NO. 21-0423

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. WILLIAMS WPC- 1, LLC and LEE DAWSON

Defendant Below, Petitioner,

v.

COTY LANTZ,

Plaintiff Below, Respondent.

On Appeal from the Circuit Court of Marshall County, West Virginia
Civil Action No, 21-C-6

BRIEF OF RESPONDENT

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(3) QUESTIONS PRESENTED

Petitioner presents four questions for review. Each is addressed separately below, and there is no need to restate the questions in this brief. Respondent asserts that there exists only one central question to be presented and that is whether under West Virginia law a valid contract, the Arbitration Agreement, existed between the petitioner and the respondent.

(4) STATEMENT OF THE CASE

Respondent Coty Lantz filed a wrongful termination lawsuit against his former employer Williams WPC as a result of his January 6, 2021, termination. Petitioner then filed a motion to dismiss and motion to compel arbitration asserting that Williams WPC had in effect as of January 1, 2020, an Arbitration Agreement (AR at p. 23) with all its employees.

Petitioner Williams WPC presented evidence to the trial court that it provided each employee via email, the company's website, and regular mailing a copy of the Arbitration Agreement. These were the sole efforts of the petitioner; therefor, petitioner Williams WPC admits by omission that respondent Lantz (and all employees) never signed the Arbitration Agreement, never acknowledged receipt of the Arbitration Agreement, never had to confirm electronically receipt of the arbitration agreement, nor ever had to electronically sign the Arbitration Agreement. Petitioner Williams WPC further admits by omission that it never conducted any sort of meeting, whether in person, telephonically or online, with its employees where the Arbitration Agreement was discussed or explained. Petitioner Williams WPC produced no evidence to the trial court that respondent Lantz ever consented or agreed to be bound by the Arbitration Agreement.

As evidenced by the respondent's affidavit (AR at p. 104), respondent Lantz never saw the Arbitration Agreement until after counsel for the petitioner provided it to counsel for

Lantz. There exists no copy of the Arbitration Agreement bearing the respondent's signature, assent, or acknowledgement.

(5) SUMMARY OF ARGUMENT

The sole issue presented in this appeal is whether a valid arbitration agreement existed between the parties. West Virginia laws/rules of contract formation apply, and the petitioner failed to present sufficient evidence of a contract between petitioner and respondent.

(1) Petitioner presented zero evidence to the trial court of mutual assent to the Arbitration Agreement.

(2) Respondent's continued employment did not constitute consideration for the Arbitration Agreement.

(3) Petitioner's argument that a mutual agreement to arbitrate covered claims is sufficient consideration for an arbitration agreement is irrelevant because petitioner is unable to show evidence of a mutual agreement.

(4) Petitioner must show evidence of mutual assent to the Arbitration Agreement by the parties, and the trial court was correct in ruling that petitioner produced no such evidence.

The trial court appropriately denied the petitioner's motion to dismiss because the petitioner failed to establish the elements of a valid contract between the parties.

(6) STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for the Respondent asserts that oral argument is not necessary pursuant to the criteria in Appellate Rule 18(a). The issues in this appeal have been authoritatively decided by this Court in the past, and the facts and legal arguments are adequately presented in the briefs and

record on appeal such that the decisional process would not be significantly aided by oral argument.

(7) ARGUMENT

a. The respondent does not dispute that the petitioner has properly invoked the original jurisdiction of this Court.

Respondent concedes that the review of circuit court orders adjudicating arbitration motions fits within the original jurisdiction of this Court.

b. Respondent agrees that review by this Court is appropriate.

c. Respondent disagrees that the Circuit Court's decision presents new and important issues of law for employees and employers in West Virginia.

The petitioner asserts in its Petition that this Court has not answered the question of whether the act of continuing employment is sufficient evidence of assent to the terms of an arbitration agreement when the continuation of employment is the only manner of acceptance identified within the terms of the arbitration agreement. Respondent asserts that this Court has addressed the question as to whether continued employment constitutes consideration for an employment-related contract.

This Court has found that the promise of continued employment does not constitute consideration for an employer to force an employee into a covenant not to compete **after** employment has started.

> If a covenant not to compete is contracted after employment has been commenced without restriction, there must be new consideration to support it. *Pemco Corp. v. Rose*, 163 W. Va. 420, 257 S.E.2d 885, 889 (1979). In *Pemco*, we found that neither Virginia nor West Virginia had decided whether continued employment is adequate consideration for a new contract and divined that it would not be adequate in Virginia. It certainly is not adequate here.

Environmental Prods. Co. v. Duncan, 168 W.Va. 349, 351, 285 S.E.2d 889 (1981). No reason exists for this same analysis not to apply to an arbitration agreement forced upon an employee, like the respondent, seven years into his employment with a company. Both a covenant not to compete and an arbitration agreement are contracts, and normal rules of contract interpretation would apply. Continued employed does not constitute consideration for a new employment-related contract based on this Court decision in *Environmental Prods. Co. v. Duncan.*

d. The Circuit Court correctly determined that no valid contract for arbitration existed between the parties.

i. Mutual assent is an absolute requirement for the Petitioner to establish a valid arbitration agreement.

