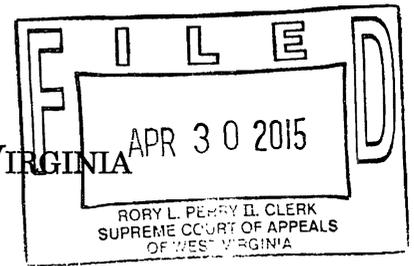


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1215



NAVIENT SOLUTIONS, INC.,
FORMERLY KNOWN AS SALLIE MAE,
INC.
Petitioner

Appeal from an interlocutory order
of the Circuit Court of Raleigh
County (14-C-231(B))

V.)

JENNIFER ROBINETTE,
Respondent

Petitioner's Reply Brief

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SUMMARY OF ARGUMENT

Plaintiff-Respondent Jennifer Robinette (“**Robinette**”) obtained seven student loans from Navient Solutions, Inc., formerly known as Sallie Mae, Inc. (“**Navient**”). The terms of each loan are identical and are set forth in the Tuition Answer Loan Application and Promissory Note (the “**Application and Note**”). For each loan, Robinette accessed and filled out an Application and Note on Navient’s website. Each Application and Note contains an arbitration agreement.

Robinette contends that she never assented to an arbitration agreement because it is contained in the promissory note portion of the Application and Note, which Robinette maintains is a separate document from the loan application portion of the Application and Note. The trial court agreed with Robinette, and Robinette argues that the trial court’s factual finding should not be reversed. But whether the Application and Note is a single document or two documents presents a question of law, which this Court reviews de novo. It is clear from the face of the Application and Note that it is a single document.

Even if the loan agreement is a distinct document from the promissory note, the loan agreement clearly incorporates the terms of the promissory note. The loan application makes a clear reference to the promissory note, describes the promissory note in such terms that its identity may be ascertained beyond doubt, and includes language to ensure that Robinette knew of and assented to the terms of the promissory note. Robinette argues that arbitration agreements require additional indicia of assent beyond what is required for other contract provisions. That

argument, however, assumes that arbitration agreements can be treated less favorably than other contractual provisions, a view contradicted by the Federal Arbitration Act.

ARGUMENT

I. The trial court erred, as a matter of law, when it concluded that the Application and Note are separate documents.

A. This Court reviews the trial court's decision de novo.

This Court reviews de novo a trial court's order denying a motion to compel arbitration. *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013); see also *American Bankers Ins. Group Inc. v. Long*, 453 F.3d 623, 629 (4th Cir. 2006) ("We generally review *de novo* the district court's decision on a petition to compel arbitration."). Robinette argues that this Court should review the order denying Navient's Motion to Compel Arbitration only for clear error because the court made factual findings as part of its order. That argument fails because the determination that Robinette characterizes as a finding of fact is actually a conclusion of law.

Robinette maintains that the trial court's determination "regarding whether the loan application and promissory note are separate documents" constitutes a "finding of fact." (Respondent's Brief at 6.) But whether the loan application and promissory note comprise a single document or two documents presents a question of contract interpretation, which is a question of law. *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 100, 468 S.E.2d 712, 715 (1996)

("[I]t is for a trial court to determine whether the terms of an integrated agreement are unambiguous and, if so, to construe the contract according to its plain meaning. In this sense, questions about the meaning of contractual provisions are questions of law, and we review a trial court's answers to them de novo."); *see also* Restatement (Second) of Contracts § 212 cmt. d (1981) ("[Q]uestions of interpretation of written documents have been treated as questions of law in the sense that they are decided by the trial judge rather than by the jury. Likewise, since an appellate court is commonly in as good a position to decide such questions as the trial judge, they have been treated as questions of law for purposes of appellate review.").

Robinette nevertheless argues that this Court should not apply a de novo standard of review because "[t]his case is not an appeal of a Motion to Dismiss." (Respondent's Brief at 6.) But the procedural posture of the case does not determine the standard of review. A summary judgment order may be based on an extensive factual record, but a summary judgment order "based upon contract interpretation is subject to de novo review because interpretation of contract language is a question of law." *Wood v. Acordia of W. Virginia, Inc.*, 217 W. Va. 406, 411, 618 S.E.2d 415, 420 (2005).

Accordingly, this Court should review de novo the trial court's order denying Navient's Motion to Compel Arbitration, as well as the legal issues raised by that order.

