IN THE SUPREME COURT OF MISSOURI

CARLA R. BAKER	)	
Plaintiffs- Respondent	)	
vs.	)	Supreme Court No. SC93451
BRISTOL CARE INC. d/b/a BRISTOL MANOR & DAVID FURNELL	)	
Defendants-Appellants	)	

Appeal from Dekalb County, Missouri Circuit Court
43rd Judicial Circuit
The Honorable R. Brent Elliott, Judge

SUBSTITUTE BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

JURISDICTIONAL STATEMENT

Respondent does not dispute Appellants' Jurisdictional Statement or this Court's jurisdiction over this appeal.

STATEMENT OF FACTS

Pursuant to Mo.R.Civ.P. 84.04(f), Plaintiff[1] agrees with Defendant's Statement of Facts except for statement number 9 as submitted by Appellants. Plaintiff's would submit the following paragraph number 9 an add a number 10:

9. Pursuant to the Employment Agreement, Baker's employment could be terminated without cause if five days notice was given or in lieu of notice, at the company's sole opinion the company may pay Baker for the five day notice period and dismiss her immediately, which would remove Baker from her residence in the facility.

10. Baker's employment could also be terminated immediately, at the sole opinion of the Defendant, for failing to follow the terms and conditions of the employment agreement, which mentions policies within an administrator's guide and handbook that are not submitted in any exhibit, and for dishonesty, insubordination, moral turpitude, or incompetence. The terms dishonesty, insubordination, moral turpitude, and incompetence are not defined within the agreement.

[1] Respondent, as the Plaintiff at the trial court level, will refer to herself as the Plaintiff and to the Appellant(s) as Defendant(s).

POINTS RELIED ON

RESPONSE TO APPELLANTS' POINT RELIED ON I

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT IS NOT AN ENFORCABLE CONTRACT UNDER MISSOURI LAW DUE TO THE FACT THAT AT-WILL EMPLOYMENT, PROMOTIONS WITHIN A COMPANY, NOR A NEW PAY SCALE CONSTITUTE CONSIDERATION AND FURTHER THE UNILATERAL RIGHT TO AMEND THE ARBITRATION AGREEMENT RENDERS DEFENDANT'S PROMISES MADE WITHIN THE ARBITRATION AGREEMENT ILLUSORY AND IN CONFLICT WITH DEFENDANT'S OWN EMPLOYMENT AGREEMENT; THUS THE BASIC ELEMENTS OF A CONTRACT ARE LACKING.

Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15, 21 (Mo. Ct. App. 2008).

Whitworth v. Mcbride & Son Homes, Inc., 344 S.W.3d 730, 741 (Mo. Ct. App. 2011).

Frye v. Speedway Chevrolet Cadillac, 321 S.W.3d 429, 443 (Mo. Ct. App. 2010)

RESPONSE TO APPELLANTS' POINT RELIED ON III

THE TRIAL COURT CORRECTLY FOUND THAT DEFENDANTS' ARBITRATION AGREEMENT IS NOT AN ENFORCABLE CONTRACT BUT IS INSTEAD AN ILLUSORY AGREEMENT THAT RESERVES FOR THE

DEFENDANT THE UNILATERAL RIGHT TO AMEND THE ALLEGED AGREEMENT, AND DEFENDATS' ARGUMETNS TO THE CONTRARY ARE MERELY RED HERRINGS.

Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15, 21 (Mo. Ct. App. 2008).

Whitworth v. Mcbride & Son Homes, Inc., 344 S.W.3d 730, 741 (Mo. Ct. App. 2011).

Frye v. Speedway Chevrolet Cadillac, 321 S.W.3d 429, 443 (Mo. Ct. App. 2010)

RESPONSE TO APPELLANTS' POINT RELIED ON IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS OR TO COMPEL ARBITRATION AS IT PERTAINS TO DAVID FURNELL BECAUSE DAVID FURNELL IS NOT A COVRED ENTITY WITHIN THE ARBITRATION AGREEMENT.

Triarch Indus., Inc. v. Crabtree, 158 S.W.3d 772, 776 (Mo. banc 2005)

Dumais v. Am. Golf Corp., 299 F.3d 1216, 1219 (10th Cir. 2002)

RESPONSE TO APPELLANTS' POINT RELIED ON V

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS OR TO COMPEL ARBITRATION BECAUSE IT IS THE COURT'S JOB TO DETERMINE IF A VALID CONTRACT EXISTS AND WITHOUT A VALID CONTRACT THE TERMS OF THE ARBITRATION AGREEMENT ARE NULL AND VOID.

Brewer v. Missouri Title Loans, 364 S.W.3d 486, 490 (Mo. 2012)

Dumais v. Am. Golf Corp., 299 F.3d 1216, 1219 (10th Cir. 2002)

ARGUMENT

Introduction

Defendant presents this Court with many arguments, all with the intent to shift the focus away from the arbitration agreement, which is the actual contract before the Court. Respondent understands the purpose of Appellant wishing to deflect the focus from the arbitration agreement itself. After all the arbitration agreement unambiguously defines the employment relationship between the Respondent and Appellant as an at-will employment relationship. Appellant does not want to focus on the Appellant's power to amend the arbitration agreement, a power retained by the Appellant even now and which conflicts with Missouri precedent. Moreover, Appellant wishes to shift the focus off of the arbitration agreement because the agreement directs anyone interpreting the document to look no further than the four corners of the agreement itself and that the agreement is the entire agreement in respect to Respondent's employment.

Instead , Appellant directs this Court's attention to matters from Carrol County and the Eighth Circuit[2] which while related to the arbitration agreement do not pertain to issues before this Court.[3] The Defendant wishes the Court to focus on promises that Missouri precedent has long since decided are illusory. Finally, the Appellant asks this

[2] Respondent incorrectly cites to *Baker v. Bristol Care*, rather than the correct case name of *Owens v Bristol Care*.

