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No. 97429-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN BURNETT,
individually and on behalf of all others
similarly-situated,

Plaintiff/Respondent,

vs.

PAGLIACCI PIZZA, INC.,
a Washington corporation,

Defendant/Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus program and has an interest in the rights of persons seeking redress under the civil justice system.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case asks the Court to determine whether and under what circumstances an employer may use provisions inserted into employee handbooks to impose binding contractual obligations upon their employees. The facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192, 196-99, 442 P.3d 1267, *review granted*, 97429-2, 2019 WL 5800127 (Wash. Nov. 6, 2019); Pagliacci Pet. for Rev. at 3-10; Burnett Ans. to Pet. for Rev. at 3-5; Pagliacci Supp. Br. at 2-3; Burnett Supp. Br. at 1-4.

Burnett began working for Pagliacci as a delivery driver in October of 2015. At his employee orientation, Pagliacci showed Burnett around the store, provided him with employee clothing, informed him about company history and values, and required him to watch videos detailing expectations for delivery drivers. Burnett was also furnished with forms that he was directed to sign before he could begin working, including an “Employee Relationship Agreement” (ERA). Burnett signed the ERA. The ERA referenced the company’s employee handbook, which was entitled the

“Little Book of Answers.” The ERA directed employees that: “On your own initiative you will learn and comply with the rules and policies outlined in our Little Book . . . including those that relate to positive attitude, public safety, company funds, tips and FAIR [Fair and Amicable Internal Resolution] Policy.” Burnett Supp. Br. at 3 (brackets added). Burnett was given a copy of the “Little Book” and was told to take it home and read it. On page 18 of the 23-page handbook is a mandatory arbitration policy:

MANDATORY ARBITRATION POLICY

The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant to the Washington Arbitration Act.

Burnett, 9 Wn. App. 2d at 197. “FAIR,” found on page 17 of the Little Book and referenced in the arbitration policy, informs employees that before they may initiate arbitration in regard to an employment dispute, they must first “report the matter and all details” to their supervisor. *Id.*, 9 Wn. App. 2d at 197. If supervisor review does not offer an acceptable resolution, the “F.A.I.R. Administrator will designate a responsible person at Pagliacci Pizza (who may be its owner) to meet face-to-face with you in a non-binding Conciliation.” *Id.* Significantly, the FAIR policy made compliance with its full provisions mandatory prerequisites to commencing arbitration, and further precluded any tolling during the pendency of these internal

procedures. *See id.* (providing “[t]he limitations set forth in this paragraph shall not be subject to tolling, equitable or otherwise” (brackets added)).

Pagliacci terminated Burnett in January of 2017. Thereafter, Burnett filed a putative class action against Pagliacci, asserting that it failed to provide required rest and meal breaks, failed to pay wages due, retained delivery charges and made unauthorized wage deductions. Pagliacci moved to compel arbitration under the arbitration policy. Burnett opposed arbitration, arguing the arbitration policy was both procedurally and substantively unconscionable. The trial court did not reach the unconscionability issues, but found the arbitration clause was not binding on Burnett because the Little Book was not incorporated by reference into the ERA and denied Pagliacci’s motion to compel arbitration.

Pagliacci appealed. The Court of Appeals affirmed, but on different grounds. It held that the trial court erred in ruling that the arbitration policy was not incorporated by reference into the ERA. However, it concluded that the arbitration policy was procedurally and substantively unconscionable, and as such was unenforceable. This Court granted review.

III. ISSUES PRESENTED

1. Does the employee handbook exception, heretofore applied in Washington to define the scope of employers’ obligations to their employees based on promises in employee handbooks, allow an employer to impose upon an employee affirmative binding obligations, without a showing that the employee assented to its terms?
2. Assuming the arbitration clause in the Little Book was incorporated into the ERA and otherwise contractually binding, was it nonetheless procedurally and substantively unconscionable?

IV. SUMMARY OF ARGUMENT

Arbitration agreements are favored under both state and federal law. Their favored status, however, presupposes they were validly executed with the mutual assent of both parties. As with any other purported waiver of a constitutionally protected right, the circumstances surrounding the execution of such agreements must demonstrate the rights were waived knowingly, voluntarily and intelligently.

