IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
U-HAUL CO. OF WEST VIRGINIA, a
West Virginia Corporation,

Petitioner,

vs. Case No. 13-0181

THE HONORABLE PAUL ZAKAIB, JR.,
AMANDA FERRELL, JOHN STIGALL,
and MISTY EVANS,

Respondents.

RESPONDENTS' BRIEF

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RESPONSE TO PETITION FOR WRIT OF PROHIBITION

This case and this proceeding arise out of deceptions perpetrated by U-Haul Co. of West Virginia ("U-Haul"). Plaintiffs filed the underlying case after declining U-Haul's offer to pay an "optional" environmental service fee only to find later that the charge was added to their bills anyway. U-Haul's deceptions continued after the plaintiffs agreed to the terms of the rental. Without any prior notice that U-Haul was hiding material contractual terms in a color document holder festooned with marketing for additional U-Haul products and services, U-Haul attempted to add a mandatory, pre-dispute arbitration clause to their signed rental agreements by folding the signed agreement and placing it in the document holder which was handed to the customers on their way out the door.

Once suit was filed, U-Haul attempted to deceive the Circuit Court, falsely asserting that it's materially changed documents and procedures were in use when Plaintiffs rented their vehicles. U-Haul proffered a picture of an electronic terminal that, following Plaintiffs' objection that terminal was installed post-litigation, was neither authenticated nor introduced into evidence. U-Haul's deceptions did not end below. The picture of the unauthenticated, not-admitted, post-litigation installed electronic terminal is prominently reproduced in U-Haul's petition to this Court even though there is no evidence any plaintiff in this case ever saw it.

The Circuit Court correctly determined that an agreement to submit a dispute to arbitration requires mutual assent not deception. This Court should reject U-Haul's petition and dismiss this proceeding.

QUESTIONS PRESENTED

1. Whether an agreement to submit a case to binding arbitration exists when one party includes the arbitration clause in a document provided to the other party after the contract is executed, the signed contract does not clearly incorporate the document containing the arbitration clause, and the document containing the arbitration clause does not clearly indicate that it contains material contractual provisions.

2. Whether an arbitration clause is a material term to a contract such that that a party seeking to add the clause to a contract after execution must obtain the assent of the other party.

3. Whether a challenge to the inclusion of an arbitration clause based on a claim that the document containing the arbitration clause was never assented to by one party violates the Federal Arbitration Act's severability doctrine when the un-assented to document contains other contractual provisions not challenged by the party opposing arbitration.

4. Whether it is an abuse of discretion to refuse to reconsider the denial of a motion when the grounds asserted were either actually raised prior to the ruling or the grounds asserted were available to the party seeking reconsideration and no cause for not raising the claims prior to ruling is given.

STATEMENT OF THE CASE

Plaintiffs' Complaint pled the following facts. U-Haul's business involves leasing vehicles and non-motorized trailers for short-term use.[1] In order to rent from U-Haul, the customer must visit one of U-Haul's authorized rental locations.[2] At that time, the customer is quoted a price for the rental.[3] The quoted price does not include any other fees.[4]

After the customer chooses the vehicle at some of the U-Haul's locations, the customer is directed to an electronic terminal where the customer is instructed to approve the charges. At that time, certain other options are offered to the customer such as optional liability and contents insurance. The customer can electronically agree to these charges by responding affirmatively to the offer on the electronic terminal.

One of the optional offers proposed to the customer is an optional environmental charge. With respect to this optional charge, the customer can decline it in its entirety or select from several optional fees. Unbeknownst to the customer, U-Haul has already added a $1.00, $3.00 or $5.00 environmental charge to the customer's rental.[5] This undisclosed mandatory fee is not required by any governmental regulation and amounts to U-Haul surreptitiously shifting its overhead to its customers.

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[1]Pet. App. at 24, ¶ 7.
[2]*Id.* at ¶ 8.
[3]*Id.*
[4]*Id.*
[5]*Id.* at ¶24.

Some of U-Haul's locations do not use the electronic terminal. Rentals at these locations, however, proceed in much the same manner in that the mandatory environmental charges are added to the customer's bill deceptively masquerading as a mandatory governmental fee.[6]

Each of the three plaintiffs rented a motorized truck from U-Haul. Each declined the offer to pay an environmental fee, but charges of between $1.00 and $5.00 for an Environmental Fee were added to each of their bills.

With respect to the arbitration clause that is the subject of the current dispute, the purported agreement was undisputed evidence that Plaintiffs were not given notice of the fact that U-Haul intended to bind them to arbitration prior to entering executing an agreement with U-Haul.[7]

Customers, who rented vehicles at locations that used the electronic terminal, were requested to "sign" their names on the electronic terminal with an electronic pen.[8] Thereafter, the electronic signature was affixed to the U-Haul Rental Contract ("RC"), printed out, folded and placed in into a folded cardstock document holder U-Haul refers to as the Rental Contract Addendum ("RCA"). Customers who rented at locations that did not have an electronic terminal were presented with the RC and they signed the document manually. Thereafter, the RC was again folded and placed in the RCA and handed to the customer.

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[6] *Id.* at ¶ 12.

[7] *See* Affidavit of John Stigall, ¶ 3 (Jan. 4, 2012) [App. at 121]; Affidavit of Amanda M. Ferrell, ¶ 3 (Jan. 4, 2012) [App. at 123]; Affidavit of Misty Evans, ¶ 3 (Jan. 6, 2012) [App. at 125].

