

**Summary of SC93846, State ex rel. Todd Hewitt v. Honorable Kristine Kerr, Judge, Circuit Court for St. Louis County, Missouri**

Proceeding originating in the St. Louis County circuit court, Judge Kristine Kerr  
Argued and submitted May 21, 2014; opinion issued April 28, 2015

**Attorneys:** Hewitt was represented by John D. Lynn of Sedey Harper PC in St. Louis, (314) 773-3566; and the Rams were represented by Bradley A. Winters of Sher Corwin Winters LLC in St. Louis, (314) 721-5200.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A former longtime employee of a professional football club seeks a writ preventing the circuit court from compelling arbitration in his age discrimination lawsuit against the club. In a per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri makes permanent its writ as modified. Five judges find that a writ of mandamus is the appropriate mechanism to review whether the circuit court erred in sustaining the club's motion to compel arbitration. Four judges find that the employee's employment contract contained a valid and enforceable arbitration clause that required him to arbitrate disputes against the club. Four judges find that the National Football League's dispute resolution procedural guidelines setting out the essential terms of arbitration were not referenced in the employee's employment contract and, therefore, were not incorporated into his contract. Four judges find the contract terms designating the NFL commissioner – an employee of the team owners – as the sole arbitrator with unfettered discretion to establish the rules for arbitration are unconscionable and, therefore, unenforceable. Four judges find that the state's uniform arbitration act provides a mechanism to imply the terms missing from the arbitration agreement and provides the rules for appointing an arbitrator to replace the NFL commissioner. Accordingly, four judges issue a permanent writ of mandamus directing the circuit court to vacate its order compelling arbitration and, instead, to issue an order compelling arbitration wherein the circuit court appoints a neutral arbitrator, implies the specific terms of arbitration from applicable statutes in the state's uniform arbitration act, and directs the parties to proceed with arbitration.

Judge Laura Denvir Stith concurs in part and dissents in part. She agrees that a writ of mandamus is the appropriate mechanism to review whether the circuit court erred in sustaining the motion to compel arbitration and agrees that the parties' arbitration agreement is valid. She disagrees that the parties have not agreed to the NFL's dispute resolution guidelines and that the NFL commissioner is presumptively biased and believes the better course would be to direct the circuit court simply to refer this matter for arbitration under the contract as written. But, because a majority of judges hold that the parties have not agreed on the terms governing arbitration and that the arbitrator is disqualified, she agrees that the state's uniform arbitration act provides mechanisms for providing substitute terms governing arbitration and mechanisms for appointing a substitute arbitrator. Accordingly, she also agrees that a writ should issue on the terms set out in the instructions to the circuit court.

Judge Richard B. Teitelman also concurs in part and dissents in part. He agrees that mandamus is an appropriate remedy, that the NFL dispute resolution guidelines were not incorporated into Hewitt's contract and that designating the NFL commissioner as the arbitrator is unconscionable. He disagrees, however, that the arbitration agreement is enforceable because its essential terms, as set forth in the guidelines, never were incorporated into the employment contract. He would find that, because there is no enforceable arbitration agreement, the circuit court abused its discretion in compelling arbitration.

Judge Zel M. Fischer dissents in an opinion joined by one other judge. He would not issue a writ of mandamus. The legislature has foreclosed an appeal for the employee at this state of the proceedings but has given him the remedy of raising his claims – including his specific claim that the arbitrator is biased – after arbitration during the normal course of judicial review and appeal. Because the employee has an adequate remedy by appeal, an extraordinary writ of mandamus should not issue in this case.

Judge Paul C. Wilson also dissents. He would not issue a writ of mandamus, which he believes has been misused in this case because there is no clear and unequivocal right being enforced.