At common law, employment relationships are presumptively at-will, permitting either party to terminate at any time for any reason. This rule has at times proven harsh, however, as employers occupy a superior bargaining position and can exercise unfettered control over the employment relationship. As one way to ameliorate this inequity, courts may enforce promises made by employers to employees in employee handbooks, under either unilateral contract principles or a “specific treatment” claim. Where employers have pledged such promises, they may under some circumstances modify or rescind them, provided reasonable notice is provided to the employee.

Because the employee handbook exception is charged with identifying the obligations owed by *employers*, it should not provide a basis for imposing affirmative obligations on employees, absent a showing of assent. Because an agreement to arbitrate constitutes a promise to relinquish a known right, it constitutes an affirmative promise, the relinquishment of which requires assent.

Finally, assuming for the sake of argument the Little Book was incorporated by reference into the ERA and a contractual obligation assumed, it was both substantively and procedurally unconscionable.

V. ARGUMENT

Both state and federal law favor arbitration. *See Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013). Accordingly, courts may not refuse to enforce arbitration agreements under state laws that apply only to such agreements, *see Doctor's Assocs., Inc., v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed.2d 902 (1996), or by “rely[ing] on the uniqueness of an agreement to arbitrate.” *Perry v. Thomas*, 482 U.S. 483, 493 n.9, 107 S. Ct. 2520, 96 L. Ed.2d 426 (1987) (brackets added). However, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.” *Casarotto*, 517 U.S. at 687. “Gateway” questions related to the validity of an arbitration agreement are generally reserved for the court. *See Hill v. Garda NW*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013).¹

Just as clear as the rule favoring arbitration is the verity that the arbitrability of disputes depends upon whether the parties actually agreed to

¹ Washington’s Uniform Arbitration Act, ch. 7.04A RCW, does not apply to employment agreements. *See* RCW 7.04A.030. Instead, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, generally applies to all employment contracts, except those involving certain transportation workers. *See* 9 U.S.C. § 2; *see also Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 119, 121 S. Ct. 1302, 149 L. Ed.2d 234 (2001). The Court of Appeals below declined to determine the applicability of the FAA here, indicating the issue was not preserved on appeal. *See Burnett*, 9 Wn. App. at 199 n.5. In any case, whether under state or federal law, the presumption favoring arbitration applies only if there is in fact a valid agreement to arbitrate. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 941–43, 115 S. Ct. 1920 (1995); *Weiss v. Lonquist*, 153 Wn. App. 502, 510, 224 P.3d 787 (2009).

arbitrate. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-43, 115 S. Ct. 1920, 131 L. Ed.2d 985 (1995); *see also McKee v. AT&T Corp.*, 164 Wn.2d 372, 394, 191 P.3d 845 (2008). Arbitration agreements are wholly a matter of contract, and must reflect both parties' agreement and assent. *See Todd v. Venwest Yachts, Inc.*, 127 Wn. App. 393, 397, 111 P.3d 282 (2005), *review denied*, 156 Wn.2d 1025 (2006); *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed.2d 648 (1986). Accordingly, any presumptions favoring arbitration cannot negate the prerequisites of a knowing, voluntary and intelligent waiver to the constitutional right to a trial by jury. *See Wash. Const. Art. I, § 21*; *see also Adler v. Fred Lind Manor*, 153 Wn.2d 331, 360-61, 103 P.3d 773 (2004).

This case presents the Court with the opportunity to address the extent of an employer's right to unilaterally impose obligations on employees, like arbitration agreements, through the provision of employee handbooks. To date, Washington courts have applied the employee handbook exception to bind employers to promises they have made to their employees in handbooks or policy manuals. Courts have balanced this rule by permitting employers to modify such policies under certain circumstances, as employment policies in handbooks are generally understood to be temporary and flexible. No Washington case, however, has permitted an employer to foist affirmative obligations on employees without a showing of assent. The Court should take this opportunity to

clarify that employers may not impose contractual obligations on employees, arbitration agreements or otherwise, through the distribution of handbooks or manuals, without securing employees' assent.

