IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0368

20-0755

AMIE MILLER,

Petitioner,

v.

ST. JOSEPH RECOVERY CENTER, LLC,
a Delaware limited liability company,
ST. JOSEPH'S OPERATING COMPANY, LLC,
a Delaware limited liability company, and
SILTSTONE HOLDINGS, LLC,
a Delaware limited liability company,

Respondents.

Appeal from final order of the
Circuit Court of Wood County
(Civil Action No. 19-C-226)

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

This matter involves a breach of contract action filed by Petitioner in which she sought severance pay, accrued vacation pay, and civil penalties pursuant the West Virginia Wage Payment and Collection Act (the "Act"), W. Va. Code §21-5-1, *et seq.*, for which she was not entitled, according to the express terms and conditions of Petitioners Employment Agreement with Respondent. Following multiple pre-trial motions and hearings, as well as a bench trial finding for Respondent, all of Petitioner's claims were denied and ultimately dismissed. As a result of the Circuit Court's pre-trial findings and final *Trial Order*, Petitioner brings the instant appeal.

Factual Background

On or about January 2, 2019, Petitioner, Aimee Miller, was hired as a Nurse Practitioner with Respondent, St. Joseph Recovery Center, LLC (hereinafter "SJRC"). Complaint, ¶ 1, Appx., p. 3. The terms and conditions of Plaintiff's employment, as correctly stated by Petitioner in her Complaint, are governed by an employment contract titled "Employment Agreement." See Complaint, ¶ 2, Appx., p. 3. More specifically, the Employment Agreement notes very clearly that "[Petitioner] wishes to enter into this Agreement with [SJRC] ***in accordance with the terms and conditions of employment stated in this Agreement.***" Employment Agreement, Appx., p. 8 (emphasis supplied).

Those very terms and conditions of employment, which Petitioner specifically agreed, included the following choice of law provision:

> This Agreement shall be governed by and construed in accordance with the laws of the State of Texas without regard to conflicts of law principles.

Id., §7.5; Appx. 17. The terms and conditions also included a mutual jury waiver clause:

> Each party hereto hereby waives, to the fullest extent permitted by applicable law, any right it may have to a trial by jury in respect of

> any litigation directly or indirectly arising out of, under or in connection with this Agreement.

Id., §7.6; Appx., p. 18. In agreeing to these terms, Petitioner represented and warranted that she had the opportunity to seek the advice of counsel prior to executing the agreement, that she availed herself of that opportunity, and that she was entering into the agreement voluntarily without duress or undue pressure. Id., §7.2; Appx., p. 18

Petitioner's term of employment pursuant to the Agreement was twelve (12) months. Id., §2.1; Appx., p. 11. Should the parties desire to terminate the employment prior to the expiration of the 12-month term, Article 4 of the Agreement specifically addresses such circumstances. Id., Art. 4; Appx., pp. 13-14. Section 4.4 provides:

> In the event that [Plaintiff] voluntarily resigns, [Plaintiff] ***will give a minimum of three (3) months advance written notice to [SJRC]***, except in the case of voluntary resignation for Good Reason as provided for in this Agreement. In the event that [Plaintiff] resigns for Good Reason, [she] shall be entitled to the Severance Package set forth in Section 4.6 below.

Id., §4.4; Appx. 13 (emphasis added). Section 4.5 provides that in the event Petitioner voluntarily resigned her position "**without Good Reason**," she would not be entitled to ***any*** termination or severance payment. Id., §4.5; Appx. 13

Section 4.6 of the Employment Agreement govern the terms and conditions of (a) what constitutes "Good Reason" pursuant to Article 4; and (b) the Severance Package available if Plaintiff met the appropriate criteria. "Good Reason" under the express terms of the Employment Agreement occurs if Petitioner were to resign because SJRC materially breaches its obligations to provide Petitioner with compensation or benefits or breaches any other material term of the Employment Agreement." Id., §4.6(b); Appx. 14.

If the specific conditions and requirements of §4.6 are met and Petitioner voluntarily resigns for "Good Reason," a "Severance Package" becomes available, which equals the:

> Base Salary paid monthly in accordance with [SJRC's] normal payroll practices for the lesser of (A) the total number of full months of the then remaining term of the Agreement; of (B) three (3) months, together with health insurance coverage during the severance period. The provisions of the Severance Package ***shall constitute full and final satisfaction of all rights and entitlements that the [Plaintiff] has or may have arising from or related to the termination*** of his/her employment, whether pursuant to statute, contract, common law, or otherwise.

Id., §4.6(a); Appx. 14.[1]

After six months of employment, on or about June 18, 2019, Plaintiff delivered a letter to Donna Meadows, CEO of SJRC, as well as Tabitha Smith, Director of Nursing, informing SJRC of her intent to leave her employment two months (59 days) later on August 15, 2019. Resignation Letter; Appx. 82. In this letter, Petitioner provided that her reason for leaving employment at SJRC was to take a new job at a competing substance abuse rehabilitation center – a direct breach of her non-compete provision in the subject Agreement. See Employment Agreement, §6.2; Appx. pp. 15-16. Petitioner's resignation letter specifically states:

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[1] Petitioner continues to spend significant time discussing her Employee Handbook as a purported legal basis to substantiate her claims. Petitioner's Brief, p. 8. Any reference to the Employee Handbook is nothing more than a "red herring" with no relevance to the issues surrounding this matter. The Employee Handbook provided to Plaintiff specifically provides:

> Because you are employed at will, either you or the company may terminate the employment relationship at any time, for any reason, with or without notice **(if employee is under an employment agreement, employment termination by either party *will follow the terms of the contract*).**

Employee Handbook, §3.8; Appx. 108 (emphasis supplied). The Employee Handbook plainly states that it shall not control when there is an employment agreement in place. Petitioner was obviously subject to an employment agreement, and as such, the terms of her termination are unequivocally and unambiguously governed by the same. Therefore, any argument by Petitioner citing the Employee Handbook as a legal basis for accrued paid time off is both irrelevant and inapplicable to the present matter, was correctly dismissed by the Circuit Court upon summary judgment and should not be considered by this Court on appeal.

> **I have received an offer to work as a Nurse Practitioner at a halfway house** in Marietta, Ohio. After careful consideration I have realized that **this opportunity is too exciting to decline.**
>
> It has been a great pleasure to work on your team for the past 6 months, and I hope you understand that his was a difficult decision. The skill that I have learned in your facility will be an asset with all my future patients. I would like to thank you for the ability to work as part of a great team while furthering my education and my career path.

Resignation Letter; Appx. 82 (emphasis supplied). At no time does Petitioner allege or otherwise contend in her letter that the reason for her leaving employment with SJRC and terminating her Employment Agreement is for any other reason than to take what Petitioner felt was a job offer that was "too exciting to decline" in violation of her non-compete provision of her Employment Agreement. Id. However, it is admitted and has never been disputed by SJRC that Petitioner was not paid on normal payroll days four times during her employment. Such payments, however, Petitioner confirmed that she was always paid in full, and at the time she resigned her position, there were no outstanding wages owed to her. Appx. pp. 371-373.

At trial of this matter, Petitioner testified that she actually delivered not one, but two, resignation letters to Donna Meadows – one that has been submitted into evidence and provides two months' notice, and allegedly one that provided three months' notice. Appx. pp. 369-370. Despite this mystery letter being a potentially important piece of evidence, which may purport to show that Petitioner provided the requisite three month notice of resignation as required under §4.6 of her Agreement, Petitioner did not feel it necessary to bring it to trial, and she reported that her counsel did not advise her to bring it so that it may be submitted into evidence. Id. As such, the only resignation letter that is part of the official record on appeal is that which is cited above, providing 59-days' notice.

Upon receiving only 59-days' notice of her intent to leave her employment with SJRC and terminate the Employment Agreement to take a job with a competing entity in violation of the Employment Agreement, which precluded Plaintiff from receiving any Severance Package, in addition to her recent disciplinary problems and unprofessional conduct in the workplace only two weeks prior to her delivering SJRC her resignation letter, it was decided that Petitioner's last day of employment would be July 3, 2019, and that was reflected by a handwritten insertion to the resignation letter. Resignation Letter; Appx. 82; Plaintiff's Personnel File; Appx. pp. 83-143.

Procedural History

SJRC learned for the first time that Petitioner was seeking the Severance Package pursuant to §4.6 of her Employment Agreement through counsel for Petitioner. Appx. p. 371. Upon denying Petitioner's request, the instant lawsuit was filed against SJRC, *et al.*,[2] in the Circuit Court of Wood County on September 10, 2019. Complaint, Appx. p. 3-21. Petitioner specifically alleged that she was entitled to the Severance Package provided for in her Employment Agreement, as well as to accrued paid time off pursuant to an Employee Handbook, which bears no relevance to the instant matter, because Petitioner's employment was subject to an employment agreement. Id. Outside of the contractual claims, Petitioner also asserted claims for civil penalties pursuant to the West Virginia Wage Payment and Collection Act, W. Va. Code §21-5-1, *et seq.* Id.

At the time of filing, and throughout discovery of this matter, multiple defendants, who were not parties to the subject Employment Agreement, but (in theory) had claims pending against them relative to the Wage Payment and Collection Act, were still parties to the case. All defendants were represented by undersigned counsel. Because the additional defendants were not parties to

[2] Petitioner also named St. Joseph Operating Company, LLC and Siltstone Holdings, LLC as defendants in this matter, who were also represented by the undersigned counsel. These defendants were dismissed by the Circuit Court upon summary judgment ruling, and Petitioner does not challenge that ruling on appeal.

the subject Agreement, they could not seek a jury waiver pursuant to the terms of the Agreement. As such, and in the interest of judicial economy, trial by jury was demanded by all defendants rather than attempt to bifurcate the issues and hold multiple trials. When the additional defendants were dismissed properly upon summary judgment, only the parties to the Agreement remained – SJRC and Petitioner – such that enforcement of the jury trial waiver in the subject Agreement was possible.

