Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

IN THE SUPREME COURT OF MISSOURI

NO. SC96499

JEFF REED,

***Plaintiff – Appellant*,**

vs.

THE REILLY COMPANY, LLC,

***Defendant – Respondent*.**

On Appeal from the Circuit Court of Jackson County, Missouri
Honorable Marco Roldan, Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

William C. Kenney, Mo. Bar No. 63001
BILL KENNEY LAW FIRM, LLC
1101 Walnut Street, Suite 102
Kansas City, Missouri 64106
Telephone: (816) 842-2455
Facsimile: (816) 474-8899

Attorney for Appellant Jeff Reed

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

TABLE OF CONTENTS

INTRODUCTION 6

ARGUMENT 7

I. The Trial Court Erred In Failing To Exclude The Extraneous Documents And Arguments Introduced By Respondent's Reply Suggestions, Or In Failing To Convert Reilly's Motion To Dismiss Into A Motion For Summary Judgment.....7

II. Respondent's Attempts To Supplement The Record On Appeal, And Its New Arguments On This Point, Should Be Disregarded. 9

III. Based On The Plain Language Of The Statute, The Exemptions In Section 407.020 Do Not Apply To Appellant's Employment-Related Claim Under Sections 407.911 To 407.915.....12

IV. Appellant Has Not Alleged Claims Arising From The Contract, And The Forum Selection Clause Does Not Require Appellant's Tort Claims To Be Litigated In Johnson County, Kansas. 16

V. Accepting Appellant's Allegations As True, Reed's Continued At-Will Employment Is Not Sufficient Consideration To Create An Enforceable Contract, And Respondent Cannot Seek To Enforce The Broker Agreement It First Breached.....19

VI. Enforcement Of The Forum Selection Clause Would Be Unfair And Unreasonable. 21

CERTIFICATE OF COMPLIANCE.....23

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Baker Frye v. Speedway Chevrolet Cadillac,

321 S.W.3d 429 (Mo. App. 2010) 19

Baker v. Bristol Care, Inc.,

450 S.W.3d 770 (Mo. banc 2014) 18

Bergel v. Kassebaum,

577 S.W.2d 863 (Mo. App. 1978) 11

Bianco Kawasaki Plus v. Meramec Valley Bank,

81 S.W.3d 528 (Mo. banc 2002) 7

Boten v. Brecklein,

452 S.W.2d 86 (Mo. 1970) 17

Campbell v. City Comm'n of Franklin County,

453 S.W.3d 762 (Mo. banc 2015) 11

Chase Third Century Leasing Co., Inv. v. Williams,

782 S.W.2d 408 (Mo. App. 1989) 7

English v. Old Am. Ins. Co.,

426 S.W.2d 33 (Mo. 1968) 10

Farris v. Boyke,

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

936 S.W.2d 197 (Mo. App. S.D. 1996) 7

Forms Mfg., Inc. v. Edwards,

705 S.W.2d 67 (Mo. App. E.D. 1985) 20

Heins Implement Co. v. Hwy. & Transp. Comm'n,

859 S.W.2d 681 (Mo. banc 1993) 8

High Life Sales Co. v. Brown-Forman Corp.,

823 S.W.2d 493 (Mo. banc 1992) 20

ITT Comm. Finance Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. banc 1993) 8