[8] Affidavit of Amanda M. Ferrell, ¶¶ 4-5 (Mar. 5, 2012) [App. at 547]; Affidavit of H.E. "Gene" Sigman, ¶ 6 (Mar. 14, 2012) [Resp. App. at 1].

The version of the RC used for transactions at issue in this case contains the basic terms of the rental and states before the signature line: "acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum."[9] Nothing on the face of the RC warns the customers that U-Haul is attempting to bind them to an arbitration clause not contained in the RC. Arbitration is not mentioned at all in the RC. And, with respect to the customers who signed the electronic terminal in use for the transactions at issue in this case, the terminal does not mention the existence of the RCA.

A color version of the RCA is included in Respondent's Appendix. The Circuit Court characterized the RCA as follows:

> [The RCA] is made of cardstock and is a multicolor document that is folded to serve as a document holder. On the front cover of the RCA, in bold large type appears the title: "RENTAL CONTRACT ADDENDUM" with the next line stating in bold and slightly smaller type "DOCUMENT HOLDER". A few small lines of text appear next stating: "Additional Terms and Conditions for Equipment Rental". These lines are followed by a large block of text in reverse type stating "RETURNING EQUIPMENT". The remainder of the front cover focuses on instructions for returning the rental equipment. The back cover of the folded RCA contains an advertisement for additional services offered by the Defendant.[10]

U-Haul asserts that the language printed inside the folded cardstock envelope document holders in which the signed rental agreement is placed and given to the Plaintiffs after they signed (electronically or manually) the RC constitutes additional terms to the agreement which bind the Plaintiffs to waive their constitutional right to a jury trial and submit to arbitration. The Defendant

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[9] Affidavit of H.E. "Gene" Sigman, ¶ 18 (Mar. 14, 2012) [Resp. App. at 2]
[10] Resp. App. at 9

presented no evidence that the RCA was provided to the Plaintiffs prior to executing (electronically or manually) the RC.

After this litigation was filed, U-Haul changed its practices. With respect to the electronic terminals, U-Haul added the phrase: "By clicking Accept, I agree to the terms and conditions of this Rental Contract and Rental Contract Addendum."[11] The RC itself has also been changed to make a specific reference to arbitration. These practices were changed in 2012, after the transactions at issue in this case.

It is clear that the electronic terminals were changed after this litigation was filed. U-Haul's employee admitted on March 8, 2012 that the electronic terminals in use that day were installed in early March, 2012 -- the previously used electronic terminal did not have the contractual language included on the new terminal.[12] A comparison of the pictures of the terminals establishes that they have been changed.[13]

This case was filed on August 19, 2011.[14] On October 26, 2011, U-Haul filed its Motion to Compel Arbitration with an attached affidavit from its President, Jeff Bowles.[15] The motion was originally noticed for a January 12, 2012, hearing.[16] On, January 9, 2012, Plaintiffs timely filed their response to the Motion to Compel and included affidavits from the Plaintiffs.[17] The next day, U-Haul unilaterally

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[11] App. at 700; Affidavit of H.E. "Gene" Sigman (Mar. 14, 2012) [Resp. App. at 566].

[12] *Id.*

[13] *Compare* Plaintiffs' Exhibit 1, March 6, 2012 Hearing [Resp. App. at 9] at *with* Defendant's Exhibit 1, June 29, 2012 Hearing [App. at 700].

[14] See App. at 23.

[15] See App. at 32 and 53, respectively.

[16] See App. at 87.

[17] See App. at 96, 121, 123 and 125, respectively.

cancelled the hearing.[18] The hearing was rescheduled for Tuesday, March 6, 2012.[19] On March 2, 2012, two business days prior to the hearing, and over a month after Plaintiffs' filed their response, U-Haul filed a reply with a second affidavit from Mr. Bowles.[20]

Plaintiffs also filed a motion to bifurcate the issue of whether their contracts contained arbitration clauses from the issue of whether the purported arbitration clauses are unconscionable.[21] Plaintiffs also served discovery directed to U-Haul regarding the existence of the arbitration clause and its enforceability.[22] While Defendant provided some responses,[23] it sought protective orders and discovery stays, and much of that discovery remains outstanding.[24] Indeed, U-Haul's counsel conceded that, if the finding that no arbitration agreement had been entered into was reversed, the Circuit Court would then have to consider whether the agreement was unconscionable.[25]

At the March 6, 2012 hearing, Plaintiffs filed a second affidavit from Plaintiff Amanda Farrell in response to the second affidavit from Mr. Bowles.[26] U-Haul contends that this affidavit is inconsistent with her first affidavit because in the first affidavit, she states that she signed the RC. That she signed the electronic terminal is not inconsistent. Plaintiffs never argued that they did not sign –

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[18] See App. at 139.
[19] See App. at 142.
[20] See App. at 290 and 307, respectively.
[21] See App. at 91.
[22] See App. at 163, 168 and 175.
[23] See App. at 182, 194 and 221.
[24] See App. at 144.
[25] June 29, 2012 Tr. at 32 [App. at 690].
[26] App. at 547.

electronically or traditionally certain documents. The issue is whether the signed documents or electronic terminal adequately disclosed the RCA containing the arbitration clause.