[3] These two cases focused on the legality of the class waiver, an argument Respondent does not now and never has made.

Court to focus on the employment agreement which directly conflicts with the arbitration agreement in multiple areas. Respondent has one simple requests; focus on the arbitration agreement and apply Missouri precedent so that Respondent may have her day in court in Dekalb County.

Standard of Review For All Points

"The question of whether or not arbitration can properly be compelled is a question of law which we review *de novo.*" *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 21 (Mo. Ct. App. 2008). Further, regardless of whether the Missouri or Federal Arbitration Act applies, "Missouri substantive law governs the issues of the existence, validity, and enforceability of any purported arbitration contract. In determining whether the parties have entered into a valid agreement to arbitrate, the usual rules of state contract law and cannons of contract interpretation apply." *Id.* (citing the Federal Arbitration Act at 9 U.S.C. § 2).

RESPONSE TO APPELLANTS' POINT RELIED ON I

THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT IS NOT AN ENFORCABLE CONTRACT UNDER MISSOURI LAW DUE TO THE FACT THAT AT-WILL EMPLOYMENT, PROMOTIONS WITHIN A COMPANY, NOR A NEW PAY SCALE CONSTITUTE CONSIDERATION AND FURTHER THE UNILATERAL RIGHT TO AMEND THE ARBITRATION AGREEMENT RENDERS APPELLANTS' PROMISES MADE WITHIN THE ARBITRATION AGREEMENT ILLUSORY AND IN CONFLICT WITH APPELLANTS' OWN EMPLOYMENT AGREEMENT; THUS THE BASIC ELEMENTS OF A CONTRACT ARE LACKING.

A. The Appellants' Arbitration Agreement Is Not A Valid Contract

"Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 21 (Mo. Ct. App. 2008). Absent a contract to arbitrate, a party lacks the unilateral right to require another party to arbitrate as the sole procedure for dispute resolution. *Dunn Indus. Group, Inc. v. City of Sugar Creek,* 112 S.W.3d 421, 435 (Mo. banc 2003). The party asserting the existence of a valid and enforceable contract to arbitrate bears the burden of proving that proposition. *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730 (Mo. Ct. App. 2011), transfer denied (Aug. 30, 2011), reh'g and/or (transfer denied (May 3, 2011)).

Under both the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the Missouri Uniform Arbitration Act, chapter 435, RSMo, whether the parties entered into an enforceable arbitration agreement is a preliminary issue for the court to decide by applying Missouri law. *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 130 S.Ct. 2847, 2855–56, 177 L.Ed.2d 567 (2010); *State ex rel. Vincent v. Schneider,* 194 S.W.3d 853, 856 (Mo. banc 2006); *Whitworth,* 344 S.W.3d at 736–37 & n. 8; *Frye v. Speedway Chevrolet Cadillac,* 321 S.W.3d 429, 436 & n. 12 (Mo.App. W.D.2010); *Morrow,* 273 S.W.3d at 21; *Johnson v. Vatterott Educ. Centers, Inc.*, 410 S.W.3d 735, 738 (Mo. Ct. App. 2013). The elements required to form a valid contract in Missouri are "offer, acceptance, and bargained for consideration." *Johnson v. McDonnell Douglas Corp.,* 745 S.W.2d 661, 662 (Mo. banc 1988). Missouri courts have provided ample precedent that arbitration agreements similar to theAppellants' are not enforceable contracts because they lack the required elements of a contract.

1. Appellants' At-Will Employment Relationship Does Not Provide Consideration For The Arbitration Agreement

Both Missouri precedent and the arbitration agreement are clear. The former orders that an at-will employment relationship does not provide sufficient consideration to support an arbitration agreement and the latter is clear that an at-will employment relationship exists between the Appellant and Respondent. *Morrow*, 273 S.W.3d at 26; *Frye*, 321 S.W.3d at 443; *Frye,* 321 S.W.3d at 436. Employment-at-will is not a *legally enforceable employment relationship* because it is terminable at the will of either party,

on a moment-by-moment basis. *Morrow*, 273 S.W.3d at 26. Additionally, "the mere continuation of at-will employment provides no consideration for employees' waiver of the right to access to the courts." *Frye*, 321 S.W.3d at 431.

The contract in question before this Court is the arbitration agreement. The arbitration agreement clearly and unequivocally states that the employment relationship between the Appellant and Respondent is an at-will relationship at § 3:

> Employment At-Will: This Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and does not alter the Employee's status as an at-will employee. Notwithstanding this Agreement, wither the Employee or the Company can terminate the employment of the Employee at any time, for any reason, with or without cause, at the option of the Employee or the Company. L.F. 32.

Defendant requests this Court to ignore the plain language of the arbitration agreement. Defendants' requests to ignore § 3 of the arbitration agreement further conflicts with § 26 of the arbitration agreement. Section 26 reads:

> In executing this Agreement, neither party is relying on any representation, oral or written, on the subject to the effect, enforceability, or meaning of this Agreement except as specifically set forth herein. L.F. 36.

Thus, § 26 dictates that the four corners of the arbitration agreement control and instructs not look to other contracts to influence the terms of the arbitration agreement. Reading sections three and twenty-six together forecloses any argument that an at-will

employment relationship between the Appellant and the Respondent did not exist. Section twenty-six directs the reader to look only at the arbitration agreement and § 3 unambiguously states the employment relationship is at-will.

Section three reads that the employment may be terminated at any time for any reason with or without cause. L.F. 32. The Respondent could be terminated at the will of the Defendant on a moment to moment basis just as the *Morrow* court opined in finding that such a relationship cannot serve as the basis for consideration to support an arbitration agreement. Respondent's at-will employment with the Appellant was not a legally enforceable employment relationship, so any terms and conditions imposed during employment, such as the arbitration agreement, are not enforceable at law as contractual duties.