Jimenez v. Cintas Corp.,

475 S.W.3d 679 (Mo. App. E.D. 2015) 19

JumboSack Corp. v. Buyck,

407 S.W.3d 51 (Mo. App. 2013) 19

Luketich v. Goedecke, Wood & Co., Inc.,

835 S.W.2d 504 (Mo. App. E.D. 1992) 19

Morrison v. Thomas,

481 S.W.2d 605 (Mo. App. 1972) 11

Morrow v. Hallmark Cards, Inc.,

273 S.W.3d 15 (Mo. App. W.D. 2008) 18, 19

Motor Port, Inc. v. Freeman,

62 S.W.2d 479 (Mo. App. 1933) 17

Rell v. Burlington Northern R. Co.,

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

976 S.W.2d 518 (Mo. App. E.D. 1998) 7

Rexite Casting Co. v. Midwest Mower Corp.,

267 S.W. 2d 327 (Mo. App. 1954) 17

Scott v. Tutor Time Child Care Sys., Inc.,

33 S.W.3d 679 (Mo. App. W.D. 2000) 7

Smith-Scharff Paper Co., Inc. v. Blum,

813 S.W.2d 27 (Mo. App. E.D. 1991) 20

Sofka v. Thal,

662 S.W.2d 502 (Mo. banc 1983) 16

Strain v. Murphy Oil USA,

No. 15-cv-3246 (W.D. Mo. Feb. 9, 2016) 18, 19

Timson v. Mfgs' Coal & Coke Co.,

119 S.W.565 (Mo. 1909) 10

White v. Mulvania,

575 S.W.2d 184 (Mo. banc 1979) 16

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Statutes

RSMo § 407.020 ..... 8, 12, 13, 14

RSMo § 407.025 ..... 13, 14

RSMo § 407.413 20

RSMo § 407.912 17

RSMo § 407.913 13

RSMo § 407.914 6

RSMo § 407.915 20

RSMo Chapter 407 ..... passim

V.A.M.S. 407.020 ..... 12, 14

Rules

Mo. S. Ct. R. 55.27 8

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

INTRODUCTION

In its Substitute Brief, Respondent The Reilly Company, LLC ("Reilly") makes a number of new arguments, and abandons many of the arguments in its Court of Appeals brief. However, Respondent has not abandoned its attempts at improperly supplementing the record on appeal. Respondent goes so far as to claim that, if this Court were to remand this case based on the undisputed lack of evidence in the record, it would be "promot[ing] form over substance to the detriment of these parties and justice." Resp. Sub. Br. at 23. Even considering Respondent's new arguments, or reliance on extraneous documents not properly before this Court, it is clear that Respondent still has no answer for many of Appellant's arguments.

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE EXTRANEOUS DOCUMENTS AND ARGUMENTS INTRODUCED BY RESPONDENT'S REPLY SUGGESTIONS, OR IN FAILING TO CONVERT REILLY'S MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

In its Court of Appeals Brief, Respondent's only response to Appellant's Argument I(A) consisted of a concession that it transacts business in Missouri, and jurisdiction and venue are proper pursuant to RSMo § 407.914.[1] *See* R. Appx. R-57 (*citing* RSMo § 407.914). Respondent did not address Appellant's Argument I(B) in its Court of Appeals brief. *See* Resp. Sub. Br. at 22 ("[n]o portion of Respondent's Brief addressed [Appellant's summary judgment argument].") (*citing* R. Appx. R-45 to 78). To the extent that Respondent's new arguments are properly before this Court, they equally fail to address the substantive issues raised by Appellant's Arguments.

Respondent voices its confusion as to why Appellant makes a brief argument about jurisdiction. To address Respondent's confusion, Appellant notes that his jurisdictional arguments are two-fold. First, a motion to dismiss based on "improper venue relating to a forum selection clause … should be treated as an issue of jurisdiction." *Scott v. Tutor Time Child Care Sys., Inc.*, 33 S.W.3d 679, 682 (Mo. App.

---

[1] Respondent now claims that it "strongly disputes the applicability of R.S.Mo. § 407.914, …" Resp. Sub. Br. at 24.

W.D. 2000) (*citing Chase Third Century Leasing Co., Inv. v. Williams*, 782 S.W.2d 408, 411-12 (Mo. App. 1989)). Because "Appellant has the burden of making a prima facie showing that the trial court has personal jurisdiction", *Farris v. Boyke*, 936 S.W.2d 197, 200 (Mo. App. S.D. 1996) (citation omitted), Appellant thought it prudent to meet his burden.

Second, Respondent's motion to dismiss appeared to be aimed at disputing jurisdiction in Jackson County, Missouri, and "[a] court is not restricted to the pleadings in considering a motion to dismiss for lack of jurisdiction." *Rell v. Burlington Northern R. Co.*, 976 S.W.2d 518, 520 (Mo. App. E.D. 1998) (citations omitted), *abrogated on other grounds by Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528 (Mo. banc 2002). However, in Respondent's reply suggestions, it concedes that jurisdiction is proper. Because Respondent's motion was not made under subsections 1 or 2 of Rule 55.27(a), *i.e.*, the subsections that address jurisdictional defenses, and did not specify any other subsection of Rule 55.27(a), it should have been treated as a motion to dismiss for failure to state a claim upon which relief could have been granted under Rule 55.27(a)(6), and the trial court should have limited its review to the allegations in the Petition. Alternatively, the trial court should have converted Respondent's motion into a motion for summary judgment.