A. Overview Of Washington Law Regarding The Employee Handbook Exception To The At-Will Employment Doctrine

At common law, the employment relationship was “at-will,” permitting either party to terminate at any time for any reason. *See Snyder v. Med. Servs. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081 (1984). The common law rule frequently proved unfair to employees, however, as employers occupied the more powerful role in the relationship and maintained largely “unfettered control” over the workplace and working conditions. *See Thompson*, 102 Wn.2d at 226. Scholars have noted the unequal bargaining power created by an unconstrained at-will employment rule. *See, e.g.,* Brian T. Kohn, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 *Cardozo L. Rev.* 799, 807-08 (2003) (Kohn) (noting “critics argue that by granting employers the absolute power to terminate employees, the doctrine promotes an unequal employment relationship. This imbalance, in turn, leaves employees vulnerable to unfettered employer coercion”).

Under strict application of the at-will doctrine, employers that extended employment benefits in manuals or handbooks – interpreted as mere “gratuities” – could rescind them unilaterally, notwithstanding

employees' reasonable expectations and reliance interests to the contrary. See Kohn at 812. It was against this backdrop that courts developed the "employee handbook exception" to the at-will employment doctrine. See *Thompson* at 226-29; *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); see also Kelby D. Fletcher, *The Disjointed Doctrine of the Handbook Exception to Employment At Will: A Call for Clarity through Contract Analysis*, 34 Gonz. L. Rev. 445, 446, 1998-1999.

This Court first recognized the rights of employees to enforce provisions in an employee handbook in *Thompson*. There, the plaintiff was terminated without explanation after 17 years of employment. Thompson argued his termination violated the implied employment contract created by the employer's policy manual, which included a for-cause termination provision. In analyzing this argument, the Court noted the inequity created by an unconstrained application of the at-will employment rule:

[T]he "American rule", became the rule governing termination of employees and employers could discharge employees for no cause, good cause or even cause morally wrong without fear of liability. The employer's absolute prerogative to discharge employees has not remained unconstrained however [citing selected statutory remedies for employees] . . . Commentators argue that despite legislation the employee is still left largely unprotected. Principal criticism is that the doctrine gives the employer unfettered control of the workplace and, thus, allows the employer to take unfair advantage of their employees.

Thompson, 102 Wn.2d at 226 (brackets added; citations omitted).

With these concerns in mind, the Court held that "employers may be obligated to act in accordance with policies as announced in handbooks

issued to their employees,” 102 Wn.2d at 229. Such obligations may arise under one of two legal theories. First, under unilateral contract principles, an implied contract can be created by an employer’s assurances, but only where “the requisites of contract formation, offer, acceptance and consideration” are present. *Id.* at 228. In such cases, “an employee and employer can contractually obligate themselves concerning provisions found in an employee policy manual and thereby contractually modify the terminable at will relationship.” *Id.* at 228-29.

Second, independent of contract, employers may be obligated to comply with promises of “specific treatment in specific situations”:

...we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe that by his or her unilateral objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises.

Id. at 230 (citation omitted). This rule protects the reasonable expectations of the parties. *See id.*; *see also Toussaint*, 292 N.W.2d at 892 (employers secure “an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly”).

Following its decision in *Thompson*, this Court examined the question of whether and under what circumstances an employer may unilaterally modify or withdraw promises by issuing a subsequent handbook. *See Gaglidari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 815

P.2d 1362 (1991). In *Gaglidari*, the plaintiff signed an employment contract that included a for-cause termination provision, which defined “cause” to include fighting while on duty. Several years later, the employer issued a new handbook that altered the for-cause provision, changing the definition of “cause” to include fighting on company premises. This document was distributed to employees, including the plaintiff, who were required to sign the updated handbook. When the plaintiff got into a fight at the restaurant while she was off duty, she was fired. The plaintiff sued, arguing she was entitled to enforce the provisions of the original employee handbook. The employer argued that even if the original handbook created binding obligations, it was entitled to unilaterally modify those obligations, which it did through the distribution of the subsequent signed handbook.