Following discovery, SJRC filed its Motion for Summary Judgment, and a hearing on the same was held August 11, 2020. On August 12, 2020, the Circuit Court provided a letter ruling so that the parties would know the status of the pending claims in advance of scheduled mediation. Aug. 12, 2020 Letter Ruling from Court; Appx., pp. 266-267. Pursuant to that letter ruling the Court found the following relative to the present appeal:

1. That the Employment Agreement is the controlling document and that the provisions of the Employee Handbook, which Petitioner relied, are inapplicable;

2. That §4.6 of the Employment Agreement defines that the Severance Package is "full and final satisfaction" of all amounts owed if Petitioner qualified for the same at the time of separation, and therefore, is not entitled accrued paid time off;

3. That "severance pay" is not "wages" as defined under the Act, as it is not "compensation for labor or services rendered," and is likewise, not a "then accrued fringe benefit, because it does not accrue until the moment of termination; and

4. That whether the Petitioner left her employment for "Good Reason" pursuant to the Employment Agreement is an issue of fact to be determined by the trier of fact at trial.

See Id.

A final pretrial hearing was held on August 26, 2020 at the request of SJRC to address the issue of enforcing the valid jury waiver provision in the Employment Agreement. At the August 26, hearing, SJRC argued that Petitioner's waiver was knowing and intelligent (a standard that is recognized in both West Virginia and Texas) and was valid now that the only parties left in the matter were the original parties to the Employment Agreement. Aug. 26, 2020 Hearing Transcript;

Appx., pp. 294-307. Additionally, at the hearing, the Circuit Court noted that the contract is "very clear that it indicates it is governed by the laws of Texas" pursuant to its choice of law provision. Id.; Appx. 300.

At no time in this hearing did Petitioner ever question the validity of the jury waiver, or choice of law, provisions, and instead chose to focus on the timeliness of these issues, because counsel indicated he "knew nothing about Texas law" even though the Circuit Court was only applying the terms of the Agreement, which Petitioner agreed to nearly two years before. Id. The transcript from the August 26, 2020 pretrial hearing makes clear that Petitioner was provided every opportunity to continue the trial date to either prepare under Texas law, or question the validity of the choice of law provision. Appx., pp. 304 – 307. In fact, Petitioner was specifically offered more time to prepare under Texas law, to which SJRC indicated it would not object to. Appx., p. 306. Instead, Petitioner's counsel stated, "**I don't want more time.**" Id. (emphasis added). The Circuit Court ultimately ruled that the provisions of the subject Agreement were valid and the trial of this matter would proceed as a bench trial, and issues of law pertaining to the contract would be governed by Texas law. Id.; Appx. pp. 303-305.

A one-day bench trial was held on September 1, 2020 to address only two issues: (1) whether SJRC materially breached the Agreement – a question of law; and (2) whether Petitioner left her employment for "Good Reason." Three witnesses were called to testify – Petitioner, and two former SJRC employees, Tabitha Smith and Gina Elschlager. As it would go to the credibility of the witnesses called, it must be noted that both Ms. Smith and Ms. Elschlager both have pending civil actions against SJRC based upon identical contract language faced in the present matter and have a vested interest in seeing Petitioner prevail. Ms. Smith and Ms. Elschlager are also represented by Petitioner's counsel.

Much of the testimony of Petitioner's witnesses revolved around the four times that SJRC admittedly did not pay some employees on time – a fact that was never in dispute. See generally Trial Testimony of Tabitha Smith, Appx. pp. 311-341; Trial Testimony of Gina Elschlager, Appx. pp. 344-353. In fact, the only testimony relevant to the issue at trial was that of Petitioner.

Petitioner testified that the reason she left her employment with SJRC is because she did not get paid timely on four occasions. Trial Testimony of Petitioner, Appx. pp. 359-364. However, Petitioner's letter of resignation, made contemporaneous in time to when she left employment, tells a completely different story. Appx. 82. In addition to the letter in which Petitioner described an opportunity "too exciting to decline," Petitioner also testified that in the meeting in which she provided Donna Meadows her resignation, she told Ms. Meadows that the new job would make her daily drive much easier, because it was closer to her home. Trial Testimony of Petitioner, Appx. pp. 367-368. Petitioner made several admissions, which attack the credibility of her contention that she left her employment for "Good Reason," allowing the Circuit Court, as trier of fact, to draw plausible inferences and conclusions as to Petitioner's true motives when resigning:

> Q: Can you show me in [the resignation letter] where it states you are leaving your employment because of something that St. Joseph Recovery Center has done wrong?
>
> A: It's not in there.
>
> Q: Where in this [resignation] letter, can you show me in this letter where you state that you were leaving because SJRC was – had late paychecks to you?
>
> A: No, I cannot.
>
> Q: Where in this [resignation] letter do you demand that St. Joseph Recovery Center pay out a severance package under your employment agreement?

A: It is not in the letter.

Q: And you never raised this issue when you submitted the letter?

A: I did not.

Q: You never personally made a demand for the severance package to St. Joseph, did you?

A: No.

Q: The first time the severance package was raised was through your attorney?

A: Correct. I did contact them about vacation pay that I was not paid for.

Q: You were not seeking a severance package when you submitted this resignation letter, were you?

A: It was in the back of my mind, but I was more concerned about getting a job that was secure than a severance package at the time.

Q: You believe you were parting St. Joseph on good terms, is that correct?

A: As I was told by Donna, I gave the two-week notice and I would be leaving on good terms and I worked out the full notice.

Q: You testified earlier that you had two drafts of the [resignation] letter?

A: I did.

Q: And you testified that you brought this to the meeting with Ms. Meadows?

A: I did.

Q: And hat you both reviewed this second letter, as well?

A: I had asked her, I said, "I have two letters. I have one for three months and one with two months, which letter would you prefer that I turn in?

I was advised to turn in the two months. Then at the end of the conversation I was told maybe you can just do two-week notice.

Q: And Ms. Meadows provided you a reason why she preferred to just notice the two weeks?

A: Yes.

Q: Did you bring that second letter with you?

A: Today.

Q: Yes.

A: No.

Q: Don't you think it would be important to have the second letter?

A: I wasn't advised to bring it, so I didn't.

Q: You have a second letter that supposedly provides three-month notice, but you didn't bring it with you?

A: Correct.

Q: You testified earlier that your goal was not to burn bridges when you left St. Joseph, is that correct?

A: Correct.

Q: But you never personally requested a severance, correct?

A: Correct.

Q: And the first request for such severance was through an attorney, correct?

A: Yes.

Q: And then you filed suit?

A: Yes.

Trial Testimony of Petitioner, Appx. pp. 368-371.

On September 2, 2020, the Circuit Court entered its Trial Order finding for SJRC. Trial Order, Appx., pp. 382-383. Specifically, the Circuit Court found that SJRC had breached the Agreement with Petitioner by having late payroll payments on four occasions, but that the weight and credit of the evidence – in particular, the specific words chosen by Petitioner in her resignation letter – led to the conclusion of fact that Petitioner had voluntarily left her employment without cause under the terms of the subject Agreement. Id. As a result, Petitioner filed the instant appeal.

II. SUMMARY OF ARGUMENT

This appeal involves five assignments of error asserted by Petitioner:

1. That the Circuit Court, as trier of fact, erred in finding that Petitioner did not resign her employment with SJRC for "Good Reason" pursuant to her Employment Agreement.

2. That the Circuit Court erred in determining that the "Severance Package" provided for in Petitioner's Employment Agreement did not constitute "wages" or "then accrued fringe benefits" under the West Virginia Wage Payment and Collection Act, W. Va. Code §21-5-1, *et seq.*

3. That the Circuit Court erred in finding that the subject Employment Agreement contained a valid jury waiver provision and that the trial of this matter would proceed as a bench trial.

4. That the Circuit Court erred in determining that the subject Employment Agreement contained a valid choice of law provision, which dictated that the Agreement would be interpreted under the laws of the State of Texas.

5. That the Circuit Court erred in ruling that the Employment Agreement controlled Petitioner's terms of employment, and the Employee Handbook provided to Petitioner was inapplicable to Petitioner relative to accrued paid time off.

Petitioner's Brief, pp. 2-4.

SJRC, in response, argues that all of the various assignments of error presented by Petitioner must fail when applying the established record and applicable law to the facts. Specifically, SJRC responds to the individual assignments of error as follows:

1. **That the Circuit Court, as trier of fact, erred in finding that Petitioner did not resign her employment with SJRC for "Good Reason" pursuant to her Employment Agreement.**

It was universally agreed by the parties that whether Petitioner resigned her position for "Good Reason" under the terms of her Employment Agreement was a question of fact for the trier of fact to determine. Because the issue of "cause" pursuant to the employment agreement is a factual matter, the findings of the Circuit Court in a bench trial are reviewed under a "clearly erroneous standard. The record reflects the Circuit Court was presented with evidence and testimony which permitted it with a choice between two permissible views of the issue of "cause." That the Petitioner did not like the ultimate finding in regard to the permissible views does not equate to a conclusion that the Circuit Court acted erroneously and that decision cannot be overturned under West Virginia law. The Trial Order fully described and weighed the evidence presented at trial, drew appropriate and plausible findings in light of the record viewed in its entirety.

