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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

#329780

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

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**STEPHEN MAYNE, Appellant**

**vs.**

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

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

The Arbitration Agreement [Agreement] signed by Stephen Mayne [Mayne] as a condition of his employment with Monaco Enterprises is unenforceable because it is both procedurally and substantively unconscionable. It is procedurally unconscionable because Mayne had no meaningful choice about whether to sign the agreement in which he gave up his rights. The Agreement is substantively unconscionable because it contains terms that are one-sided and overly harsh. Specifically, the Agreement obligates Mayne to pay one-half of the arbitrator's fees and costs and provides for an award of attorney's fees and costs to the employer if the employer is the prevailing party.

Should the Court find that the Arbitration Agreement is either procedurally or substantively unconscionable, Mayne requests that the Court invalidate the Agreement. In the alternative, Mayne requests that those provisions of the Arbitration Agreement that the court finds to be substantively unconscionable be severed.

## **II. ASSIGNMENTS OF ERROR**

### **A. ASSIGNMENTS OF ERROR**

1. The Trial Court Erred in its Determination that the Arbitration Agreement Was Not Procedurally Unconscionable.

2. The Trial Court Erred in its Determination that the Requirement that Mayne Pay One-Half of the Arbitrator's Fees and Costs Was Not Substantively Unconscionable.
3. The Trial Court Erred in its Determination that the Requirement that the Non-Prevailing Party Pay the Costs of Arbitration Was Not Substantively Unconscionable.
4. The Court Erred in its Determination that the Arbitration Agreement is Enforceable.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is the Arbitration Agreement Procedurally Unconscionable? [Assignment of Error No. 1.]
2. Is the Requirement that the Employee Pay One-Half of the Arbitrator's Fees and Costs Substantively Unconscionable? [Assignment of Error No. 2.]
3. Is the Requirement that the Non-Prevailing Party Pay the Costs of Arbitration Substantively Unconscionable? [Assignment of Error No. 3.]
4. Do the Unconscionable Provisions of the Arbitration Agreement Render the Agreement Unenforceable? [Assignment of Error No. 4.]

**III. STATEMENT OF THE CASE**

**A. PROCEDURAL HISTORY**

On July 14, 2014, Mayne sued his former employer, Monaco Enterprises, as well as Gene Monaco and Roger Barno [collectively "Monaco"] alleging negligent misrepresentation and promissory estoppel.

CP 1-5. Mayne alleges that his employer wrongfully enticed him to relocate from Houston, Texas to Spokane, Washington with the false promise of a promotion. CP 1-5. The promotion did not occur, and Mayne was laid off effective December 31, 2013. CP 1-5.

On October 6, 2014, Monaco filed a Motion to Dismiss and to Compel Arbitration based on an Arbitration Agreement between Monaco and Mayne. CP 30-37. After briefing and argument, Spokane County Superior Court Judge Michael P. Price granted the Motion to Compel Arbitration and Dismiss on November 18, 2014. CP 80-81. This appeal followed. CP 82-85.

#### B. RELEVANT FACTS

During the course of his employment, Mayne was required to sign three separate Arbitration Agreements as a condition of his continued employment. CP 14–24. The Arbitration Agreement dated March 28, 2013 was in effect at the time Monaco terminated Mayne’s employment. CP 23-24.

The Agreement explicitly states that “had the Employee not agreed to execute this Arbitration Agreement, the Company would not have agreed to employ the Employee”. CP 23. The Agreement also requires the employee to pay one half of the total fees and costs of the arbitrator

and provides that the prevailing party may recover costs of arbitration, including attorney's fees, costs and litigation expenses including expert fees and costs. CP 24, ¶ C.4.

#### IV. SUMMARY OF ARGUMENT

Arbitration should not be compelled in this matter because the Arbitration Agreement is procedurally and substantively unconscionable and, under Washington law, a finding of either procedural or substantive unconscionability is sufficient to void the Agreement. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 293 P.3d 1197 (2013).

#### V. ARGUMENT

##### A. STANDARD OF REVIEW AND BURDEN OF PROOF.

The Court of Appeals engages in de novo review of a trial court's decision compelling or denying arbitration. *Romney v. Franciscan Medical Group*, No. 71625-5-I, 2015 WL 668051 (Court of Appeals, Div. I, Feb. 17, 2015), citing *Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 602, 293 P.3d 1197 (2013). Although Washington's policy favors arbitration, courts have noted that the policy does not lessen the Court's responsibility to determine whether the arbitration agreement is valid. *Hill v. Garda CL Northwest, Inc.*, 179 Wash.2d 47, 308 P.3d 635 (2013). The party opposing arbitration has the burden of establishing that the arbitration agreement is not

enforceable. *Zuver v. Airtouch Commc 'ns, Inc.*, 153 Wash.2d 293, 302, 103 P.3d 753 (2004).

