outcome.

Dated this 7th day of June 2024.

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