2. **That the Circuit Court erred in determining that the "Severance Package" provided for in Petitioner's Employment Agreement did not constitute "wages" or "then accrued fringe benefits" under the West Virginia Wage Payment and Collection Act, W. Va. Code §21-5-1, *et seq*.**

Even if the Circuit Court's underlying finding of fact that Petitioner did not leave her employment for "Good Cause" was clearly erroneous, which it was not, the Circuit Court's ruling upon summary judgment that severance pay does not meet the definition of "wages" and is not an "accrued fringe benefit," is correct as a matter of law. The Severance Package in the subject Agreement cannot be considered "compensation for labor or services rendered by an employee," as it is a sum certain that was negotiated at the time the Employment Agreement was entered into and could not possibly be "earned" until after the employment relationship is severed. Severance pay by its nature is designed to be contractual damages owed to employees for suffering an

unexpected employment loss, such package cannot be "wages" as defined by the Act and are not subject to civil penalties pursuant to the Act. Moreover, severance pay is explicitly not included in the Act's definition of "fringe benefits," and even if severance pay were a fringe benefit, such benefit did not, and could not, vest in the Petitioner until she met the expressly enumerated conditions and requirements of her Employment Contract, which the Circuit Court correctly found as a matter of fact she did not. Therefore, the Circuit Court did not err in ruling that the "Severance Package" provided for in Petitioner's Employment Agreement did not constitute "wages" or "then accrued fringe benefits" under the Act.

3. That the Circuit Court erred in finding that the subject Employment Agreement contained a valid jury waiver provision and that the trial of this matter would proceed as a bench trial.

The Circuit Court correctly proceeded with a bench trial in this matter, as §7.6 of the subject Employment Agreement contains a jury waiver provision, and despite Petitioner's representations, the Circuit Court evaluated and analyzed the relevant legal standards of waiver in arriving at such conclusion. Contractual jury waivers are enforceable, but they must be found to be a voluntary, knowing, and intelligent act that was done with sufficient awareness of the relevant circumstances and likely consequences – (which holds true under both Texas and West Virginia law). Despite the opportunity to argue against the validity of the jury waiver at the pretrial hearing, as well as on appeal, Petitioner has wholly failed to contend that Petitioner's waiver of a jury trial in her Employment Agreement was anything but voluntary, knowing, and intelligent. Therefore, the Circuit Court's analysis of the jury waiver provision was correct, and the Circuit Court did not abuse its discretion in conducting a bench trial pursuant to the same. Even if the Circuit Court erred in conducting a bench trial, such error was "harmless" pursuant to Rule 60 of the *West Virginia Rules of Civil Procedure*, because conducting a bench trial did not have any effect on the issues to be decided, the evidence presented, or Petitioner's ability to make her case at trial.

4. **That the Circuit Court erred in determining that the subject Employment Agreement contained a valid choice of law provision, which dictated that the Agreement would be interpreted under the laws of the State of Texas.**

Petitioner's assignment of error relating to the valid choice of law provision contained in her employment agreement must fail, because at no time has Plaintiff ever contended that the choice of law provision is invalid and conceded that she would be prepared to proceed at trial under Texas law. Additionally, the choice of law provision requiring the Employment Agreement to be decided under Texas law is not mutually exclusive to Petitioner's claims under the Wage Payment and Collection Act. As such, issues which require interpretation of the terms of the Agreement can apply Texas law, while applying West Virginia law to issues arising out of the Wage Payment and Collection Act. Finally, even if there were error in applying Texas law to the terms of the Employment Agreement, the result is "harmless error," as the only issue of law decided at trial relative to the Agreement was decided in Petitioner's favor.

5. **That the Circuit Court erred in ruling that the Employment Agreement controlled Petitioner's terms of employment, and the Employee Handbook provided to Petitioner was inapplicable to Petitioner relative to accrued paid time off.**

In the present appeal, the terms of Petitioner's employment were specifically laid out in her Employment Agreement, which Petitioner both alleged and specifically acknowledged in Paragraph 2 of her Complaint. As such, the terms of her termination are unequivocally and unambiguously governed by her Employment Agreement, and any argument by Petitioner citing to the Employee Handbook as a legal basis for her position is both irrelevant and inapplicable to the present matter. Because the Employment Agreement controls the terms of Petitioner's employment, and because the Employment Agreement is sufficiently express and specific so that Petitioner could easily understand the amount of unused fringe benefit pay, if any, owed to her upon separation from employment, the Circuit Court's ruling upon summary judgment that

Petitioner was only eligible for the severance package as "full and final satisfaction" at the time of separation, which expressly and unambiguously does not include PTO. Therefore, Petitioner's assignment of error relative to PTO must fail.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a)(4) of the *West Virginia Rules of Appellate Procedure*, the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. However, should this Court find necessary to address the question of whether the severance package in Petitioner's contract of employment constitutes "wages" as defined in the West Virginia Wage Payment and Collection Act, W. Va. §21-5-1, *et seq.*, such question would be an issue of first impression suitable for oral argument pursuant to Rule 20 of the *West Virginia Rules of Appellate Procedure.*

IV. ARGUMENT

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. Pt. 1, Public Citizen, Inc. v. First Nat. Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996).

A. The Circuit Court's finding of fact that Petitioner did not leave her employment with SJRC for "good reason" pursuant to the terms of her Employment Agreement was based upon appropriate and plausible findings in light of the facts and evidence presented at trial.

Petitioner contends that the Circuit Court "erroneously dismissed the Petitioner's claim for severance after concluding that she was not entitled to this relief since she did not resign for 'good reason' as defined by the *Employment Agreement.*" In support of her contention, Petitioner argues

that the Circuit Court improperly analyzed Petitioner's stated motivations for leaving her employment with SJRC, rather than looking only at the terms of the Employment Agreement. Petitioner's Brief, at 23. According to Petitioner, her motivation for leaving her employment has no bearing on whether the same was for "good reason." Id.

This position, however, flies directly in the face of Petitioner's own briefing in her *Response to Defendants' Motion for Summary Judgment*, wherein she states: "Plaintiff's reason for resignation ***is an issue of material fact*** . . ." that must be decided by the trier of fact, and not as a matter of law – the position she now purports to take on appeal. See Appx., pp. 151-152. It cannot be understated that this ***question of fact*** was the only issue to be decided at the trial of this matter. See Appx., pp. 283-284 (the parties agreed that the "only factual issue to be resolved" is "the reason for plaintiff's resignation").

Because the issue of "cause" pursuant to the employment agreement is a factual matter, "the circuit court's underlying factual findings are reviewed under a ***clearly erroneous standard.***" Syl. Pt. 1, in part, Public Citizen, Inc., 198 W. Va. 329, 480 S.E.2d 538 (1996)(emphasis added). Clearly erroneous is a "highly deferential" standard of review. Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995). Reversal of a factual finding under the clearly erroneous standard should not be done lightly. Woo v. Putnam County Bd. of Educ., 202 W.Va. 409, 412, 504 S.E.2d 644, 647 (1998). More specifically, this Court has found that "a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, in part, In re Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996). Put plainly, "***[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.***" Frymier–Halloran v. Paige,

193 W.Va. 687, 695 n. 13, 458 S.E.2d 780, 788 n. 13 (1995)(citation omitted)(emphasis supplied); see also Harrell v. Cain, 242 W. Va. 194, 832 S.E.2d 120 (2019)(stating that "This Court gives due regard to a circuit judge's ability to evaluate the credibility of the witnesses," and finding circuit court's order fully described and weighed the evidence presented at trial)(citation omitted).

In the present appeal, the record reflects that the factfinder – i.e., the Circuit Court – was presented with evidence and testimony which permitted it with a choice between two permissible views. That the Petitioner did not like the choice the factfinder made in regard to the permissible views does not equate to a conclusion that the Circuit Court acted erroneously, and West Virginia law specifically forbids a reversal on appeal. Id.

The Trial Order lays out the positions of the parties relative to the evidence and testimony, and explains the Circuit Court's reasoning for its finding as to "cause" pursuant to the subject employment agreement:

> The plaintiff's actions, however, are inconsistent with the position that at the time of the presentation [sic] her letter of resignation that she believed she was entitled to the severance package set forth in the employment agreement. The evidence reflects at no time during the discussion on the day of her resignation that the plaintiff brought up to Donna Meadows the severance package. The plaintiff further testified that at the time of her resignation she also had two letters of resignation. The first offered two months notice and the second offered three months notice. If the plaintiff believed that she was entitled to a severance package due to the alleged breach, pursuant to Section 4.4. of the Agreement she would not have been required to provide any notice, yet she prepared a letter giving full notice and a letter with a reduced period of notice and offered each to SJRC. Neither of these letters made any references to the severance package.
>
> ***These facts lend more weight and credit to the specific words chosen by the Plaintiff in composing her resignation letter*** which was admitted as Plaintiff's Exhibit 2 which set forth her reasons for leaving SJRC. Plaintiff indicated that "I have received an offer to work as a Nurse Practitioner at a halfway house in Marietta, Ohio. After careful consideration I have realized that this opportunity is

> too exciting to decline." She further acknowledged that this was "a difficult decision". She further offered in the letter to being fully committed to assisting with this transition and with training my replacement and in any other matters that will be required in this transition period.
>
> Having considered all of the evidence and argument of counsel, the Court FINDS that the Plaintiff has failed to prove beyond a preponderance of the evidence that the [sic] her resignation constituted termination without cause under the terms of the contract and further FINDS that the Plaintiff voluntarily resigned her employment and is therefore not entitled to the severance package set forth in the employment agreement.

Appx. at 382-383 (emphasis supplied).

It is abundantly clear from the *Trial Order* that the Circuit Court, as the trier of fact, understood and analyzed the facts and evidence presented at trial. Id. The *Trial Order* fully described and weighed the evidence presented at trial, drew appropriate and plausible findings in light of the record viewed in its entirety. Therefore, the Circuit Court's finding of fact that Petitioner did not leave her employment with SJRC for "cause" and was, therefore, not entitled to the severance pay as provided in Section 4.6 cannot possibly be "clearly erroneous" under West Virginia law and must not be reversed on appeal.