B. The Application and Note constitute a single document.

Each Application and Note is a single document with three sections. The first section is the application, a three-page section that requests information from the borrower and includes a signature page. (A.R. 172.) The second section consists of three pages of instructions, ending in an application checklist. (*Id.*) The third section is the promissory note. (*Id.*) The Application and Note contains text in the right margin of each page reading, “Tuition Answer Loan Application and Promissory Note,” and includes the academic year for the loan. (*Id.*)

Thus, it is clear to any borrower that the Application and Note consists not only of a loan application, but also a promissory note. In fact, the Application and Note cautions the borrower not to sign until she reads the promissory note. (*Id.* 34, 48, 62, 76, 90, 103, 118.) The Application and Note also requires the borrower to affirm, “I have read and agree to the terms of the Promissory Note accompanying this application,” and to acknowledge that “[t]he terms and conditions set forth in the Promissory Note constitute the entire agreement between us.” (*Id.*)

The face of the document Robinette signed shows that she received only one document, not two. But if extrinsic evidence is needed, that evidence confirms what the face of the document shows. For each loan, Robinette accessed and filled out an Application and Note on Navient’s website. (*Id.* 176.) The Application and Note were presented to Robinette as one document. (*Id.*) Thus, Robinette, as well as any reasonable person applying for a loan with Navient, would have understood that the

Application and Note was one document, not two. Accordingly, Robinette signed the very document containing the arbitration agreement Navient seeks to enforce.

II. Even if the loan application and promissory note are separate documents, the trial court erred when it concluded that the promissory note—including its arbitration agreement—was not incorporated by reference into the loan application.

Even if this Court agrees with Robinette that the Application and Note are separate documents, Robinette still entered into an enforceable arbitration agreement because the loan application incorporates by reference the promissory note. Under West Virginia law, “parties may incorporate into their contract the terms of some other writing.” *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 441, 752 S.E.2d 586, 595 (2013). There are three requirements a written agreement must meet to incorporate by reference the terms of another agreement:

- (1) the writing must make a clear reference to the other document so that the parties’ assent to the reference is unmistakable;
- (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and
- (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

U-Haul Co., 752 S.E.2d at 598.

Here, the loan application Robinette signed meets all the requirements to incorporate the promissory note. First, the loan application has several clear references to the promissory note. Second, the loan application describes the promissory note in such terms that a borrower can ascertain its identity beyond

doubt. Third, it is certain that Robinette knew of and assented to the promissory note.

Robinette does not dispute that the loan application incorporates the promissory note's terms concerning the principal amount of the loan, the interest rate, and the term for repayment. Robinette, however, claims that the arbitration clause in the promissory note should be treated differently from the other terms of the promissory note. (Respondent's Brief at 10.) By accepting Robinette's argument, the trial court violated a fundamental principle of the Federal Arbitration Act, which "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 494, 729 S.E.2d 808, 816 (2012).

Robinette cites a variety of cases from other jurisdictions for the principle that parties cannot be bound to arbitrate unless they agree to arbitrate. (Respondent's Brief at 12.) While that general proposition is true, there is abundant evidence that Robinette agreed to arbitrate her dispute with Navient. Further, as explained below, none of the cases Robinette relies upon involve facts similar to this case.

A. Robinette's Cases Are Not Analogous.

In *Barkley v. Pizza Hut of America, Inc.*, the court denied a motion to compel arbitration where an employer could not produce any signed agreement with an arbitration clause, and the employer did not have personal knowledge of the plaintiff's signing the arbitration agreement. No. 6:14-CV-376-ORL-37DA, 2014 WL

3908197, at *3–4 (M.D. Fla. Aug. 11, 2014). In this case, Navient has produced the agreement that Robinette signed.

In *Barrow v. Dartmouth Housing Nursing Home, Inc.*, the court reversed an order compelling the executor of an estate to arbitrate a claim against a nursing home because the person who signed the agreement did not have authority to sign for the decedent. 14 N.E.3d 318, 325 (Mass. Ct. App. 2014). In this case, Robinette signed the agreement in her individual capacity. No other party signed for her or on her behalf.

In *Basulto v. Hialeah Automotive*, the court refused to compel arbitration where (1) the contract was in English and the plaintiffs spoke only Spanish, (2) the employees who explained the contract to the plaintiffs did not understand the core nature of arbitration, and (3) there were blanks that had not yet been filled in for the dollar amount of the contract. 141 So. 3d 1145, 1156–57 (Fla. 2014). In this case, Robinette speaks English, and the Application and Note was complete when signed.

In *Bellemere v. Cable-Dahmer Chevrolet, Inc.*, the court affirmed an order denying a motion to compel arbitration where the written agreement expressly conditioned formation of a binding contract on the presence of a signature by an authorized car dealer representative, and the agreement was not signed by the authorized representative. 423 S.W.3d 267, 274–76 (Mo. Ct. App. 2013). In this case, the Application and Note does not include any unfulfilled conditions and was signed by all necessary parties.