Prior to the conclusion of the hearing, U-Haul requested the opportunity to respond to Plaintiffs' supplemental Affidavit of Amanda Ferrell filed at the hearing.[27] No objection to this request was made by the Plaintiffs.[28] The Court concluded the hearing by requesting the parties to submit proposed orders in support of their respective positions.[29] U-Haul did not submit any response other than its proposed order.[30]

The Court denied the Motion to Compel Arbitration on March 27, 2012.[31] On April 27, 2012, U-Haul filed its Motion to Reconsider.[32] With the memorandum of law was a third affidavit from Mr. Bowles.[33] In response to that motion, Plaintiff filed the Sigman Affidavit which details the Defendant's changes in procedures.[34]

The hearing on the Motion to Reconsider was held on June 29, 2012. At the hearing, U-Haul marked for identification, the photograph of the new terminal.[35] Plaintiffs clearly objected to the admission of the photograph on the grounds of authenticity contending it was a new terminal not in use when the Plaintiffs rented their vehicles. It is clear on the record that the photograph was marked for

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[27]March 6, 2012 Tr. at 30-31 [App. at 650].
[28]*Id.*
[29]March 6, 2012 Tr. at 36 [App. at 36].
[30]See App. at 315.
[31]See App. at 1.
[32]See App. at 355.
[33]See App. at 481.
[34]Respondent's Appendix at 1.
[35] See App. at 700.

identification only.[36] Indeed, the Court later confirmed that the photograph was "not in evidence."[37] Amazingly, U-Haul argues that neither the Circuit Court nor the Plaintiffs insisted on evidence of authentication of the photograph. This falsehood is clearly refuted by the record citations noted herein. While U-Haul's attorney stated that the photographer was present,[38] there was simply no need to "insist" on his testimony when, after Plaintiff objected and the Court confirmed the photograph was not in evidence, U-Haul declined to move its admission.

In denying its original order denying the Motion to Compel Arbitration, the Circuit Court found:

- "Nothing on the face of the RC warns the customers that U-Haul is attempting to bind them to an arbitration clause not contained in the RC."[39]
- "Based upon the record herein, the Court finds that the RCA was not provided to the plaintiffs prior to their signing the rental agreement."[40]
- There is no evidence that the statement contained in the printed RC that the customer agreed to the terms and conditions of the RCA was ever provided to customers prior to their electronically signing the 'electronic box'."[41]

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[36] June 29, 2012 Tr. at 7-8 [App. at 665-66].
[37] June 29, 2012 Tr. at 16-17 [App. at 674-75].
[38] June 29, 2012 Tr. at 8 [App. at 666].
[39] See March 27, 2012 Order ¶ 2 [App. at 2].
[40] *Id.* at ¶ 3.
[41] *Id.* at ¶ 5 [App. at 3].

- "The RC contains no statement warning the customer that, by signing the RC, the customer is agreeing to be bound by the terms of an arbitration clause."[42]
- "The language making up Defendant's arbitration clause is contained inside the RCA. Nothing on the cover of the RCA notifies a customer that U-Haul is attempting to bind the customer to arbitration with language contained inside the RCA."[43]
- "Plaintiffs were not provided with either the RCA or the arbitration clause prior to contracting with the Defendant."[44]
- "Plaintiffs were not aware of the arbitration clause in the RCA prior to contracting with the Defendant."[45]
- "Plaintiffs did not agree to be bound by the arbitration clause prior to entering into a contact with the Defendant."[46]
- "Defendant's arbitration clause is a clause purporting to require mandatory arbitration of any claims against the Defendants. As that clause purports to waive significant rights to a jury trial and to appeal, this term is a material term. "[47]

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[42] *Id.* at ¶ 6.
[43] *Id.* at ¶ 8 [App. at 4].
[44] *Id.* at ¶ 9 [App. at 4].
[45] *Id.* at ¶ 10.
[46] *Id.* at ¶ 11.
[47] *Id.* at ¶ 12.

- "Plaintiffs did not agree to the inclusion of this material term requiring arbitration after contracting with the defendant."[48]

Based on these factual findings, the Court concluded that a contract between the Plaintiffs and U-Haul was entered into prior to referring to or submitting the RCA containing the arbitration clause to the Plaintiffs.[49] Because an arbitration clause is a material term, the modification of an agreement to include the clause requires assent of all parties to the clause which was lacking in this case.[50] The Court then held: "Because, the Defendant has failed to meet its burden of establishing the existence of an agreement to arbitrate, the Court must deny and hereby does deny the Motion to Compel Arbitration and Dismiss or Stay the Case."[51]

With respect to the Motion to Reconsider, the Court first rejected U-Haul's arguments that were the same as the ones it had previously offered both as procedurally improper and for the same reasons it had previously rejected them.[52] The Court also rejected the supposed "new" evidence presented in the Mr. Bowles third affidavit. After noting that U-Haul offered no justification for not presenting the evidence in the third affidavit sooner, the Court found the substance of the affidavit lacking:

> Furthermore, in the response to the third affidavit signed by Mr. Bowles, the Plaintiffs submitted evidence from their investigator which shows that the Defendant updated the electronic boxes used by the Defendant following the transactions that give rise to this case. *See* Affidavit of H.E. "Gene" Sigman (Plaintiffs' Reconsideration Exhibit

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[48] *Id.* at ¶ 13.
[49] *Id.* at ¶ 21 [App. at 9].
[50] *Id.* at ¶ 23 [App. at 11].
[51] *See* Order at ¶ 24 [App. at 12].
[52] *See* January 16, 2013 Order ¶ 2 [App. at 15].