B. The Circuit Court correctly held that the "Severance Package" described in §4.6 of Petitioner's Employment Agreement is not "wages" and is not an "accrued fringe benefit" pursuant to the West Virginia Wage Payment and Collection Act, W. Va. Code §21-5-1, *et seq*.

Petitioner asserts that the severance pay provision of her Employment Agreement constitutes "wages" as defined pursuant to the West Virginia Wage Payment and Collection Act (the "Act"), W. Va. Code §21-5-1, *et seq*., and entitles her to civil penalties under the same. In support of her position, Petitioner incorrectly argues:

1. That Petitioner's employment agreement "defined such severance payments as wages" thereby triggering civil penalties under the Act; and

2. Although made without any legal citation in support, that the severance package contemplated in the Employment Agreement must be considered a "fringe benefit," and thus, subject to the Act's civil penalty provisions.

Petitioner's Brief, p. 29.

The Act controls the manner in which employees in West Virginia are paid wages and explicitly provides a private cause of action and statutory remedy when the employer breaches its obligation to pay earned wages. See generally, W. Va. Code §21-5-1, *et seq*. The Act defines "wages" as:

> . . . **compensation for labor or services rendered by an employee**, whether the amount is determined on a time, task, piece, commission or other basis of calculation. As used in sections four, five, eight-a, ten and twelve of this article, the term "wages" shall also include **then accrued fringe benefits capable of calculation and payable directly to an employee**: *Provided,* That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an employer and his or her employees which does not contradict the provisions of this article.

W. Va. Code §21-5-1(c) (emphasis supplied).

The Circuit Court held in its summary judgment ruling:

> The Court FINDS that "severance pay," by its very nature, cannot be "earned" by a plaintiff until after she is terminated. Therefore, severance pay is not "compensation for labor or services rendered" by the plaintiff. The employment relationship must be ended in order for it to become payable. Therefore, under 21-5-1(c), it is not a "then accrued fringe benefit" ("then" being the moment of termination). Therefore, severance pay does not meet the definition of wages under West Virginia law.

Appx., p. 267.

Even if the Circuit Court's underlying finding of fact that Petitioner did not leave her employment for "Good Cause" was clearly erroneous, which it was not, for the reasons provided below, the Circuit Court's ruling upon summary judgment that severance pay does not meet the definition of "wages" and is not an "accrued fringe benefit," is correct as a matter of law, and thus,

the severance package in Petitioner's Employment Agreement is not subject to the civil penalties provided for in the Act.[3]

i. The "Severance Package" provided for in §4.6 of Petitioner's Employment Agreement does not constitute "wages" as defined in the Act.

As the Circuit Court correctly found, the Severance Package in the subject Agreement cannot be considered "compensation for labor or services rendered by an employee," as it is a sum certain that was negotiated at the time the Employment Agreement was entered into and could not possibly be "earned" until after the employment relationship is severed.

While this issue, if even considered by this Court in the instant appeal, would be one of first impression, West Virginia law is not without some guidance from similar matters on how severance pay should be treated. In Conrad v. Charles Town Races, Inc., this Court was asked to determine whether back pay "wages" paid to employees after their separation from employment pursuant to the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §2101-2109 (1988), within the statutory time frames in §21-5-4 of the Act, triggers civil penalties under the Act. 206 W. Va. 45, 521 S.E.2d 537 (1998). The Court, finding that payments made under WARN were *not* "wages" as defined under the Act. Id. Instead, the Court reasoned that these payments were not "compensation for services rendered but are damages designed to compensate employees for an employer's failure to provide the required sixty-day notice [under WARN]." Id., 206 W. Va. at 50, 521 S.E.2d at 542. The Court in Conrad relied heavily on and adopted the reasoning of a Pennsylvania case, Georgia-Pacific v. Unemployment Comp. Bd., which emphasized:

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[3] Although Texas law applies to the terms of Petitioner's Employment Agreement, it does not apply to any civil penalties that may be enforced as part of the Act. As such, whether the "Severance Package" at issue can be classified as "wages" for the purpose of civil penalties under the Act, is a question left solely for West Virginia law. See W. Va. Code §21-5-10 (providing that parties may not set aside the provisions of the Act through private agreement).

> **. . . merely because wage amounts form the basis for the formula by which to calculate the WARN payments, those payments are not lost wages; they are damages owed for violations of WARN's notice requirements.**

Conrad, 206 W. Va. at 49, 521 S.E.2d at 541 (quoting 157 Pa. Cmwlth. 651, 669, 630 A.2d 948, 957 (1993)) (emphasis in original).

Following the reasoning of Conrad, and applying it to the case at bar, there is little question that the Severance Package in the subject Agreement cannot possibly be "wages." First, severance packages, like WARN payments, are not designed to be wages, but instead damages owed to employees for suffering an unexpected employment loss where they had a rightful expectation of continued employment with that employer. Specific to the instant appeal, Petitioner's Employment Agreement carried a one-year term, which had specific provisions allowing either party to terminate the Agreement prior to the expiration of that term. See Appx. pp. 13-14 (Article 4 of Employment Agreement). Had the specific requirements to prematurely terminate the Agreement been met by Petitioner, which they were not, she would have been eligible to receive the Severance Package described in §4.6 as damages for losing the expected benefit of the one-year term.

Moreover, Petitioner argues that "the terms of the *Employment Agreement* defined such severance payments as wages thereby triggering the applicability of the civil penalties under [the Act]," because the Severance Package in §4.6 is "consisting of Base Salary paid monthly in accordance with the company's normal payroll practices." Petitioner's Brief, p. 29. Simply because the Agreement uses her "Base Salary" as the means of calculating the amount of severance damages due and owing at the time of separation if the criteria for receive such payment is met, does not equate to "wages" that are "compensation for labor or services rendered." See Conrad, 157 Pa. Cmwlth. at 669, 630 A.2d at 957 ("merely because wage amounts form the basis for the formula by which to calculate the WARN payments, those payments are not lost wages").

Because the Severance Package described in §4.6 of the subject Employment Agreement is not "compensation for labor or services provided," could not be "earned" until *after* the employment relationship had ended and are designed to be contractual damages owed to employees for suffering an unexpected employment loss, such package cannot be "wages" as defined by the Act and are not subject to civil penalties pursuant to the Act.

ii. ***The "Severance Package" provided for in §4.6 of Petitioner's Employment Agreement is not a "fringe benefit."***

Petitioner appears to assume, without providing any legal authority at all, that the "Severance Package" provided for in Petitioner's Employment Agreement is a "accrued fringe benefit" under the Act, and pursuant to Meadows v. Wal-Mart Stores, 207 W. Va. 203, 530 S.E.2d 676 (1999), the Employment Agreement is ambiguous as to fringe benefits to be paid at the time of separation and must, therefore, be decided in Petitioner's favor. For the reasons provided below, the Employment Agreement is not ambiguous, and West Virginia law dictates that severance payments are *not* fringe benefits.

The Act includes the "then accrued fringe benefits capable of calculation and payable directly to an employee" in the definition of "wages." W. Va. Code §21-5-1(c). The Act specifically defines "fringe benefits" as:

> Any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.

W. Va. Code §21-5-1(l). The West Virginia Legislature made very specific references to the types of benefits that would be included in the definition of "fringe benefits," and severance pay, or any other benefit that is even closely related to severance pay is conspicuously not included. Id.

Meadows held "the [Act] protects as "wages" only those fringe benefits which have both accumulated and vested." 207 W. Va. at 217, 530 S.E.2d at 690. Even if the Severance Package is a fringe benefit, which by definition it is not, severance pay, by its plain meaning cannot accrue or otherwise vest until *after* the employment is severed. The Severance Package at issue, and in fact, all forms of severance pay, can neither accumulate, nor vest, while Petitioner was an employee of SJRC.

Again, even if the Severance Package were a fringe benefit, which it is not, "the concept of vesting is concerned with expressly enumerated conditions or requirements all of which must be fulfilled or satisfied before a benefit becomes a presently enforceable right." Id. at 215, 530 S.E.2d at 688. In the present matter, §4.6 of the Employment Agreement dictates that if the employee does not resign for "good reason," that employee shall not receive the Severance Package. It was specifically found by the Circuit Court, as trier of fact, that Petitioner did not resign her position for "good reason" pursuant to the Agreement, which is briefed more fully in Section "A" above. Therefore, the Severance Package, if it were a fringe benefit, which it is not, never vested in Petitioner and she would not be entitled to the same.[4]

Because severance pay, is explicitly not included in the Act's definition of "fringe benefits" and because even if severance pay were a fringe benefit, such benefit did not, and could not, vest in the Petitioner until she met the expressly enumerated conditions and requirements of her Employment Contract, which the Circuit Court correctly found as a matter of fact she did not.

[4] Petitioner, without analysis or explanation, appears to advance the argument that if the Severance Package constitutes a "fringe benefit" under the Act, which it does not, that the Employment Agreement is ambiguous and must be construed in favor of Petitioner. While SJRC is somewhat unclear as to the legal argument being made by Petitioner, the issue of ambiguity (or lack thereof) in the Employment Agreement as it relates to an actual fringe benefit – accrued paid-time-off – is briefed in full in Section "D" below, and would be applicable to all forms of fringe benefits.

C. The Circuit Court did not abuse its discretion in ruling that the trial of this matter be decided by bench trial, and even if the Circuit Court committed error, which it did not, such error was "harmless."