Relying on the reasoning of the Michigan Supreme Court decisions in *Toussaint* and *Bankey v. Storer Broadcasting Co.*, 432 Mich. 438, 441, 443 N.W.2d 112 (1989), this Court held that “[a]n employer may unilaterally amend or revoke policies and procedures established in an employee handbook. . . . However, an employer’s unilateral change in policy will not be effective until employees receive reasonable notice of the change.” *Gaglidari*, 117 Wn.2d at 434 (citations omitted; brackets added). The Court incorporated the framework laid out in *Thompson* for establishing the bases for obligations that may be imposed on *employers*:

In *Thompson*, we held an employment relationship terminable at will can be modified by statements contained in policy manuals or handbooks. . . . The concepts of offer, acceptance and consideration are requisite to a contract analysis of employee handbooks. . .

Employer obligations may also arise independent of traditional contract analysis when the employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and the employee relies thereon.

Gaglihari, 117 Wn.2d at 433 (citations omitted; emphasis added).

The rules set out in *Thompson* and applied to permit unilateral modification in *Gaglihari* have been characterized as application of unilateral contract and promissory estoppel principles. *See, e.g., Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 542, 826 P.2d 664 (1992) (Dolliver, J., concurring); *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 340-41, 27 P.3d 1172 (2001). Under either theory, the law contemplates binding obligations imposed on an employer.

Under Washington law, a “unilateral contract” does not commit the offeree to a promise; rather, an offeror (here, employer) extends a promise which may be accepted by the offeree (here, employee) *performing* under the agreement. *See Multicare Med. Ctr. v. State*, 114 Wn.2d 572, 583, 790 P.2d 124 (1990); see also Black's Law Dictionary 325 (6th ed. 1990) (defining unilateral contract as a “contract that consists of a promise for an act; the acceptance consists of the performance of the act requested, rather than the promise to perform it”). While the offeree’s performance must be in compliance with the terms of the contract, he or she makes no affirmative promises nor assumes affirmative obligations.² Similarly, a “specific treatment” claim described in *Thompson* contemplates duties imposed on

² This may be contrasted to a bilateral contract, which is characterized by an exchange of promises. *See Multicare Med. Ctr.*, 114 Wn.2d at 584 (citation omitted).

the employer, based on a justifiable reliance theory. *See Bulman*, 144 Wn.2d at 341 (describing *Thompson's* specific treatment theory as binding an employer to “promises upon which the employee justifiably relied”).

In keeping with these principles, whether employing unilateral contract or promissory estoppel principles, Washington courts have frequently applied the rule governing enforceability of employee handbook provisions, always to ascertain the extent and enforceability of *employer's* obligations. *See, e.g., Brady v. Daily World*, 105 Wn.2d 770, 775, 718 P.2d 785 (1986) (whether employer was bound by for-cause termination provision); *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609, 611-12, 762 P.2d 1143 (1988) (whether employer must comply with promise to consider seniority when laying off workers); *Swanson*, 118 Wn.2d at 516-20 (whether employer's termination of employee for fighting breached employer's obligation to warn before discharge); *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 362-65, 20 P.3d 921 (2001) (whether employer's promise in handbook to warn before termination created contractual obligation); *Mikkelsen v. Public Utility Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 539-41, 404 P.3d 464 (2017) (whether employer's policy constituted binding promise to discharge only for cause); *Govier v. North Sound Bank*, 91 Wn. App. 493, 498-501, 957 P.2d 811 (1998) (similar).

B. Pagliacci's Little Book Of Answers Could Not Independently Impose An Obligation On Burnett To Arbitrate Because The Waiver Of A Right To A Jury Trial Constitutes A Promise To Relinquish An Existing Right For Which Assent Must Be Given.

Pagliacci maintains that the arbitration agreement contained in the Little Book should be enforced regardless of whether Burnett read or even saw the agreement before signing the ERA. It cites *Gaglidari* for the proposition that “an employer can impose new terms of employment on existing, at-will employees simply by amending a handbook and giving employees notice that the conditions of their employment have changed.” Pagliacci Pet. for Rev. at 13. Pagliacci overlooks the difference between promises triggering binding obligations from mere terms of employee performance. Its proposed rule, if accepted, would constitute a dangerous erosion of contract formalities in Washington designed to protect parties’ reasonable expectations and prevent abuses of superior bargaining power.