> A). If the Court would consider the third affidavit of Mr. Bowles on the merits, the Court would FIND that the Defendant has failed to meet its burden of establishing that prior to March 2012, Defendant used an electronic box that allowed the customers to read the contractual terms prior to signing. Because the Defendant offered no admissible evidence to counter the specific allegations in Mr. Sigman's affidavit, the Court credits these over the vague allegations in the three affidavits provided from Mr. Bowles.[53]

Finally, the Court rejected the supplemental cases cited by U-Haul on the grounds that the cases were not newly decided and distinguishable because unlike here, none of the authorities involved material contractual terms that attempted to be incorporated by reference prior to either making the terms available or notifying the customer of their existence.[54]

Based on these findings, the Court entered an Order denying the Defendant's Motion to Reconsider This Court's March 27, 2012 Order Denying Motion to Compel Arbitration and to Stay Discovery and Circuit Court Proceedings Pending Reconsideration and, If Necessary, Proceedings Before the Supreme Court of Appeals on January 16, 2013.[55] The Court stayed the case for thirty days to permit U-Haul to seek this writ.[56] On February 26, 2013, forty-one days later, U-Haul filed the instant Petition.

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[53] *Id.* at ¶ 3 [App. at 16].
[54] *Id.* at ¶ 5 [App. at 17].
[55] App. at 14.
[56] *Id.* [App. at 17].

SUMMARY OF ARGUMENT

This Court has made it clear that a Circuit Court should not grant a motion to compel arbitration absent a finding that an agreement to arbitrate exists. For an arbitration agreement to exist, the party seeking to compel arbitration must show mutual assent to the arbitration clause. Parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.

U-Haul's argument is based on the single sentence in the signed contract which states: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." From this U-Haul argues that the RCA is incorporated by reference.

Incorporation by reference requires the contract actually signed to inform the parties that another document is being incorporated. With respect to customers who electronically signed the rental contracts, the Circuit Court correctly found that the electronic terminal did not contain the language incorporating the document with the arbitration clause. Moreover, the language printed on the contracts that were physically signed is insufficient because it refers to the term Rental Contract Addendum as having been provided to the customer. This term is hardly clear and unmistakable prior to the document being provided to the customer. Because the addendum is not provided to the customers prior to their signing the rental contract, the false statement to the customers that they have received it makes the

reference to an ambiguously named document confusing and, therefore, insufficient to meet the "clear and unmistakable writing" requirement.

The addendum itself also fails the "clear and unmistakable writing" requirement as the contractual language contained inside a folded document with instructions and advertising is hardly a "clear and unmistakable writing" sufficient to allow a court to find assent to material terms contained inside. Nothing on either exposed side of the document holder alerts the customer to nature of the obligations contained therein.

Once a contract has been made, a modification of the contract requires the assent of both parties to the contract as mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract. Arbitration clauses are uniformly held to be material. The Circuit Court correctly rejected the inclusion of a post-agreement clause without proof of assent to the added material arbitration clause.

"When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et sec., the severability doctrine restricts the party from arguing that the contract as a whole is subject to a challenge. U-Haul argues that, because the Plaintiffs' challenge to the RCA would also invalidate the language in RCA relevant to optional insurance coverage, the challenge violates the severability rule. Severability does not require the Court to limit its review to the arbitration clause itself. In this case, while there are other purported provisions in the addendum containing the arbitration clause, the

plaintiffs do not challenge those provisions so severability is not implicated. In this case the issue raised by the Plaintiffs is whether the parties actually agreed to arbitrate not whether the arbitration clause is enforceable.

The Defendant has not cited a case holding that failure to assent to additional contractual language containing an arbitration clause and other provisions not at issue in the cases constitutes a violation of the severability doctrine. Under *Richmond American Homes*, *supra,* the Court can look at the circumstances surrounding the execution of the contract *as a whole.*

U-Haul's final argument is that the Circuit Court applied the wrong standard of review in denying its motion to reconsider. In the end, the Circuit Court concluded that the arguments U-Haul made on reconsideration were either already made in its original motion or ones that could have been made in connection with its original motion. While the Court applied the correct standard, under any standard reconsideration under these facts was not justified.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiffs do not believe that oral argument is necessary. The legal principles actually at issue in this case are not novel. The Circuit Court made detailed factual findings. A review of the record is all that is necessary to establish that the findings are not clearly erroneous and are sufficient to support the Court's decision in this case.

With respect to the decision, a simple order denying the rule to show cause or a brief memorandum decision is all that is necessary in this case.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE ARBITRATION CLAUSE IN THE RENTAL CONTRACT ADDENDUM WAS NOT PART OF PLAINTIFFS' RENTAL AGREEMENTS.

This Court has made it clear that a Circuit Court should not grant a motion to compel arbitration absent a finding that an agreement to arbitrate exists:

> Parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.

Syl. pt. 10, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 288 W.Va. 646, 724 S.E.2d 250, 261 (2011), *vacated on other grounds, Marmet Health Care Center, Inc. v. Brown*, 563 U.S. ——, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (per curiam), *reinstated in pertinent part,* 229 W.Va. 382, 729 S.E.2d 217 (2012). Just this year, this Court emphasized:

> Thus, to be valid, an arbitration agreement must conform to the rules governing contracts, generally. We long have held that " '[t]he fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.' Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.,* 100 W.Va. 559, 131 S.E. 253 (1926)." Syl. pt. 3, *Dan Ryan Builders, Inc. v. Nelson,* —— W.Va. ——, —— S.E.2d —— (2012). Accordingly, to be valid, the subject Arbitration Agreement must have (1) competent parties; (2) legal subject matter; (3) valuable consideration; *and* (4) mutual assent. *Id.* Absent any one of these elements, the Arbitration Agreement is invalid.

State ex rel. AMFM, LLC v. King, 2013 WL 310086, p*6 (W.Va. 2013).