Petitioner contends that the Circuit Court, without any analysis or consideration of the legal standards of waiver . . . forced this matter to be tried as a bench trial . . ." Petitioner's Brief, p. 31. As shown in the record, the Circuit Court correctly proceeded with a bench trial in this matter, as §7.6 of the subject Employment Agreement contains a jury waiver provision, and despite Petitioner's representations, the Circuit Court evaluated and analyzed the relevant legal standards of waiver in arriving at such conclusion.

Section 7.6 of the Employment Agreement contains the following jury waiver provision:

> Each party hereto hereby waives, to the fullest extent permitted by applicable law, any right it may have to a trial by jury in respect of any litigation directly or indirectly arising out of, under or in connection with this Agreement.

Appx., p. 18. Additionally, the subject Employment Agreement, pursuant to §7.5, is subject to the laws of the State of Texas. Appx., p. 17. As such, any question regarding the validity of the jury waiver provision must be resolved under Texas law.

In analyzing whether the jury waiver contained in Petitioner's employment agreement was valid, the Circuit Court looked at In re: Frank Kent Motor Co. 336 S.W.3d 374 (Tex. App. 2011) (held that at-will employee failed to rebut the presumption that he executed the conspicuous jury waiver in employer's handbook knowingly, intelligently, and voluntarily).[5] Frank Kent Motor Co. recognized that contractual jury waivers are enforceable, but they must be found to be a ***voluntary, knowing, and intelligent*** act that was done with sufficient awareness of

[5] Petitioner cites only cites to West Virginia law in her brief, but no matter which law actually applies, Texas or West Virginia, the standard of "voluntary, knowing, and intelligent" remains consistent in both. See State ex rel. Dunlap v. Berger, 211 W. Va. 549, 567 S.E.2d 265 (2002)(recognizing legally enforceable jury waivers and that a strict "knowing and intelligent waiver" standard should ordinarily apply to the waiver of the rights to a jury trial in the public court system).

the relevant circumstances and likely consequences. Absent the allegation of fraud or imposition in regard to a jury waiver, it is presumed to be knowing and voluntary if the provision is conspicuous within the document, and it is then incumbent upon the one seeking to invalidate the waiver to rebut such presumption. Id. at 378. Despite the opportunity to argue against the validity of the jury waiver at the pretrial hearing, as well as on appeal, Petitioner has wholly failed to rebut the presumption that Petitioner's waiver of a jury trial was anything but knowing and intelligent. Therefore, the Circuit Court's analysis of the jury waiver provision was correct, and the Circuit Court did not abuse its discretion in conducting a bench trial pursuant to the same.

Even if, assuming *arguendo*, that the Circuit Court erred in conducting a bench trial, such error was "harmless" pursuant to Rule 60 of the *West Virginia Rules of Civil Procedure*. Rule 60 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Similarly, it has been consistently held by this Court that "[o]n appeal of a case involving an action covered by the Rules of Civil Procedure, this Court will disregard and regard as harmless any error, defect or irregularity in the proceedings in the trial court which does not affect the substantial rights of the parties." Syl. Pt. 3, Original Glorious Church of God In Christ, Inc. of Apostolic Faith v. Myers, 179 W. Va. 255, 367 S.E.2d 30 (1988); Syl. Pt. 2, Boggs v. Settle, 150 W.Va. 330, 145 S.E.2d 446 (1965). The substantial rights of Petitioner were not affected by this matter proceeding to bench trial, and she has advanced no argument which would contend otherwise.

In the August 26, 2020 pretrial hearing, Petitioner's sole argument in support of a perceived effect of her substantial rights was to state, "We prepared this case for a jury, as did the Defendant. We prepared jury instructions, as did the Defendant. We debated the issues to be presented to the jury as did the Defendant." Appx., p. 301. Unpersuaded, the Circuit Court recognizing that the jury waiver simply determines the trier of fact, correctly noted that Petitioner's case to be presented is unaffected:

> Those are still the issues that are going to be presented to the Court if the Court interprets the employment agreement in favor of the Defense. This is what I am getting at. Other than the jury instructions, and those would be helpful to the Court in determining the issues, I am struggling to see how you are prejudiced.

Appx., pp. 301-302.

Because the decision by the Circuit Court to correctly apply the jury waiver provision contained in Petitioner's Employment Agreement and conduct a bench trial did not have any effect on the issues to be decided, the evidence presented, or Petitioner's ability to make her case at trial, any error of the Circuit Court, if one exists, was harmless error and should not be considered on appeal.

D. The Circuit Court did not err in applying Texas law to Petitioner's Employment Agreement, and Petitioner never challenged its validity and conceded that she would be prepared to proceed at trial under Texas law when offered additional time to prepare her case.

Petitioner claims that the Circuit Court, *sua sponte*, and without notice determined that Texas law would govern the subject Employment Agreement (executed by Petitioner in January 2019) pursuant to a valid choice of law provision contained in the same. With little legal analysis, Petitioner's three-paragraph argument centers on the mistaken belief that (a) the Circuit Court "interpreted" the choice of law provision; and (b) the legal issues concerning the application of the

Employment Agreement are not mutually exclusive of the claims for damages involving the West Virginia Wage Payment and Collection Act ("WPCA").

Petitioner's assignment of error relating to the valid choice of law provision contained in her employment agreement must fail, because at no time has Plaintiff ever contended that the choice of law provision is invalid and conceded that she would be prepared to proceed at trial under Texas law. Additionally, Petitioner's assignment of error fails because the choice of law provision requiring the Employment Agreement to be decided under Texas law is not mutually exclusive to Petitioner's claims under the WPCA. Finally, even if there were error in applying Texas law to the terms of the Employment Agreement, the result is "harmless error," as the only issue of law decided at trial relative to the Agreement was decided in Petitioner's favor.

i. The choice of law provision was valid, and Petitioner denied the opportunity to continue the trial date to address the validity of the choice of law provision and/or prepare to proceed under Texas law.

Section 7.5 of the Petitioner's Employment Agreement provides as follows:

> This agreement shall be governed by and construed in accordance with the laws of the State of Texas without regard to conflicts of law principles.

Appx., p. 17. West Virginia law has long recognized "the presumptive validity of a choice of law provision, (1) unless the provision bears no substantial relationship to the chosen jurisdiction or (2) the application of the laws of the chosen jurisdiction would offend the public policy of this State." W. Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc., 238 W. Va. 465, 471, 796 S.E.2d 574, 580 (2017)(quoting Manville Pers. Injury Settlement Tr. v. Blankenship, 231 W.Va. 637, 644, 749 S.E.2d 329, 336 (2013) (citing Bryan v. Massachusetts Mut. Life Ins. Co., 178 W.Va. 773, 777, 364 S.E.2d 786, 790 (1987); Syl. Pt. 1, General Elec. Co. v. Keyser, 166 W.Va. 456, 275 S.E.2d 289 (1981). The record on appeal, including *Petitioner's Brief*, is completely

devoid of any challenge to the validity of the choice of law provision. Therefore, the choice of law provision, under West Virginia law is presumed valid.

Rather than argue the validity of the choice of law provision, Petitioner instead focuses on the notion that the Circuit Court, *sua sponte* and without notice, unilaterally determined that Texas law would apply to the contract only five days before the trial was set to begin. This argument, however, is created solely from Petitioner's own acts and omissions.

First, the Circuit Court only applied the valid terms of the subject Agreement, which Petitioner agreed to and which became binding on January 2, 2019 – **608 days before the trial of this matter**. Moreover, as the transcript from the August 26, 2020 pretrial hearing makes clear, it is disingenuous for Petitioner to imply that she was somehow prejudiced by the alleged "11th hour" notice that the Agreement would be applied under Texas law, as Petitioner was provided every opportunity to continue the trial date to either prepare under Texas law, or question the validity of the choice of law provision:

Mr. Auvil:	. . . Are we proceeding under Texas law now because I know nothing about Texas law.
The Court:	That is what the contract says and maybe it is best –
Mr. Auvil:	I am just asking.
The Court:	And one of the cases that I relied on was In re: Frank Motor Co., the Supreme Court of Texas [361 S.W.3d 628, 629 (Tex. 2012)] as it related to the enforcement of a jury waiver agreement. ***Are the parties ready to proceed next week or do you need more time to prepare in light of – where do we stand now?***
Mr. Auvil:	If we are proceeding under West Virginia Contract law I am able to proceed.

If today we are finding out we are proceeding under Texas law, I know nothing about Texas law so I will have to learn something about it. I will try to do so before next week.

The Court: There are very few, if any, differences as it related to the jury waiver issue between Texas and West Virginia. It came down to whether it was knowing and intelligent and whether it was against public policy.

. . .

Mr. Auvil: That may be the case. I have not researched it. I accept the Court's view of that.

My question was are we proceeding under that law substantively in terms of whatever contract claim it is because the Plaintiff and Defendant clearly from the instruction you can see on the e-mail had reached an understanding as to what the factual issue was for resolution. If that is different under Texas law, I need to figure that out.

. . .

Mr. Reale: ***If the Plaintiff wants more time, I mean, we are not going to object to it.***

Mr. Auvil: ***I don't want more time.*** I need to know what I need to know.

The Court: The contract appears clear. The Court finds that it is controlled by Texas law.

Mr. Auvil: Okay. I just want to know because today if the first time that I am hearing about it, in this hearing.

The Court: You should have probably read the contract.

Mr. Auvil: Whether I did or not, we've already covered. I appreciate the Court's position.

