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Supreme Court No. 97429-2

SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN BURNETT, Respondent,

v.

PAGLIACCI PIZZA, INC., Petitioner.

PETITIONER PAGLIACCI PIZZA, INC.'S RESPONSE TO AMICUS
CURIAE BRIEF OF PUBLIC JUSTICE, P.C.

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I. INTRODUCTION

Public Justice, P.C. (“Public Justice”) exists to advocate anti-arbitration policies. The United States Supreme Court recently explained that discussions surrounding the policy of arbitration “are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms [...]” *Epic Sys Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 200 L.3d 2d 889, 896-97 (2018). Public Justice seeks to create a new state rule that an agreement limited to certain claims more likely brought by an employee are unconscionable, overruling this Court’s prior holding in *Satomi Owners Ass’n v. Satomi, LLC* which enforced an agreement where arbitration was at the discretion of the party who wrote the contract. *See* Amicus Brief at 14; *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 790 n.4, 225 P.3d 213, 220 (2009). Creating a new state rule is simply not allowed under this Court’s prior holdings, the Federal Arbitration Act (FAA), or United States Supreme Court precedent.

Eight of the nine state Supreme Court cases cited by Public Justice were decided based on express language in the underlying arbitration agreement that reserved the right for one party to bring claims into court, while requiring the other party to arbitrate its claims. There is no such

express language here in Burnett and Pagliacci's agreement to arbitrate. The Ninth Circuit cases cited by Public Justice all predate critical United States Supreme Court cases regarding arbitration, including *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011), *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 200 L.3d 2d 889 (2018), and *Lamps Plus v. Varela*, 139 S. Ct. 1407, 203 L.Ed.2d 636 (2019). The legal reasoning behind one case Public Justice relies on has been questioned by other courts. This Court should not, and cannot under the FAA, create a new rule that applies only to arbitration agreements.

II. ARGUMENT

Public Justice seeks to create a new rule in Washington that all one-sided arbitration agreements are unconscionable. *See Amicus Br.*, at 14. The United States Supreme Court held that states cannot create special rules that apply only to arbitration agreements. *See Concepcion*, 563 U.S. at 333, 131 S. Ct. at 1742, 179 L.Ed.2d at 742. It held that while states can address concerns regarding arbitration agreements, such steps cannot conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms. *Id.* A state contract principle cannot preempt the FAA on defenses that only apply to arbitration, which is what Public Justice is requesting. *See Id.*, 563 U.S. at 339, 131 S. Ct. at 1746, 179 L.Ed.2d at 751.

The Pagliacci Employee Relationship Agreement and Little Book of Answers (the “Handbook”) contain multiple provisions binding Pagliacci in some instances and Burnett in others. This Court rejects the notion that there must be mutuality of all obligations in a contract. *See Zuver v. Airtouch Commc'ns*, 153 Wn.2d 293, 317, 103 P.3d 753, 766-67 (2004). In fact, this Court sanctioned arbitration where it was at one party’s option. *See Satomi Owners Ass’n*, 167 Wn.2d at 790 n.4, 225 P.3d at 220. Even so, Pagliacci is bound by all of the benefits it offers employees in the Employee Relationship Agreement and the Handbook. Both documents are abundant with mutual promises from the employer and employee. This Court should not contravene federal law and its own prior rulings to create a new, unconstitutional standard.

A. Washington Cannot Create a New Rule that Applies Only To Arbitration Agreements.

Washington cannot create a new standard or rule that would apply only to arbitration agreements. As articulated in *Concepcion*, “[t]he FAA’s] saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *See Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1746, 179 L.Ed.2d at

751. This Court has affirmed this principle, refusing to impose a higher standard of review for arbitration agreements because it would “impermissibly rely on the unique nature of agreements to arbitrate employment disputes as justification.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344 n.6, 103 P.3d 773, 781 (2004). Any new rule required only of arbitration agreements in the state of Washington would be preempted by federal law.

B. The Pagliacci Arbitration Requirement is Fair and Applies to Both Sides; It is not Egregiously One-Sided.

The Mandatory Arbitration Policy is part of a larger agreement, the Employee Relationship Agreement, which incorporates the Handbook. CP 58. Arbitration is just one of the obligations created by the Employee Relationship Agreement. It is one of many policies in the Handbook, which are all incorporated into the Employee Relationship Agreement. *See* CP 58, 71. The parties’ “agreement” contains numerous policies that are only binding on Pagliacci (i.e. “Schedule of Hourly Employee Benefit Eligibility,” “Benefits,” and “Wage Benefits”), and many that are binding on employees (i.e. “Unlawful Harassment Policy,” “No Freebies,” and “Alcohol, Drugs and Weapons”). The documents are full of promises that go both ways to bind both the employer and employee. Standing alone, the Mandatory Arbitration Policy itself contains no “overly harsh” or

“egregiously one-sided” term that renders the provision unconscionable. Pagliacci has no discretion or other “safety valve” (as incorrectly argued by Public Justice) allowing Pagliacci to opt out of arbitration.

