Summary of SC93451, *Carla Baker v. Bristol Care Inc., d/b/a Bristol Manor, and David Furnell*

Appeal from the DeKalb County circuit court, Judge R. Brent Elliott
Argued and submitted February 19, 2014; opinion issued August 19, 2014

Attorneys: Bristol was represented by Brian N. Woolley of Lathrop & Gage LC in Kansas City, (816) 292-2000, and Baker was represented by Jayson A. Watkins and Charles Jason Brown of Brown & Associates LLC in Gower, (816) 505-4529.

Overview: A company appeals the trial court's order overruling its motion to compel arbitration in a suit filed by a former employee it fired. In a 4-3 decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri affirms the order, finding there was no consideration to create a valid arbitration agreement. Whether the parties entered into a valid agreement to arbitrate is a question of contract law to be determined by Missouri courts. The former employee's continued at-will employment did not provide consideration for the arbitration agreement. The fact that the company retroactively could modify, amend or revoke the agreement means its promise to arbitrate is illusory and does not constitute consideration for the former employee's agreement to arbitrate.

Judge Paul C. Wilson dissents. He would hold that Baker's arbitration promise was supported by consideration and should be enforced. There was consideration for the parties' bilateral exchange of promises so as to make those promises binding. Because the former employee was required to sign both an employment and arbitration agreement to receive the promotion, the collected promises are considered together – no separate consideration was needed for the arbitration agreement. The company's promise to arbitrate was not illusory, and this Court should modify the arbitration agreement, as provided by the parties in the agreement, so it may be enforced. Further, Missouri courts have recognized continued at-will employment as consideration.

Facts: Bristol Manor promoted Carla Baker from her position as an hourly employee to a salaried managerial position at one of its long-term care facilities. At the time of her promotion, the parties signed an employment agreement and arbitration agreement. The employment agreement gave Baker increased pay and employment benefits, including a license to live rent-free at the facility. It provided that Baker's employment would "continue indefinitely" unless Baker gave 60 days' notice or unless Bristol terminated her employment, including by giving her five days' written notice and by terminating her without notice but with five days' pay. The arbitration agreement requires the parties to arbitrate any legal claims they may have against one another. Section 3 of the agreement, titled "Employment-At-Will," notes that the arbitration agreement does not alter Baker's status as an at-will employee and notes that either party can terminate the employment at any time and for any reason, with or without cause. The arbitration agreement also says Bristol reserves the right to amend, modify or revoke the agreement with 30 days' notice to Baker. Bristol later terminated Baker from her position as administrator of the

facility, and she sued, seeking compensation for allegedly unpaid overtime hours. The circuit court overruled Bristol's motion to compel arbitration. Bristol appeals.

AFFIRMED.

Court en banc holds: (1) The validity of the arbitration agreement is determined by the state courts, not by an arbitrator as provided in the agreement. A dispute "relating to the applicability or enforceability" of the agreement presupposes the formation of a contract. Baker's argument that there was no consideration raises not an applicability or enforceability issue but rather a contract formation issue, which raises a question of law to be resolved by Missouri courts.

(2) The arbitration agreement was not valid because it was not supported by consideration.

> (a) Neither Baker's continued at-will employment nor the incidents of that employment provide consideration supporting an obligation for Baker to arbitrate disputes with Bristol. Key indicia that employment is "at-will" include an indefinite duration and the employer's option to terminate the employment immediately, without cause. Bristol's employment agreement provided no guaranteed duration of employment and permits Bristol to terminate Baker immediately without notice, for any reason, by giving her what amounts to a severance package of five days' pay. Further, section 3 of the arbitration agreement provides that it "does not alter [Baker's] status as an at-will employee." The severance pay was a term and condition of at-will employment.
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> (b) The fact that Bristol retroactively could modify, amend or revoke the agreement means its promise to arbitrate is illusory and does not constitute consideration for Baker's agreement to arbitrate. In a bilateral contract, each party's promises to undertake some legal duty or liability can be consideration supporting an enforceable contract, such promises must be binding, not illusory. A promise is illusory if one party retains the unilateral right to amend the agreement and avoid its obligations. Bristol's alleged mutual promise to arbitrate is conditioned on its unilateral right to amend, modify or revoke the agreement with 30 days' notice to Baker. The notice requirement does not preclude Bristol from making unilateral changes. Accordingly, its promise to arbitrate is illusory and does not constitute consideration to create an enforceable contract.

Dissenting opinion by Judge Wilson: The author would hold that Baker's arbitration promise was supported by consideration and should be enforced.

(1) Questions of contract formation are governed by principles of Missouri law. One of the basic elements of contract formation is consideration. Generally, a bargained-for exchange of promises – one promise given in consideration for the other promise – supplies the consideration needed to bind both parties to their promises. Consideration either is present – and a contract is formed – or it is not. Courts are not authorized to determine, in hindsight, whether consideration is "adequate" for the promise given. Similarly, separate consideration is not needed for each contemporaneous promise – especially when a collection of promises is given in exchange for another collection of promises.

(3) There was consideration for the parties' exchange of promises. As a condition of her employment as a facility administrator Baker was required to sign both the employment and arbitration agreements, which are considered one bilateral contract. The exchange of promises each party made to the other supplies consideration to make all of their promises binding. No separate consideration was needed for Baker's arbitration promise, which was just one of many for which Bristol bargained – and Baker gave to receive the promotion and its accompanying benefits. In exchange for Baker's promise to arbitrate claims she may have against Bristol, the company promised to waive any right it might have to administrative review or civil litigation and arbitrate not only these claims but also any claims Bristol might have against Baker. It also agreed to pay all costs of arbitration. This promise to arbitrate was not illusory. Neither Baker nor this Court is free now, in hindsight, to dissect the parties' bargain and declare one of their many promises unenforceable because of a lack of consideration. This Court should modify the arbitration agreement, as the parties provided in section 25 of the agreement, to provide that no change by Bristol can alter Baker's rights with respect to any claim she already has asserted. Bristol's employment promises also are not illusory. In exchange for Baker's promise to arbitrate, her employment did not just continue – Bristol gave her a promotion, a pay raise and living quarters. Missouri courts have recognized continued at-will employment as consideration for non-compete agreements and cannot apply a different rule for arbitration agreements.