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COURT OF APPEALS
OF THE STATE OF WASHINGTON
SEATTLE, WASHINGTON

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

No. 329780-III

STEPHEN MAYNE
Appellant/Plaintiff,

v.

MONACO ENTERPRISES, INC., a corporation; GENE MONACO, an
individual, and ROGER BARNO, an individual
Respondents/Defendants,

RESPONDENTS' BRIEF

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A. INTRODUCTION

Plaintiff/Appellant Stephen Mayne (“Mr. Mayne”) is a former employee of Defendant Monaco Enterprises, Inc. (“MEI”). Mr. Mayne admits that he signed several arbitration agreements while employed by MEI. At the end of the 2013 calendar year, Mr. Mayne was laid off from MEI. He filed a lawsuit against MEI seeking to enforce alleged oral promises of future promotions. Meanwhile, he claimed that every *written* agreement to arbitrate that he had signed was both procedurally and substantively unconscionable. The trial court rejected Mr. Mayne’s challenge to the validity of the arbitration agreements and compelled him to submit his claims to arbitration.

B. RESPONDENTS’ STATEMENT OF THE CASE

1. Mr. Mayne’s Claims Against MEI.

Mr. Mayne’s employment with MEI began in 1997. CP 1-5. He was based out of Massachusetts for approximately six years before moving to Texas for three years. *Id.* In 2006, he relocated to Spokane. *Id.* Mr. Mayne claims that he was induced to move to Spokane based upon a promise that he would at some undefined time become the “Head of Contracting.” *Id.* Mr. Mayne was laid off from MEI effective December 31, 2013. *Id.* A few months later he sued MEI as well as Chief Operating Officer Roger Barno

and Chief Executive Officer Gene Monaco (collectively, “MEI”) under theories of negligent misrepresentation and promissory estoppel. *Id.*

2. Two Arbitration Agreements Signed by Mr. Mayne.

Mr. Mayne signed an Arbitration Agreement with MEI on May 17,

2011. The agreement provides in pertinent part:

The company and the undersigned Employee hereby agree that any dispute with any party that may arise from Employee’s employment with the Company or the termination of Employee’s employment with the Company shall be resolved by mandatory, binding arbitration before a retired judge.

...

The arbitration agreement applies to all statutory, contractual and/or common law claims arising from employment with the Company, including, but not limited to, the following:

Claims that could be asserted in court, including breach of any express or implied contract or covenant; tort claims...

...

I acknowledge that I have carefully read this agreement, and that I understand and agree to its terms. I have entered into this agreement voluntarily and have not relied upon any promises or representations other than those contained herein. I understand that I am giving up my right to a jury trial by entering into this agreement. I understand that this arbitration agreement does not change my at-will employment status with the Company.

CP 21-22.

Mr. Mayne executed another Arbitration Agreement with MEI on March 28, 2013. The agreement provides in pertinent part:

Monaco Enterprises, Inc. ... and the undersigned employee ... hereby enter into this Arbitration Agreement ... effective immediately...

...

Other than those enumerated below in Section B, all claims and disputes between the Company and the Employee are subject to mandatory arbitration, including all statutory, contractual and/or common law claims, and including without limitation those claims that arise from or relate to Employee's employment with the Company. Such claims and disputes between the parties subject to mandatory arbitration include (without limiting the generality of the foregoing) the following:

Any claims that could be asserted in court, including without limitation breach of any express, implied, written or oral contract or covenant; tort claims...

...

E. **Employee Acknowledgment.** The Employee acknowledges that he/she has carefully read this Arbitration Agreement, and that he/she understands and agrees to its terms. The Employee further acknowledges that he/she entered into this Arbitration Agreement voluntarily, did not rely upon any promises or representations other than those contained herein, and had the right to consult with an attorney of his/her choice prior to executing this Arbitration Agreement. The employee understands that he/she is giving up the right to a jury trial by entering into this Arbitration Agreement. The Employee understands that this Arbitration agreement does not change the Employee's at-will employment status with the Company.

CP 23-24.

C. ARGUMENTS AND AUTHORITIES

1. Standard of Review/Burden of Proof.

Appellate courts review trial court decisions granting or denying motions to compel arbitration under the *de novo* standard. *Otis Housing Ass'n v. Ha*, 165 Wash.2d 582, 201 P.3d 309 (2009); *Gandee v. LDL Freedom Enters, Inc.*, 176 Wash.2d 598, 602, 293 P.3d 1197 (2013).