B. THE ARBITRATION AGREEMENT IS PROCEDURALLY UNCONSCIONABLE AND THEREFORE INVALID.

Procedural unconscionability arises during the formation of the contract. *Nelson v. McGoldrick*, 127 Wash.2d 124, 131, 896 P.2d 1258 (1995). The court reviews the circumstances under which the arbitration agreement was entered into to determine whether the employee had a meaningful choice about signing the contract. Relevant considerations include:

1. The manner in which the contract was entered into;
2. Whether the employee had a reasonable opportunity to understand the terms of the contract; and
3. Whether the important terms were hidden in a maze of fine print.

*Nelson v. McGoldrick*, 127 Wash.2d 124, 131, 896 P.2d 1258 (1995). If the facts indicate that the employee did not have a meaningful choice, the contract is procedurally unconscionable. *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 347, 103 P.3d 773 (2005). The factors are not to be applied mechanically, but rather with a focus on whether the employee truly had a meaningful choice about the content and terms of the agreement. *Schroeder v. Fageol Motors, Inc.*, 86 Wash.2d 256, 260, 544 P.2d 20 (1975).

Procedural unconscionability can also arise out of an adhesion contract. An adhesion contract is one where the employee has unequal bargaining power and therefore cannot effectively bargain over the terms of the agreement, and therefore lacks meaningful choice. *Id.* An adhesion contract exists where:

1. The contract is a standard form printed contract;
2. The contract is prepared by one party and submitted to the other on a take it or leave it basis; and
3. There is no true equality of bargaining power between the parties.

*Id.*, at 347. The key inquiry where an adhesion contract exists is still whether the employee lacked meaningful choice. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash.2d 293, 305, 103 P.3d 753 (2004).

The Arbitration Agreement presented to Mayne is an adhesion contract about which he had no meaningful choice. The Agreement is a standard printed form contract which explicitly provides that “had the Employee not agreed to execute this Arbitration Agreement, the Company would not have agreed to employ the Employee”. CP 23-24. The contract was prepared by the employer and submitted to the employee on a take it or leave it basis. Where employees are not free to negotiate the terms of the agreement, there can be no true equality of bargaining power. *Id.*, at 348.

Because all of the elements of an adhesion contract are present, the remaining question is whether Mayne had a meaningful choice about whether to sign the Agreement.

Mayne did not have a meaningful choice about whether to sign the Arbitration Agreement. The first element to be considered is the manner in which the contract was entered into. The Agreement recites that signing is a condition of employment. CP 23-24. Here, unlike a person who is asked to sign an arbitration agreement upon hire, Mayne had already been employed by Monaco for years. He had moved his family from Texas to Washington based on Monaco's promise of a promotion. CP 48, ¶ 6. He had a wife and two young children who were financially dependent on him. CP 47, ¶ 2. He was in the process of building a house in Spokane. CP 48, ¶ 6. If he refused to sign, he would have been unemployed.

The second element evaluates whether the employee had a reasonable opportunity to understand the terms of the Agreement. Mayne does not contend that he was denied an opportunity to understand the terms.

The third element focuses on the format and location of the terms of the Agreement. The Agreement is contained in an Appendix to the Employee Handbook consisting of more than sixty (60) pages, and was a two page document in very small font. CP 23-24. The unconscionable

provisions are set forth on page two, identified under the title “Arbitration Process and Procedure”. CP 24. The language used includes reference to undefined RCW’s and legal terms such as “binding arbitration”, “discovery plans”, “statutes of limitation”, “venue”, “personal jurisdiction” and “governing law”. CP 24. These statutes, concepts and terms have specific legal ramifications which are outside of the experience of most employees, including Mayne. One cannot make a meaningful decision to give up rights that are not understood. It is anticipated that Monaco will argue that Mayne should have taken the agreement to an attorney. Even if he had, his only option would have been to refuse to sign the agreement and be unemployed.

In *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 103 P.3d 773 (2005), Adler alleged that he lacked meaningful choice in signing an arbitration agreement because (1) he was forced to sign the agreement under threat of termination from employment; (2) he needed the job due to financial commitments; and (3) his limited English proficiency impaired his ability to understand what he was signing. His employer countered that it did not threaten to fire him, that it had no knowledge of his financial circumstances and that Adler had a week to ponder the agreement and seek counsel if desired.

The Washington Supreme Court held that a factual dispute existed with respect to the circumstances surrounding the execution of the agreement, and consequently the trial court needed to make additional findings. The Court stated:

[I]f the trial court finds that [the plaintiff] has proved his claim of procedural unconscionability . . . such a finding will necessarily lead to a finding that [the plaintiff's] waiver of his right to a jury was not 'knowing, voluntary and intelligent.' If such a finding is ultimately made, the arbitration agreement would be void.