Because that the trial court did not exclude the affidavits and extraneous documents attached to Respondent's reply suggestions, the arguments based on those extraneous documents, or Respondent's assertion that "the 'MMPA' does not pertain to

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

insurance practices[,]" (LF_066), Respondent believes this Court should limit its review to a *de novo* review of whether Appellant's Petition states actionable claims.

II. RESPONDENT'S ATTEMPTS TO SUPPLEMENT THE RECORD ON APPEAL, AND ITS NEW ARGUMENTS ON THIS POINT, SHOULD BE DISREGARDED.

With the exception of Respondent's reference to the extraneous documents in its Appendix, and its assertion that it is licensed by the Missouri Department of Insurance, the entirety of Arguments II of Respondent's Substitute Brief consists of new arguments not raised in the Court of Appeals.

In its reply suggestions in support of its motion to dismiss, the only mention of Respondent's asserted affirmative defense to Appellant's claims under the Commissioned Salesperson Act, RSMo §§ 407.911 to 407.915 (the "CSA") is its bare assertion that "the 'MMPA' does not pertain to insurance practices." LF_066, § I(B) (*citing* RSMo § 407.020.2). However, "the bare assertion of an affirmative defense, bereft of supporting facts, is insufficient as a matter of law." *Heins Implement Co. v. Hwy. & Transp. Comm'n*, 859 S.W.2d 681, 695 at fn. 3 (Mo. banc 1993) (*citing ITT Comm. Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 383-84 (Mo. banc 1993)).

Appellant has consistently argued that "there are no facts in the record from which the trial court could have determined whether Reilly fit within the claimed exemption." App. Am. Opening Br. at 17; App. Sub. Br. at 17-18. Respondent did not dispute the absence of evidence in the Court of Appeals, and it does not dispute the absence of evidence in this Court. Instead, Respondent now argues that it was "totally unnecessary"

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

to present evidence of its asserted affirmative defense, and that such evidence "would serve no purpose." *See* Resp. Sub. Br. at 27-28.

Respondent also attaches insurance licenses to its appendix, claiming that it has now met its burden of proof. *See* Resp. Sub. Br. at 28 ("Respondent's Appendix Ex. 1 (R. Appx. RA-75 – RA-78) illustrat[e] the annual Department of Insurance licenses issued by the State of Missouri …"). Respondent claims that the inclusion of these extraneous documents is justified because "Reed's appellate brief argued, for the first time, that there had been no trial court evidence that The Reilly Company, LLC was licensed by the State of Missouri Department of Insurance." *Id*. Needless to say, it is not a litigant's burden of controverting evidence pertaining to the affirmative defense of an adversary, when the adversary never offered any evidence in the first place.

Nevertheless, Respondent argues, "[i]n the eight months between Judge Roldan's decision and the determination of the Court of Appeals, Reed did not present any additional facts or argument to alter the dismissal without prejudice." Resp. Sub. Br. at 23; *see also Id*. at 28-29 (Appellant "presents this Court with no contrary information or evidence that this is an inaccurate presentation"); *Id*. at 29 ("there is no evidence to the contrary"). Resp. Sub. Br. at 28-29. At the risk of sounding redundant, Appellant notes that Respondent appears to have missed the entire point of his argument. The Courts of Appeals, and the Supreme Court, are not appropriate forums in which a litigant can "present … additional facts …" *Id*. at 23.

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Finally, Respondent argues for the first time that "[t]he registration of an insurance company within the State of Missouri is a simple matter for which judicial notice may be taken." *Id*. at 29. Appellant first submits that it would be extremely unfair for this Court to entertain such an argument, which Respondent makes for the first time in its brief to the Supreme Court. As to the merits of Respondent's argument, the doctrine of judicial notice requires that the facts requested to be noticed,

> must be part of the *common knowledge of every person of ordinary understanding and intelligence*; only then does it become proper to assume the existence of that fact without proof. It follows, therefore, that *judicial notice must be exercised cautiously*, and if there is doubt as to the notoriety of such fact, judicial recognition of it must be declined.

