IN THE SUPREME COURT OF MISSOURI

CARLA BAKER, Plaintiff -Respondent, vs. BRISTOL CARE, INC., D/B/A BRISTOL MANOR, AND DAVID FURNELL, Defendants-Appellants.	)	Supreme Court No. SC93451

Appeal from the Circuit Court of
Dekalb County Missouri
43rd Judicial Circuit

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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STATUTES

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The arguments presented by Plaintiff do not change the fact that there is an enforceable contract to arbitrate Plaintiff's claim.[1]

I. Plaintiff was not an employee at will (Point I).

Plaintiff's principal argument rests on the assertion that Plaintiff was an employee at will. The argument fails because the facts conclusively show that Plaintiff was not an employee at will.

A. Both the Arbitration Agreement and the contemporaneous Employment Agreement must be considered.

Plaintiff arrives at her faulty conclusion by looking only at the Arbitration Agreement, while asking the Court to ignore the contemporaneous Employment Agreement she also signed. Plaintiff asserts that the Arbitration Agreement defines the employment as "at will." The flaw in this premise, however, is that the Arbitration Agreement does not create the employment relationship. It is one component of that relationship, but the employment relationship itself is created and defined by the Employment Agreement. LF 101, 106, 105A.

It would seem obvious that if the question turns on the nature of the employment relationship, as Plaintiff asserts, then the Employment Agreement which *creates* that employment relationship must be considered. Moreover, Plaintiff does not contest the

[1] Plaintiff appears to have abandoned any argument that the Arbitration Agreement was a contract of adhesion or is unconscionable, arguments addressed in Point II of Appellants' Substitute Brief, and therefore these arguments will not be addressed here.

fact that the Employment Agreement and the Arbitration Agreement were both signed at the time she received her promotion. Respondent's Substitute Brief at 14. In fact, the Employment Agreement specifically references the Arbitration Agreement and the requirement that Plaintiff sign both agreements. LF 105A, ¶ 19. Because the two agreements were part of a single transaction, they must both be considered in discerning the nature of the relationship. Appellants' Substitute Brief at 14, fn. 3.

Moreover, Plaintiff's reliance on § 26 of the Arbitration Agreement as somehow precluding consideration of the Employment Agreement is not supported by the language of the document. Respondent's Brief quotes one sentence of § 26. Respondent's Substitute Brief at 9. When the *entire* § 26 is read, it is clear that Plaintiff has overstated its impact. Section 26 says the Arbitration Agreement is the "complete agreement of the parties *on the subject of arbitration of disputes*." LF 112 (emphasis added). Further, § 26 states that the Arbitration Agreement "supersedes any prior or contemporaneous oral or written *arbitration agreement* between the parties." *Id.* (emphasis added). Thus it is clear, when all of the provision is read, that § 26 refers to agreements to arbitrate, but has nothing to do with the nature of the *employment* relationship or in any way precludes consideration of the Employment Agreement when determining the nature of that relationship.

B. The Employment Agreement establishes that Plaintiff was not an at-will employee.

The Employment Agreement, as discussed in Appellants' Substitute Brief, places restrictions on the employer's ability to terminate Plaintiff's employment. Appellants'

Substitute Brief at 13-17. This is clearly different from the unfettered discretion to end the employment relationship that is inherent in employment at will.

Because the employment is not "at will," the *Morrow*, *Frye* and *Whitworth* appellate cases relied on by Plaintiff are not applicable. In those cases, the plaintiff's employment was undeniably at will. Here, because the employer is bound to provide the promotion, salary, benefits and other items granted by the Employment Agreement, unless circumstances exist which allow for the termination pursuant to the terms of the contract, those items granted to Plaintiff do constitute consideration.

Nor are the benefits granted by the Arbitration Agreement itself, such as payment of fees and the employer's agreement to arbitrate certain claims, illusory. Plaintiff's argument at page 11 and 12 of her brief ignores the fact that any amendment to the Arbitration Agreement requires 30 days prior notice. LF 111, ¶ 24. Therefore, the Arbitration Agreement is not illusory because it is binding for a minimum of 30 days. Appellants' Substitute Brief at 24-30.