Appx., pp. 304 – 307 (emphasis supplied). Petitioner was specifically offered more time to prepare under Texas law, to which SJRC indicated it would not object to. Appx., p. 306. Instead,

Petitioner's counsel stated, "**I don't want more time.**" Id.; see Jennings v. Smith, 165 W. Va. 791, 791, 272 S.E.2d 229, 229 (1980)("'A judgment will not be reversed for any error in the record introduced by or invited by the party asking for the reversal.' Syl. pt. 21, State v. Riley, 151 W.Va. 364, 151 S.E.2d 308 (1966)"). For Petitioner to now suggest on appeal that the notice of the application of Texas law to the Agreement was too close in time to the trial date is both inconsistent with the facts and is a built-in argument on appeal of counsel's own making.

ii. The choice of law provision is inapplicable to claims pursuant to the West Virginia Wage Payment and Collection Act.

Petitioner contends that because she has asserted claims pursuant to the WVWPCA, that the subject Employment Agreement cannot possibly be subject to interpretation under Texas law. Quite simply, this argument fails, as the employment contract is not mutually exclusive of the WVWPCA, and vice versa.

Petitioner correctly notes that the WVWPCA cannot be waived by private agreement. See W. Va. Code §21-5-10 (". . . no provision of this article may in any way be contravened or set aside by private agreement . . ."). Although Petitioner does not elaborate on how the Texas choice of law provision allegedly contravenes the WVWCPA, it is of no consequence, because that has not occurred in the instant matter. Nothing in the subject employment agreement precludes the WVWPCA from being applied.

What Petitioner fails to recognize is that before it is possible to proceed with the application of West Virginia law pursuant to the WVWPCA, it must first be determined whether there is any recovery available to her under the specific conditions required under the agreement. See generally Appx. pp. 13-14 (Art. 4 of Employment Agreement). Specifically, §4.7 of the Employment Agreement provides:

> "Except as set forth in this Agreement, the Employee shall not be entitled to any compensation for wrongful dismissal, severance pay, or termination pay, if the employment of the Employee is terminated pursuant to the terms hereof."

Appx. p. 14. Put simply, only if Petitioner were entitled to severance pay pursuant to the terms of the Agreement, which is governed by the valid choice of law provision, could the application of the WVWPCA even be considered. Even the Petitioner appears to acknowledge this position in her "Statement Regarding Oral Argument," recognizing that the Court must first determine whether Petitioner is entitled severance pay under the terms of the Agreement ***before*** it can "reach the question of whether or not the severance package at issue in this matter constitutes 'wages' under the [WVWPCA] . . ." Petitioner's Brief, p. 22.

Therefore, Petitioner's argument that the WVWPCA precludes application of the valid choice of law provision and the contract being interpreted under Texas law must fail.[6]

iii. Even if error occurred in applying Texas law to the Employment Agreement, such error was "harmless" and does not affect the substantial rights of Petitioner.

In the instant matter, Petitioner seeks reversal and remand of the (correct) pretrial ruling by the Circuit Court that Texas law governs the terms of the Petitioner's employment agreement. However, assuming, *arguendo*, that decision was in error, the same must be considered "harmless error," as the only possible issue to be decided as a conclusion of law at the trial of this matter was in favor of Petitioner and against SJRC.

Rule 60 of the *West Virginia Rules of Civil Procedure* provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new

[6] Following Petitioner's logic, foreign corporations doing business in this state, who desire to contract under the law of another state in employment contracts, would never be able to have a choice of law provision based on the premise that any employer who pays wages in West Virginia is subject to the WVWCPA and therefore unable to apply anything other than West Virginia law to its employment agreements.

> trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Similarly, it has been consistently held by this Court that "[o]n appeal of a case involving an action covered by the Rules of Civil Procedure, this Court will disregard and regard as harmless any error, defect or irregularity in the proceedings in the trial court which does not affect the substantial rights of the parties." Syl. Pt. 3, Original Glorious Church of God In Christ, Inc. of Apostolic Faith v. Myers, 179 W. Va. 255, 367 S.E.2d 30 (1988); Syl. Pt. 2, Boggs v. Settle, 150 W.Va. 330, 145 S.E.2d 446 (1965).

At trial, the only questions before the Circuit Court were (a) whether SJRC materially breached the subject Agreement – a question of law, and (b) whether Petitioner resigned her position with SJRC for "good reason" – a question of fact. As such, the application of Texas law by the Circuit Court could have only applied to the question of whether the breach of the subject Agreement was "material." Concerning that question, the Circuit Court held in its Trial Order, in relevant part:

> Based upon the evidence presented, the Court FINDS that SJRC materially breached its obligation to provide the plaintiff compensation or benefits by failing to make payments of the base salary in accordance with the Company's regular payroll practices.

Appx., p. 382. This ruling by the Court was made squarely in Petitioner's favor. Petitioner, inexplicably, now seeks remand and reversal based upon the application of Texas law to Petitioner's benefit. Because the only conclusion of law possible under Texas law at the trial of this matter was made in favor of Petitioner, whether or not the decision to apply Texas law was

made in error is of no consequence, is not inconsistent with substantial justice, and is "harmless error." W. Va. R. Civ. P. 61.

E. The Circuit Court did not err in ruling upon summary judgment that §4.6 of the Employment Agreement is sufficiently express and specific so that Petitioner could easily understand the amount of unused fringe benefit pay, if any, owed to her upon separation from employment.

Petitioner contends on appeal that her claims for accrued paid-time-off ("PTO") were improperly dismissed and that she was entitled to such amounts according to her Employee Handbook (*not her Employment Agreement*). It is Petitioner's contention that because her Employment Agreement does not specifically reference accrued PTO, that she is entitled to such payment pursuant to Meadows v. Wal-Mart Stores, 207 W. Va. 203, 530 S.E.2d 676 (1999). Petitioner's three-paragraph analysis has no basis in fact and is not consistent with West Virginia law, as the terms of Petitioner's employment made abundantly clear what she was entitled at the separation of employment.[7]

In Meadows, this Court made clear that whether fringe benefits are paid at the time of separation is defined by the terms of the employment. See Syl. Pt. 5, Id. In the present appeal, the terms of Petitioner's employment were specifically laid out in her Employment Agreement, which Petitioner both alleged and specifically acknowledged in Paragraph 2 of her Complaint. Appx., p. 2 ("The terms and conditions of Plaintiff's employment with defendant are set forth in a contract titled "Employment Agreement . . ."). This is also supported by §3.8 of the Employee Handbook provided to Petitioner which specifically provides: "**if employee is under an employment agreement, employment termination by either party *will follow the terms of the contract*.**

[7] Texas law is inapplicable to this assignment of error, as Petitioner's claim for accrued PTO is not part of her employment agreement, as it is clearly not included as part of any severance or other entitlement at the time of separation of employment. Moreover, if Petitioner were entitled PTO, which she is not, Petitioner seeks civil penalties pursuant to the West Virginia Wage Payment Collection Act.

(emphasis supplied). As such, the terms of her termination are unequivocally and unambiguously governed by her Employment Agreement, and any argument by Petitioner citing to the Employee Handbook as a legal basis for her position is both irrelevant and inapplicable to the present matter.

Because only the terms of the employment – i.e., the Employment Agreement – defines the payment or nonpayment of accrued PTO at separation, a determination under Meadows must be made as to whether the Employment Agreement permits the payment of accrued PTO.

Syllabus Point 6 of Meadows provides, in relevant part:

> Terms of employment concerning the payment of unused fringe benefits to employees must be express and specific **so that employees understand the amount of unused fringe benefit pay, if any, owed to them upon separation from employment.**"

207 W. Va. 203, 530 S.E.2d 676 (1999)(emphasis supplied). Petitioner's Employment Agreement speaks directly to what Plaintiff is eligible to receive upon termination of employment if she were eligible for severance pay, which she is not as discussed above, under §4.6(a) of the Employment Agreement:

> The company may terminate the employment of the Employee in its absolute discretion, without Cause, and for any reason, upon providing the Employee with one (1) month notice and a Severance Package (the "Severance Package") consisting of Base salary paid monthly in accordance with the Company's normal payroll practices for the lesser of (A) the number of full months of the then remaining term of the Agreement; or (B) three (3) months, together with health insurance coverage during the severance period. The provisions of the Severance Package shall constitute **full and final satisfaction of all rights and entitlements that Employee has or may have arising from or related to the termination of his/her employment,** whether pursuant to statute, contract, common law, or otherwise.

Appx. pp. 13-14. (emphasis supplied). The Employment Agreement specifically limits that which may be payable to Petitioner – three months of her "Base Salary" Id. "Base Salary" is a term that is specifically defined in Section 3.1 of the Employment Agreement:

> The Company agrees to pay the Employee a base salary of $115,000.00 per annum (the "Base Salary"), prorated for any partial year. Payment of the Base Salary shall be made in accordance with the Company's regular payroll practices, as they are established and may be changed from time to time, less any deductions or withholdings required by law. Nowhere in the Agreement is there any mention of payment of accrued vacation or other fringe benefits.

Appx., p. 12. Accrued PTO is neither contemplated, nor included, in the very specific terms of what may be payable to Petitioner upon separation of employment if certain conditions were met, which they were not. For Petitioner to suggest otherwise is grasping at straws to manufacture ambiguity where none exists.

Understanding that the Employment Agreement controls the terms of employment, and that the provisions therein determine what if any accrued PTO is payable upon separation of employment, the Circuit Court, in granting Respondent's Motion for Summary Judgment, correctly and specifically held:

> The Court FINDS that the employment agreement sets forth what plaintiff would be entitled to at the time of separation. Specifically, **section 4.6 sets forth the terms of a severance package as full and final satisfaction if the plaintiff qualifies for the package at the time of separation.**

Appx., p. 267 (emphasis supplied).