2. The Promotion, Benefits, and Salary Championed By The Appellants Do Not Provide Adequate Consideration

Appellants argue that consideration could also derive from the promotion provided the Respondent and the benefits stemming from that promotion. Moreover, Appellantst declare consideration stems from promises made within the arbitration agreement. All these arguments are flawed and fail in the face of Missouri precedent.

The *Morrow* court recognized there is a crucial "distinction between terms and conditions of employment, on the one hand, and legally enforceable contracts, on the other." 273 S.W.3d at 23. The benefits, new salary and promotion, which is merely an offer of continued employment, were all attached to Respondent's at-will employment

relationship. As the Western District Court of Appeals held in *Frye* and *Whitworth*, an offer of continued at-will employment provides no consideration that is adequate to support an arbitration agreement. 321 S.W.3d at 431; 344 S.W.3d at 741-742.

Appellant further argues that Respondent was provided with a salary, room and board, and benefits along with the promotion. The salary, room and board, and benefits that Appellant upholds are nothing more than terms and conditions of the at-will employment relationship. Employer policies unilaterally imposed on at-will employee (*i.e.,* terms and conditions of employment) are not contracts enforceable at law. *Morrow*, 273 S.W. 3d at 26; *See Johnson v. McDonnell Douglas Corp.,* 745 S.W.2d 661, 662 (Mo. banc 1988). Moreover, forms of remuneration offered along with the at-will employment relationship do not constitute consideration to support an arbitration agreement. *Whitworth*, 344 S.W.3d at 742. Missouri precedent is clear that if the at-will relationship, which is terminable at any time cannot provide consideration then the benefits that stem from the at-will relationship, which also are terminable at any time, cannot provide consideration. *Id*; *Morrow* 273 S.W.3d at 23.

3. Appellants' Illusory Promises Are Not Consideration

Appellants next scheme is to generate consideration through promises made within the arbitration agreement. Appellants direct the Court's attention to promises to pay the costs of the arbitrator and other fees. While Appellants champion the promises made to the Respondent, Appellants do not illuminate the power to change those promises. Section 24 of the arbitration agreement provides the Appellants the unilateral power to amend the arbitration agreement at any time. L.F. 35.

"A contract is illusory where a party retains the power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee." *Frye*, 321 S.W.3d at 443 (citing *Cooper v. Jensen*, 448 S.W.2d 308, 314 (Mo.App.1969)). Appellants maintain a unilateral right to modify the arbitration agreement that is not restricted once litigation has begun. Appellants argue that they will not change the promises made to the Respondent in the arbitration agreement. Appellants' endeavor to mitigate the reality of the unilateral power to amend does not change the fact that the Defendant drafted the power into the agreement which violates Missouri contract principles. *Morrow* 273 S.W3d at 18.

B. Appellants' Ambiguous Employment Agreement Conflicts With The Arbitration Agreement And Does Not Provide Consideration

The contract before the Court is the arbitration agreement. Section 26 of the arbitration agreement directs this Court to look to the four corners of the document and not to consider other oral or written representations. Much as Appellants have argued that it would not do, the Appellants change how to interpret the arbitration agreement and now argues that the employment agreement and arbitration agreement are the same document. This is contrary to Appellants' past arguments where they described the arbitration agreement as a "standalone document". Appellant Reply Brief pg. 4 electronically filed October 22, 2012. Appellants' past argument regarding a standalone document were consistent with § 26. The employment agreement championed by the

Appellants is ambiguous and as the Court of Appeals found does not alter the at-will employment relationship.[4]

[4] ""Employment Agreement" allowed Bristol Care to terminate Baker at any time and without notice for "failure to follow the terms and conditions" of the employment agreement relating to dishonesty, insubordination, moral turpitude, or incompetence. In addition, Bristol Care could terminate Baker for any other reason, or for no reason at all, "at its sole option" by simply giving Baker what is effectively five days" severance pay. While Appellants argue that this "limitation" on Bristol Care's ability to terminate Baker changes her at-will employment status, we disagree. As this Court stated in *Clemmons*, the employer "could have fired [the employee] fifteen minutes after [s]he signed the Agreement without suffering any legal consequences [other than the five days severance] because [her] employment remained at-will." *Clemmons*, 2013 WL 661645, at *3. In addition, an obligation to pay severance alone is not enough to change an employee's at-will status. *See Karzin v. Collett*, 562 S.W.2d 397, 400 (Mo. App. 1978) (employment was at-will even though employee was entitled to severance because he did not have tenure, and his termination did not have to be for cause); *Earl v. St. Louis Univ.*, 875 S.W.2d 234, 237 (Mo. App. E.D. 1994) (employment was at-will despite employee"s negotiation of eight months" severance because employee could leave his employment at any time and his employer properly terminated his employment, not for cause, but for fiscal reasons)." *Baker v. Bristol Care Inc*, WD75035 WL 1587882 slip opinion p. 7 (Mo. Ct. Apr. 16, 2013).

1. The Employment Agreement Is Ambiguous And Does Not Create Consideration

Appellants next attempt to blur the clear language of the arbitration agreement's description of the employment relationship is to introduce the employment agreement. The Respondent was required to sign the employment agreement and arbitration agreement as a condition of her employment. Employment Agreement § 19. L.F. Supp. 1.[5] The employment agreement is vague and ambiguous, it conflicts with the arbitration agreement and references evidence that is not in the record. Finally, the employment agreement does not alter the at-will status of the Respondent.

Appellants focus the Court's attention on the employment agreement and argues that it creates a definite period of time for employment. Appellants' Substitute Brief p. 15. Additionally, Appellants argue that the employment agreement restricts the Appellants ability to terminate the Respondent thus transforming the at-will employment relationship and creating consideration for the arbitration agreement[6]. *Id*.