Plaintiff also mischaracterizes a prior argument made by Defendant in the Court of Appeals in a vain attempt to have this Court ignore the realities of the transaction. Plaintiff latches on to the use of the term "stand alone document" to describe the Arbitration Agreement in Defendants' appellate court briefing, arguing this means the Employment Agreement should be ignored. Respondent's Substitute Brief at 12. In fact, if you read the entire argument, not just one or two words, it is clear that Plaintiff is

taking this phrase out of context.[2] Defendants' use of the phrase "stand alone document" is in the context of contrasting this Arbitration Agreement, which is a discrete, clearly-labeled document individually signed by the Plaintiff, with a purported arbitration agreement which is nothing more than a policy included in an employee handbook or other company announcement (the circumstance present in *Morrow*, *Frye*, and other cases relied on by Plaintiff). This argument says nothing about ignoring the Employment Agreement. In fact, in the very same brief, just one page *prior* to the "stand alone document" phrase upon which Plaintiff places her reliance, Defendant specifically argued that both the Employment Agreement and Arbitration Agreement must be considered

[2] The paragraph in the Appellate Court brief containing this phrase reads as follows:

In short, this case is very different from the principal decisions relied on by Respondent. This Arbitration Agreement is not a policy added to an employee handbook or pieced together from various pronouncements of management. It is a stand-alone agreement individually entered into by Respondent which, on its face, meets the requirements for offer, acceptance and consideration. Respondent may not now, after her employment ended, be happy with the contract she made, but there can be no doubt that she did, in fact, enter into an enforceable agreement. Reply Brief of Appellant, 4 (Mo. App. W.D. 10/22/12).

together as part of a single transaction.[3] Plaintiff's assertion that Defendant has changed its position or made inconsistent arguments is, quite simply, off base.

Plaintiff also stretches § 3 of the Arbitration Agreement beyond its meaning in an effort to avoid her agreement to arbitrate. LF 108. Section 3 makes clear that the Arbitration Agreement in and of itself does not create a contract of employment. ("This Agreement is not, and shall not be construed to create, a contract of employment . . ."). *Id.* (emphasis added). But it does not exclude the possibility that such a contract of

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[3] The noted portion of the appellate brief reads as follows:

Respondent correctly asserts that the Employment Agreement and Arbitration Agreement were part of a single transaction. LF 48-49. They were signed by Respondent on the same date when she was promoted to Administrator. LF 48-49; see also LF 31-35, 100-112. All documents which are part of this transaction must be considered together; no one portion can be considered in isolation. *See Martin v. U.S. Fid. & Guar. Co.*, 996 S.W. 2d 556, 510 (Mo. Banc 1999)("Where the agreement of the parties is evidenced by several documents . . . . the meaning of those documents must be gleaned from the entire transaction and not simply from isolated portions of a single document.") In this case, consideration of all of the facts show that there is a restriction on the reason and timing of any termination of employment. Therefore this is not employment at-will, and therefore Respondent's employment as an Administrator, in and of itself, is sufficient consideration to support the Arbitration Agreement. Reply Brief of Appellant, 3 (Mo. App. W.D. 10/22/12).

employment may otherwise exist. If the Arbitration Agreement had been the only document signed by Plaintiff, then the language makes clear that, in and of itself, the Arbitration Agreement does not create a contract of employment or alter the default status of employment at will. But, although Plaintiff tries to ignore it, the Employment Agreement she signed does create an employment relationship which is *not* at will.

Plaintiff also tries to avoid the impact of the Employment Agreement by claiming it is "ambiguous." The alleged "ambiguity" is the failure to define certain terms that are grounds for termination. Respondent's Substitute Brief at 15-16. By making this argument, Plaintiff seems to tacitly concede that there are specified grounds for termination, the antithesis of employment at will, but claims that she does not understand what those terms mean. If this were a breach of contract claim by Plaintiff, then the precise reason for termination, and whether it falls within the contractual language, would be the relevant issue. However, for purposes of the issue before the Court in the present case, it is enough to know that there *are* specified reasons for termination. Plaintiff here could have challenged her termination as a breach of the Employment Agreement and a fact finder would determine the meaning of the contractual language and the propriety of the reason for termination when measured against that language. *See*, e.g. Appellants' Substitute Brief at 14, fn. 4. This type of review of the reason for termination is not available to an employee at will.[4]

[4] Similarly, Plaintiff's argument that the employee handbook is not part of the record, Respondent's Substitute Brief at 15, would be relevant if this were a breach of

Plaintiff also tries to find some comfort in the fact that only the Arbitration Agreement was attached to the original Motion to Compel Arbitration. Respondent's Substitute Brief at 17. While this is true, it is of no consequence. The purpose of the Motion to Compel Arbitration is enforcement of the agreement to arbitrate. R.S.Mo. § 435.355. The Employment Agreement becomes important only after Plaintiff opposed that motion on the grounds of lack of consideration and made the claim that her employment was at will. Plaintiff well knows that Defendant's position has consistently been that Plaintiff was *not* an at will employee. *See*, e.g. Transcript pg. 17.[5]

Plaintiff's argument based on an alleged lack of "mutuality of arbitration," Respondent's Substitute Brief at 19, is likewise unavailing. There is no requirement for enforceability that both parties agree to arbitrate, and even if there were the correct reading of the agreements here shows that both parties have agreed to arbitrate. *See* Appellants' Substitute Brief at 18-19 and footnote 6.