**Facts:** Todd Hewitt worked more than 40 years for the St. Louis Rams professional football team, holding the position of equipment manager from 1985 until early 2011. Hewitt signed his most recent contract with the Rams in November 2008 for the 2009-2011 seasons. Like many of his prior employment contracts, this contract contained an arbitration clause by which Hewitt agreed to be bound by the constitution, bylaws, rules and regulations of the National Football League and by the final decision of the NFL commissioner, who has full and final authority to arbitrate any disputes under the contract. In January 2011 – when Hewitt was 54 years old – then-head coach Steve Spagnuolo notified Hewitt that his employment contract would not be renewed. In May 2012, Hewitt sued the St. Louis Rams Partnership and three affiliated companies (collectively, the Rams), alleging age discrimination. The Rams moved to compel arbitration, which Hewitt opposed. Ultimately, the circuit court granted the Rams' motion to compel arbitration and ordered the court action stayed pending the arbitration. Hewitt asks this Court to issue its writ of mandamus preventing the circuit court from compelling arbitration.

#### **WRIT MADE PERMANENT AS MODIFIED.**

**Court en banc holds:** (1) A writ of mandamus is the appropriate mechanism to review whether the circuit court improperly sustained the Rams' motion to compel arbitration, as this Court recognized in its 2006 decision in *State ex rel. Vincent v. Schneider*, and when adequate relief cannot be afforded by an appeal. The federal arbitration act governs the applicability and enforceability of arbitration agreements in all contracts involving interstate commerce. The United States Supreme Court has held the federal act applies when an arbitration agreement is executed in one state by a resident of that state if one party to the agreement engages in business in multiple states. It is undisputed the Rams operate in interstate commerce, as its players and employees participate in games and take in revenue in other states, and several of the affiliated corporations named as defendants are incorporated in Delaware. As such, Hewitt's employment contract is within the purview of the federal arbitration act, which is substantially similar to the state's uniform arbitration act. Hewitt has a clearly established right to arbitrate his claims using

only those terms that are not unconscionable as determined using the general principles governing contract law in Missouri. Mandamus is appropriate because Hewitt has no immediate alternative remedy to his claim that the arbitration agreement is invalid, and delay results in harm not only to him but to the Rams and to the courts.

(2) Hewitt's employment contract contained a valid and enforceable arbitration clause that required him to arbitrate disputes against the Rams. The United States Supreme Court has held that the federal arbitration act reflects a liberal policy favoring arbitration, but this does not diminish a trial court's broad authority to determine the validity of an arbitration agreement by applying state contract law principles. According to the plain language of the contract – which included a similar arbitration provision as had been included in many of the previous contracts Hewitt signed with the Rams over the prior 40 years – Hewitt intended to be legally bound by the NFL's constitution and bylaws, which provided that his disputes would be arbitrated. The record supports the circuit court's finding that the Rams already are bound by the NFL's constitution and bylaws, and the Rams promised to arbitrate disputes before the NFL commissioner. Hewitt's employment contract was signed by and is binding on not only on him but also the Rams' then-president and general manager. As such, the agreement did not lack consideration. Inequality in bargaining power is not itself a sufficient reason to hold that arbitration agreements never are enforceable in the employment context. Hewitt does not allege he was coerced or defrauded into agreeing to the arbitration clause, especially after decades of signing such agreements, and he does not show that the circumstances under which the contract was entered into were so unconscionable as to render the agreement invalid.

(3) The NFL's dispute resolution procedural guidelines setting out the essential terms of arbitration were not referenced in Hewitt's employment contract and, therefore, were not incorporated into his contract. While terms not explicit in a contract may be incorporated into the contract by reference, the intent to incorporate must be clear. Hewitt's employment contract did not reference the NFL guidelines, nor were they clearly referenced in the NFL's constitution and bylaws. As such, Hewitt had no way to identify the terms by which the commissioner would arbitrate or to know the NFL intended the guidelines to govern arbitration proceedings and could not assent to the essential terms of arbitration in the guidelines. So, although Hewitt agreed to arbitrate disputes against the Rams, the specific terms of arbitration, therefore, are unenforceable. But this does not invalidate the arbitration agreement, as the terms of arbitration will be implied from the provisions of the state's uniform arbitration act.