The Washington State Constitution guarantees the right to trial by jury. See Wash. Const. Art. I, § 21. Waivers of constitutional rights are narrowly construed.³ See *Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) (holding the defendant did not waive his right to a jury trial, based in part on the rule that “any waiver of a right guaranteed by a state’s constitution should be narrowly construed in favor of preserving the right”). To be legally valid, a waiver of the right to trial by jury must be made knowingly, voluntarily and intelligently. See *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). Such waivers “will not be presumed.” *In re Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982).

³ Because this argument focuses on the solicitude afforded constitutional rights, and the corresponding scrutiny applied to waivers thereof, it does not commit the error of relying on the “uniqueness of an agreement to arbitrate.” *Perry*, 482 U.S. at 493 n.9.

Where a party agrees to relinquish a pre-existing right, such as the right to bring a claim, this functions as a promise that may support the creation of a bilateral contract. *See Restatement (Second) of Contracts* § 2 (1981) (defining promise as “a manifestation of intention to act or refrain from acting in a specified way”). Similar to a noncompete agreement, an arbitration agreement elicits more than mere compliance with employment conditions in an employee’s performance under the contract. Rather, it functions an affirmative *promise* that in the event of a dispute, the employee will forego his pre-existing right to a jury trial and submit to arbitration.

In keeping with these principles, this Court should hold that while an employer may under some circumstances use handbooks to set terms and conditions for an employee’s performance of job duties, it may not use them to impose binding contractual obligations upon employees, such as an arbitration clause purporting to permanently extinguish an employee’s right to trial by jury.⁴ Rather, where employers seek to bind their employees to enforceable obligations, they must secure the employee’s assent.⁵

⁴ This is consistent with the reasonable expectations of the parties regarding the content of employee handbooks. In *Bankey*, the Michigan Supreme Court noted that because employee handbooks generally contain provisions that are temporary and flexible, employees should reasonably expect they may be subject to modification: “The very definition of ‘policy’ negates a legitimate expectation of permanence. . . . [A] ‘policy’ is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation.” *Bankey*, 443 N.W.2d at 120 (brackets added).

⁵ While it doesn’t appear to have been discussed by the parties, the arbitration clause was likely also unenforceable because it constituted an illusory promise. In the ERA, Pagliacci expressly reserved the right to unilaterally modify all terms in the Little Book: “We will on occasion change the policies and procedures contained in the employee handbook.” Generally, courts have refused to enforce arbitration clauses as illusory promises to arbitrate where the agreement allows one party to unilaterally modify the arbitration agreement. *See, e.g., Salazar v. Citadel Comm. Corp.*, 90 P.3d 466, 469-70 (N.M. 2004) (holding that where the employer “retained the authority to unilaterally modify both the

C. Even If The Little Book Created A Contractual Obligation To Arbitrate, It Is Unconscionable And Unenforceable.

Washington law recognizes both substantive and procedural unconscionability. *See Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 259-60, 544 P.2d 20 (1975). This Court has stated that “either substantive or procedural unconscionability is sufficient to void a contract.” *Gandee*, 176 Wn.2d at 603 (citing *Adler*, 153 Wn.2d at 347).⁶ Unconscionability is generally a question of law for the court. *See Adler*, 153 Wn.2d at 344. Whether a contract is unconscionable is determined at the time of formation.

The *Restatement (Second) of Contracts* § 208 (1981) explains:

If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

(Emphasis added). Washington decisional law is in accord with this view.

See Schroeder, 86 Wn.2d at 260 (unconscionability “relates to impropriety during the process of forming a contract”).

arbitration section of the Handbook and the annexed Agreement to Arbitrate,” the arbitration agreement was “illusory and unenforceable”); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205-06 (5th Cir. 2012) (where employer reserved the “right to revise, delete, and add to the employee handbook,” arbitration clause was an unenforceable illusory promise); *Canales v. Univ. of Phoenix, Inc.*, 854 F. Supp. 2d 119, 124-25 (D. Me. 2012) (collecting cases).

