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DIVISION III
STATE OF WASHINGTON
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No. 329780

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STEPHEN MAYNE, Appellant

vs.

**MONACO ENTERPRISES, INC., GENE MONACO and
ROGER BARNO, Respondents.**

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Monaco's Arbitration Agreement should be invalidated because it is both procedurally and substantively unconscionable. Cases relied upon by Monaco in an attempt to defeat procedural unconscionability are factually distinguishable from the case before this Court. Monaco cannot defeat substantive unconscionability because (1) it failed to submit evidence to offset Mayne's evidence of financial hardship with respect to the fee splitting provision of the Agreement and (2) no authority was presented to support a finding that the loser pays provision of the Agreement is conscionable.

II. ARGUMENT

A. PROCEDURAL UNCONSCIONABILITY.

The pivotal inquiry when analyzing a claim of procedural unconscionability is whether the employee truly had a meaningful choice with respect to the arbitration agreement. *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 345, 103 P.3d 773 (2005). The analytical factors articulated by the courts are not to be applied mechanically without regard to whether there was a meaningful choice. *Id.* Monaco seeks to avoid a finding of procedural unconscionability by engaging in just the sort of mechanical analysis that the Washington Supreme Court has cautioned against.

Monaco primarily relies on *Zuver v. Airtouch Communc'ns, Inc.*, 153 Wash.2d 293, 103 P.3d 753 (2004) to support its contention that the Arbitration Agreement presented to Mayne was not procedurally unconscionable. While both *Zuver* and the case at bar involved adhesion contracts presented to the employee on a take it or leave it basis, the facts in *Zuver* are distinguishable from those in the present case.

In *Zuver*, the Court held that even though the arbitration agreement was an adhesion contract, *Zuver* was provided a meaningful choice about whether to sign the agreement because (1) the arbitration agreement was provided to *Zuver* as part of the offer of employment, giving her the opportunity to pose questions about the Agreement to the employer or seek legal advice prior to accepting the position; (2) the arbitration agreement was a stand-alone document clearly labeled “Arbitration Agreement” in bold letters; and (3) the one-page agreement was written in a normal typeface and font. *Id.*, at 305-06.

In this case, the Arbitration Agreement was presented to Mayne after he was already employed and had been induced to relocate his family from Texas to Spokane with the promise of a promotion, effectively eliminating any meaningful choice about whether to sign the Agreement. Although Mayne could have posed questions, he still would not have had

any choice about whether to sign or any opportunity to negotiate different terms. Second, the header and footer to the Arbitration Agreement indicate that it is an Appendix to the Employee Handbook for 2013, and that it is the last two pages of a 64 page document. CP 23-24. Finally, the Agreement presented to Mayne was a two page document in a small typeface attached to a much longer document.

Application of the Supreme Court's direction to remain focused on the primary inquiry – whether there was meaningful choice – leads to the conclusion that this Arbitration Agreement is procedurally unconscionable. Mayne had already relocated his family to the Northwest, had started building a house and had a family to support. He was not free to negotiate the terms of the Agreement with his employer. The Agreement was attached to the 64 page employee handbook, and had technical legal terms. There was no meaningful choice.

B. SUBSTANTIVE UNCONSCIONABILITY.

1. Fee Splitting Provision.

Monaco seeks to defend its fee splitting provision in the Arbitration Agreement on the basis that fee splitting provisions are only invalid if the arbitration cost is prohibitive when compared to the value of the Plaintiff's claim. *Respondent's Brief*, p.10. Monaco misstates the

courts' analysis with respect to the substantive unconscionability of fee splitting provisions. Further, Monaco failed to submit any evidence disputing Mayne's evidence that the fee splitting provision was cost prohibitive to him.

An arbitration agreement may be invalid where the costs associated with arbitration are prohibitively expensive. *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 345, 103 P.3d 773 (2005). In order to establish prohibitive expense, the employee must submit evidence of the likelihood of incurring excessive costs by submitting an affidavit describing his personal finances as well as the costs of arbitration. *Id.* at 353. Once prohibitive costs are established, the opposing party must submit contrary offsetting evidence to enforce arbitration. *Id.* at 354. There is no requirement that the costs of arbitration exceed the value of the plaintiff's claim. "If the up-front costs of arbitration have the practical effect of deterring a . . . claim, the arbitration agreement should not be enforced. *Walters v. AAA Waterproofing, Inc.*, 151 Wash.App. 316, 211 P.3d 454 (2009).