It is important to note what this case is not about. It is not about whether contractual documents can be incorporated by reference. It is not about whether documents can be electronically signed. The Plaintiffs do not argue otherwise. Instead, Plaintiffs' argument is that U-Haul's documents and policies are insufficient to permit a finding that the *Brown I* standard for assent is met in this case. While U-Haul seeks to complicate and obscure the issues in the case, the question here is a simple one – have the parties agreed to arbitrate? The Circuit Court correctly answered the question in the negative.

U-Haul does not contest the basic principles. "It is elementary that mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.,* 158 W.Va. 935, 216 S.E.2d 234 (1975). In order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance on the part of the other." *Mays v. Imation Enterprises Corp.*, 214 W.Va. 305, 313, 589 S.E.2d 36, 44 (2003) (quoting *Bailey v. Sewell Coal Co.,* 190 W.Va. 138, 140-41, 437 S.E.2d 448, 450-51 (1993)).

U-Haul's first argument is based on the single sentence in the RC which states: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." From this U-Haul argues that the RCA is incorporated by reference. U-Haul does not argue that any of the documents or electronic screens presented to the customers before execution of the contract mention arbitration or let alone provide any notice that an arbitration agreement is being offered.

As the Circuit Court noted:

> U-Haul argues that the doctrine of incorporation by reference allows it to impose its arbitration clause on the plaintiffs. While West Virginia recognizes the doctrine, *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.*, 186 W.Va. 613, 616-617, 413 S.E.2d 670, 673 - 674 (1991), incorporation by reference still requires offer and acceptance of the terms of the incorporated contract. *Id.* Indeed, in *Art's Flower Shop, Inc.*, the terms of a prior contract were incorporated by reference. There was no argument that the disputed terms had not been previously communicated **and** accepted by the parties. Similarly, in *Rashid v. Schenck Const. Co., Inc.*, 190 W.Va. 363, 367, 438 S.E.2d 543, 547 (1993), there was no dispute that the contracts incorporated by reference had not been communicated to the parties sought to be charged prior to agreement.

Order of March 27, 2012 at ¶ 21 [App. 009].

In every case cited by U-Haul regarding incorporation by reference, the contract actually signed informs the parties that another document is being incorporated. As such, these cases are distinguishable. For example, in *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 841 F.Supp.2d 955 (S.D. W.Va., 2012), the Court focused on the fact that "'both parties are sophisticated business entities'" in a case involving a business transaction where parties did not dispute that a valid contract was made noting *Williston on Sales* § 7:31 which notes a central requirement of the doctrine of incorporation by reference is that the document to be read into the agreement must be "clear[ly] referenc[ed]" and identified "in such terms that its identity may be ascertained beyond doubt."

In *In re Raymond James & Assocs., Inc.*, 196 S.W.3d 311 (Tex. 2006), unlike this case, the contract language communicated to consumer clearly disclosed the existence and content of addendum language. Likewise, in *Lucas, et al. v. Hertz*

Corp., 875 F.Supp.2d 991 (N.D. Ca., 2012), the contract language communicated to consumer clearly disclosed the existence and content of addendum language contained in folder sleeve); Finally, in *Botorff v. Amerco*, 2012 WL 6628952 (E.D. Ca., 2012), the court noted that the incorporation by reference rule, requires that the reference must be called to the attention of the consumer. This case is different from these cases because either the customers had no notice or the notice provided was insufficient.

First, with respect to the customers, like Plaintiff Farrell, who signed the electronic terminal, the Circuit Court found that no such notice was provided, crediting the specific evidence from the Farrell and Sigman affidavits, over the post-denial submissions of U-Haul on reconsideration.

U-Haul argues, for the first time on appeal, that Sigman's prior visit pre-dated the claims of the Plaintiffs. Sigman's affidavit states that he did not see the reference to agreeing to the RC and the RCA when he rented in December, 2009. Plaintiff Farrell rented in November, 2009, Plaintiff Evans rented in March 2010 and Plaintiff Stigall in April 2010. U-Haul does not provide any evidence that the missing references to agreeing to the RC and the RCA were somehow there before and after Sigman's rental and missing the month he rented. Indeed, Sigman was explicitly told in March, 2012 that the electronic terminals were changed the prior week because the previous terminals did not have "written contractual information on them."[57] Res. App. at 2, ¶ 13.

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[57]U-Haul's suggestion that an investigator's communications with a retail clerk constitute an ethical violation in this state are contrary to West Virginia law. *See syl. pt. 2 State ex rel.*

Even if this Court were to credit the post-ruling affidavit and un-admitted picture of the electronic terminal, the language is insufficient to put the Plaintiffs on notice that U-Haul is asking them to assent to another document that they have not been provided. According to the picture of the terminal, the customers sign a statement that they are agreeing to "this Rental Contract and Rental Contract Addendum." There is no evidence in the record that any of the terms of the RCA are disclosed in the terminal. Thus, the reference to "*this* Rental Contract and Rental Contract Addendum" (emphasis added) is insufficient to constitute a "clear and unmistakable writing" indicating an agreement to arbitrate. *Brown I, supra.* This Court should reject U-Haul's invitation to improperly find an agreement to arbitrate "by construction or implication." *Id.*

Moreover, even the language printed on the RC is insufficient even with respect to those who physically sign the RC with an actual pen. First, the RC starts out by stating that the customer has received "the terms and conditions of this Rental Contract and the Rental Contract Addendum." First, the term Rental Contract Addendum hardly has a clear and unmistakable meaning prior to it being provided to the customer. The record in this case conclusively establishes (and the Defendant does not contest) the fact that the RCA is not provided to the customers