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contract/wrongful termination case and the Court were being asked to determine if Plaintiff had violated a stated policy, but is of no consequence here.

[5] Plaintiff also makes the puzzling assertion that the employer "terminated the Respondent as an at-will employee." Respondent's Substitute Brief at 18. There is nothing in the record concerning the reason for, or circumstances of, the termination of Plaintiff's employment.

II. The Arbitration Agreement is not illusory (Point III).

Plaintiff focuses on Section 24 to attack the Arbitration Agreement. Plaintiff's argument, however, does not give credit to the language of the entire provision.

Plaintiff does not acknowledge that any amendment or modification requires 30 days' notice. LF 111. Thus, without question, Defendant is bound to retain the obligations, as-is, for at least 30 days. This binding obligation conclusively shows that the Arbitration Agreement is not illusory. *See* Appellants' Substitute Brief at 24-26. The 30 day requirement also removes this case from the reach of *Morrow*, *Frye* and others cited by Plaintiff[6], where the agreements allowed immediate modification or amendment.

Plaintiff also persists in ignoring the language that "thirty (30) days' *prior* written notice" must be given to effect an amendment. LF 111, § 24 (emphasis added). This supplies protection, should it be a requirement, that any amendment or modification be prospective. Plaintiff never explains how an amendment, to become effective 30 days in the future, can change something that happened in the past. The AAA rules cited, and the contract principle of good faith and fair dealing, further undercut any contention that the rules of the game could somehow be changed after the fact. Appellants' Substitute Brief at 27-30.

The case of *Gratzer v. Yellow Corp.*, 316 F. Supp. 2d 1099 (D. Kan. 2004), cited in Appellants' Substitute Brief, is not the only case to enforce an arbitration agreement

[6] Including *Dumais v. American Golf Corp.*, 299 F. 3d 1216 (10th Cir. 2002) and *Zamora v. Swift Transportation Corp.*, 547 F. Supp. 2d 699 (W.D. Tx. 2008).

with similar amendment/modification language specifically requiring only advance notice. See, e.g., *Morrison v. Circuit City*, 317 F.3d 646 (6th Cir. 2002); *Rupert v. Macy's*, 2010 U.S. Dist. LEXIS 54050, *20-21 (N.D. Ohio 2010); *Bell v. Hollywood Entertainment Corp.*, 2006 Ohio App. LEXIS 3974, *5-6 (Ohio App. 2006). Similarly, while several of the provisions for amendment in cases cited by Plaintiff include specific language about prospective application, it does not appear that any cases cited by Plaintiff deny enforcement due to lack of an express "prospective" statement. The key clearly is whether advance notice is required, a condition satisfied by the Arbitration Agreement. Moreover requiring language in arbitration agreements expressly stating the obvious proposition that any amendment would be prospective would violate the mandate of both the Missouri and United States Supreme Courts that special rules or requirements may not be imposed on arbitration agreements. "Given Missouri's preference for the arbitrability of disputes, a rule of contract construction that would be an exception to the general rules of contract construction and that would make arbitration less likely should not be erected." *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 858-9 (Mo. banc 2006). See also *AT&T Mobility v. Concepcion*, 131 S.Ct. 2875 (2011) (state law contract defenses applicable only to arbitration agreements are invalid).

In addition to *Frye* and *Morrow*, Plaintiff cites three other principal cases in support of her "illusory" arguments. Two of these are not applicable to this issue. In *American Laminates Inc. v. J.S. Latta*, 980 S.W.3d 12 (Mo. App. W.D. 1998), the issue was not whether one party could amend the agreement. In any event, the court there found the agreement was not illusory. In *Manfredi v. Blue Cross and Blue Shield of*

Kansas City, 340 S.W.3d 126 (Mo. App. W.D. 2011) the issue addressed by the court was not whether the agreement was illusory, but rather whether the contract as a whole was unconscionable. Given the severe limitations on remedies available and other restrictions on the arbitrator which effectively prevented the plaintiff from receiving any relief, the Court not surprisingly found that agreement to be unconscionable. Neither of these cases has any applicability to the Arbitration Agreement in this case.

