NO. 97429-2

SUPREME COURT OF THE STATE OF WASHINGTON

Steven BURNETT, Respondent,

v.

PAGLIACCI PIZZA, INC., Petitioner

AMICUS CURIAE BRIEF BY

WASHINGTON HOSPITALITY ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Hospitality Association ("Association") is Washington's leading hospitality trade group, representing more than 6,000 members of the hotel, restaurant, and hospitality industry across the state. Its members comprise catering, concessions, pubs, formal and casual dining, quick-service restaurants, recreation, hotels, and allied members whose operations support these businesses. Its members also range in size, from single location, family owned restaurants, pubs, or inns, to multi-location, full-service restaurants or hotels. To operate, members enter into commercial contracts with suppliers, vendors, landlords, or other service providers, as well employ excellent and valued service professionals, who perform all types of work at every level, from a valet to a Head Chef, from a General Manager to the CEO. The Association advocates on behalf of its members to facilitate their operations in Washington – which includes both supporting their business operations and helping to promote respectful and successful employee relations.

II. INTRODUCTION TO ARGUMENT

It is well established that both federal and state law recognize a strong public policy favoring arbitration as an alternative means of dispute resolution – including in the employment relationship. *See* Federal

Arbitration Act (FAA), 9 U.S.C §§ 1-16[1]; RCW 7.04A.060[2]; *Zuver v. Airtouch Comm'ns*, 153 Wn. 2d 293, 301 (2004); *Romney v. Franciscan Med. Grp*., 186 Wn. App. 728, 734 (2015). Recent U.S. Supreme Court cases emphasize the strength of this public policy and the validity of arbitration agreements in the employment setting. *See Epic Systems Corporation v. Lewis,* 138 S.Ct. 1612 (2018) (in three consolidated cases, holding that employment arbitration agreement containing a class and collective action waiver was valid and fell under the FAA); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745–46 (2011) (explaining that "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms").

Yet despite these directives and solid public policy, the Court of Appeals' decision in *Burnett v. Pagliacci Pizza, Inc*., --Wn. App.--, 442 P.3d 1267 (2019) expands the application of both procedural and substantive unconscionability to invalidate an arbitration agreement contained in an employee handbook, even though it found that a contract to arbitrate was formed. In doing so, the opinion creates uncertainty and

[1] Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[2] "(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract."

confusion in its practical application for employers. The opinion also ignores the value to both employers and employees (of all types) in having an efficient onboarding process, as well as internal pre-dispute grievance or conciliation procedures to encourage resolution of workplace disputes without needing to resort to an adversarial process. The Association asks this Court to accept the Petition for Review to correct the legal inconsistencies with *Burnett*'s holding, which supports reversal, while also fully considering the practical, far-reaching impact of this case on both employers and employees in the context of public policy considerations.

III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Burnett sought to apply long-standing law: An employee challenging an arbitration agreement bears the burden to prove that its formation was "procedurally unconscionable" or its terms are "substantively unconscionable." *Zuver*, 153 Wn.2d at 302; *Romney*, 186 Wn. App. at 735. *See also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (the party opposing arbitration bears the burden of showing that the agreement is not enforceable). *Burnett,* however, expanded application of both principles to such an extent that it is uncertain how, or even if, employers and employees may agree to alternative dispute resolution.

A. Burnett's Use of Procedural Unconscionability to Invalidate a Handbook's Arbitration Clause Goes Beyond Current Cases and Creates Operational Uncertainty.

Procedural unconscionability exists if there was no "meaningful choice" under all the circumstances surrounding the making of the agreement. *Zuver,* 153 Wn.2d at 303. While citing this relevant case law, *Burnett* goes further than other courts in applying "procedural unconscionability" to invalidate an arbitration clause. Before *Burnett*, the relevant factual inquiries for procedural unconscionability in the employment context were clear:

> **At a minimum**, an employee who asserts an arbitration agreement is procedurally unconscionable must show some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, or that the terms of the agreement were set forth in such a way that an average person could not understand them.

Zuver, 153 Wn. 2d at 306-07 (emphasis added).

Thus for example, in *Mayne v. Monaco Enterprises, Inc.,* 191 Wn. App. 113, 121 (2015), Division III found that an arbitration agreement was procedurally unconscionable where it was offered to the employee after six years of employment, and his only choice was to "decline to sign the agreement and immediately end his employment, or he could sign the agreement and continue working." This holding contrasts with (1) *Romney,*

186 Wn. App. at 740 (2015), where Division I enforced an arbitration clause contained only in an addendum to an employment agreement; (2) *Tjart v. Smith Barney, Inc*., 107 Wn. App. 885, 896 (2001), where Division I enforced an arbitration clause contained in a job application signed by the former employee; and (3) *Turner v. Vulcan, Inc*., 190 Wn. App. 1048 (2015) (unpublished), where Division I rejected an employee's argument that the agreement was unconscionable because the employee said she felt she would be fired if she did not sign the agreement within 24 hours and that she did not have time to "find out" what the AAA rules said. *See also Oakley v. GMRI, Inc*., No. CV-13-042-RHW, 2013 WL 5433350, at *1 (unpublished) (E.D. Wash. Sept. 27, 2013) (compelling arbitration of employment claims where explanation of mandatory and exclusive dispute resolution process ("DRP") was contained in separate DRP handbook).