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Charleston Area Medical Center v. Zakaib, 190 W.Va. 186, 187, 437 S.E.2d 759, 760 (1993) ("A corporate 'party' for the purposes of *W.Va. Rules of Professional Conduct,* Rule 4.2, includes those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation. Syllabus Point 2, *Dent v. Kaufman,* 185 W.Va. 171, 406 S.E.2d 68 (1991)").

prior to them signing the RC. Thus, the false statement to the customers that they have received the RCA makes the reference to an ambiguously named document confusing and, therefore, insufficient to meet the "clear and unmistakable writing" requirement of *Brown I, supra.*

The RCA itself also fails the "clear and unmistakable writing" requirement of *Brown I, supra.* As for the RCA, it is made of cardstock and is a multicolor document that is folded to serve as a document holder. On the front cover of the RCA, in bold large type appears the title: "RENTAL CONTRACT ADDENDUM" with the next line stating in bold and slightly smaller type "DOCUMENT HOLDER". A few small lines of text appear next stating: "Additional Terms and Conditions for Equipment Rental". These lines are followed by a large block of text in reverse type stating "RETURNING EQUIPMENT". The remainder of the front cover focuses on instructions for returning the rental equipment. The back cover of the folded RCA contains an advertisement for additional services offered by the Defendant. *See, e.g.,* Res. App. at 7. Contractual language contained inside a folded document with instructions and advertising is hardly a "clear and unmistakable writing" sufficient to allow a court to find assent to material terms contained inside. Nothing on either exposed side of the document holder alerts the customer to the nature of the obligations contained therein.

Finally, it is irrelevant that the Plaintiffs may have rented on more than one occasion and may have received the RCA on the prior rentals. First, as noted above, the procedures used were insufficient to place the customers on notice to

constitute assent to the terms of the RCA. These facts are similarly applicable on subsequent rentals. Indeed, it is even more remote to expect an RCA received months ago to constitute notice on a subsequent rental – especially when U-Haul requests return of the contract documents with the vehicles. Bowles Second Affidavit, ¶ 9 [App. at 529]. Second, even if the arbitration agreements are incorporated into the subsequent rentals by virtue of being provided a version of the RCA during a prior rental (a premise Plaintiffs dispute), there would be no arbitration clause applicable to claims arising out of Plaintiffs' first rentals.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE ARBITRATION CLAUSE WAS A MATERIAL CLAUSE THAT COULD ONLY BE INCLUDED IN THE RENTAL CONTRACTS WITH THE ASSENT OF THE CUSTOMERS.

Once a contract has been made, a modification of the contract requires the assent of both parties to the contract as "mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract." *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W.Va. 93, 97-98, 199 S.E.2d 308, 311 (W.Va. 1973) (citations omitted). This is particularly the case when a party attempts to include an additional term into the agreement that is material. *See, e.g., Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 136 (4th Cir. 1979) (when a written confirmation form contains material terms in addition to those reached in the oral sales contract the additional terms do not become part of the contract absent assent).

Arbitration clauses are uniformly held to be material. In *Supak,* the Fourth Circuit concluded: "Moreover, courts of last resort of both states [New York and

North Carolina] have held that the addition of an arbitration clause constitutes a *per se* material alteration of the contract . . . . Thus, under the law of either state, the arbitration clause did not become part of the contract." 593 F.2d at 136. (citations omitted); The Fifth Circuit reached the same conclusion on similar facts in *Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F. 2d 375, 379 (5th Cir. 1981) holding: "By requiring evidence of an express agreement before permitting the inclusion of an arbitration provision into the contract, a court protects the litigant who will be unwillingly deprived of a judicial forum in which to air his grievance or defense."

Courts distinguish cases like this where the arbitration clause was presented after agreement. *See Electrical Box & Enclosure, Inc. v. Comeq, Inc.*, 626 So. 2d 1250, 1252 (Ala. 1993) (distinguishing *Coastal Industries* on the grounds that the arbitration clause was presented to Electrical Box during the negotiations of the contract). *See also Diskin v. J.P. Stevens & Co.*, 836 F. 2d 47 (1st Cir. 1987) (similar facts and same holding as in *Supak & Sons*); *N&D Fashions, Inc. v. DHJ Indus.,* Inc., 548 F.2d 722, 727 (8th Cir. 1977) ("we cannot say on this record that the District Court was clearly erroneous in holding that the arbitration provision in DHJ's acknowledgement form was a 'material alteration.'"); *Universal Plumbing and Piping Supply, Inc. v. John C. Grimberg Co.*, 596 F. Supp. 1383, 1385 (W.D. Pa. 1984) (similar facts and same holding as in *Supak & Sons* noting "[o]ther courts have held that an arbitration clause is a material alteration requiring the parties' assent."); *Fairfield- Noble Corp. v. Pressman-Gutman Co.*, 475 F. Supp. 899, 903

