SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-687

BRITTANY DIXON, PATRICIA TABER
MARTHA ELIZABETH WATHEN-COLLIER,
MONICA SYKES, CANDICE WILLIAMS,
TASHA ALLEN, JESSICA GORDAN,
DARENA PRESCOT, TINA CAIN,
KIMBERLY MILAN AND AMY LEE — APPELLANTS

V.

REPLY BRIEF FOR APPELLANTS

DAYMAR COLLEGES GROUP, LLC
DAYMAR LEARNING OF PADUCAH, INC.,
DAYMAR LEARNING OF OHIO, INC.
MARK GABIS, AND
DAYMAR LEARNING, INC. — APPELLEES

On Review from Court of Appeals
Case No. 2010-CA-002039-MR
Appeal from McCracken Circuit Court No. 10-CI-0132

Respectfully submitted,

Kenneth L. Sales
BUBALO GOODE SALES & BLISS, PLC
9300 Shelbyville Road, Suite 215
Louisville, KY 40222

David G. Bryant
312 South Fourth Street, Sixth Floor
Louisville, KY 40202

and

Mark P. Bryant
Emily Ward Roark
Ben E. Stewart
BRYANT LAW CENTER
601 Washington Street
Paducah, KY 42002-1876
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that the original and ten copies of this Brief have been sent via UPS overnight delivery to Susan Stokley Clary, Clerk, Kentucky Supreme Court, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601. I further certify that true and accurate copies of this Brief have been served by U.S. Mail to: Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40106; Hon. Tim Kaltenbach, McCracken Circuit Court, 301 S. 6th Street, Paducah, KY 42003; R. Kenyon Meyer, Stephen J. Mattingly and Caroline L. Pieroni, Dinsmore & Shohl, LLP, 101 S. 5th Street, Suite 2500, Louisville, KY 40202, and Kevin C. Burke, 125 S. Seventh Street, Louisville, KY 40202.

This 17th day of February 2014

Kenneth L. Sales, ***Counsel For Appellants***

I. ARGUMENT

A. Introduction.

The Daymar Students, Appellants herein, never assented to be bound by the arbitration provision included in Daymar's Student Enrollment Agreement. Rather than recite their earlier arguments concerning the invalidity and unconscionability of the arbitration provision, the Daymar Students instead will only address the misleading arguments put forth by Daymar in its Brief of Appellees.

B. No Valid Arbitration Agreement Exists.

It is impossible, under Kentucky or federal law, for the Daymar Students to be bound by the terms of the back side of the agreement, which includes the arbitration provision. Because each of the Daymar students signed their names in the middle of the Enrollment Agreement, on the front side of the page, and not at the end, all those terms that followed the signature, including the arbitration provision, are excluded from the agreement. KRS 446.060. Thus, in this case, there is no valid agreement to arbitrate because the requirements for incorporating terms of an agreement *after* the signature have not been met.

First and foremost, Daymar erroneously argues that KRS 446.060 does not apply because the "law does not require arbitration agreements to be signed."[1] While that may be the case generally, the Enrollment Agreement at issue herein must be signed in order to be valid for multiple reasons. First, this contract falls under the statute of frauds because it cannot be performed in one year, and thus it must be "in writing and signed by the party to be charged." KRS 371.010. The Enrollment Agreements at issue herein set forth the specific time for the course of study that the student has chosen, each of which

[1] Brief of Appellees at 12.

is greater than one year. For instance, Brittany Dixon enrolled in the "paralegal program", which was expected to last 9 terms, or 27 months, if she attended full time.[2] By its own literal terms, there was no way for the contract to be performed within a year, and thus it must be signed in order to be valid.

Second, at the very least, the Enrollment Agreement is a mixed contract for services and the sale of goods. Specifically, the Agreement sets out the specific cost for the various components of the Agreement, including tuition, books and fees.[3] Arguably then, the UCC would apply to at least a portion of the agreement, and thus would require a writing signed by the party to be charged.

Because the Student Enrollment Agreements *does* require signatures to be valid, then the signatures had to come at the "end" of the writing. Since the arbitration provision comes on a completely separate page, it is not part of the agreement. Kentucky courts apply KRS 446.060 strictly, holding that parties are not bound by matters which do not appear above their signatures unless additional contract terms have been clearly incorporated by reference above the signature line.[4] (Contrary to Daymar's insinuation, the Daymar Students are *not* suggesting that incorporation by reference has been abolished, merely that it does not save the arbitration agreement here.)

Unfortunately for Daymar, what it claims is the incorporating language does not clearly incorporate by reference the terms on the back side of the page. Specifically, the

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[2] *See, e.g.*, Student Enrollment Agreement signed by Brittany Dixon, attached as App. A to Brief for Appellees.

[3] *Id.*, wherein the specific charges for each component are set out, along with the total charge for the program of study, and the student is required to sign her initials as acknowledgement and acceptance of those terms.

[4] *Consolidated Aluminum Corp. v. Krieger*, 710 S.W.2d 869, 872-73 (Ky. App. 1986). See also *J.P. Morgan Delaware v. Onyx Arabians II, Ltd.*, 825 F.Supp. 146 (W.D. Ky. 1993).

incorporating language must indicate the party's knowledge of and assent to the terms set out after the signature.