In *Hill v. Garda CL Northwest, Inc.*, 179 Wash.2d 47, 308 P.3d 635 (2013), the court found the fee splitting provision to be unconscionable because it effectively prohibited the plaintiffs from

pursuing their claims because of the lack of financial resources of either the plaintiffs or the union. *Id.*, at 56-57. The court's decision was not dependent on the comparison of the value of the claim to the costs of arbitration. The employee's submitted evidence of "the high costs of individual arbitration as well as the limited resources of the representative plaintiffs and the union." *Id.*

Nor was the focus of the analysis a comparison of claim value v. arbitration expense in *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash.2d 598, 293 P.3d 1197 (2013). Rather, the focus of the inquiry was whether the cost associated with the arbitration was such that it effectively denied the plaintiff the ability to vindicate her rights. *Id.*, at 604, citing *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed. 2d 373 (2000). Although the *Gandee* court did note that the value of Plaintiff's claim was approximately \$3,500.00, she provided evidence that the costs to arbitrate in Orange County as well as the expense of the arbitrator would cause her to have to forego her claim.

Here, Mayne submitted affidavits outlining his personal finances and setting forth the cost of arbitration. CP 47-55. Mayne further indicated that payment of one half of the arbitrator's fees would constitute a substantial hardship. Monaco did not submit any evidence contradicting

the likely arbitration cost as required by *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 345. 103 P.3d 773 (2005). Because Monaco has failed to rebut Mayne's evidence of financial hardship, the fee splitting provision should be held to be unconscionable.

2. Loser Pays Provision.

Monaco's sole argument in response to Mayne's contention that the loser pays attorney's fees provision is substantively unconscionable is that Mayne did not identify the statutory provisions regarding attorney's fees in his Complaint. This argument is without merit because Mayne's Request for Relief in the Complaint does request an award of reasonable attorney's fees and costs. CP 5, ¶ 4.3. Further, Monaco provides no citation to authority (and Mayne has found none) for the proposition that the Complaint must include a specific citation to the statutes upon which Mayne relies to support his request for fees should he prevail.

Because Monaco has failed to submit legal authority to support its position, the loser pays provision should be found to be substantively unconscionable.

C. SEVERANCE OF UNCONSCIONABLE PROVISIONS.

Mayne acknowledges the existence of the severance provision in the Arbitration Agreement. However, because the unconscionable

provisions are such an integral part of the spirit of the Agreement, severance would fundamentally alter the nature of the Agreement. Mayne contends that invalidation of the Agreement, not severance, is the appropriate remedy in this case.

D. REQUEST FOR ATTORNEY'S FEES.

In order to preserve his ability to recover attorney's fees related to this appeal, Mayne must request fees in his brief and explain the basis for the request. RAP 18.1. Consequently, Mayne requested both statutory attorney's fees and fees pursuant to the Arbitration Agreement in his brief.

With respect to fees requested pursuant to RCW § 49.48.030 and RCW § 49.52.050 and 070, Mayne seeks to preserve his right to statutory attorney's fees should he ultimately prevail. Similarly, should the Court determine that the Arbitration Agreement is enforceable and the loser pays provision is not substantively unconscionable, then Mayne seeks an award of fees incurred on appeal pursuant to the Arbitration Agreement.

III. CONCLUSION

The Arbitration Agreement is procedurally unconscionable because Mayne did not have a meaningful choice about the Agreement. Further, both the fee splitting and loser pays provisions of the Agreement are substantively unconscionable. Severance of those provisions would

fundamentally alter the nature of the agreement between the parties, and consequently invalidation of the agreement is the appropriate remedy.

Dated this 29th day of April, 2015.

Respectfully Submitted,

Michelle K. Fossum
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WSBA No. 20249

CERTIFICATE OF SERVICE

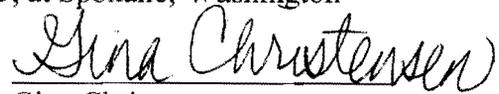
Gina Christensen hereby certifies under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, residing in Spokane County, Washington, over the age of 18 years, not a party to the above-captioned matter and qualified to give the following testimony:

That on April 30, 2015, I personally served one set of copies of the Appellant's Reply Brief on the following:

James King and
Markus W. Louvier
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The above service is additionally evidenced by 'copy received' stamps affixed to the original filed document.

DATED this 30 day of April, 2015, at Spokane, Washington


Gina Christensen