“The party opposing arbitration bears the burden of showing that the agreement is not enforceable.” *Zuver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 103 P.3d 753 (2004), *Otis Housing Ass'n, Inc.*, 165 Wash.2d at 587 (“[T]he party opposing arbitration bear[s] the burden of showing the arbitration[...] clause is inapplicable or unenforceable”). This is because Washington State has a strong public policy favoring arbitration of disputes. *Int'l Ass'n. of Fire Fighters, Local 46 v. City of Everett*, 146 Wash.2d 29, 51, 42 P.3d 1265 (2002); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 454, 45 P.3d 594 (2002); *Perez v. Mid-Century Ins. Co.*, 85 Wash.App. 760, 765, 934 P.2d 731 (1997). In analyzing arbitration agreements in the employment context, “[c]ourts must indulge every presumption ‘in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay,

or a like defense to arbitrability.” *Zuver*, 153 Wash.2d at 301, *quoting*, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25, 103 S.Ct. 927.

2. The Agreements Were Not Unconscionable.

“It is black letter law that the parties to a contract shall be bound by its terms.” *Zuver*, 153 Wash.2d at 302, *citing*, *Nat'l Bank of Wash. v. Equity Investors, L.P.*, 81 Wash.2d 886, 912–13, 506 P.2d 20 (1973). Washington recognizes two types of unconscionability which can potentially invalidate an arbitration agreement: procedural and substantive. *McKee v. AT & T Corp.*, 164 Wash.2d 372, 396, 191 P.3d 845 (2008). Mr. Mayne claims that the agreements he signed were *both* procedurally and substantively unconscionable.

a. Procedural Unconscionability.

Procedural unconscionability is “the lack of meaningful choice, considering all the circumstances surrounding the transaction including ‘[t]he manner in which the contract was entered,’ whether each party had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms [were] hidden in a maze of fine print.” *Zuver*, 153 Wash.2d at 303, *quoting*, *Nelson v. McGoldrick*, 127 Wash.2d 124, 131, 896 P.2d 1258 (1995). An employee may not simply rely upon a lack of bargaining power to assert that a court should find an agreement procedurally unconscionable. *Zuver*, 153 Wash.2d 306. This is because “as

the Fourth Circuit aptly reasoned, if a court found procedural unconscionability based solely on an employee's unequal bargaining power, that holding 'could potentially apply to [invalidate] every contract of employment in our contemporary economy.'" *Id.*, quoting, *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir.2002). In *Romney v. Franciscan Medical Group*, --- P.3d ---, 5, 2015 WL 668051 (Feb 17, 2015, Div.1, 2015), the court rejected the notion that a "take it or leave it" employment agreement was sufficient to show that an employee lacked a meaningful choice: "The key inquiry under Washington law is whether the employees lacked a meaningful choice. Here, as in other cases of employment, the employees could choose employment elsewhere." The same could certainly be said of Mr. Mayne.

Instead, an employee like Mr. Mayne's burden is as follows:

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 a reasonable opportunity to consider its terms, and/or that the terms of the agreement were set forth in such a way that an average person could not understand them.

153 Wash.2d at 306-307.

Despite submitting a declaration to the trial court relaying his post-MEI employment, Mr. Mayne did not claim that he did not understand the

arbitration agreements, that he was not given adequate time to review them, that he felt pressured to sign them, or that MEI would not answer questions about the terms of the agreements.

Mr. Mayne instead fixates his procedural unconscionability argument on his characterization of the agreement as an “adhesion contract,” and therefore, he reasons, it is unconscionable. There is no such rule. “[T]he fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable.” *Zuver*, 153 Wash.2d at 304, citing, *Yakima County Fire Prot. Dist No. 12 v. City of Yakima*, 122 Wash.2d 371, 393, 858 P.2d 245 (1993).