English v. Old Am. Ins. Co., 426 S.W.2d 33, 41 (Mo. 1968) (emphasis added) (*citing Timson v. Mfgs' Coal & Coke Co.*, 119 S.W.565 (Mo. 1909) (additional citations omitted)).

Respondent asserts, without explanation, that it is a "simple matter" for a company to secure a license from the Missouri Department of Insurance, however, none of Respondent's briefing before the trial court, the Court of Appeals, or this Court, discuss the requirements of obtaining such a license. While Appellant's pleadings might, at best, give rise to an inference that Respondent holds a Missouri insurance license, "[i]n testing the adequacy of the petition to determine if it states a claim, all allegations are accepted as true and all reasonable inferences are granted in favor of plaintiff." App. Sub. Br. at

11 (*citing Campbell v. City Comm'n of Franklin County*, 453 S.W.3d 762, 767 (Mo. banc 2015)). Additionally, "inferences must be based on evidence in the record." *Bergel v. Kassebaum*, 577 S.W.2d 863, 873 (Mo. App. 1978). Viewing the Petition in this light, it is equally plausible that Reilly was not required to obtain a Missouri insurance license, that it sold a type of insurance for which a license was not required, that it fell within one of the many exceptions and was not required to obtain a license, that it conducted business in Missouri through a local affiliate, that it simply failed to obtain a Missouri insurance license, etc.

While Respondent claims that "there is no evidence" which controverts its asserted affirmative defense (Resp. Sub. Br. at 29), if this Court were to take judicial notice of such a fact at this late stage, it would deprive Appellant of the ability to present evidence or make arguments to contest Respondent's claims. *See Morrison v. Thomas*, 481 S.W.2d 605, 607 (Mo. App. 1972) (defendant's failure to request that the trial court take judicial notice, "improperly deprived plaintiff of th[e] opportunity … to offer rebuttal evidence.").

III. BASED ON THE PLAIN LANGUAGE OF THE STATUTE, THE EXEMPTIONS IN SECTION 407.020 DO NOT APPLY TO APPELLANT'S EMPLOYMENT-RELATED CLAIM UNDER SECTIONS 407.911 TO 407.915.

With the exception of Respondent's argument that the District Court of Johnson County, Kansas should determine the applicability of the Missouri Merchandising Practices Act ("MMPA"), the entirety of Respondent's Argument III consist of new

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

arguments not raised in Respondent's Court of Appeals brief, and Respondent has abandoned the only argument it did make in response to Argument III(A) of Appellant's Substitute Brief. To the extent that any of Respondent's new arguments are properly before this Court, they again fail to address Appellant's primary argument.

While Appellant believes that the record lacks evidence from which the trial court could have determined that Reilly is "subject to chartering, licensing, or regulation by the director of the department of insurance," even if there were, based on the plain language of section 407.020.2, the exemptions to not apply to Reed's claims under the CSA. This is because the exemptions are expressly limited to "this section". None of Respondent's original (or new) arguments, offer an explanation as to why the legislature would use the word "section" in subsection 407.020.2, if it really meant "chapter"; or why, the legislature deliberately changed the term "herein contained" to "contained in this section", if it really meant "contained in this chapter". *See* V.A.M.S. 407.020, Appx., A30.

Respondent argues that Appellant's "needlessly complex argument [that section means section] obscures the fact that the requested result would virtually eliminate the MMPA provision excluding the coverage of regulated entities[.]" Resp. Sub. Br. at 31. However, Respondent fails to explain *why* allowing a commissioned salesperson to sue his or her principal under a different section of the MMPA, a claim which is obviously limited to rare occasions where a principal fails to pay commissions when they are due, would "virtually eliminate" the exclusions in section 407.020.2(2). Even the Missouri Bankers Association, the Missouri Insurance Coalition, the Property and Casualty

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Insurers Association of America, and the American Insurance Association ("Bankers and Insurers") state that they "take no position on whether the … exemption in § 407.020 applies to Appellant's claim under § 407.913." Br. of Bankers and Insurers at 17, fn. 2. If Respondent's new arguments were correct, and Appellant's position, if accepted, would "virtually eliminate" the exclusions in section 407.020.2(2), surely the Bankers and Insurers Associations would agree with Respondent's position.