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[5] Where an arbitration agreement is entered into is unilaterally enforced as a term and condition of employment it is not an enforceable contract. *Morrow*, 273 S.W.3d at 23.

[6] An obligation to pay severance alone is not enough to change an employee's at-will status. *See Karzin v. Collett*, 562 S.W.2d 397, 400 (Mo. App. 1978) (employment was at-will even though employee was entitled to severance because he did not have tenure, and his termination did not have to be for cause); *Earl v. St. Louis Univ.*, 875 S.W.2d 234, 237 (Mo. App. E.D. 1994) (employment was at-will despite employee's negotiation of

Appellants' arguments center on §2 of the agreement. Section two describes the term of Respondent's employment as indefinite, thus failing to include a statement of duration which is an essential element to an employment contract. L.F. 100; *Luethans v. Washington Univ.*, 894 S.W.2d 169, 172 (Mo. banc 1995). Further, the employment agreement allows the Company to terminate the Respondent at any time without prior notice for failure to follow the terms and conditions of the employment agreement or for conduct which jeopardized the general operation of the facility or the care, comfort, or security of its residents. L.F. 100. Additionally the Respondent could be fired immediately at the sole discretion of the Appellants for dishonesty, insubordination, moral turpitude or incompetence.

The Appellants fail to define dishonesty, insubordination, moral turpitude or incompetence and each term is subject to multiple interpretations. Moreover, the employee agreement's § 13 directly references an employee handbook as setting forth the policies and procedures that Respondent must abide by, but that handbook is not in evidence. The Appellants enjoy carte blanche authority to treat the Respondent as at-will

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eight months severance because employee could leave his employment at any time and his employer properly terminated his employment, not for cause, but for fiscal reasons)." The broad nature of the employment agreement provides a de- facto at-will relationship that renders the five-day severance agreement nothing more than a fiction. Respondent was not provided with any five day severance.

employee and then interpret the policies and procedures, or terms dishonesty, insubordination, moral turpitude or incompetence in a manner that best suits the Appellants.

Where an employer prepares a contract or offer to contract with his employees, all ambiguities in the instrument are to be resolved strongly against the employer; if the employer chooses words having more than one meaning, the courts should construe language in favor of the employee. *Enyeart v. Shelter Mut. Ins. Co.*, 693 S.W.2d 120, 124 (Mo. Ct. App. 1985). An employer's offer to modify the at will status of his employees must be stated with great definiteness and clarity. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988). Here the employment agreement is ambiguous. Appellants fail to define material terms within the agreement, Appellants reference an employee handbook as setting forth policies and procedures that are not before the Court, and Appellants use open ended language such as, "for conduct which jeopardized the general operation of the facility or the care, comfort, or security of its residents" to provide further power to treat the Respondent in a manner consistent with the at-will relationship defined in the arbitration agreement. L.F. 100. These phrases do not modify the at-will relationship with the required clarity or definiteness this Court spoke of in *Johnson*. 745 S.W.2d at 662.

As the Court of Appeals noted any doubt left open by the ambiguous employment agreement is removed by the contemporaneously signed arbitration agreement which provided that it did "not alter the Employee's *status as an at-will employee*." *Baker v. Bristol Care Inc*, WD75035 WL 1587882, p. 7 (Mo. Ct. Apr. 16,

2013). Further, the Appellants terminated the Respondent without notice and treated her as an at-will employee by immediately severing all benefits connected with the position. Appellants' treatment of the Respondent is consistent with the arbitration agreement's definition of the employment relationship. Thus, while Appellants argue that the employment agreement alters the at-will employment relationship, the actions of the Appellant paint a clear intent that the Respondent is and always was an at-will employee.

2. The Ambiguous Employment Agreement Conflicts With The Unambiguous Arbitration Agreement

The arbitration agreement and employment agreement conflict in many ways. The two most notable contradictions concern the Appellants' interpretation of the employment relationship and the rights Appellants receive under the employment agreement. Only the first will be addressed in this section.

Appellants' motive for originally filing the Motion to Stay was to enforce the arbitration agreement. L.F. 28. The only exhibit attached to the Motion to Stay was the arbitration agreement. L/F. 28-37. The arbitration agreement is unambiguous and states at § 3 that the employment relationship is at-will. Appellant now endeavors to redefine the at-will employment relationship and create ambiguity by introducing the employment agreement and declaring that the relationship was not at-will.

"Where the language of a contract is unambiguous, the intent of the parties is to be gathered from the contract alone, and a court will not resort to construction where the intent of the parties is expressed in clear, unambiguous language. *City of Harrisonville v. Pub. Water Supply Dist. No. 9 of Cass Cnty.*, 49 S.W.3d 225 (Mo. Ct. App. 2001).

Extrinsic evidence may not be introduced to vary or contradict the terms of an unambiguous agreement or to create an ambiguity. *Helterbrand v. Five Star Mobile Home Sales, Inc.*, 48 S.W.3d 649, 657 (Mo. Ct. App. 2001). *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428-29 (Mo. 2003).

Appellants have never argued that § 3 of the arbitration agreement is ambiguous. Instead of arguing ambiguity the Appellants attempt to introduce extrinsic evidence that will create ambiguity. Such evidence should not be considered in interpreting the arbitration agreement. *Helterbrand,* 48 S.W.3d at 658. Appellants acted in conformity with the unambiguous language of the arbitration agreement when it terminated the Respondent as an at-will employee. Only now that Respondent seeks her day in court do the Appellants wish to redefine the at-will employment relationship. As Missouri precedent illustrates Appellants' attempts are improper and should be rejected.