In *Zuver*, the employment agreement was offered to the employee on a “take it or leave it” basis. The arbitration agreement was contained on a standard form. The employee/plaintiff likely did not have any “true equality of bargaining power.” Yet, the Supreme Court recognized that even inequality of bargaining power was insufficient to negate the existence of an arbitration agreement where the employee had a reasonable opportunity to inspect the agreement and the terms were fully disclosed. *Zuver*, 153 Wash.2d at 305. In this case, Mr. Mayne concedes that he had a reasonable opportunity to understand the terms of the agreement. *Brief of Appellant*, pg. 11, Paragraph 3. Mr. Mayne has offered no evidence whatsoever

suggesting that the circumstances surrounding the execution of either or both of the arbitration agreements were unconscionable.

There is no evidence suggesting that he lacked the intellectual ability, language proficiency, or time to understand the agreement. Mr. Mayne does not claim that MEI refused to answer questions about the agreement or refused to allow him to consult with a lawyer. To the contrary, the evidence shows that Mr. Mayne agreed to arbitration twice over the course of a two year period. He had two years to re-evaluate his decision to agree to arbitration. At the end of the two year period he willingly signed another agreement. Again, as set forth in *Zuver*, Mr. Mayne's arguments are insufficient to show procedural unconscionability.

Finally, with regard to the format and location of the terms, Mr. Mayne strains credibility to suggest that the arbitration agreements were contained in an appendix of a 60-page document with small font. In reality, both agreements are separate, two-page documents, requiring separate signatures, with large, bolded titles reading "Arbitration Agreement." The language is plainspoken. The arbitration agreements were not clauses buried in a sea of fine-print which could be quickly passed over. They were separate documents requiring separate signatures. Mr. Mayne further claims that the language in the arbitration agreement contains "legal terms" which "are outside of the experience of most employees, including Mayne." This

is argument, not evidence. Mr. Mayne never submitted evidence claiming a lack of understanding of *any* term of the agreement. Again, despite offering a declaration to the Court, Mr. Mayne **never** claimed to be misled by the agreement. As indicated above, he does not contest the fact that he was given plenty of time to review the document. (“Mayne does not contend that he was denied an opportunity to understand the terms”). *Brief of Appellant, pg. 11, Paragraph 3*. Again, Mr. Mayne had the burden of persuasion at the trial court level. The trial court properly concluded that Mr. Mayne failed to satisfy his burden of proof in support of his procedural unconscionability claim.

b. Substantive Unconscionability.

“Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh.” *Zuver*, 153 Wash.2d at 303, *citing, Schroeder v. Fageol Motors, Inc.*, 86 Wash.2d 256, 260, 544 P.2d 20 (1975). “‘Shocking to the conscience’, ‘monstrously harsh’, and ‘exceedingly calloused’ are terms sometimes used to define substantive unconscionability.” *Id, quoting, Nelson*, 127 Wash.2d at 131, 896 P.2d 1258.

Mr. Mayne argues two provisions of the arbitration agreements are substantively unconscionable:

- (1) Requiring the parties to equally split the fees and costs of the arbitrator, and
- (2) The bilateral prevailing party attorney's fees and costs provision.

As to the equal split of the arbitrator's fees and costs, Mr. Mayne's argument rests upon *Hill v. Garda CL Northwest, Inc.*, 179 Wash.2d 47, 308 P.3d 635 (2013) and *Gandee v. LDL Freedom Enters., Inc.*, 176 Wash.2d 598, 293 P.3d 1197 (2013). *Hill* and *Gandee* both stand for the proposition that cost-splitting provisions may be declared invalid where, when compared to the value of the plaintiff's claim, the arbitration clause is cost **prohibitive**.

Mr. Mayne, meanwhile, claimed only that the arbitration would be a "hardship." CP 48. He did not say, as in *Hill* and *Gandee* that the value of his claim was exceeded by the costs of arbitration. In addition, he submitted a grossly inflated estimate of the cost of arbitration: 80 hours at a range of \$200 to \$495 per hour. CP 51. The respondents pointed the court to the simplicity of this case. Mr. Mayne's claim boils down to a single issue, which is whether in 2006 Mr. Mayne was offered the "Head of Contracting" position in the course of conversations with Frank Tokarz and Randy Frick, and whether collateral promises were made regarding prospective salary and travel requirements. CP 4. This is not simply argument. Mr. Mayne was asked in the course of discovery to:

...produce copies of any and all correspondence, memoranda, pamphlets, brochures, agreements, handbooks, emails, telephone messages or transcripts, recordings, notes, calendars, or any other documents of any kind whatsoever which relate or refer, directly or indirectly, to alleged promises or representations made by Monaco Enterprises or any employee or agent of Monaco Enterprises to the plaintiff, Stephen Mayne at any time.