The above cases illustrate how the Court of Appeals' decision in *Burnett* is an outlier necessitating this Court's review. To find procedural unconscionability, the Court of Appeals primarily relied upon its conclusion that the agreement was a contract of adhesion, coupled only with the fact that the relevant employee guide containing the clause was provided to the employee on his first day of work and he was told to read it at home. *Burnett,* 442 P.3d at 1273. These facts fall short of *Zuver*'s caution that "more is needed" than finding of an adhesion contract to prove procedural

unconscionability. *Zuver*, 153 Wn.2d at 737. More is needed because it is enough that an at-will employee "could choose employment elsewhere" rather than agreeing to arbitrate. *Romney,* 186 Wn. App. at 740 (arbitration agreement was not procedural unconscionable where there was no proof beyond the finding of an adhesion contract). *See also Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn. 2d 781, 814 (2009) (holding that homeowners failed to show procedural unconscionability as sole argument was that the relevant contract addendum was an adhesion contract).

By finding procedural unconscionability under the slim facts discussed, the Court of Appeals' decision gives little guidance as to what "a reasonable opportunity [for the employee] to understand that he was agreeing to arbitrate" practically means. If *Burnett* stands, then employers are now vulnerable and open to an argument that arbitration agreements in handbooks, or even standalone agreements presented on the first day of employment, can never be enforceable. This would be a radical departure from the practice followed by employers across many industries aside from hospitality, and apply to all types of employees from a Chief Executive Officer, to a General Manager, to an entry level employee.

By overemphasizing its conclusion that the relevant agreement was a contract of adhesion, the decision implies that it is the employer, rather than the party challenging the arbitration agreement, who must prove that

the employee actually read the document containing the arbitration clause, even though the burden of proof to avoid enforcement is on the party/employee challenging it (*Zuver*, 153 Wn.2d at 302), and ignorance of the contents of a written contract generally does not affect the liability of the person who signs it. *Tjart*, 107 Wn. App. at 897. Other key, unanswered questions resulting from the *Burnett* ruling include: Must an applicant, rather than an employee, be presented with the arbitration agreement? How much time must an employee be given to review the documents? Must a new employee be sent home after orientation to consider the arbitration agreement before performing any other work? Must, and if so how long, an employer delay an onboarding process for new employees? Must an employer representative actually observe the employee reviewing the agreement? These same types of questions regarding what constitutes a signatory's "reasonable opportunity" to review an agreement hold true in any setting where the party seeking to void the agreement successfully shows a contract of adhesion. The answers are wholly unclear from the Court of Appeals' opinion. Such uncertainty, especially when Washington recognizes that arbitration is a favored forum for resolution of disputes, should be avoided, and this Court should accept review to correct the Court of Appeals' decision.

B. Burnett's Expansion of Substantive Unconscionability Beyond Current Caselaw Ignores the Value of Alternative Dispute Resolution.

Burnett's analysis of substantive unconscionability appears to similarly overreach. "Substantive unconscionability does not concern 'whether the parties have mirror obligations under the agreement [.]" *Romney,* 186 Wn. App. at 742. Rather, the terms of an arbitration agreement are substantively unconscionable when they are wholly "one-sided or overly harsh," "shocking to the conscience," "monstrously harsh," or "exceedingly calloused." *Gandee v. LDL Freedom Enters., Inc*., 176 Wn. 2d 598, 603 (2013).

It is concerning that *Burnett* put the employer's "limitations clause," which the court admitted contained no time limit whatsoever, in the same camp as *Adler*, 153 Wn.2d at 357, whose clause imposed a 180-day limitations period – nearly half the time limit for filing discrimination complaints with the Equal Employment Opportunity Commission or the Washington Human Rights Commission, and *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 55 (2013), where the arbitration clause imposed a 14-day limitations provision when Washington law otherwise provides a 3-year period to bring wage claims. *Burnett* offered little explanation why the clause here was "shocking" other than the fact that the first step in the conciliation process was for the employee to speak with their supervisor, or

a hypothetical situation where the employer could drag out the conciliation process with a current employee (Mr. Burnett being a former employee) beyond the expiration of the limitations period. *Burnett,* 442 P.3d at 1279. Yet this Court has made it clear that potential, or speculative consequences do **not** support a finding of substantive unconscionability. Specifically in *Zuver,* this Court concluded that a provision was not substantively unconscionable based on a speculative argument that the arbitrator might not abide by Washington law. 153 Wn.2d at 310–11, 312. *Burnett's* arguments are even more speculative.

Perhaps more importantly, *Burnett*'s implication that any pre-claim mandatory dispute resolution procedure is only advantageous to the employer and "shocking to the conscience" ignores important public policies to the contrary and the valid goal of promoting open workplace relations. Both employers and employees have an interest in an internal procedure to informally resolve workplace disputes, short of a formal charge, lawsuit, or arbitration. Indeed, pre-arbitration grievance procedures are a key provision in many collective bargaining agreements, and many employers voluntarily adopt similar procedures. Promoting methods by which to share workplace concerns with management short of filing a claim should be encouraged, not discouraged. The availability of pre-dispute internal conciliation procedures encourages communication and positive

employee relations, and it also mitigates against unnecessary litigation costs for both employers and employees. *Burnett* overlooked such considerations.

If this Court does not accept review, employers will be discouraged from offering any meaningful pre-litigation or arbitration dispute procedure out of fear that, based upon the vague ruling in *Burnett*, any such agreement will be found substantively unconscionable. Consequently, denying review harms both employers and employees.

IV. CONCLUSION

Alternative dispute resolution procedures short of filing a lawsuit, whether informal or arbitration, benefit both employers and employees. An imprecise standard of procedural unconscionability to invalidate an arbitration clause creates uncertainty not only in employment agreements, but in commercial contracts. This Court should accept review in order to correct and clarify the issues raised above.

Respectfully submitted this 10th day of September 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I served via Supreme Court E-Service Portal and emailed the foregoing on:

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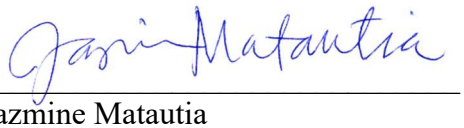
DATED this 10th day of September 2019.



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