3. Appellants' Claim of Mutuality Is An Illusion

Appellants argue that mutuality of consideration exists in the promises exchanged. A contract that purports to exchange mutual promises will be construed to lack legal consideration if one party retains the unilateral right to modify or alter the contract as to permit the party to unilaterally divest itself of an obligation to perform the promise initially made. *Frye*, 321 S.W.3d at 442. "Mutuality of [obligation] means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, *neither party is bound unless both are bound.*" *Morrow*, 273 S.W.3d at 30 (Ahuja, J. concurring).

Appellants ignore Missouri precedent and declare that mutuality of consideration exists through the promises made between the parties despite the fact that § 24 provides the Appellants the unilateral power to amend the agreement. Appellants currently retain the power to amend all promises made to the Respondent. Such power renders the arbitration agreement illusory and void of consideration. *Frye*, 321 S.W.3d at 442; *Morrow*, 273 S.W.3d at 28.

Additionally, the Court of Appeals illustrated while the Appellants' arbitration agreement contains illusory promises to substitute arbitration for the court as a forum to resolve disputes, the Appellants maintain the right to bring suit and recover attorneys' fees, court costs, and settlement costs in connection with the Company's enforcement of its rights under the employment agreement. L.F. 105; *Baker v. Bristol Care Inc*, WD75035 WL 1587882 slip opinion p. 9 (Mo. Ct. Apr. 16, 2013). Such a right further exemplifies the illusory nature of Appellants' promises.

Appellants seek the power to enforce arbitration upon the Respondent while maintaining the right to change the rules of the game. Missouri precedent is clear that where one party retains the power to amend the contract; the contract is illusory. This is not a special contract enforcement rule as the Appellant proclaims, but instead a basic requirement of Missouri contract law. Missouri law requires offer, acceptance, and consideration to form a contract. *Morrow,* 273 S.W.3d at 28. Where the consideration consists of illusory promises the consideration is lacking and the contract is void. *Magruder Quarry & Co. v. Briscoe,* 83 S.W.3d 647, 650–51 (Mo.App. E.D.2002).

C. The Matter Before This Court Is Not Covered Within The Scope Of The Arbitration Agreement

The matter before this Court is not the enforceability of the arbitration agreement, but the principle of contract formation. "Missouri substantive law governs whether a valid arbitration contract exists." *Whitworth*, 344 S.W.3d at 737. The scope of the arbitration agreement does not cover contract formation, but only the applicability or enforceability of the agreement. L.F. 111.

Appellants request this Court enforce §20 of the arbitration agreement, but that section fails to address contract formation. In fact the arbitration agreement does not contain a section addressing contract formation. Appellants' request to enforce § 20 is yet another requests to enforce certain sections of the arbitration agreement while ignoring other sections.[7] Appellants efforts to pick and choose which portions of the arbitration agreement to ignore and enforce are further worries for the Respondent due to the fact that Appellants maintain a power to amend the arbitration agreement. L.F. 111. With such a power the scope of the arbitration agreement is ever evolving and the promises made within are subject to change at any time. Nevermore, the question of contract formation is not within the scope of the arbitration agreement.

[7] Appellants' argument that the employment relationship is not at-will directly conflicts with § 3. Appellants' attempts to introduce the employment agreement directly conflicts with § 26. L.F. 108, 112.

RESPONSE TO APPELLANTS' POINT RELIED ON III

THE TRIAL COURT CORRECTLY FOUND THAT APPELLANTS' ARBITRATION AGREEMENT IS NOT AN ENFORCABLE CONTRACT BUT IS INSTEAD AN ILLUSORY AGREEMENT THAT RESERVES FOR THE APPELLANTS THE UNILATERAL RIGHT TO AMEND THE ALLEGED AGREEMENT, AND APPELLANTS' ARGUMENTS TO THE CONTRARY ARE MERELY RED HERRINGS.

Appellants predict that Respondent will rely upon the *Morrow*, *Frye* and *Whitworth* decisions to exemplify why the arbitration agreement is illusory. The three cited cases speak directly to the issue before the Court and apply Missouri precedent. Missouri courts have repeatedly rejected arbitration agreements where one party retains a power to unilaterally amend the agreement. Appellants ignored the plethora of Missouri court opinions striking agreements where one party retains the unilateral power to amend. Appellants now seek to avoid Missouri precedent by citing persuasive authority that does nothing more than support Respondent's position. In an effort to mitigate the unilateral power the Appellants have retained, they have argued that this Court should interpret the arbitration agreement as if it can no longer be modified. Such a reading runs contrary to the plain meaning of the arbitration agreement and precedent dictates that the arbitration clause should be viewed as it existed at the time it was adopted. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 861 (Mo. 2006).

1. **Missouri Courts Have Provided Ample Opinions That Appellants' Arbitration Agreement Is Illusory**

Missouri precedent dictates where the Defendant reserves the right to unilaterally amend the arbitration agreement, the arbitration agreement fails under Missouri contract principles[8]. *See, Frye*, 321 S.W.3d at 443 (striking arbitration agreement where Defendant reserved unilateral right to amend.) The power to avoid a promise made within the contract renders the contract illusory and unenforceable. *Cooper v. Jensen*, 448 S.W.2d 308, 314 (Mo.App.1969)

In *Morrow* the Court considered the effect of retaining a unilateral power to amend an arbitration agreement and found that it destroyed all promises made within the arbitration agreement. *Morrow*, 273 S.W.3d at 25. The *Morrow* court declared that such a power would allow the Defendant to change the terms of the program, retaining the sole right to select the arbitrator. *Id*. In this matter Appellants hinge their hopes on the fact that § 24 requires a thirty day notice period prior to an amendment. The problem with allowing the power to amend with notice alone is nothing prevents the Appellants from amending the arbitration agreement in such a manner that removes the thirty day notice

[8] Restatement (Second) of Contracts § 77 cmt. a (1981); *Whitworth*, 344 S.W.3d at 741; *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d at 21; *Manfredi v. Blue Cross & Blue Shield of Kansas City*, 340 S.W.3d 126, 135 (Mo. Ct. App. 2011); *Am. Laminates, Inc. v. J.S. Latta Co.*, 980 S.W.2d 12, 23 (Mo.App. W.D.1998); *Cooper*, 448 S.W.2d at 314.

provision. Whether the amendment happened thirty days or five years from now the Plaintiff would still be bound to a different promise than was originally bargained for without an opportunity to contest the amendment, thus consequentially the arbitration agreement is illusory. *Id*.