Aside from disparaging Appellant's argument as being myopic, *i.e.*, narrow-minded, Respondent's Substitute Brief (like its original brief) offers no explanation for why Appellant's simple-minded argument that "section" means "section" is wrong. *See* Resp. Sub. Br. at 31. Instead, Respondent ignores the fact that the exemptions are limited to "section" 407.020, and focuses on the exceptions to the exemptions. However, Appellant did not, and could not, sue Respondent under section 407.020, and the sections under which he did sue make no mention of "section" 407.020, "section" 407.025, or any other "section" of the MMPA. As such, the exemptions simply do not apply to Appellant's claims – regardless of the qualifying language of the exemptions.

Severely undercutting Respondent's position, the Missouri Bankers Association, the Missouri Insurance Coalition, the Property and Casualty Insurers Association of America, and the American Insurance Association, agree with Appellant's assertion that the issue of whether a consumer can bring a civil suit under RSMo § 407.025 against a person or entity exempted from enforcement actions under § 407.020 is a separate matter not at issue in this case. *See* Br. of Bankers and Insurers at 8-9, 17 ("Appellant did not

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

(and could not) bring a claim under [section 407.025, and] this Court should not address this issue now.").

Citing to cases that address the conflict between sections 407.020 to 407.025, Respondent claims that Appellant's arguments "have been addressed and refuted by Missouri's Southern and Western District Courts of Appeal and by all of the federal courts addressing MMPA coverage issues[.]" To the contrary, aside from the Court of Appeals' decision in this case – which has been withdrawn, Appellant is unaware of any decision, from any circuit court, appellate court, or federal court, which holds that the exemptions in section 407.020.2(2) apply to claims brought under any section of Chapter 407 aside from section 407.025. Respondent asserts that all of the cases it relies on refute Appellant's arguments, however, none of them are on point.

In 1986 – which was notably the year after RSMo § 407.025 was enacted, the legislature deliberately narrowed the scope of the exemptions in section 407.020, changing the term "herein contained" to "contained in this section". *See* V.A.M.S. 407.020, Appx., A30. As discussed in depth in Appellant's Substitute Brief, while numerous other sections *do* authorize enforcement actions under section 407.020, the CSA does not. As noted in Appellant's brief, and the *Amici* Brief of the Bankers and Insurers, the applicability of the exemptions in section 407.020 to other sections, which are not at issue in this case, should be reserved for a time when such a controversy is properly before this Court.

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

IV. APPELLANT HAS NOT ALLEGED CLAIMS ARISING FROM THE CONTRACT, AND THE FORUM SELECTION CLAUSE DOES NOT REQUIRE APPELLANT'S TORT CLAIMS TO BE LITIGATED IN JOHNSON COUNTY, KANSAS.[2]

In its suggestions in support of its motion to dismiss, Respondent argues that the Exhibit 1 to the broker agreement, *i.e.*, the document that sets forth Appellant's commission structure and provides that Appellant "remains an 'at will' employee subbject *[sic]* to termination with or without cause", is not part of the Broker Agreement and should not be considered "when determining the legal effect of the contract provision." LF_027 (*citing* ¶ 22 of the broker agreement, titled "Entire Agreement"; ¶¶ 7-8 of the Petition); Exhibit 1, LF_040. However, on appeal, Respondent takes the opposite position, arguing that Appellant's claims are "solely and exclusively predicated in contract upon commission entitlements associated with the IBA and Exhibit 1." Resp. Bus. Br. at 40. Based on Respondent's prior contention that Exhibit 1 to the Broker Agreement is *not* part of the broker agreement, Appellant's statutory claims for commissions – to the extent these claims would arise under Exhibit 1 to the Broker Agreement, are clearly independent of and unrelated to the Broker Agreement. This one-page document simply provides that Appellant's employment was "at will", and provides

---

[2] Respondent's argument concerning the economic loss doctrine, contained in the last paragraph of Argument IV, is also a new argument not raised in the Court of Appeals.

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

no consideration for the enforcement of any of the terms of what Respondent contends is a completely separate agreement.

With regards to the applicability of the forum selection clause – which is in the Broker Agreement, not Exhibit 1 – the clause expressly applies only to claims seeking to "interpret *and* enforce" the terms of the Broker Agreement. LF_038, Broker Agreement at ¶ 1. Appellant does not seek to enforce any of the terms of the Broker Agreement, he seeks a declaration that the Broker Agreement is illusory and unenforceable, and an injunction preventing Reilly from enforcing any of its terms. *See* LF_009-12, Petition at ¶¶ 25-33.