The third case cited, *Cooper v. Jensen*, 448 S.W.2d 308 (Mo. App. W.D. 1969) actually supports enforcement of the Arbitration Agreement in this case. This case involved a contract to provide housing which allowed either side to cancel. This Court, in addressing the issue of mutuality of obligation, explained that where there was no restriction on cancellation, the contract was unenforceable only "to the extent that it remained executory. To the extent that a party-promisee performed under it, however, the consideration theretofore lacking was supplied, and to that extent, the party promisor was bound." *Id.* at 314. The court thus enforced the agreement with respect to the performance up to the point one of the parties cancelled the agreement. *Id.* at 315-316. As explained by *Cooper*, as long one party performs the other party is bound, at least up to the point of cancellation. Under the authority of *Cooper*, since Appellant did not actually amend or modify the Arbitration Agreement, Respondent is bound to follow the terms of the Agreement.

III. Any claim against David Furnell is subject to arbitration (Point IV).

As anticipated, Plaintiff asserts that whatever claim she has against David Furnell is not subject to arbitration. Plaintiff reaches that conclusion, however, by selectively ignoring certain language in the contractual provision. The use of boldface type in Respondent's Substitute Brief illustrates these omissions. Plaintiff bolds the phrase "such entities," Respondent's Substitute Brief at 31, in order to divert attention from the fact that the complete phrase is "*all* such entities." LF 108, ¶ 1. (Emphasis added). Plaintiff obviously wishes that the language was more circumscribed (defining the covered officers of only certain entities) when in reality the complete provision, fairly read, is much more encompassing – it defines the relevant parties to include officers of all such entities. Nor does Plaintiff's brief acknowledge that the predicate of this definition includes both the parent company (Bristol Care Inc.) and all subsidiary and affiliate entities. The operative sentence states that "Company" (previously defined to be Bristol Care Inc., LF 108, ¶ 1) shall *include* subsidiary and affiliate entities. Thus Bristol Care Inc. and any subsidiaries or affiliates comprise "all such entities," and therefore the officers of those entities (including David Furnell, President of Bristol Care Inc.) are expressly covered by the arbitration agreement. Plaintiff's restrictive reading improperly excludes Bristol Care Inc. from the definition – it reads the operative sentence as if it read "Company means only subsidiary and affiliate entities," which is contrary to the clear language of the agreement.

IV. The parties agreed that an arbitrator would rule on these issues (Point V).

The parties undeniably agreed to an arbitrator's determination of the "enforceability and/or validity" of their agreement. LF § 109, ¶ 5. The fact that the word "formation" is not used in the Arbitration Agreement's delegation clause (the provision submitting these questions to the arbitrator) is not controlling. Plaintiff is arguing that the entire agreement between the parties is not enforceable due to lack of consideration and otherwise. This type of enforceability challenge that must be committed to the arbitrator. In *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204 (2006), (relied on in *Rent-A-Center West v. Jackson*, 130 S. Ct. 2772 (2010)), the plaintiff claimed no enforceable contract had been created due to fraud in the inducement. The Supreme Court found that the arbitration agreement, which committed questions of the "validity, enforceability or scope" of the agreement to the arbitrator, required an arbitrator to rule on the plaintiff's challenge to the formation of the agreement. *Id.* at 445-446, 126 S. Ct. at 1209. Clearly either a court, or an arbitrator, must make the enforceability decision, and the *Buckeye* court acknowledged seeming inconsistencies regardless of who makes the decision. *Id.* at 448-449, 126 S. Ct. 1210. But regardless, someone must make the enforceability decision and the *Buckeye* court makes clear that it must be made by the arbitrator. *See also Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *Rent-A-Car v. Jackson* brings the *Buckeye* decision forward and applies it when, as here, the plaintiff challenges the validity of the contract as a whole, but does not specifically challenge the delegation provision. *Rent-A-Center*, 130 S. Ct. at 2779.

V. Conclusion.

Plaintiff entered into an Employment Agreement and Arbitration Agreement when she was promoted to the position of administrator of Bristol Care's Maysville facility. That agreement provides Plaintiff, if she prevails, with the right to receive all possible relief available. Plaintiff prevents no principled reason to nullify that agreement to arbitrate. Defendant asks only that Plaintiff be held to her part of the bargain and this matter be referred to arbitration.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 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

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 2,723 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.

/s/ *Brian N. Woolley*
An Attorney for Appellant