Further, the *Frye* opinion considers arbitration agreements in which notice provisions are found. That court considered cases where the unilateral power to amend was held with a notice requirement **and** an additional requirement that restricted the power to amend once a claim was submitted. *Frye*, 321 S.W.3d at 443-444 (citing *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1215 (E.D. Okla. 2003) (arbitration agreement valid where amendment required notice **and** power not effective once proceeding initiated); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.); *Batory v. Sears, Roebuck & Co.,*124 Fed. Appx. 530, 534 (9th Cir. 2005) (the court found a mutual promise to submit to arbitration was not illusory where "Sears' discretion to modify the DRP is limited in two important respects: It must provide employees 60 days' notice of termination or any modification, ***and*** it cannot modify the DRP with respect to a previously submitted claim."); *Zamora v. Swift Transp. Corp.,* 547 F.Supp.2d 699, 703 (W.D.Tex.2008) ("If a party possesses the right to modify or terminate an arbitration agreement *without notice,* its promise is illusory, and the agreement is unenforceable."); *Holloman v. Circuit City Stores, Inc.,* 162 Md.App. 332, 873 A.2d 1261, 1264–66 (Md.Ct.Spec.App.2005) (stating

arbitration agreement valid due to notice **and** employee's right to accept or reject amendment through continued employment)).

Appellants' reservation of the power to amend fails to contain any restriction upon that power. Section 24 of the arbitration agreement states:

> This agreement shall survive the employer-employee and/or the employer-applicant relationship between the Company and the Employee and shall apply to any covered claim whether it arises or is asserted before, during, or after termination of the employment relationship or the expiration of any benefit plan. **The employer reserves the right to amend, modify, or revoke this agreement** upon thirty (30) days prior written notice to the Employee. (emphasis added) Arbitration Agreement § 24, L.F. 35.

While § 24 currently requires notice of the amendment, the notice does not restrict what the Appellants can amend, how the Appellants can amend, or when and why the Appellants can amend. L.F. 35. The notice requirement does nothing to restrict the unilateral discretion given to the Appellants to change the promises made to the Respondent.

Appellants' unilateral right to amend reserves more power than what Missouri courts allow. The Appellants' arbitration agreement can be modified at any time. Appellants now ask this Court to impose restrictions upon the arbitration agreement that were not existent when the contract was written. Appellants' failure to construct the arbitration agreement in a manner that conforms to Missouri law should not be

overlooked. The arbitration agreement at issue is a form contract effectively written by the Appellants without any influence from the Respondent. The power enjoyed by Appellants in constructing the arbitration agreement in the manner preferred justifiably includes the burden of the document's shortcomings as well.

2. Appellants' Persuasive Authority Furthers Respondent's Arguments

The *Frye* decision cited to five cases that considered if notice alone was sufficient to avoid an arbitration agreement being defined as illusory. Appellants now cite to six non-binding decisions from courts around the country. Five of the six cases discuss that the power to amend must have notice and a restriction on when the power may be used.

Cases cited from the Fifth, Sixth, and Eleventh Circuit and the Eastern District of Oklahoma all found that for a party to reserve the unilateral power to amend and avoid the illusory label, that unilateral power had to be restricted by providing notice to the other party **and** no amendment is effective as to existing disputes[9]. *Pierce*, 245 F. Supp. 2d at 1215 (neither an amendment of the DRP nor its termination shall be effective as to disputes "for which a proceeding has been initiated); *Armstrong v. Associates Int'l Holdings Corp.*, 242 F. App'x 955, 958 (5th Cir. 2007) (*citing to In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002) (upholding a ten-day notice of termination provision where amendments had to happen before start of claim)); *Seawright v. Am. Gen. Fin. Services, Inc.*, 507 F.3d 967, 975 (6th Cir. 2007) (upholding agreement where employer gave 90 days notice **and** amendment only applied to disputes known before the amendment.); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1374 (11th Cir.

[9] Such a restriction is not found in Appellants' arbitration agreement.

2005) (validating arbitration agreement where employer had to provide notice of amendment **and** version of the agreement in effect at the time claim was made governed.).

Appellants also cite to the case of *Blair v. Scott Specialty Gases,* 283 F.3d 595, 604 (3d Cir. 2002). In *Blair*, the employer retained the right to unilaterally amend the arbitration agreement, but had to provide notice of the amendment **and** provide the employee the opportunity to accept the amendment by continuing employment. 283 F.3d at 604 (emphasis added). The employee in *Blair*, who was an at-will employee, had the option of accepting the amendment or seeking new employment. *Id*. The *Blair* decision restricted the employer's right to unilaterally amend the arbitration agreement to current employees only. *Id*. If the current employee rejected the amendment then the employee would not be bound by the amendment. *Id*. Additionally, the employer was limited to amendments that were non-material changes of the handbook . *Id*. Appellants' arbitration agreement does not restrict amendments to current employees or non-material items. Respondent does not have the option to continue employment and accept an amendment. Thus, the Third Circuit's decision in *Blair* is not applicable and is another example of a court requiring notice and a restriction on the power to amend.