Where the reference to the arbitration clause and other terms and conditions is in clear type, and ***in plain and direct language commits the other party to their acceptance***, the arbitration clause becomes an integral part of the agreement. On the other hand, where no mention of the clause or of terms and conditions generally, is included in the language that precedes the signature, the clause will be held unenforceable. The usual test is whether a reasonable person would have been aware of the clause under the circumstances, not whether the person signing the contract was actually and subjectively aware of the arbitration clause's presence. *Home Lumber Co. v. Appalachian Regional Hospitals, Inc.*, 722 S.W.2d 912, 915 (Ky. Ct. App. 1987) quoting, Stipanowich, *Arbitration*, 74 K.L.J. 319, 336 (1985-86) (Emphasis added.) In this case, even assuming the incorporating language did sufficiently convey the presence of additional terms on the back side of the Enrollment Agreement (which it does not, as set out in Appellants' opening Brief and the *Amicus* Brief filed on behalf of the Kentucky Justice Association), it is indisputable that the language does *not* indicate the signer's assent to the additional terms.

C. The Trial Court's Determination that the Arbitration Agreement is Unconscionable was Correct.

Even assuming a cost analysis is inappropriate when determining whether an arbitration agreement is substantively unconscionable,[5] the agreement at issue herein is procedurally unconscionable and therefore, unenforceable. As previously noted, an agreement to arbitrate may be unenforceable if it is *either* procedurally or substantively

[5] Appellants do not concede that a cost analysis is inappropriate when analyzing the unconscionability of an arbitration agreement. See discussion, *infra*.

unconscionable – the Court need not find that both elements of unconscionability exist.[6] In this case, the trial court painstakingly sifted through the agreement at issue, heard testimony of the witnesses presented, and made clear factual determinations regarding the procedural unconscionability of the arbitration agreement at issue herein, and these findings of fact cannot be disregarded or overturned because they are not clearly erroneous.[7] Despite no showing that the trial court's factual conclusions were "against the weight of the evidence,"[8] the Court of Appeals seemingly agreed with the trial court's factual determinations, disregarded those facts and substituted its own judgment.[9] In fact, when looking at the factors delineated by this Court in *Schneurle*, it is patently evident that this arbitration agreement is procedurally unconscionable.

First, the agreement was offered on a take it or leave it basis.[10] Second, the arbitration language in the Daymar agreement is not clear and conspicuous.[11] Third, the language is part of a larger document, and in fact is included on the back side of one page, not the second of two pages.[12] Fourth, the terms of the arbitration claims were not explained at all (much less adequately) to the person signing the agreement.[13] Despite these findings, and many others, the Court of Appeals dispenses with the procedural unconscionability argument merely by stating "we do not find this to be the case."[14] It is not the within the purview if an appellate court to replace its judgment regarding factual

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[6] *Louisville Bear Safety v. S. Cent. Bell Tel. Co.*, 571 D.W.3d 438, 440 (Ky. Ct. App. 1978).
[7] CR 52.01.
[8] *Justice v. Justice*, 421 S.W.2d 868, 870 (Ky. 1967)(citing *Ingram v. Ingram*, 385 S.W.2d 69 (Ky. 1964)).
[9] This is even more curious given that the court of Appeals seemingly agreed with many of the trial court's factual findings. *Compare*, Court of Appeals Opinion at 4, wherein the Court of Appeals sets out its description of the arbitration agreement at issue *and* the trial court's Findings of Fact, R. 398-406, which are substantially similar.
[10] Findings of Fact at ¶37, attached as App. A to Appellants' Brief.
[11] *Id.*
[12] *Id.* at ¶17.
[13] *Id.* at ¶¶18, 37.
[14] Court of Appeals, Opinion at 21.

matters for the judgment of the fact finder, here, the trial court. As such, the Court of Appeals erred when it ignored the trial court's findings of facts.

Finally, Appellants urge this Court to give proper credence to its own *dicta* in *Schnuerle*:

> **Accordingly, arbitration clauses certainly may continue to be struck down as unconscionable** if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, **because, for example, the arbitration costs on the plaintiff are prohibitively high**; or the location of the arbitration is designated as a remote location.[15]

Fully accounting for the U.S. Supreme Court's position as set out in *Concepcion*[16] and *Green Tree Financial Corp.*[17], this Court has recognized that cost may be a factor to consider when analyzing the validity of arbitration agreements. Yet Daymar would have this Court accept the reasoning and holding of a non-precedential opinion from the Middle District of Tennessee, while ignoring this Court's own statements and predictions of how the issue would be handled if properly raised. Certainly the Court's language in *Schnuerle* holds the same meaning today that it did when the Court rendered that opinion. As such, because the cost-prohibitiveness was properly raised by the Daymar Students, the analysis engaged in by the trial court was appropriate and its determination sound.

II. CONCLUSION

For the reasons enumerated herein, as well as for all those reasons enumerated in Appellants opening Brief and in the *Amicus* Brief filed on behalf of the Kentucky Justice

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[15] *Schnuerle* 376 S.W.3d at 573 (emphasis added). See also, *Energy Home* 2013 Ky.LEXIS at *11 ("Certainly, unconscionability is one of the grounds upon which any contract may be revoked.")(citing *Concepcion, Schnuerle* and *Conseco*).

[16] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1760, 179 L. Ed. 2d 742 (2011).

[17] *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 81, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

Association, this Court should reverse the Court of Appeals and reaffirm the McCracken Circuit Court's denial of Daymar's request for arbitration.

Respectfully Submitted,

Kenneth L. Sales
Leslie M. Cronen
BUBALO GOODE SALES & BLISS, PLC
9300 Shelbyville Road, Suite 215
Louisville, KY 40222

Mark P. Bryant
Emily Ward Roark
Ben E. Stewart
BRYANT LAW CENTER
601 Washington Street
Paducah, KY 42002-1876

and

David G. Bryant
312 South Fourth Street, Sixth Floor
Louisville, KY 40202

Counsel for Appellants