Appellant alleges that Reilly made certain misrepresentations and concealed certain material facts from him, and that Reilly's fraudulent conduct induced him into the Broker Agreement. *See Sofka v. Thal*, 662 S.W.2d 502, 507 (Mo. banc 1983) ("[A] promise *accompanied by a present intent not to perform* is a misrepresentation of present state of mind, itself an existing fact, sufficient to constitute actionable fraud.") (*citing White v. Mulvania*, 575 S.W.2d 184, 188 (Mo. banc 1979)). As a result, Appellant alleges that he has, and will continue to, suffer "damage to his professional reputation and good will, loss of business relationships, loss of sales, and other business, pecuniary and/or personal interests which are directly at stake." LF_013, Petition at ¶ 41. Appellant's claims of fraud do not seek to enforce any of the terms of the Broker Agreement, and they seek no relief under the Broker Agreement.

Once again contradicting its prior contention that Exhibit 1 is wholly separate from the Broker Agreement, Respondent argues that all of Appellant's claims are "solely

and exclusively for breach of contract". Resp. Sub. Br. at 41 (referencing what it misconstrues to be claims for "the 60-day commission obligation alleged to be due and owing, …"). Appellant addressed this argument in his suggestions in opposition to Respondent's motion to dismiss, where he noted that "60-days' commissions for November and December 2015, … *would have been due* under ¶ 7(b) to the Agreement" if the Broker Agreement was not illusory and unenforceable. LF_050. As is clear from the Petition, and all of Appellant's briefing since, Appellant is not making a claim for the 60-days' commissions that were falsely promised to him. Instead, Appellant simply claims that, "[o]n information and belief, on one or more occasions in the five-year period preceding the filing of this lawsuit, Reilly has wrongfully withheld commissions from Mr. Reed, in violation of RSMo § 407.912." LF_014, Petition at ¶ 47.

Assuming that the Broker Agreement is invalid, as Appellant alleges, commissions under RSMo § 407.912 would be determined when Respondent receives payment for the product or service, when Reilly accepts the order and receives payment, or based on "custom and usage". *See* RSMo § 407.912(1)-(3). Alternatively, accepting as true Appellant's allegation that Reilly was the first to breach the Broker Agreement, Appellant would still be able to enforce its terms, yet Respondent would be barred from claiming its benefits. *See Boten v. Brecklein*, 452 S.W.2d 86, 92 (Mo. 1970) ("It is elementary that a party to a contract cannot claim its benefit where he is the first to violate it.") (*citing Rexite Casting Co. v. Midwest Mower Corp*., 267 S.W. 2d 327 (Mo. App. 1954); *Motor Port, Inc. v. Freeman*, 62 S.W.2d 479 (Mo. App. 1933)).

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

V. ACCEPTING APPELLANT'S ALLEGATIONS AS TRUE, REED'S CONTINUED AT-WILL EMPLOYMENT IS NOT SUFFICIENT CONSIDERATION TO CREATE AN ENFORCEABLE CONTRACT, AND RESPONDENT CANNOT SEEK TO ENFORCE THE BROKER AGREEMENT IT FIRST BREACHED.

As noted in Appellant's Substitute Brief, an agreement for employment-at-will "'is sometimes called a 'unilateral contract' because there is an implied (if not expressed) promise that if an employee performs work as directed, the employer will pay.'" App. Sub. Br. at 37 (*quoting Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 26 (Mo. App. W.D. 2008)). At oral arguments before the Court of Appeals, Respondent conceded that Reed's employment was at-will. In spite of its concession, Respondent now claims that "'separate consideration' need not be identified for the forum selection clause at § 21." Resp. Sub. Br. at 44.

Respondent argues that Appellant "completely misunderstand[s] the contractual concept of consideration[,]" R. Appx. at RA-62, and "[m]isinterpret[s] the four-three decision in *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014)[.]" Resp. Sub. Br. at 43. To the contrary, "[Respondent's] argument that an offer of at-will employment may constitute consideration for contract formation is simply not supported by the law." *Strain v. Murphy Oil USA*, No. 15-cv-3246, 2016 WL 540810, at *4 (W.D. Mo. Feb. 9, 2016) ("An offer of at-will employment, or the continuation of at-will employment, is simply not a source of consideration under Missouri contract law.") (*citing Bristol*, 450 S.W.3d at 775; *Baker Frye v. Speedway Chevrolet Cadillac*, 321

S.W.3d 429, 438 (Mo. App. 2010); *Morrow*, 273 S.W.3d at 26; *Jimenez v. Cintas Corp*., 475 S.W.3d 679, 685 (Mo. App. E.D. 2015) ("terms and conditions of at-will employment are unilaterally imposed on employees, so they are not enforceable at law as contractual duties and will not create consideration.")).