Appellants also cite to *Gratzer v. Yellow Corp*, , 316 F. Supp. 2d 1099, 1102 (D. Kan. 2004). The Kansas Federal District Court held that an arbitration agreement that is a term and condition of employment is not illusory if notice is required prior to amendment. *Id*. The *Gratzer* opinion fails for two reasons. First, *Gratzer* applies Kansas law rather than Missouri law and a substantial difference between the laws of the two

states exists. Second, Gratzer is distinguished by the later Missouri cases of *Morrow, Frye*, and *Whitworth*. The *Morrow* opinion in particular extinguishes the Gratzer reasoning; "[w]hen an employer unilaterally imposes a requirement on employees, one might look to see if the employer has also promised anything, if the requirement is purported to be a contract." *Morrow,* 273 S.W.3d at 23. Missouri courts have subsequently rejected the opportunity to follow *Gratzer* and instead have continually distinguished the opinion. *Id*.

Appellant has cited to three additional cases in the lower courts.[10] Each of the three cases is further support that the power to amend must contain notice and the power must cease once a claim is made. Thus, Missouri precedent is clear that neither party is bound by contracted promises unless both are bound." *Morrow,* 273 S.W.3d at 30. Appellants' cited case law shows that notice alone does not bind a party to the promise made. Instead, mutuality of obligation only exists if the party retaining the right to unilaterally amend provides notice of the amendment **and** a restriction to when the power can be used.

3.Appellants' Good Faith and §7 Arguments Are Red Herrings

Appellants ask this Court to rescue the arbitration agreement under the guise of the duty of good faith and fair dealings. Appellants state that current use of the power to

[10] *In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002); *Martinez v. TX. C.C., Inc.*, CIV.A. H-05-3747, 2006 WL 18374 (S.D. Tex. Jan. 4, 2006); and *Hardin v. First Cash Fin. Services, Inc.*, 465 F.3d 470, 478 (10th Cir. 2006).

amend would violate such a duty and that this type of change would not be permitted. Section 7 of the arbitration agreement is upheld as a further restriction on the power to amend. These arguments are red herring efforts to avoid the illusory tag.

Section 7 of the arbitration agreement does not restrict the power to amend, but instead states that the applicable rules and procedures of the American Arbitration association ("AAA") in effect at the time of filing are the rules in effect for the arbitration. L.F. 33. The language in § 7 does nothing to restrict the Appellants' power to amend the arbitration agreement itself:

> 7. Selection of an Arbitrator: Rules of Procedure: A single neutral arbitrator engaged in the practice of law shall conduct the arbitration under the applicable rules and procedure of the American Arbitration Association ("AAA") in effect when the demand for arbitration is filed. Any dispute relating to your employment with the Company or to termination of your employment shall be governed by the AAA National Rules for the Resolution of Employment Disputes in effect when the demand for arbitration is filed. The neutral arbitrator selected by the parties according to the provisions set forth in the AAA National Rules for the Resolution of Employment Disputes in effect when the demand for arbitration is filed. In the event any applicable rules or procedures adopted by the AAA conflict with this Agreement the terms of the Agreement shall govern. Arbitration Agreement § 7, L.F. 33.

Appellants' power to amend is not curtailed by § 7. Further, if the arbitration agreement was amended and the amendment conflicts with the AAA rules, § 7 directs that the arbitration agreement shall govern. Thus, any amendment that the Appellants seeks to enforce would be given the utmost authority.

Similarly as § 7 does not restrict the power to amend neither does the duty of good faith and fair dealing. "[W]hen terms are present that directly nullify the implied covenant[] of good faith . . . the contract is void for lack of mutuality." *Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647, 650 (Mo. App. E.D. 2002). Since an at-will contract allows an employer to terminate an employee for no cause, or even bad cause, to impose a covenant of good faith and fair dealing within an at-will employment relationship would contradictorily alter an intrinsic function of the contract. *Newco Atlas, Inc. v. Park Range Const., Inc.*, 272 S.W.3d 886, 894 (Mo. Ct. App. 2008). In addition, applying a duty of good faith and fair dealing into an at-will employment agreement where the right to terminate at-will is unfettered would be inconsistent. *Id*. Hence the duty of good faith and § 7 do not remove the unilateral power to amend that the Appellants reserved in violation of Missouri contract principles.

RESPONSE TO APPELLANTS' POINT RELIED ON IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS OR TO COMPEL ARBITRATION AS IT PERTAINS TO DAVID FURNELL BECAUSE DAVID FURNELL IS NOT A COVERED ENTITY WITHIN THE ARBITRATION AGREEMENT.

Appellants' arbitration agreement enumerates the entities covered by the arbitration agreement. The covered entities are the Company, the subsidiary and affiliate entities of the company, and the officers, directors, and employees of those entities. Appellants failed to draft the agreement to cover the officers of the parent company itself. The Court should not now undertake the task of rewriting the arbitration agreement in a manner that covers the officers of the parent company.

Section one of Appellants' arbitration agreement reads:

> This is a binding agreement between you ("the Employee") and Bristol Care, Inc. ("the Company"). All references to "Company" in this Agreement shall include all of **Bristol Care, Inc.'s subsidiary and affiliate entities**, including all former, current, and future officers, directors, and employees of all such entities, in their capacity as such or otherwise; all benefit plans and their sponsors, fiduciaries, administrators, affiliates, and agents in their capacity as such and otherwise; and all successors and assigns of any of them. (emphasis added). L.F. 32.

David Furnell is the President of Bristol Care Inc. Mr. Furnell is not an officer of a subsidiary or affiliate entity, but is an officer of the Company itself. Section one covers

the officers, agents and directors of the **subsidiary and affiliate entities** of **Bristol Care Inc.**, but not the officers of Bristol Care Inc. itself.

An unambiguous contract "will be enforced according to its terms," but if the contract is ambiguous, it "will be construed against the drafter." *Triarch Indus., Inc. v. Crabtree,* 158 S.W.3d 772, 776 (Mo. banc 2005). The Appellants drafted the form contract free from influence from the opposing party. The power the Defendant enjoyed in constructing the arbitration agreement in the manner it preferred justifiably includes the burden of the document's shortcomings in each instance.