The Circuit Court's Order did not limit prima facie evidence of mutual assent to the petitioner producing a signed copy of the Arbitration Agreement. (AR at pp. 238-41). In fact, the circuit court made several findings with regard to mutual assent, namely that the petitioner could not produce either a signed Arbitration Agreement, any evidence that respondent acknowledged receipt of the agreement, or evidence in any form that respondent consented or agreed to be bound by the Arbitration Agreement. (AR at p. 239). Petitioner does not seem in any way to dispute these findings of the circuit court.

When a Circuit Court in West Virginia is called upon to rule on a motion to compel arbitration under the Federal Arbitration Act, "the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties, and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syl. Pt. 2, *New v. GameStop, Inc.*, 232 W.Va. 564, 753 S.E.2d

62 (2013). In this case only the existence of a valid arbitration agreement was at issue. .

"In considering whether an arbitration agreement has been validly formed, normal rules of contract interpretation apply." *New*, 232 W.Va. at 571, 753 S.E.2d at 69. "West Virginia contract law requires mutual assent to form a valid contract." *Id.* at 572, 70. The decisions of this Court in *New*, as well as the decision in *Rent-A-Center, Inc. v. Ellis*, 241 W.Va. 660, 827 S.E.2d 605 (2019), involve factual scenarios where an employer sought to enforce an arbitration agreement against an employee, and in each case the employer produced a signed arbitration agreement or a signed acknowledgment of the enforceability or applicability of an arbitration agreement.

The circuit court concluded as a matter of law in its Order that "Defendants are unable to show in any form that the plaintiff signed, acknowledged, consented or agreed to the arbitration agreement." (AR at p. 240). It's not that the petitioner failed to produce an Arbitration Agreement signed by the respondent; petitioner failed to offer any evidence of mutual assent whatsoever. For this reason alone, the request for a writ or prohibition should be denied.

ii. Continued employment cannot be used in this case as evidence of mutual assent to an arbitration agreement.

This brief already has covered that continued employment in West Virginia would not constitute the necessary consideration for an arbitration agreement. Petitioner also makes the argument that continued employment can be used as evidence of mutual assent. However, the facts in this case clearly demonstrate that the respondent's continued employment was never meant to show in any way his consent to the Arbitration Agreement.

Petitioner asserts in this case that the conduct of respondent Lantz in continuing his employment is sufficient evidence of mutual assent. The fatal flaw of this argument is the affidavit of the respondent. (AR at p. 104). Respondent clearly testified that he had never actually seen the Arbitration Agreement prior to his filing suit in this case; therefore, even accepting petitioner's legal assertion, respondent's intent in continuing employment had nothing to do with assenting to an arbitration agreement about which he knew nothing. Petitioner produced no evidence that respondent's continued employment was evidence of respondent wanting to be bound by the Arbitration Agreement.

iii. Petitioner's argument that a mutual agreement to arbitrate covered claims is sufficient consideration for an arbitration agreement is irrelevant because petitioner is unable to show evidence of a mutual agreement.

Petitioner never addressed the issue of consideration in front of the circuit court. Now petitioner asserts that a mutual agreement to arbitrate covered claims is sufficient evidence of consideration, citing *Hampden Coal, LLC v. Varney*, 240 W.Va. 284, 810 S.E.2d 286 (2018). The facts of *Hampden Coal*, however, involved a signed arbitration agreement and a finding of mutual assent, exactly what is lacking in the present case. The terms of the Arbitration Agreement itself may constitute sufficient consideration if the petitioner could establish mutual assent, which it cannot. Continued employment is insufficient both legally and factually in this case to establish either mutual consent or consideration.

Petitioner's argument here that the terms of the Arbitration Agreement evidence consideration put the proverbial cart before the horse because the petitioner cannot establish mutual assent.

iv. Petitioner's inability to produce any evidence of mutual assent was fatal to its motion to compel arbitration.

Petitioner makes the assertion that it made the Arbitration Agreement available to the respondent but then fails to show any evidence of mutual assent to the Arbitration Agreement by the respondent. Petitioner easily could have required each employee to sign an arbitration agreement. Petitioner could have conducted employee meetings where the Arbitration Agreement was passed out, reviewed, acknowledged and/or signed. Petitioner easily could have had every employee go on its website and electronically acknowledge and agree to the Arbitration Agreement. It did none of these things.

Sure, the petitioner cast a net hoping that every employee would receive and review the Arbitration Agreement, but not every cast catches every fish. Respondent produced unrefuted evidence via his affidavit that he did not see a copy of the Arbitration Agreement until after he filed suit. Mutual assent is a required component in the formation of a contract. Petitioner easily could have taken steps to acquire mutual assent, but it did not make that effort. Petitioner just hoped that its employees would never question the validity of the Arbitration Agreement, and when one did, the petitioner was unable to demonstrate that a valid contract was formed.

(8) CONCLUSION

For the reasons stated herein this Court should affirm the decision of the lower court denying the petitioner's motion to dismiss and motion to compel arbitration.

Dated this 22nd day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF RESPONSENT** was served upon the following parties by U.S. Mail on this 22nd day of June, 2021:

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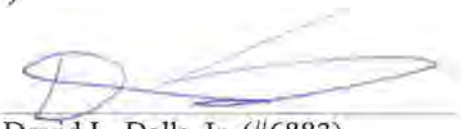

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