(4) The contract terms designating the NFL commissioner – an employee of the team owners – as the sole arbitrator with unfettered discretion to establish the rules for arbitration are unconscionable and, therefore, unenforceable. In essence, the NFL's constitution and bylaws require the commissioner to arbitrate claims against his employers with control over virtually every aspect of the arbitration, putting him in a position of bias as an arbitrator. This does not invalidate the arbitration agreement, as the relevant provisions of the state's uniform arbitration act provides for substitution of a new arbitrator when the designated arbitrator is disqualified.

(5) The arbitration clause encompasses Hewitt's underlying claim against all the defendants. Hewitt waived a judicial forum for his claim that he was fired in violation of the state's human rights act. His contract mandates arbitration of "any dispute" that may arise between Hewitt and

the Rams, and “any dispute” plainly means any dispute, including his statutory claims under the state’s human rights act. Further, Hewitt’s petition makes no differentiation between the Rams, which signed his contract, and the affiliated defendants, which did not, essentially alleging that each defendant is responsible for the single act of firing him due to age while he was under contract. As such, his claim against the defendants is a single one that should be referred in its entirety to arbitration.

(6) Although Hewitt is obligated to arbitrate his claims against all four defendants, he should not be compelled to do so using the terms in the guidelines and with the commissioner appointed as the sole arbitrator, and no adequate remedy exists on appeal. As such, a permanent writ of mandamus should issue. The circuit court is directed to vacate its order granting the Rams’ motion to compel arbitration using the terms set forth in the NFL’s guidelines and then to issue an order compelling arbitration whereby the circuit court appoints a neutral arbitrator and implies the specific terms of arbitration pursuant to applicable statutes in the state’s uniform arbitration act and directs the parties to proceed with arbitration.

**Opinion concurring in part and dissenting in part by Judge Stith:** (1) The author agrees that a writ of mandamus is the appropriate mechanism to review whether the circuit court erred in sustaining the motion to compel arbitration and agrees the arbitration agreement here is valid. A party cannot be forced to arbitrate a dispute absent a valid agreement to do so, and it is the circuit court – not the arbitrator – that determines whether the parties have signed a valid agreement to arbitrate. This determination should not be made after requiring a party to go through arbitration, which would deny that party the recognized right to try the case before the courts.

(2) The author dissents from the holdings that the parties have not agreed to the NFL’s dispute resolution guidelines and that the NFL commissioner is presumptively biased. No court before has held that the NFL commissioner, simply by virtue of his position, is inherently biased and unable to serve as a neutral arbitrator. Both the federal and state arbitration acts entitle Hewitt to seek judicial review of any arbitration award if he believes the commissioner shows bias or partiality in considering Hewitt’s employment discrimination claim, and this review is adequate. Although it would be pointless to wait until after arbitration to disqualify an arbitrator who was shown to be actually biased or to have an actual conflict of interest, Hewitt concedes he has not alleged or shown actual bias. The NFL commissioner does not own the Rams or any other team, nor does he exclusively represent the interests of the team owners. He is hired and employed by the league, not the owners individually or collectively, and he cannot be fired without a vote of two-thirds of the league members. Further, the commissioner is required to arbitrate disputes between NFL teams as well as between employees and between NFL owners and their players or other employees – including disputes in which the NFL commissioner must take a position adverse to one or more team owners. Hewitt offers no evidence of the NFL commissioner’s bias against employees and cites no legal authority for his claim that the commissioner is inherently biased or has exhibited bias based solely on his position as commissioner. Further, Hewitt was fully aware through the current contract and many prior contracts that the NFL commissioner would arbitrate any dispute arising between him and the Rams, precluding him from objecting to enforcement of this term of his contract. Similarly, Hewitt agreed to arbitration under the NFL rules, and the only place the NFL sets out rules governing arbitration are in the guidelines adopted under the rules. The only reason he may not have known what the guidelines said or

where they were located is because – despite having signed a similar contract with similar terms for up to 40 years – he never inquired about the terms or asked for supporting documents; a court now is unable to turn back the hands of time and shield him from his own contractual promises. The rules are sufficiently specific and ascertainable to govern the arbitration. The author would affirm the circuit court’s referral of this matter to arbitration under the contract as written.