This Court has held enforceable an arbitration agreement even where only the party with superior bargaining power could decide whether to require arbitration. *See Satomi Owners Ass'n*, 167 Wn.2d at 790 n.4, 225 P.3d at 220. In *Satomi*, the arbitration provision stated: “At the option of the Seller, Seller may require that any claims asserted by Purchaser or by the Association [...] must be decided by arbitration. *Id.* (emphasis added). Here, Pagliacci and Burnett’s arbitration provision does not give Pagliacci an option to select whether to arbitrate. This Court enforced a much more one-sided arbitration term in *Satomi*, and there is no reason to overrule it in this case.

C. None of the State Law Cases Cited by Public Justice Are Similar to the Valid Agreement to Arbitrate Between Pagliacci and Burnett.

Pagliacci counts nine state court cases cited by Public Justice in which egregiously one-sided arbitration agreements were held substantively unconscionable. None of these cases are apposite. Only one arises from employment, and all but one contain express language reserving one party the ability to bring claims in court, while restricting the weaker party to bring claims only in arbitration.

Eight of the nine cases cited by Public Justice involve an arbitration agreement with language that explicitly provided the stronger bargaining party an option to bring its claims into court, but requiring the weaker party to arbitrate claims. For example, in *Taylor v. Butler*, 142 S.W.3d 277, 280 (Tenn. 2004), the Court struck down an arbitration clause as substantively unconscionable where the language of the arbitration agreement stated: "Dealer, however may pursue recovery of the vehicle under the Tennessee Uniform Commercial Code and Collection of Debt due by state court action." *Taylor*, 142 S.W.3d at 284 (emphasis added). No such carve-out or express language is present anywhere in the Pagliacci arbitration agreement to allow Pagliacci to bring claims into court. As Pagliacci has previously argued, if an employee brought a claim into arbitration, the company would be required to arbitrate it. *See* Supplemental Brief of Petitioner at 18 (citing *Govier v. N. Sound Bank*, 91 Wn. App. 493, 499, 957 P.2d 817, 815 (1998)).

In *Arnold v. United Cos. Lending Corp.*, the West Virginia Supreme Court struck down an agreement to arbitrate as unconscionable where the language provided, in part: "This Agreement to . . . arbitrate shall not apply with respect to either (i) the Lender's right . . . to submit and to pursue in a court of law any actions related to the collection of the debt [...]." *See Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 233

511 S.E.2d 854, 857 (W. Va. 1998). Again, there was express language allowing a much stronger party, a lender, to submit claims into court to collect debt from a borrower. Here, there is no carve-out or safety valve language allowing Pagliacci to bring claims in court.

Likewise, the arbitration agreement in *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901 (N.M. 2009) contained express language reserving the right of a lender to bring claims into court, while mandating that the borrower bring all claims into arbitration. The language provided, in part: “Notwithstanding this Agreement, in the event of a Default under the Loan Agreement, Lender may seek its remedies in an action at law or in equity, including but not limited to, judicial foreclosure or repossession. Lender may also exercise its other remedies provided by law (such as, but not limited to, the right of self-help repossession [...] or other applicable law and/or the foreclosure power of sale).” *Cordova*, 146 N.M. at 259-60, 208 P.3d at 904-05. In *Padilla v. State Farm Mut. Auto. Ins. Co.*, an express reservation for claims subject to appeal was present, limiting only appeals that could be brought by the insured. *See Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 10, 133 N.M. 661, 665-66, 68 P.3d 901, 905-06 (2003). The Court’s analysis was also specific to a New Mexico motorist statute requiring liability coverage for insureds against uninsured motorists.

The additional cases cited by Public Justice do nothing to support its argument because they also involve express carve-out or safety valve language. In *Wisconsin Auto Title Loans, Inc. v. Jones*, the arbitration provision between a lender and borrow contained a “save and except” parenthetical that provided a safety valve for the lender only: “(save and except the LENDER's right to enforce the BORROWER's payment obligations in the event of default, by judicial or other process, including self-help repossession).” See *Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶8, 290 Wis. 2d 514, 522-23, 714 N.W.2d 155, 160; see also *Caplin Enters. v. Arrington*, 145 So. 3d 608, 611 (Miss. 2014) (“except the Lender’s rights to enforce the Borrower[’s] payment obligations in the event of default by judicial or other process”); *Glob. Client Sols., LLC v. Ossello*, 2016 MT 50, ¶ 15, 382 Mont. 345, 349-50, 367 P.3d 361, 366 (“[...] collection actions may be pursued against you. If any such collection action is undertaken, you agree to pay all court costs and collection fees, including reasonable attorney's fees to the extent permitted by applicable law.”); *Alltel Corp. v. Rosenow*, 2014 Ark. 375, ¶ 8 (2014) (“If we do not enforce any right or remedy available under this Agreement, that failure is not a waiver.”); *Tillman v. Commer. Credit Loans, Inc.*, 362 N.C. 93 (2008) (containing an express monetary cap on lawsuits that could be brought into arbitration, allowing the lender to bring

a bulk of its collection actions in court, while prohibiting borrowers from bringing claims). Every one of these cases involved arbitration provisions containing obvious and explicit language reserving the right of only one party to seek legal action in court. They have no bearing on the arbitration requirement before us, which involves no such carve-out, “safety valve” or “save and except” clause.