⁶ The Court of Appeals expressed uncertainty as to whether a finding of procedural unconscionability is enough on its own to invalidate an unconscionable agreement. *See Burnett*, 9 Wn. App. 2d at 210. This Court has stated on repeated occasions that procedural unconscionability is sufficient to invalidate a contract. *See Gandee*, 176 Wn.2d at 603; *see also Hill*, 179 Wn.2d at 55. Moreover, in the case of purported waivers of the right to a jury trial, such as an arbitration agreement, a finding of procedural unconscionability demonstrates the absence of the requisite elements of waiver, which should necessarily be an independent basis to invalidate the agreement. *See Adler*, 153 Wn.2d at 350 n.9; *see also Mayne v. Monaco Enterprises, Inc.*, 191 Wn. App. 113, 121-22, 361 P.3d 264 (2015).

Re: Substantive Unconscionability

A provision in an arbitration clause is substantively unconscionable if it is one-sided or overly harsh. *See Zuver v. Airtouch Communications*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004). Substantive unconscionability alone is sufficient to void a contract. *See Gandee*, 176 Wn.2d at 603.

Here, Pagliacci's handbook required employees to submit their claims to arbitration. Furthermore, the handbook provided that employees were required to first submit any such claims to Pagliacci's F.A.I.R. policy before pursuing arbitration. F.A.I.R. required employees to first report the matter to a supervisor, and if that did not resolve the matter the "F.A.I.R. Administrator" would designate a person at Pagliacci to meet with the employee. If the employee did not follow the F.A.I.R. procedure, the employee waived "any right to raise the claim in any court or other forum, including arbitration." Compliance with the F.A.I.R. procedures "shall not be subject to tolling, equitable or otherwise." The appellate court found these procedures substantively unconscionable because they: 1) shorten the statute of limitations for former employees because they had no way to report the matter to a supervisor; 2) shorten the statute of limitations for any employee because the procedures do not toll the statute of limitations, and the time for completing the procedures is totally within the Pagliacci's control; 3) provide no exception to the requirement for supervisor review where a supervisor is the person subjecting the employee to unfair treatment. *See Burnett*, 9 Wn. App. 2d at 214-17.

Pagliacci cites *Zuver*, 153 Wn.2d at 312, for the proposition that the F.A.I.R. procedures cannot void the arbitration agreement “based on hypothetical outcomes that did not occur.” *See* Pet. Supp. Br. at 13, 16. But Pagliacci misapplies *Zuver*. There, the plaintiff brought a discrimination claim that entitled her to an award of fees if she prevailed. The arbitration clause provided the prevailing party “*may* be entitled to receive reasonable attorney fees.” *Id.*, 153 Wn.2d at 310. The Court held the attorney fee provision was not substantively unconscionable, because it would be speculative to assume the arbitrator would ignore controlling law and fail to award the plaintiff fees if she prevailed in arbitration. *See id.* at 312.

Here, there is nothing speculative about the effect of Pagliacci’s requirement that its employees follow the F.A.I.R. procedures prior to pursuing arbitration, and that the statute of limitations would not toll during the time – wholly within Pagliacci’s control – that it takes to pursue the F.A.I.R. procedures. F.A.I.R. provides that it is mandatory that Pagliacci’s employees follow the F.A.I.R. procedures, and failure to comply results in a waiver of the right to raise their claims in any court or in arbitration.

Pagliacci argues that if its arbitration agreement provisions are deemed substantively unconscionable, the appropriate remedy is severance.⁷ *See* Pet. Supp. Br. at 14-15. However, where unconscionable provisions pervade an arbitration agreement, the entire agreement should be

⁷ Severance cannot cure a finding of procedural unconscionability. *See Gorden v. Lloyd Ward & Assoc., P.C.*, 180 Wn. App. 552, 565, 323 P.3d 1074 (2014). Pagliacci does not argue to the contrary. *See* Pagliacci Pet. for Rev. at 3 (presenting for review the issue of whether severance may cure substantive, but not procedural, unconscionability).