Because the Employment Agreement controls the terms of Petitioner's employment, and because §4.6 of the Employment Agreement is sufficiently express and specific so that Petitioner could easily understand the amount of unused fringe benefit pay, if any, owed to her upon separation from employment as required by Meadows, the Circuit Court's ruling upon summary judgment that Petitioner was only eligible for the severance package as "full and final satisfaction" at the time of separation, which expressly and unambiguously does not include PTO. Therefore, Petitioner's assignment of error relative to PTO must fail.

V. CONCLUSION

For the reasons set forth above, and for any other additional reasons apparent to this Honorable Court, Respondent St. Joseph Recovery Center, LLC respectfully requests that the rulings of the Circuit Court of Wood County be affirmed and its *Trial Order* upheld.

Respectfully submitted,

ST. JOSEPH RECOVERY CENTER, LLC

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0368

AMIE MILLER,

Petitioner,

v.

ST. JOSEPH RECOVERY CENTER, LLC,
a Delaware limited liability company,
ST. JOSEPH'S OPERATING COMPANY, LLC,
a Delaware limited liability company, and
SILTSTONE HOLDINGS, LLC,
a Delaware limited liability company,

Respondents.

Appeal from final order of the
Circuit Court of Wood County
(Civil Action No. 19-C-226)

CERTIFICATE OF SERVICE

I, undersigned counsel for Respondent, St. Joseph Recovery Center, LLC, do hereby certify that on this 16th day of February 2021, true and accurate copies of **RESPONDENT'S BRIEF** were served upon the following counsel of record, via United States mail, postage prepaid:

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336 S.W.3d 374
Court of Appeals of Texas,
Fort Worth.

In re FRANK KENT MOTOR COMPANY d/b/a Frank Kent Cadillac, Relator.

No. 02–10–00462–CV.
|
Feb. 24, 2011.

Synopsis

Background: Employee sued employer for age discrimination and demanded a jury trial in his original petition. Employer filed a motion to strike employee's jury demand, arguing that employee waived his right to a jury trial. The 236th District Court, Tarrant County, Thomas Wilson Lowe, III, J., denied employer's motion to strike employee's jury demand. Employer filed petition for mandamus, directing the trial court to enforce the jury waiver.

The Court of Appeals, Bill Meier, J., held that at-will employee failed to rebut the presumption that he executed the conspicuous jury waiver in employer's handbook knowingly, intelligently, and voluntarily.

Writ of mandamus conditionally granted.

Attorneys and Law Firms

*376 Robert Ruotolo, Christopher M. Albert, Busch, Ruotolo & Simpson, L.L.P., Dallas, TX, for Relator Frank Kent Motor Company d/b/a Frank Kent Cadillac.

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PANEL: LIVINGSTON, C.J.; MEIER and GABRIEL, JJ.

OPINION

BILL MEIER, Justice.

I. INTRODUCTION

Relator Frank Kent Motor Company d/b/a Frank Kent Cadillac seeks mandamus relief from the trial court's November 30, 2010 order denying its motion to strike Real Party in Interest Tony Garcia's jury demand. We will conditionally grant Frank Kent's petition for writ of mandamus.

II. FACTUAL AND PROCEDURAL BACKGROUND

Garcia sued Frank Kent for age discrimination and demanded a jury trial in his original petition. Frank Kent thereafter filed a motion to strike Garcia's jury demand, arguing that Garcia waived his right to a jury trial. Frank Kent attached to its motion a document entitled "Frank Kent Motor Company Employee Handbook Acknowledgment & Mutual Waiver of Jury Trial," which is signed by Garcia and dated May 20, 2008. The document states in part:

> ***FKMC AND EACH EMPLOYEE THAT SIGNS THIS ACKNOWLEDGMENT, RECEIVES A COPY OF THIS HANDBOOK, HAS KNOWLEDGE OF THIS POLICY, AND CONTINUES TO WORK FOR FKMC THEREAFTER, HEREBY WAIVES THEIR RIGHT TO TRIAL BY JURY AND AGREE TO HAVE ANY DISPUTES ARISING BETWEEN THEM RESOLVED BY A JUDGE OF A COMPETENT COURT SITTING WITHOUT A JURY.***

It is undisputed that Garcia and Frank Kent contracted to waive a jury.[1]

Garcia responded that Frank Kent's motion should be denied because the jury waiver "was not signed under circumstances which were 'knowing, voluntary and intelligent.' " Garcia reached this conclusion by considering the facts contained in an affidavit that he attached to his response in light of several factors set out in this court's opinion in *Mikey's Houses LLC v. Bank of Am., N.A.*, 232 S.W.3d 145, 153 (Tex.App.-Fort Worth 2007, no pet.), *mand. granted, In re Bank of Am., N.A.*, 278 S.W.3d 342 (Tex.2009) (orig. proceeding). Garcia's affidavit set out the following facts:

- When the jury waiver was first presented to Garcia, he told a manager that he was not going to sign it.

*377 • At some point thereafter (we do not know how long), a supervisor asked Garcia about his failure to sign the jury waiver, and Garcia—for the second time—said that he was not going to sign the waiver.

- The supervisor told Garcia that he "might" lose his job if he did not sign the jury waiver.
- Garcia asked the supervisor if he "had any choice, and she said that [he] did not."
- Garcia then signed the jury waiver "on the spot without any negotiation" "[b]ecause of what the supervisor told [him] that day."
- Garcia did not fully understand the legal significance of the document, but he knew enough that he did not like the language of the document and did not want to sign it.
- Garcia believed that he "likely" would have lost his job had he asked for time to hire a lawyer to analyze and negotiate the document.
- Garcia did not have a lawyer to evaluate the jury waiver.
- Frank Kent never told Garcia that it was willing to make changes to the jury waiver, nor does Garcia believe that Frank Kent was willing to make changes to the jury waiver.

Frank Kent replied that Garcia's affidavit failed to demonstrate that he did not sign the jury waiver knowingly, voluntarily, and intelligently, and it objected to portions of Garcia's affidavit.[2] The trial court denied Frank Kent's motion to strike Garcia's jury demand. Frank Kent seeks mandamus relief directing the trial court judge to enforce the jury waiver.

III. STANDARD OF REVIEW

Mandamus relief is proper only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex.2004) (orig. proceeding). A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992) (orig. proceeding). A trial court has no discretion in determining what the law is or in applying the law to the facts. *Prudential*, 148 S.W.3d at 135. We may not substitute our decision for that of the trial court unless the relator establishes that the trial court could reasonably have reached only one decision and that the trial court's decision is arbitrary and unreasonable. *Walker*, 827 S.W.2d at 839–40. This burden is a heavy one. *In re CSX, Corp.*, 124 S.W.3d 149, 151 (Tex.2003) (orig. proceeding). Mandamus review is proper to address whether a presuit jury waiver is enforceable. *Prudential*, 148 S.W.3d at 138.

IV. MANDAMUS RELIEF IS APPROPRIATE

Frank Kent argues that the trial court abused its discretion by denying its motion to strike Garcia's jury demand. It contends that we should presume that Garcia signed the jury waiver knowingly, intelligently, and voluntarily because Garcia did not allege or prove any fraud or imposition regarding the jury waiver; that Garcia's affidavit does not overcome the presumption that he signed the jury waiver knowingly, intelligently, and voluntarily; and, ***378** therefore, that the jury waiver is enforceable. Garcia responds that he rebutted the presumption that he signed the jury waiver voluntarily because the uncontroverted facts contained in his affidavit show that he was coerced to sign the jury waiver and the factors used to evaluate voluntariness support his position.

As the dissent in *Mikey's Houses* recognized, although waiver is ordinarily a question of fact, when the facts and circumstances are admitted or clearly established, the question becomes one of law. 232 S.W.3d at 166 (Livingston, J., dissenting). The evidence in *Mikey's Houses* was undisputed; therefore, the enforceability of the waiver in that case was determined as a matter of law. Here, the facts set out in Garcia's affidavit were uncontroverted.[3] Consequently, we determine whether the conspicuous jury waiver is enforceable as a matter of law.

Contractual jury waivers are enforceable, but they must be found to be a voluntary, knowing, and intelligent act that was done with sufficient awareness of the relevant circumstances and likely consequences. *Prudential*, 148 S.W.3d at 133–34; *In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, 257 S.W.3d 486, 490 (Tex.App.-Houston [14th Dist.] 2008, orig. proceeding [mand. denied]). If there is an allegation of fraud or imposition, then the party seeking to enforce a jury waiver has the burden to show that the waiver was executed knowingly and voluntarily. *Bank of Am.*, 278 S.W.3d at 345 (overruling *Mikey's Houses* burden analysis). If, however, there is no allegation of fraud or imposition, then a conspicuous waiver of trial by jury is presumed to be knowing and voluntary and the party opposing the waiver has the burden to rebut that presumption. *Id.; see In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex.2006) (orig. proceeding).

Garcia has not alleged any fraud or imposition in regard to the jury waiver. Therefore, the jury waiver is presumed to be knowing and voluntary if it is conspicuous. The jury waiver is written in capital letters, is in bold, and is underlined. The supreme court has held that such a jury waiver is conspicuous. *See Gen. Elec.*, 203 S.W.3d at 316; *see also* Tex. Bus. & Com.Code Ann. § 1.201(b)(10) (Vernon 2009) (defining "conspicuous" to mean "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it."). Accordingly, the jury waiver is presumed to be knowing and voluntary, and Garcia had the burden to rebut this presumption. *See Bank of Am.*, 278 S.W.3d at 345; *Gen. Elec.*, 203 S.W.3d at 316.

Considerations that are commonly relevant to a determination of whether a contractual jury waiver was entered into knowingly and voluntarily include (1) the bargaining power of the parties, (2) whether the parties were represented by counsel and whether the counsel had an opportunity to examine the agreement, (3) the experience of the parties in negotiating the type of contract signed, (4) whether the party challenging the jury waiver had an opportunity to negotiate and examine the contract, (5) the conspicuousness of the waiver, and (6) the actual negotiations over the clause. *See Prudential,* 148 S.W.3d at 134 (considering several factors); *Mikey's Houses,* 232 S.W.3d at 166 (Livingston, J., dissenting) (identifying factors).