*Id.*, at 350, n. 9. Mayne's factual scenario is very similar to *Adler* other than the limited English proficiency. Mayne was required to give up his rights, including his right to a public jury trial, or be terminated from employment and be unable to meet his financial obligations.

Because the Agreement is an adhesion contract offered to a current employee containing a multitude of non-negotiable, unfamiliar terms and concepts, Mayne was deprived any meaningful choice about whether to sign. Consequently, the Agreement should be found procedurally unconscionable and unenforceable.

C. THE ARBITRATION AGREEMENT IS SUBSTANTIVELY UNCONSCIONABLE.

An arbitration agreement is substantively unconscionable if it is one-sided, overly harsh, shocking to the conscience or exceedingly calloused.

*Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 603, 293 P.3d 1197 (2013). Mayne asserts that the following provisions of the Arbitration Agreement are substantively unconscionable:

1. The Employee and the Company shall equally pay one-half of the total fees and costs of the Arbitrator.
2. [T]he prevailing party as determined by the arbitrator shall be entitled to recover the costs of arbitration against the non-prevailing party, including without limitation, reasonable attorney's fees, costs, and litigation expenses including expert fees and costs.

CP 24, ¶ C.4.

With respect to the clause requiring the parties to split the costs of the Arbitrator, the case of *Hill v. Garda CL Northwest, Inc.*, 179 Wash.2d 47, 308 P.3d 635 (2013) is instructive. In *Hill*, the Washington Supreme Court examined a provision in an arbitration agreement that required the parties to split the cost of the arbitrator, hearing room, reporter's fee, per diem and transcript. *Id.*, at 639. The court noted that where a party provided specific information about the fees it would be required to share and why those fees would prohibit the party from bringing its claims, such evidence would be

sufficient to satisfy the party's burden that the fee splitting provision was substantively unconscionable. *Id.* Hill provided such financial information, and the Court held the provision to be substantively unconscionable.

Similarly, in *Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 293 P.3d 1197 (2013), the Plaintiff submitted evidence as part of her challenge to a venue provision that she was unemployed and that the costs to litigate pursuant to the terms of the Arbitration Agreement would be substantial, in part because the arbitration would take place in California. The Court found that the venue provision of the arbitration agreement was unconscionable because of the prohibitive cost to the Plaintiff. *Id.*, at 604.

Mayne is unable to bear the financial cost of arbitration pursuant to the terms of the Arbitration Agreement. Mayne and his spouse were unemployed between January 1, 2014 and the end of July 2014. CP 48, ¶4. At the end of July 2014, Mayne was employed at an hourly rate that is less than half of what he was earning while employed by Defendant Monaco. CP 48, ¶4. Mayne had to sell the home he was in the process of building in Spokane at a loss of approximately \$75,000.00. CP 48, ¶6. As of November 2014, Mayne and his wife were earning less than their monthly expenses. CP 48, ¶6.

The Arbitration Agreement provides that the arbitrator will be a retired judge or someone with similar qualifications. CP 24, ¶C.1. The evidence submitted indicates that the arbitrator's fees will range from \$200.00 per hour to \$495.00 per hour, for a case that will take approximately eighty (80) hours for the arbitrator to handle pretrial matters, prepare for the arbitration, conduct the arbitration and issue a decision. CP 50 -55. Based on those estimates, the arbitration fees will range from \$16,000.00 to \$39,600.00. CP 51, ¶6. By contrast, there are no fees payable to a judge or jury for determination of Mayne's claim. Under the facts presented, the cost sharing provision of the arbitration agreement is substantively unconscionable.

Division 3 of the Washington Court of Appeals was recently presented with a fee sharing provision in an arbitration agreement. In *Romney v. Franciscan Medical Group*, No. 71625-5-I, 2015 WL 668051 (Court of Appeals, Div. I, Feb. 17, 2015), the Court upheld a fee sharing provision on the basis that it was not mandatory. The *Romney* arbitration clause specifically stated that if the employee could not afford arbitration, the employer would bear the costs of arbitration pending a determination by the arbitrator. In upholding the fee sharing clause, the Court distinguished the clause in *Romney* from the mandatory clause in *Hill*.

The fee sharing clause in this case does not provide for payment of arbitration costs by the employer if the employee cannot afford to pay.

The “loser pays” provision in the Arbitration Agreement is also substantively unconscionable. Where a “loser pays” provision serves to benefit only the Defendant, it chills a plaintiff’s ability to bring suit and is therefore one-sided and overly harsh. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 606, 293 P.3d 1197 (2013). See also, *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 103 P.3d 773 (2005)(clause requiring each party to bear his or her own costs and fees was substantively unconscionable in context of a fee-shifting statute).