In *In re Carrier IQ, Inc. Consumer Privacy Litigation*, the court denied a defendant's motion to compel arbitration, where the motion was based on an arbitration agreement to which the defendant was not a party. No. C-12-md-2330 EMC, 2014 WL 1338474 at *5-7 (N.D. Cal. Mar. 28, 2014). The court held that the defendant's reliance on an arbitration contract to which it was not a party could not justify the application of equitable estoppel against a plaintiff who did not rely on that contract in its claim. *Id.* In this case, Navient is a party to the arbitration agreement at issue, so the doctrine of equitable estoppel is irrelevant.

In *Jay Wolfe Used Cars of Blue Springs, LLC v. Jackson*, the court denied a motion to compel arbitration because the seller was not a party to the agreement containing the arbitration clause. 428 S.W.3d 683, 689 (Mo. Ct. App. Mar. 25, 2015). In this case, of course, Navient is a party to the agreement containing the arbitration clause.

In *Kulig v. Midland Funding, LLC*, the court held that no valid arbitration agreement existed because the cardholder agreement containing the arbitration clause was dated after the plaintiff stopped using her credit card, and the defendant could not show that any prior agreement was in effect. No. 13 Civ. 4715 (PKC), 2013 WL 6017444 at *6-7 (S.D.N.Y. Nov. 13, 2013). In this case, the Application and Note is not post-dated; it was signed before performance began.

In *Larkin v. New Century Auto Sales Inc.*, the court denied a motion to compel arbitration because the agreement did not comply with Michigan law. No. 12-13917, 2014 WL 29119 at *4-7, 2014 U.S. Dist. LEXIS 350 (E.D. Mich. Jan. 3,

2014). Under the Michigan Motor Vehicle Sales Finance Act, an installment sales contract must contain all agreements between the buyer and seller related to the installment sale of the motor vehicle being sold—including an arbitration clause, if one exists. *Id.* Because the arbitration clause was in a separate document from the installment sales contract, the arbitration clause was unenforceable. *Id.* at *7. The Michigan Motor Vehicle Sales Finance Act does not apply in this case and, as noted above, the Application and Note constitute a single document.

In *Martin v. Wells Fargo Bank, N.A.*, the court denied a motion to compel arbitration because the arbitration agreement was not contained in the original contract (signed in 1987), but was sent to the plaintiff in December 2011 as an amendment to the 1987 contract. No. C 12-06030 SI, 2013 WL 6236762 at*3–4 (N.D. Cal. Dec. 2, 2013). Because the plaintiff never agreed to arbitration in the original contract, the court did not enforce it. *Id.* In this case, Robinette received the arbitration agreement contemporaneously with the contract she signed.

In *Nguyen v. Barnes & Noble, Inc.*, the court affirmed an order denying a motion to compel arbitration, holding that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website, but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons the user must click on, without more, is insufficient to give constructive notice to those terms and conditions. No. 12-56628, 2014 WL 4056549 at *6 (9th Cir. August 18, 2014). Because the arbitration agreement was in the terms and conditions found at

the hyperlink, the arbitration agreement was not enforceable. *Id.* at *7. This case does not involve acknowledgement by mouse click but, rather, by signature. Above the signature block Robinette signed, was text specifically alerting Robinette to the promissory note and cautioning Robinette that there were additional terms in the promissory note.

In *Reimann v. Brachfeld*, the court found that no enforceable arbitration agreement existed where the debt collector could not provide admissible evidence of an agreement. No. RG10529702, 2013 WL 5145784 at *3 (Cal. Sup. Ct. Aug. 2, 2013). The debt collector submitted an agreement given to it by the former bank (the party to the agreement) with an affidavit purporting to authenticate the agreement, but the affidavit did not adequately state facts that fit the business records exception to hearsay. *Id.* In this case, Navient has established that an agreement exists, and Robinette does not contest that she signed the Application and Note.

In *Walton v. Johnson*, the court denied a motion to compel arbitration because it found that the 36-year-old plaintiff's mother was not her legal agent and did not have the authority to sign an arbitration agreement on the plaintiff's behalf while the plaintiff was in a coma. 66 A.3d 782, 788–90 (Pa. Super. Ct. May 7, 2013). There is no agency issue in our case; Robinette signed the Application and Note herself.