CP 63-73. Mr. Mayne identified one document consisting of two pages in response to Respondents' broad request for evidence of any kind. *Id.* In sum, the credible evidence showed that Mr. Mayne's arbitration would be nowhere near as complicated as Mr. Mayne's 80 hour estimate would suggest.

In support of his claim that the fee-splitting provision is unconscionable, Mr. Mayne first cites to *Hill*. In that case, the court found an arbitration agreement was unconscionable based upon a confluence of factors, most notably: (1) shortening the statute of limitations from three years to 14 days, (2) limiting the amount of damages the plaintiffs could recover to two to four months of back pay, regardless of their rights under the law, and (3) there was objective evidence showing that bringing claims was cost-prohibitive and had prevented employees from filing claims against their employer.

Similarly, Mr. Mayne cites *Gandee* as an instance in which an arbitration clause was declared invalid because of the costs associated with

arbitration. A closer reading of *Gandee* reveals that the arbitration clause in that case was declared substantively unconscionable based upon the following facts:

- Despite entering a contract with the defendant in Washington, the clause required arbitration to take place in Orange County, California. *Gandee*, 176 Wash.2d at 601-602.
- The plaintiff was in debt and struggled financially, which caused her to contract with the defendant “debt adjusting” company.
- The arbitration clause contained a private statute of limitations requiring the plaintiff to bring her claim within 30 days of the dispute.
- It was estimated that the plaintiff’s claim was limited to \$3,500 in actual damages, whereas the arbitration fees and costs incidental to travelling to the forum far greatly exceeded the value of her claim.
- Finally, the plaintiff testified that if she was forced to comply with the arbitration provisions, it would require her to abandon her claim.

Id. at pg. 604.

The court reasoned: “Because Gandee struggles financially (as presumably do all Freedom’s customers) and the costs of arbitrating in California would exceed her claim, sufficient evidence was presented to make a prima facie case for a prohibitive-cost defense.” *Id. at 604.*

Unlike *Hill* and *Gandee*, Mr. Mayne never said that arbitration would necessitate abandoning his claim. He never claimed that the cost of arbitration exceeded the value of his claim. There was no draconian venue or statute of limitations provisions in the agreement as was the case in *Hill* and *Gandee*. To the contrary, the statute of limitations and venue were unchanged by the arbitration agreement. CP 24. Moreover, the evidence showed that the issues in Mr. Mayne's case are uncomplicated and would require minimal arbitrator time. Again, the centerpiece of a substantive unconscionability claim is that the provisions are "monstrously harsh," or "exceedingly calloused." Mr. Mayne's claims fall far short of those standards.

Mr. Mayne's second argument is that the arbitration agreement, which contains a bilateral attorney's fees provision is substantively unconscionable. His argument is that if he is successful in recovering wages, he will be entitled to an award of attorney's fees and costs under RCW 49.48.030, 49.52.050 and 49.52.070. However, Mr. Mayne never made a claim under those statutes. His *Complaint* contained two claims: negligent misrepresentation and promissory estoppel. CP 1-11. He never cited to any of the foregoing statutes claiming a right to attorney's fees or other recovery as provided therein.

3. Severance of Allegedly Offending Provisions.

“Courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties.” *Zuver*, 153 Wash.2d at 320, citing, *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 674, 911 P.2d 1301 (1996). “Consequently, when parties have agreed to a severability clause in an arbitration agreement, courts often strike the offending unconscionable provisions to preserve the contract's essential term of arbitration.” *Id.*

Mr. Mayne argues the offending provisions cannot be severed from the arbitration agreement because their “tone” is pervasive throughout the agreement. While not conceding that any of the provisions of the agreement are unconscionable, the agreement does contain a valid severance provision which reads as follows:

Should any provision of this Arbitration Agreement be declared or determined to be unlawful or invalid, the court or arbitrator shall amend the offending provision to the extent possible to be conforming with applicable law. If such amendment is not possible, then only the offending provision shall be deemed invalid and not a part of this Arbitration agreement; provided however, the remaining non-offending parts, terms and provisions of this Arbitration Agreement shall not be affected and shall remain valid and in full force and effect.

CP 24.