In *Brown v. MHN Government Services, Inc.*, 178 Wash.2d 258, 274-75, 306 P.3d 948 (2013), the Washington Supreme Court held that mandatory fee-shifting provisions in arbitration agreements are substantively unconscionable where the Washington Minimum Wage Act provides that only a prevailing employee would be entitled to recover costs and fees. In this case, if Mayne is successful and awarded lost wages, he will be entitled to an award of attorney’s fees and costs pursuant to RCW § 49.48.030, RCW § 49.52.050 and RCW § 49.52.070. Those statutes do not provide for an award of fees to a successful employer. The fee-shifting provision contained in the Arbitration Agreement is substantively unconscionable.

D. THE APPROPRIATE REMEDY IS INVALIDATION OF THE ARBITRATION AGREEMENT.

Where an arbitration agreement contains unconscionable terms, the Court must determine whether the appropriate remedy is invalidation of the agreement or severance of the unconscionable terms. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 607, 293 P.3d 1197 (2013). Generally, courts strive to uphold a contract, especially where there is a severance provision in the agreement. *Id.* However, where the unconscionable terms pervade the agreement and severance would fundamentally alter the nature of the agreement between the parties, severance is appropriate. *Id.*

Mayne contends that invalidation of the Arbitration Agreement is the appropriate remedy because severance of the unconscionable provisions would fundamentally alter the tone of the agreement. If the provision requiring joint payment of the arbitrator's costs is severed, the Court will have to rewrite the agreement to identify that the employer is responsible for payment of the costs of arbitration. Severance of the loser pays provision also fundamentally changes the tone and nature of the arbitration agreement.

The Arbitration Agreement does contain a severance clause. CP 23, ¶ D. Should the Court determine that the offending provisions do not

fundamentally change the Agreement, Mayne requests that the substantively unconscionable provisions be severed from the Arbitration Agreement.

E. ATTORNEY’S FEES AND COSTS.

Mayne respectfully requests an award of reasonable attorney’s fees and costs incurred on appeal pursuant to RAP 18.1, RCW § 49.48.030, RCW § 49.52.050 and RCW § 49.52.070. Mayne may also be entitled to attorney’s fees and costs pursuant to the Arbitration Agreement. CP 24, ¶C.4.

1. Statutory Attorney Fees and Costs.

RCW § 49.48.030 provides:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer.

This section has been interpreted to allow an award of attorney’s fees in “any action for wages, i.e. moneys due ‘by reason of employment’”.

*Flower v. T.R.A. Industries, Inc.*, 127 Wash.App. 13, 34, 111 P.3d 1192

(2005) citing *Hayes v. Trulock*, 51 Wash.App. 795, 806, 755 P.2d 830

(1988). Similarly, RCW § 49.52.070 provides that an employer is liable

for costs of suit and a reasonable sum for attorney’s fees when the

employer has willfully failed to pay an employee wages due in violation of

RCW § 49.52.050(2). Should Mayne ultimately prevail and be awarded damages including lost wages, he respectfully requests that he be awarded the attorney's fees and costs associated with this appeal.

2. Attorney's Fees and Costs Pursuant to the Arbitration Agreement.

Should this Court determine that only the cost-sharing provision of the Arbitration Agreement is unconscionable and severable, Mayne respectfully requests that he be awarded the reasonable attorney's fees and costs incurred in this appeal pursuant to the loser pays provision of the arbitration agreement.

## VI. CONCLUSION

The trial court erred in granting Monaco's motion to compel arbitration. Monaco's Arbitration Agreement is procedurally unconscionable because Mayne lacked a meaningful choice about whether to enter into the Agreement. The Arbitration Agreement is also substantively unconscionable because the cost-sharing and loser pays provisions are overly harsh and one-sided. Mayne respectfully requests that the Arbitration

Agreement be invalidated, or, in the alternative, that the cost-sharing and loser pays provisions be severed from the Agreement.

Dated this 2nd day of March, 2015.

Respectfully Submitted,

Michelle K. Fossum

Michelle K. Fossum  
Attorney for Appellant  
WSBA No. 20249

**CERTIFICATE OF SERVICE**

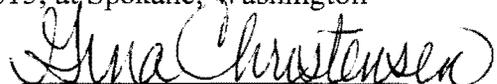
Gina Christensen hereby certifies under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, residing in Spokane County, Washington, over the age of 18 years, not a party to the above-captioned matter and qualified to give the following testimony:

That on March 2, 2015, I personally served one set of copies of the Appellant's Brief on the following:

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 2<sup>nd</sup> day of March, 2015, at Spokane, Washington

  
Gina C. Christensen