***379** Instead of simply applying the facts set out in Garcia's affidavit to these considerations, as Garcia does in his response, we are compelled to first address the status of the parties that are involved in this dispute, as it is relevant to our analysis. *Prudential* involved litigants who were parties to a commercial lease. 148 S.W.3d at 127. *General Electric* involved litigants who were parties to a promissory note and a guaranty. 203 S.W.3d at 314. *Bank of America* involved litigants who were parties to a real estate contract. 278 S.W.3d at 343. Unlike in those cases, here, it is undisputed that Garcia was an *at-will employee* of Frank Kent when he executed the jury waiver.[4]

It is well established that specific rules accompany the at-will employment relationship. *See, e.g., Tex. Farm Bureau Mut. Ins. Cos. v. Sears,* 84 S.W.3d 604, 608 (Tex.2002) (explaining that an at-will employee may be fired for any reason or no reason at all, except that the at-will employee may not be fired because he refused to act illegally); *see also Ed Rachal Found. v. D'Unger,* 207 S.W.3d 330, 332 (Tex.2006). In explaining how modifications may be made to the at-will employment relationship, the supreme court stated that, generally, at-will employees must accept the new terms or quit:

> In employment at will situations, either party may impose modifications to the employment terms as a condition of continued employment. The party asserting the modification still must prove that the other party agreed to modify the employment terms. *Generally, when the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law.* Thus, to prove a modification of an at will employment contract, the party asserting the modification must prove two things: (1) notice of the change; and, (2) acceptance of the change.

Hathaway v. Gen. Mills, Inc., 711 S.W.2d 227, 229 (Tex.1986) (emphasis added and citations omitted).

In *In re Halliburton Co.*, the supreme court considered whether an arbitration agreement between an employer and an at-will employee was supported by sufficient consideration and, among other things, whether the provision was unconscionable. 80 S.W.3d 566, 566, 571–72 (Tex.2002) (orig. proceeding). In addressing the at-will employee's argument that the arbitration provision was procedurally unconscionable, the supreme court stated,

> Myers first asserts that the provision is procedurally unconscionable as there was gross disparity in bargaining power between the parties because Myers had no opportunity to negotiate; Halliburton told him to accept the Program or leave. *But in Hathaway, we recognized that an employer may make precisely such a "take it or leave it" offer to its at-will employees. Because an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, merely to premise continued employment on acceptance* ***380** *of new or additional employment terms.*

Id. at 572 (emphasis added and citations omitted); *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 (5th Cir.2004) (citing *Halliburton* and rejecting argument that agreement was unconscionable because appellee "used its superior bargaining position to coerce potential employees").

Although this case concerns a contractual jury waiver and not an arbitration agreement, the supreme court has confirmed that "our jurisprudence 'should be the same for all similar dispute resolution agreements.' " *See Bank of Am.*, 278

S.W.3d at 343–44 (quoting *Prudential,* 148 S.W.3d at 135); *see also Mikey's Houses,* 232 S.W.3d at 161 (Livingston, J., dissenting) ("But in light of Texas's strong public policy of enforcing freedom of contract, it does not make sense to treat valid contractual jury waivers ... differently from arbitration agreements...."). Garcia directs us to no authority demonstrating that the standards underlying the employer/employee at-will relationship are irrelevant in the context of addressing the enforceability of a contractual jury waiver or are an exception thereto.[5] Therefore, *Halliburton's* at-will employee analysis is relevant to whether Garcia successfully rebutted the presumption that he knowingly and voluntarily executed the waiver.

With this background, we now evaluate Garcia's argument that he rebutted the presumption of a knowing and voluntary jury waiver. Garcia opined in his affidavit that Frank Kent gave him no choice but to sign the jury waiver, stating that he might have been fired if he did not sign it. Garcia thus construed Frank Kent's actions as presenting the jury waiver to him on a "take it or leave it" basis. In light of this uncontroverted factual foundation, Garcia argues that he successfully rebutted the presumption of a knowing and voluntary jury waiver. But Garcia's execution of what he believed to be a "take it or leave it" jury waiver did not render the waiver unenforceable for lack of voluntariness simply because Frank Kent presented it to him on a "take it or leave it" basis. This is because, under *Halliburton,* Frank Kent legally could have made such a "take it or leave it" offer to Garcia, an at-will employee. *See Halliburton,* 80 S.W.3d at 572. Concluding that Garcia overcame the presumption of a knowing and voluntary jury waiver *only* because the jury waiver was presented to him on a "take it or leave it" basis would (1) effectively create an exception to the at-will employment doctrine that we are not prepared—and, indeed, have no authority—to make and (2) erroneously distinguish *Halliburton's* relevant at-will employment analysis, contrary to *Bank of America's* guidance about analyzing dispute resolution agreements.

Further, each consideration set out above weighs in favor of the presumption that Garcia executed the jury waiver knowingly and voluntarily. Regarding relative bargaining power, Garcia apparently had to accept Frank Kent's modification to his at-will employment or face termination. ***381** On these facts, this is not an example of employer overreaching or coercion; it is simply the nature of at-will employment. Regarding representation by counsel, if Garcia had an attorney, the attorney could have asserted argument after argument against the jury waiver, but Frank Kent could have rejected each and every one and responded, "Take it or leave it." As for the experience of the parties and the negotiations surrounding the jury waiver's execution, Garcia's at-will employment relationship with Frank Kent permeates the analysis of these considerations too, and each consideration weighs in favor of Frank Kent.

Garcia agrees that Frank Kent had the authority to fire him, but he argues that Frank Kent did not have the authority to coerce him to sign the jury waiver. *See Bank of Am.,* 278 S.W.3d at 346; *Prudential,* 148 S.W.3d at 134. According to Garcia, "[t]he jury waiver contract, like all other contracts in this State, was voidable upon proof that [Garcia] was forced to execute it involuntarily." While we certainly agree that a jury waiver must be executed voluntarily, Garcia's arguments erroneously conflate coercion with an employer's well-settled power to make a "take it or leave it" offer to its at-will employee. *See Carter,* 362 F.3d at 301 (rejecting argument that employer coerced employees to sign arbitration agreement). Further, the facts contained in Garcia's affidavit do not support his argument that he overcame the presumption of a knowing and voluntary jury waiver by a showing of coercion. *See In re D.E.H.,* 301 S.W.3d 825, 828 (Tex.App.-Fort Worth 2009, pet denied) (reasoning that coercion occurs if someone is compelled to perform an act by force or threat); *see also* Tex. Penal Code Ann. § 1.07(a)(9) (Vernon Supp. 2010) (defining coercion to mean a threat, however communicated, to commit an offense; to inflict bodily injury in the future on the person threatened or another; to accuse a person of any offense; to expose a person to hatred, contempt, or ridicule; to harm the credit or business repute of any person; or to take or withhold action as a public servant, or to cause a public servant to take or withhold action); *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.,* 994 S.W.2d 830, 837 (Tex.App.-Houston [1st Dist.] 1999, no pet.) (listing elements of economic duress or business coercion, which include a threat of an act that the actor had no legal right to do). Frank Kent had a legal right to discharge Garcia.

We hold that under the specific facts of this case, Garcia failed to rebut the presumption that he executed the conspicuous jury waiver knowingly, intelligently, and voluntarily. Accordingly, the trial court clearly abused its discretion by denying Frank Kent's motion to strike Garcia's jury demand. We sustain Frank Kent's sole issue.

V. CONCLUSION

Having sustained Frank Kent's sole issue, we conditionally grant a writ of mandamus directing the trial court (1) to vacate the November 30, 2010 order and (2) to grant Frank Kent's motion to strike Garcia's jury demand. A writ will issue only if the trial court fails to do so.

All Citations

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Footnotes

1 The agreement expressly bound both parties; Garcia's signature (and facts contained in his affidavit) evidence his notification of the agreement, and Garcia continued working for Frank Kent from May 20, 2008 to January 15, 2009 (the date Frank Kent fired Garcia) with knowledge of the agreement. *See In re Dallas Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161, 162–63 (Tex.2006) (orig. proceeding) (reaffirming (1) that "[a]n employer may enforce an arbitration agreement entered into during an at-will employment relationship if the employee received notice of the employer's arbitration policy and accepted it" and (2) that "[a]n at-will employee who receives notice of an employer's arbitration policy and continues working with knowledge of the policy accepts the terms as a matter of law").

2 The trial court sustained only objection number 5, in which Frank Kent objected "to the first and second sentence[s] of paragraph number 7 of Garcia's affidavit where [he] testifies that the Jury Waiver was prepared by the Defendant's attorney as speculation, conclusory and irrelevant."

3 The lone objection sustained by the trial court does not effectively controvert the relevant parts of Garcia's affidavit.

4 There is language in the document that contains the jury waiver explaining that in the absence of a written agreement between an employee and Frank Kent, all employees of Frank Kent are employees at will, and there is no evidence or argument by either party that Garcia had a written agreement with Frank Kent. *See Ronnie Loper Chevrolet–Geo, Inc. v. Hagey,* 999 S.W.2d 81, 83 (Tex.App.-Houston [14th Dist.] 1999, no pet.) (reasoning that the presumption of at-will employment may only be rebutted by an agreement that directly limits, in a "meaningful and special way," the employer's right to terminate at will).

5 Procedurally, waiving a jury trial may be less harsh than agreeing to arbitration. In *Prudential,* the supreme court explained that,

> [I]f parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal.

148 S.W.3d at 132.

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