The California Supreme Court case, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669, (Cal. 2000), a case abrogated in part by the U.S. Supreme Court in *Concepcion*, likewise has no bearing here. The United States Supreme Court in *Concepcion* held that while states could take steps to address concerns regarding contracts of adhesion, “[s]uch steps cannot, however, conflict with the Federal Arbitration Act or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.” *Concepcion*, 563 U.S. at 333, 131 S. Ct. at 1742, 179 L.Ed.2d at 742. The court in *Armendariz* reviewed the arbitration agreement under the California contract principle requiring contracts to contain a modicum of bilaterality. But Washington has addressed the issues underlying those in *Armendariz*. In *Zuver v. Airtouch Comm’ns*, this Court held that arbitration agreements are not substantively unconscionable merely because they are not mutual. See *Zuver v. Airtouch Commc’ns*, 153 Wn.2d 293, 317, 103 P.3d 753, 766-67

(2004). The Court of Appeals agreed. *See Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192, 214, 442 P.3d 1267, 1277 (2019). In *Adler v. Fred Lind Manor*, this Court held that courts cannot rely on the uniqueness of arbitration agreements as a basis for a state law to find an agreement unconscionable, rejecting the employee’s reliance on *Armendariz* and other California case law. *See Adler*, 153 Wn.2d at 344 n.6, 103 P.3d at 781. A defense will be rejected if it impermissibly disfavors arbitration. *See Epic Sys. Corp.*, 138 S. Ct. at 1623, 200 L.Ed.2d at 901.

There is no language in Pagliacci’s arbitration provision reserving a right to bring claims into a court of law. As the United States Supreme Court has recently held: “[s]ilence is not enough; the ‘FAA requires more.’” *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416, 203 L.Ed.2d 636, 646 (2019) (internal citation omitted). The agreement to arbitrate must be enforced according to its terms.

D. The Cited Ninth Circuit Cases All Predate United States Supreme Court Decisions in *Concepcion*, *Epic Systems*, and *Lamps Plus* and are Not Binding on Washington.

All of the Ninth Circuit cases cited by Public Justice predate United States Supreme Court directives in *Concepcion* (2011), *Epic Systems* (2018), and *Lamps Plus* (2019). Public Justice relies primarily on *Ingle v. Circuit City* (2003), which relied on the California Supreme Court case *Armendariz*. The Court in *Ingle* considered an arbitration clause

under California law, which required arbitration agreements to be bilateral. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003). To apply a similar rule in Washington only to arbitration agreements would contravene *Concepcion*. It would also require this Court to overturn its prior ruling in *Satomi*, where this Court held enforceable an arbitration agreement where only one party could decide whether to even require arbitration. *See Satomi Owners Ass'n*, 167 Wn.2d at 790 n.4, 225 P.3d at 220. *Ingle* has also since been questioned by other courts for validity following *Concepcion*. *See e.g., Bradford v. Flagship Facility Servs.*, No. 17-CV-01245-LHK, 2017 U.S. Dist. LEXIS 115262, at *25 (N.D. Cal. July 24, 2017); *Assi v. Citibank Nat'l Ass'n*, No. 14-cv-03241-JD, 2015 U.S. Dist. LEXIS 3985, at *5 (N.D. Cal. Jan. 13, 2015); *Edwards v. Doordash, Inc.*, No. H-16-2255, 2017 U.S. Dist. LEXIS 191482, at *28 (S.D. Tex. Oct. 18, 2017).

III. CONCLUSION

Public Justice contends that this Court should declare a new standard or rule applying uniquely to arbitration agreements, directly contrary to the FAA, this Court's prior holdings, and United States Supreme Court law. Pagliacci's simple, two-sentence arbitration clause requires both parties to arbitrate the enumerated disputes. Refusal to enforce it on the grounds urged by Public Justice would require the Court

to overrule *Satomi* and other cases. Public Justice's proposed standard would require blanket mutuality for non-arbitration provisions, because the rule would apply to those clauses as well as statutorily-favored arbitration. This Court should not follow other jurisdictions on cases involving express exclusions not present here, are contrary to Washington precedent, and which predate current arbitration law. Pagliacci respectfully requests this Court to reject the arguments presented by Public Justice.

DATED January 7, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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