(S.D.N.Y. 1979) ("Thus, arbitration was a term 'additional to or different from' those agreed upon. As such, the arbitration provision, unilaterally inserted by the defendant, was a material alteration of the contract and accordingly did not become a part thereof."); *Duplan Corp. v. W.B. Davis Hosiery Mills, Inc.*, 442 F. Supp. 86 (S.D.N.Y. 1977) (similar facts and same holding as in *Supak & Sons*); *Valmont Indus. v. Mitsui & Co.*, 419 F. Supp. 1238, 1240 (D. Neb. 1976) (similar facts and same holding as in *Supak & Sons*); *John Thallon & Co. v. M&N Meat Co.*, 396 F. Supp. 1239 (E.D.N.Y. 1975) (very similar facts and same holding as in *Supak & Sons* "the arbitration clause and the correlative forfeiture by plaintiff of its right to trial by jury in the courts, 'alter[ed] the original bargain' and involved an 'element of unreasonable surprise.'" (citations omitted)); *J&C Dyeing, Inc. v. Drakon, Inc.*, 93 Civ. 4283, 1994 U.S. Dist. LEXIS 15194 at *6, *8 (S.D.N.Y. 1994) ("it is clear that an arbitration clause is a material addition which can become part of a contract only if it is expressly assented to by both parties. . . . Although Drakon did not object to the arbitration clause, the mere retention of confirmation slips without any additional conduct indicative of a desire to arbitrate cannot bind Drakon, for it does not rise to the level of assent required to bind parties to arbitration provisions."); *DeMarco California Fabrics, Inc. v. Nygard International*, No. 90 Civ. 0461, 1990 U.S. Dist. LEXIS 3842 at *7 (S.D.N.Y. 1990) ("provision for arbitration is 'clearly a proposed additional term' to the parties' agreement which 'materially alters' the agreement . . . ."); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 995, Cal. Rptr. 347, 352 (1972) ("it is clear that a provision for arbitration

inserted in the acceptance or confirmation of an offer to purchase goods 'materially alters' the offer."); *Matter of Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 408 N.Y.S. 2d 410, 45 N.Y. 2d 325, 380 N.E. 2d 239 (1978) ("the inclusion of an arbitration agreement materially alters a contract for the sale of goods . . . . [B]y agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent" (citation omitted)); *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 204 S.E. 2d 834, 842 (N.C. 1974) ("Beyond question, [the addition of an arbitration clause] would be a material alteration of [the contract]."); *Just Born, Inc. v. Stein Hall & Co.*, 59 D. & C. 2d 407 (Pa. D. & C. 1971) (similar facts and same holding as *Supak & Sons*) (cited in *Universal Plumbing*, 596 F. Supp. at 1385); *Stanley-Bostitch, Inc. v. Regenerative Environmental Equipment Co.*, 697 A.2d 323, 329 (R.I. 1997) ("We are of the opinion that a provision compelling a party to submit to binding arbitration materially alters the terms of the parties' agreement."). Based on this compelling authority, the Circuit Court correctly rejected the inclusion of a post-agreement clause without proof of assent to the added material arbitration clause.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THAT PLAINTIFFS' CHALLENGES TO WHETHER THEY ACTUALLY AGREED TO ARBITRATION DID NOT VIOLATE THE FAA'S SEVERABILITY RULE.

"When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid

arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 717 S.E.2d 909, 917-18 (W.Va. 2011) (footnote omitted). A corollary to this rule is the so-called severability doctrine which this Court described as follows:

> The doctrine of severability means this: If a party challenges the enforceability of the entire contract (including the arbitration clause)—that is, the party does not sever the arbitration clause from the rest of the contract and make a "discrete challenge to the validity of the arbitration clause"—then the court is completely deprived of authority and only an arbitrator can assess the validity of the contract, including the validity of the arbitration clause.

Richmond American Homes, 717 S.E.2d at 918.

U-Haul argues that Plaintiffs challenge to the lack of assent to the RCA is a challenge to the entire contract. U-Haul argues that, because the Plaintiffs' challenge to the RCA would also invalidate the language in RCA relevant to optional insurance coverage, the challenge violates the severability rule.

This Court rejected the argument that severability requires the Court to limit its review to the arbitration clause itself. *Id.* at 919 (noting that "the law of this state—and virtually every other state—is that [a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract *as a whole*") (emphasis in original; citation, footnote, and internal quotation omitted)).

As the Circuit Court noted in rejecting this argument:

> In this case, while there are other purported provisions in the RCA, the plaintiffs do not challenge those provisions. The disputed

> environmental fee is contained in the RC, not the RCA. Moreover, unlike the arbitration clause which appears only in the RCA, the optional insurance coverages appear in the RC. Finally, the severability doctrine seeks to bar judicial challenges to an entire contract masquerading under the guise of a challenge to an arbitration agreement. *In this case the issue raised by the Plaintiffs is whether the parties actually agreed to arbitrate not whether the arbitration clause is enforceable.* The Defendant has not cited a case holding that failure to assent to additional contractual language containing an arbitration clause and other provisions not at issue in the cases constitutes a violation of the severability doctrine. Under *Richmond American Homes, supra,* the Court can look at the circumstances surrounding the execution of the contract *as a whole.*

Order of March 27, 2012 at ¶ 23 [App. at 11] (emphasis added). Plaintiffs' challenges are to the formation of the arbitration agreement. Plaintiffs do not argue that the entire contract is unconscionable or unenforceable. Indeed, as noted above, Plaintiffs moved to sever their argument that the arbitration clause was unconscionable until the Court determined that the arbitration clause was in the agreement. The Circuit Court clearly understood that the issue of whether the arbitration clause was assented to is consistent with the authorization to look at the circumstances surrounding the execution of the contract as a whole set forth in *Richmond American Homes.*

IV. THE CIRCUIT COURT CORRECTLY REJECTED U-HAUL'S MOTION TO RECONSIDER.

U-Haul's final argument is that the Circuit Court applied the wrong standard of review in denying its motion to reconsider. In the end, the Circuit Court concluded that the arguments U-Haul made on reconsideration were either already made in its original motion or ones that could have been made in connection with its

original motion. Order of January 22, 2013 [App. at 14-17]. This Court's review of findings on the "denial of a motion to reconsider is for an abuse of discretion." *Oak Cas. Ins. Co. v. Lechliter*, 206 W.Va. 349, 352, 524 S.E.2d 704, 707 (1999). As U-Haul does not contest the Circuit Court's underlying findings, Plaintiffs cannot imagine any standard justifying reconsideration.