invalidated. *See Gandee*, 176 Wn.2d at 607-09; *McKee*, 164 Wn.2d at 402-03. Here, Pagliacci's F.A.I.R. procedures are inextricably intertwined with the arbitration provision. Pagliacci's employees are not permitted to pursue arbitration until proceeding through the F.A.I.R. procedures, and the statute of limitations for pursuing an arbitration continues to run while the employees comply with every step and procedure. "Permitting severability . . . in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions." *McKee*, 164 Wn.2d at 403. In *Zuver*, the Court severed the unconscionable provisions, primarily because the parties had agreed to a severance clause in an employment arbitration agreement. *See Zuver*, 153 Wn.2d at 320. Pagliacci did not include a severance clause in its employment agreement, mandatory arbitration provision or F.A.I.R. procedures. The Court should not rewrite Pagliacci's employment documents, but rather should find the arbitration clause invalid.

Re: Procedural Unconscionability

Procedural unconscionability addresses flaws in contract formation, and is found where a party lacks meaningful choice. *See Schroeder*, 86 Wn.2d at 260. In determining whether a party lacked meaningful choice, the Court considers all the circumstances surrounding the transaction, including the "manner in which the contract was entered," whether the

weaker party had a “reasonable opportunity to understand the terms of the contract,” and whether “important terms [were] hidden in a maze of fine print.” *Schroeder*, 86 Wn.2d at 260. These factors are not “applied mechanically,” *see id.*, but instead should be used flexibly to determine whether, in the facts of the particular case, a meaningful choice was given.

Burnett ably demonstrates why the arbitration agreement in the Little Book was procedurally unconscionable, and this brief does not revisit those arguments in detail here. However, one additional point deserves mention. Pagliacci claims that Burnett’s possession of the Little Book after signing the ERA should constitute “reasonable notice” under *Gagliardi* and warrants binding Burnett to the arbitration clause. It suggests flaws in the formation of the agreement were cured by Burnett’s possession of the employee handbook after signing, coupled with his performance. *See Pagliacci Pet. for Rev.* at 14. This argument misapprehends both the principles of contract formation and the doctrine of unconscionability.

The existence of a contract is determined at its formation. *See Gandee*, 176 Wn.2d at 608 (recognizing “the general approach to view the contractual terms at the time of formation”); *Restatement (Second) of Contracts* § 208. Whether the contract is unconscionable is also determined at the point of contract formation. *See Schroeder*, 86 Wn.2d at 260. In finding an arbitration clause substantively unconscionable, this Court in *Gandee* cited public policy reasons for examining unconscionability based on the circumstances at the time the agreement was drafted:

Strong reasons exist for encouraging contracts to be conscionable at the time they are written. . . Parties should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver. This would encourage rather than discourage one-sided agreements and would lead to increased litigation. Any other approach is inconsistent with the principle that contracts – especially the adhesion contracts common today – should be conscionable and fairly drafted.

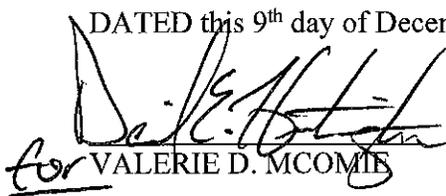
Gandee, 176 Wn.2d at 608-09.

These principles are equally applicable here. The law should not encourage employers to secure employees' unwitting signature to adhesion contracts that bind them to arbitration, and then after their signature and their supposed assent are secured, argue that "meaningful choice" was accomplished because they were given the document after the fact. Permitting such conduct would provide an incentive to employers to hide onerous provisions in contracts of adhesion and then gamble that employees will not dispute them. Employers should not be allowed to execute unconscionable contracts and then argue they can be "cured" by mere passage of time, or as in *Gandee*, by subsequent waiver.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 9th day of December, 2019.


for VALERIE D. MCOMIE


DANIEL E. HUNTINGTON

On behalf of
Washington State Association for Justice Foundation

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2019, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein.

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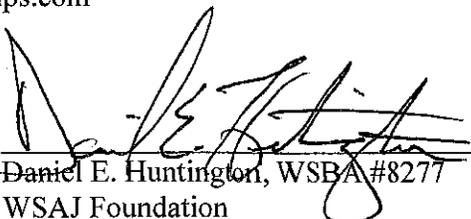
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