Mr. Mayne does not explain how the allegedly unconscionable provisions “pervade” the agreement he made with MEI. Nevertheless, any such provisions are clearly severable and the spirit of the parties’ agreement should remain intact.

4. Mr. Mayne’s Request for Attorney’s Fees Should be Rejected.

Mr. Mayne summarily concludes that depending upon the results of this appeal, or the case as a whole, he may be entitled to recover attorney’s fees under RAP 18.1, RCW 49.48.030, 49.52.050, 49.52.070 or, ironically, under the terms of the arbitration agreements he also seeks to invalidate.

RAP 18.1 provides that where applicable law grants a party the right to recover attorney’s fees on review, the party must request the fees in his/her brief, and explain the basis for the fee request. RAP 18.1(a), (b).

First, as to the statutory citations, all of those provisions apply only when the merits of the action have been determined with finality. RCW 49.48.030 (“In any action in which a person is **successful in recovering a judgment for wages or salary owed...**”); RCW 49.52.050 (“Any employer...who shall violate the provisions of 49.52.050...shall be liable...[for] costs of suit and a reasonable sum for attorney’s fees...”). If Mr. Mayne prevailed on his appeal, he would only be entitled to the right to pursue his claims in the Superior Court. At no point in time did Mr. Mayne

request from the trial court a declaration of liability against MEI. Nor was any such declaration made by the trial court. This appeal is confined to review of the trial court's Order on Motion to Dismiss and Compel Arbitration. CP 82-85. *See, Becerra v. Expert Janitorial, LLC*, 176 Wash. App. 694, 730-31, 309 P.3d 711, 727-28 (2013) review granted sub nom. *Becerra v. Expert Janitorial*, 179 Wash. 2d 1014, 318 P.3d 279 (2014) and aff'd, 181 Wash. 2d 186, 332 P.3d 415 (2014) (employees sought attorney's fees on appeal where they prevailed in having summary judgment in favor of employer reversed, "Such an award is premature. RCW 49.46.090 of the MWA and 49.48.030 of the wage statute provide for attorney fees to be awarded to employees who are successful in recovering judgment for wages owed by employers. Because there has not yet been a final determination regarding the janitors' claims, we deny their request without prejudice to them seeking fees from the proper court at the proper time.").

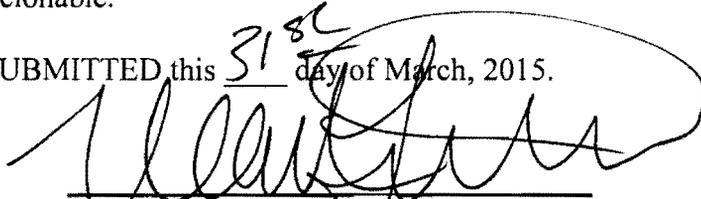
Second, Mr. Mayne did not bring a claim under any of the aforementioned statutes. He certainly never asserted a claim under RCW 49.52.050 or RCW 49.52.070. Those statutes, termed the "Wage Rebate Act," concern practices such as rebating, underpayment, or false showing of overpayment of wages. Those claims were not pled in Mr. Mayne's Complaint, were not at issue at the trial court level, were not the subject of

any decision of the trial court, and were not the subject of Mr. Mayne's Notice of Appeal. *See*, CP 1-11; 82-85.

D. CONCLUSION

The trial court correctly enforced the agreement of the parties to arbitrate disputes which arose during the course of Mr. Mayne's employment where: (1) The execution of the agreement was uneventful, and (2) no language of the agreement was "monstrously harsh" rendering it substantively unconscionable.

RESPECTFULLY SUBMITTED this 31st day of March, 2015.

A handwritten signature in black ink, appearing to read "James B. King", is written over a horizontal line. The signature is somewhat stylized and includes a large loop at the end.

JAMES B. KING, WSBA #8723
MARKUS W. LOUVIER WSBA #39319
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 15th day of April, 2015, a true and correct copy of the foregoing *Respondents' Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

Michelle K. Fossum	Via Regular Mail	<input type="checkbox"/>
201 West North River Drive, Suite 460	Via Certified Mail	<input type="checkbox"/>
Spokane, WA 99201	Via Overnight Mail	<input type="checkbox"/>
	Via Facsimile	<input type="checkbox"/>
	Hand Delivered	<input checked="" type="checkbox"/>

Dated: 4-1-15 Shauna & Wade