B. The loan application makes a clear reference to the promissory note.

The loan application contains four clear references to the promissory note

immediately before the signature block:

Notice to ALL BORROWERS

- (a) Do not sign this before you read the Promissory Note even if otherwise advised.

* * *

I have read and agree to the terms of the Promissory Note accomapnying this application.

* * *

The terms and conditions set forth in the Promissory Note constitute the entire agreement between us.

CAUTION – IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

(A.R. 34, 48, 62, 76, 90, 103, 118.)

Despite those clear and repeated references to the promissory note, Robinette argues that the arbitration agreement is nevertheless unenforceable because she never assented specifically to the terms of the arbitration agreement itself, as distinct from the larger agreement. In two recent decisions from the United States District Court for the Northern District of West Virginia, Judge Stamp compelled borrowers to arbitrate disputes with Navient based on loan applications substantially identical to the loan application Robinette signed. *Kelley v. Sallie Mae, Inc.*, No. 5:14-cv-138, 2015 WL 165080, at *7 (N.D.W. Va. Apr. 14, 2015); *Donley v. Sallie Mae, Inc.*, No. 5:14-cv-165, 2015 WL 165097, at *6–7 (N.D.W. Va. Apr. 14, 2015). Judge Stamp found, after a discussion of a similar warning contained in the loan applications at issue in those case that Kelley and Donley confirmed that they reviewed the loan application documents.” *Kelley, Id.* at *15; *Donley, Id.* at 16.

Robinette, by executing the loan application confirmed that she reviewed the loan application documents—just as Judge Stamp found in *Kelley* and *Donley*.

Despite this clear evidence of assent, Robinette analogizes her case to two cases involving so-called “Clickwrap Agreements.” But the first case Robinette cites is not analogous, and the second case she cites actually supports Navient’s position. In *Specht v. Netscape Communications Corp.*, the computer user downloaded a software program from Netscape’s website. 306 F.3d 17, 21–23 (2d Cir. 2002). The court held that the arbitration clause in the terms and conditions was an undisclosed term because it was available to read only after the download. *Id.* at 32. In contrast, the promissory note was available to Robinette before she signed the Application and Note.

In *Feldman v. Google, Inc.*, a lawyer purchased advertising from Google’s AdWords program to attract potential clients. 513 F. Supp. 2d 229, 231 (E.D. Pa. 2007). To purchase the program, the lawyer had to scroll through the terms and conditions and then click a box that said, “Yes, I agree to the terms and conditions.” *Id.* at 232–33. The court found that the lawyer had reasonable notice of the terms and conditions and that mutual assent was present. *Id.* at 236–38.

Robinette cites that case for the proposition that “courts typically require a website to include an extra box that a user must check to show assent to any additional terms and conditions.” (Respondent’s Brief at 15.) But that is not an accurate description of the case’s holding. While, in general, courts have found extra boxes to demonstrate reasonable notice and assent, the court does not hold that an

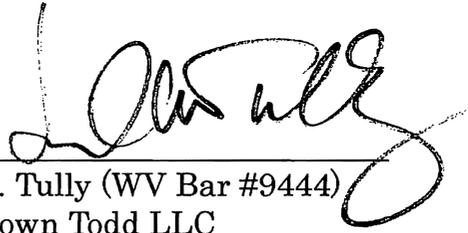
extra box is required in all such cases. *Id.* at 238. Instead, the court states, “[t]o determine whether a clickwrap agreement is enforceable, courts presented with the issue apply traditional principles of contract law and focus on whether the plaintiffs had reasonable notice of and manifested assent to the clickwrap agreement.” *Id.* at 236.

Thus, *Feldman’s* holding supports Navient’s position. If merely checking a box signifies assent, actually signing an agreement must also signify assent. Further, text immediately before the signature block alerted Robinette to the additional terms and conditions of the promissory note.

CONCLUSION

The trial court’s Order Denying Defendant’s Motion to Compel Arbitration should be reversed because the Application and Note constitute a single document that contains a valid and enforceable arbitration agreement. Even if the loan application and promissory note were separate documents, the loan application incorporates the promissory note—including the arbitration agreement—by reference. Accordingly, Robinette is bound to arbitrate the claims she has asserted against Navient.

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CERTIFICATE OF SERVICE

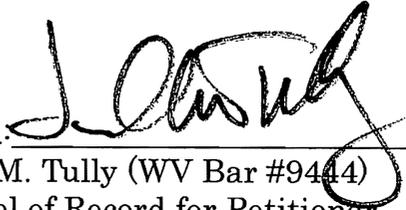
I hereby certify that on this 30th day of April, 2015, true and accurate copies of the foregoing **Petitioner's Reply Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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