Plaintiffs agree that Rule 54(b) gives the Circuit Court the power to amend previous interlocutory rulings. *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 550-551, 584 S.E.2d 176, 184-185 (2003). The power, however, is one that is limited to situations where "justice requires" reconsideration. *Id.* at 551, 584 S.E.2d at 185 (internal quotations omitted). While this standard is broader than the one applicable to Rule 60(b) motions, *id.*, this standard does not permit de novo reconsideration:

> We have limited district courts' reconsideration of earlier decisions under Rule 54(b) by treating those decisions as law of the case, which gives a district court discretion to revisit earlier rulings in the same case, subject to the caveat that "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir.1964). Thus, those decisions may not usually be changed unless there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992) (internal quotation marks omitted).

Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003). When reconsideration is sought based on newly discovered evidence or a supposed change in law, the proponent of the motion must show that the supposed new evidence and law were not previously available to

him. *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 252 (7th Cir. 1987). When "[e]verything submitted with the opening brief on reconsideration was in existence before the original motion was decided," and the proponent of the motion fails to give "any satisfactory explanation as to why the information could not have been produced earlier," the motion should be denied. *Id.; see also Coopers & Lybrand, LLP, supra* (evidence in existence at time original motion was heard was not new evidence). Contrary to U-Haul's suggestion, the Circuit Court cited and applied Rule 54(b) cases not Rule 60(b) cases on the standard. In sum, the Circuit Court determined that justice does not require reconsideration of arguments already made or, absent good cause, available at the time of the original hearing.

In this case U-Haul failed to meet this standard. Its motion below consisted mainly of regurgitation of U-Haul's previous arguments. The Circuit Court so-found, and U-Haul does not dispute this conclusion. *See* Order of January 22, 2013 at ¶ 2 [App. at 15-16].

Second, the Circuit Court rejected U-Haul's newly proffered arguments and evidence. First, the Court found that U-Haul had not attempted to justify why it waited until the Court ruled to proffer the additional cases and affidavit. Order of January 22, 2013 ¶ 3 [App. at 16]. Indeed, its excuses for not following up on its request to file a supplemental affidavit were not made until after the Court denied the motion to reconsider and only made in the form of a proposed order that contained arguments never previously presented to the Court. [App. at 589-601]. Given that U-Haul offered no justification for failing to include available evidence

prior to the Court ruling on the original motion, justice did not require reconsideration on this evidence.

Finally, the denial of the motion to reconsider was not an abuse of discretion for the reasons noted above. Consequently, this Court should not consider the evidence submitted in connection with the motion to reconsider as part of its review of the original order. U-Haul should not be permitted to establish a clear error of law on the original ruling based on evidence that was not before the Court at the time of the original ruling.

CONCLUSION

The Circuit Court's rulings in this case are correct, and therefore, cannot be considered a clear error of law. This Court should therefore not issue a rule to show cause and deny the Petition.[58]

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[58]As noted previously, it would be premature to compel arbitration. As U-Haul's lead counsel recognized, the issue of whether its arbitration clause is unconscionable remains pending. App. at 690.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that **Respondents' Brief** was served upon the persons listed below by mailing a true copy thereof as required by Rules 10(c)(9) and 37, Revised Rules of Appellate Procedure, on this 21st day of March, 2013:

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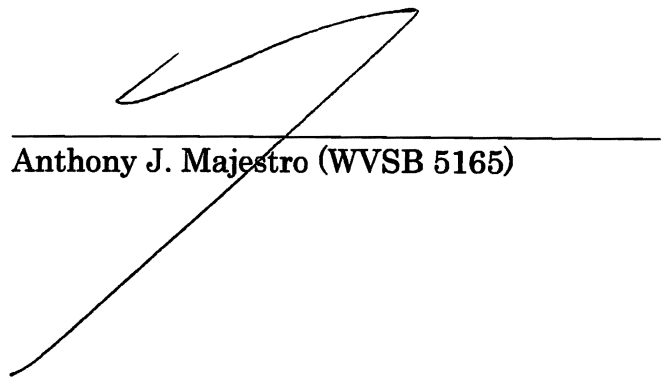

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. U-HAUL CO. OF WEST VIRGINIA, a West Virginia Corporation, **Petitioner,** **v.** **THE HONORABLE PAUL ZAKAIB, JR. AMANDA FERRELL, JOHN STIGALL, AND MISTY EVANS,** **Respondents.**	**Case No. 13-0181** **(Circuit Ct. Civil Action No. 11-C-1426)**

VERIFICATION

I, Anthony J. Majestro, counsel for Respondents, being duly sworn, depose and say that I have reviewed the foregoing Response to Petition for Writ of Prohibition and believe the factual information contained therein to be true and accurate to the best ~~of my information~~, knowledge and belief.

Anthony J. Majestro (WVSB #5165)

Taken, sworn to, and subscribed before me this 21st day of March, 2013.

My commission expires July 11, 2020.

OFFICIAL SEAL
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My Commission Expires July 11, 2020

Notary Public