Section one is unambiguous. Bristol Care Inc.'s officers and agents are not covered by the arbitration agreement. Section one does not mention the agents, officers, or directors of Bristol Care Inc. In fact, the relevant portion of the section reads: "All references to "Company" in this Agreement shall include **all of Bristol Care Inc.'s subsidiary and affiliate entities**, including all former, current, and future officers, directors, and employees of all **such entities**." L.F. 31. Section one of the arbitration agreement fails to include the officers of the parent company. Rather, the second sentence of § 1 describes the entities covered other than the Company and the Plaintiff as **Bristol Care, Inc.'s subsidiary and affiliate entities**, including all former, current, and future officers, directors, and employees of all such entities. *Id*. When interpreting the ambiguity that exists in § 1 precedent dictates that the contract should be interpreted in a light that is most favorable to the Plaintiff. Thus, David Furnell is not a covered entity.

RESPONSE TO APPELLANTS' POINT RELIED ON V

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO DISMISS OR TO COMPEL ARBITRATION BECAUSE IT IS THE COURT'S JOB TO DETERMINE IF A VALID CONTRACT EXISTS AND WITHOUT A VALID CONTRACT THE TERMS OF THE ARBITRATION AGREEMENT ARE NULL AND VOID.

A. Missouri Courts Should Decide If The Arbitration Agreement Is Valid Under Missouri Law

In an effort to avoid Missouri courts the Appellants argue that the arbitrator should rule if the arbitration agreement is valid. Such an argument is flawed and once again seeks to ignore the unambiguous wording of the agreement and binding precedent.

Section 20 of the arbitration agreement allows the arbitrator to address the applicability or enforceability of the agreement, but not if a contract was properly formed. L.F. 111. The Court of Appeals distinguished the facts of this case from the lone case cited by the Appellant. Appellant cites to *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). In Rent-A-Center the arbitrator was delegated authority over interpretation, applicability, enforceability, or formation of the agreement[11]. *Id*. The

[11] The Court of Appeals also noted that the Rent-A-Center Court did not decide the issue of contract formation and only addressed contract enforcement. *Baker v. Bristol Care Inc*, WD75035 WL 1587882 slip opinion p. 4 (Mo. Ct. Apr. 16, 2013).

arbitration agreement before this Court does not delegate such power to the arbitrator. Instead, the arbitrator is only delegated the authority to resolve disputes concerning the applicability or enforceability of the agreement to arbitrates. L.F. 111.

This Court in *Brewer v. Missouri Title Loans*, analyzed if Missouri Courts should decide if a proper contract is formed or if that task should be left to arbitrators. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490 (Mo. 2012) *cert. denied*, 11-1466, 2012 WL 2028610 (U.S. Oct. 1, 2012) (finding that not all state law unconscionability defenses are preempted by the federal act in all cases.). The *Brewer* precedent, which allowed for the defeat of arbitration agreement through use of the unconscionability doctrine, was following the Supreme Court's precedent established in *Concepcion* where the Court stated, "the § 2 saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490 (Mo. 2012) *cert. denied*, 11-1466, 2012 WL 2028610 (U.S. Oct. 1, 2012) *citing AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

Appellants confuse two separate inquiries surrounding the arbitration agreement. First, the existence of a valid arbitration agreement and second, the interpretation of a valid arbitration agreement's scope. The presumption in favor of arbitration is properly applied in interpreting the scope of an arbitration agreement. However, this presumption disappears when the parties dispute the existence of a valid arbitration agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 1924, 131 L.

Ed. 2d 985 (1995). "It is a firmly established principle that parties can be compelled to arbitrate against their will only pursuant to an agreement whereby they have *agreed* to arbitrate claims." *Morrow,* 273 S.W.3d at 21. Though employers and employees are free to enter into an agreement to arbitrate disputes, the agreement is not valid unless it reflects the essential contract elements required under Missouri law. *Id.* at 22. It follows that arbitration may not be unilaterally imposed on a party when there is not a valid and enforceable agreement to arbitrate. *Dunn Indus. Group, Inc.,* 112 S.W.3d at 427–28 .

Appellants' arbitration agreement violates Missouri's basic contract principles. The arbitration agreement is not adequately supported by consideration. Missouri courts have repeatedly held that the at-will employment relationship does not provide consideration to support an arbitration agreement. The benefits that stemmed from the at-will employment relationship do not provide consideration because they were terms and conditions of employment. The unilateral power to amend retained by the Appellant renders all promises made illusory and void. Since the arbitration agreement is not supported by adequate consideration it fails under Missouri's contract principles. Because the arbitration agreement fails under contract principles, no valid arbitration agreement exists. Respondent should be provided her day in court and the opportunity to exercise her rights.

CONCLUSION

For all of the foregoing reasons, the judgment and order of the trial court denying arbitration must be affirmed, Respondent should be allowed to proceed with litigating this matter in the Dekalb County Circuit Court and Respondent awarded costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2014, I electronically filed the foregoing with the clerk of the court by using the Missouri eFiling System which will send a notice of electronic filing to the following:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. Rule 84.06(b)(1):

1. I hereby certify that the information required by Sup. Ct. Rule 55.03 has been included, and the original copy of this Brief has been signed by the undersigned.

2. I hereby certify that this brief complies with the type-volume limitation of Sup. Ct. Rule 84.06(b)(1) because this brief contains 8,635 words, excluding the parts of the brief exempted by Sup. Ct. Rule 84.06(b)(1).

3. I certify that the file containing the digital version of Brief of Appellants has been scanned for viruses using Symantec Endpoint Protection and is virus-free.

Respectfully submitted,

s/ Jayson A. Watkins
Attorney for Respondent