Because at-will employment does not create a legally binding employment agreement, the Court must look to see "whether there is another source of consideration to create a valid contract." *Id*. Respondent made no effort to argue to the trial court that any of the purported sources of consideration listed on page 44 of its Substitute Brief constituted additional consideration, however, even if office space, telephone assistance, or paid vacation were sufficient to transform a unilateral contract into a bilateral contract, Respondent was the first to breach the Broker Agreement.[3]

Accepting the allegations in Reed's Petition as true, Reilly breached the Broker Agreement when it terminated him without cause, effective immediately, and notified him that "no future commission checks will be made." LF_007-8, Petition at ¶¶ 14, 17-18. This breach was material because it "substantially alter[ed] the manner and/or amount that the employer pays the employee". *JumboSack Corp. v. Buyck*, 407 S.W.3d 51, 55-57 (Mo. App. 2013) (*citing Supermarket Merch. & Supply, Inc. v. Marschuetz*, 196 S.W.3d 581, 585 (Mo. App. E.D. 2006); *Luketich v. Goedecke, Wood & Co., Inc.*, 835 S.W.2d 504, 507 (Mo. App. E.D. 1992); *Smith-Scharff Paper Co., Inc. v. Blum*, 813

[3] Respondent does not address Appellant's argument that it was the first to breach the Broker Agreement.

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

S.W.2d 27, 29 (Mo. App. E.D. 1991); *Forms Mfg., Inc. v. Edwards*, 705 S.W.2d 67, 69 (Mo. App. E.D. 1985). As the first to breach the Broker Agreement, Reilly cannot seek to enforce its terms, including the forum selection clause and non-compete clause.

VI. ENFORCEMENT OF THE FORUM SELECTION CLAUSE WOULD BE UNFAIR AND UNREASONABLE.

Twenty-five years ago, in *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 500-01 (Mo. banc 1992), this Court refused to "abrogate the responsibility of interpreting [an] important statute" to an out-of-state court. The statute at issue was the section of the MMPA that governs liquor franchise laws. Because section section 407.413 "ha[d] never been interpreted by the Missouri courts, there [were] no guidelines for an out-of-state court with respect to whether the statute should be applied in this situation." *Id*. at 498. Additionally, because "any effort to waive or modify [section 407.413's] provisions is unenforceable," the Court determined that it would be unreasonable to enforce the outbound forum selection clause. *Id*. at 500-01.

Appellant submits that the statutes at issue in this case are equally as important to the public policy of this state as those at issue in *High Life*, as evidenced by the fact that any provision in a contract which purports to waive its provisions "shall be void." RSMo § 407.915. As such, the trial court erred in dismissing this case and abrogating the responsibility of interpreting these important statutes to the District Court of Johnson County, Kansas.

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Respectfully Submitted,

/s/ Bill Kenney

William C. Kenney Mo. Bar No. 63001
BILL KENNEY LAW FIRM, LLC
1101 Walnut Street, Suite 102
Kansas City, Missouri 64106
Telephone: (816) 842-2455
Facsimile: (816) 474-8899
Email: *bkenney@billkenneylaw.com*
Attorney for Appellant Jeff Reed

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

Electronically Filed - SUPREME COURT OF MISSOURI - November 06, 2017 - 11:42 PM

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure, because it contains 4,587 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief and its supplements have been prepared in a proportionally spaced typeface using Microsoft Word 2016 in font size 13 of Times New Roman. This brief also includes the information required by Rule 55.03.

/s/ Bill Kenney
William C. Kenney
Attorney for Appellant Jeff Reed

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, the foregoing Substitute Reply Brief has been electronically filed with the Clerk of the Court for the Missouri Supreme Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Bill Kenney
William C. Kenney
Attorney for Appellant Jeff Reed