(3) Because a majority of judges hold that the parties have not agreed on the terms governing arbitration and that the arbitrator is disqualified – although the author disagrees with these holdings – the author agrees that the state’s uniform arbitration act provides mechanisms for providing substitute terms governing arbitration and mechanisms for appointing a substitute arbitrator. Accordingly, the author agrees to the issuance of a permanent writ as this Court sets out with the instructions to the circuit court.

**Opinion concurring in part and dissenting in part by Judge Teitelman:** The author agrees that mandamus is an appropriate remedy, that the NFL dispute resolution guidelines were not incorporated into Hewitt’s contract and that designating the NFL commissioner as the arbitrator is unconscionable. The author disagrees, however, that the arbitration agreement is enforceable because its essential terms, as set forth in the guidelines, never were incorporated into the employment contract. The failure to incorporate the guidelines is not a mere gap that can be filled by statutorily established default arbitration rules. Default arbitration rules presuppose the existence of an enforceable contract arising from assent to essential terms of the contract. But Hewitt’s contract with the Rams includes not one essential term of the alleged arbitration agreement to which the parties could assent. After removing the unconscionable provision that the NFL commissioner would arbitrate any dispute, nothing is left but an agreement to arbitrate with no further indication of how, when or under what circumstances any arbitration would be conducted. Because there is no enforceable arbitration agreement, the author would hold that the circuit court abused its discretion in compelling arbitration.

**Dissenting opinion by Judge Fischer:** (1) The author would not issue a writ of mandamus; he would find Hewitt has an adequate remedy by appeal following arbitration. Mandamus should issue only for relief requested – but the relief Hewitt sought was not to arbitrate at all. As a result of the per curiam opinion, he will be forced to arbitrate pursuant to terms neither party requested or anticipated. Nothing in *State ex rel. Vincent v. Schneider* discusses whether a writ of mandamus is an appropriate mechanism for reviewing an order sustaining or overruling a motion to compel arbitration, nor did it overrule sub silentio (without notice being taken or without making a particular point of the matter in question) all of this Court’s opinions regarding what is required for the Court to issue a writ of mandamus. Further, the constitution gives the circuit court authority to rule on a motion to compel arbitration, and the legislature has provided the remedy of an appeal to review the circuit court’s ruling. A writ of mandamus is not appropriate.

(2) If the arbitrator’s award stands in any form, Hewitt can challenge the circuit court’s previous ruling that there was a contract to arbitrate in an appeal from the circuit court’s final judgment. This appellate remedy is adequate. The legislature provides for pre-arbitration judicial review by permitting circuit courts to determine the validity of arbitration agreements when a challenge is brought. When a circuit court concludes there is a valid arbitration agreement, the statutes make clear the time for review by appellate courts is after the arbitration takes place, at the end of the

circuit court proceedings. A writ should not be used to undermine this legislative choice to favor the swift resolution of arbitrable cases without the routine interruption of interlocutory appeals (appeals of court decisions before entry of final judgments) challenging arbitration agreements.

**Dissenting opinion by Judge Wilson:** The author would not issue a permanent writ and would deny the petition for writ of mandamus. The only proper purpose of a writ of mandamus is to enforce a clear, unequivocal and specific right – but the “right” the per curiam opinion purports to enforce is so “clear and unequivocal” that it takes four opinions and dozens of pages to locate it. The author notes that, by granting “relief,” the Court is ordering Hewitt to participate in the arbitration he asked this Court to stop. The author also agrees with the reasons expressed in Judge Fischer’s dissenting opinion.