In the Missouri Court of Appeals
Eastern District
DIVISION TWO

BREANNA ROSE,	)	No. ED109193
	)	
Respondent,	)	
	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.	)	Cause No. 19SL-CC04651
	)	
SANTIAGO E. SABALA, JR,	)	Honorable Joseph S. Dueker
	)	
Respondent,	)	Filed: June 29, 2021
	)	
and	)	
	)	
VERIZON COMMUNICATIONS, INC.,	)	
	)	
Appellant.	)	

OPINION

This is an interlocutory appeal pursuant to § 435.440(1) RSMo.[1] Defendant Verizon Wireless Services, LLC (Verizon) challenges the trial court's denial of its application to compel arbitration. Because the arbitration provision was contained in a contract of adhesion that does not comport with the reasonable expectations of the parties, we affirm.

[1] All statutory references are to RSMo. Cum. Supp. 2020.

Facts & Procedural Background

Plaintiff Breanna Rose's claims relate to an incident occurring on March 7, 2018, when she entered a Verizon store to exchange her iPhone for a newer model and a store employee allegedly transferred several images from her phone to his email account without her consent. According to her petition, the store employee took her phone to the back of the store where he was researching a value for the phone exchange, Plaintiff believed. Approximately four months later, Plaintiff discovered that an email had been sent from her account to an email address associated with the Verizon employee and at a time coinciding with her visit to the Verizon location. The email included several attached photographs and a video displaying nude and partially nude images of Plaintiff, as well as a reproduction of Plaintiff nursing an infant. Based on this, Plaintiff sued both the Verizon employee and Verizon, specifically alleging multiple claims relating to the March 7 incident.

Subsequently, Verizon filed its "Motion to Compel Arbitration and to Stay Proceedings," arguing that the Plaintiff's action should be removed from circuit court pursuant to their binding arbitration agreement. More specifically, Verizon relies on a Verizon store receipt that Plaintiff signed in September 2015, following an earlier visit to a Verizon store.[2] The 2015 store receipt includes language identifying the Verizon product of purchase, references the "SETTLEMENT OF DISPUTES BY ARBITRATION INSTEAD OF JURY TRIALS," and refers to an online "Customer Agreement" accessible on Verizon's website.

According to evidence submitted by Verizon, the Customer Agreement in effect at the time Plaintiff signed the store receipt was dated July 24, 2015. A separate writing from the store

[2] Although the September 2015 store receipt includes Plaintiff's signature, the receipt identifies the "customer" as "KPMG PEAT MARWICK," not Plaintiff. The record does not indicate the reason for this distinction and the parties' briefs do not elaborate on it. For purposes of this decision, we assume that Plaintiff is deemed a party to the Customer Agreement.

receipt itself, the online July 2015 Customer Agreement states that a customer activating Verizon services is "agreeing to every provision of this Agreement whether or not [the customer] ha[s] read it." The Customer Agreement includes arbitration language on pages seven to nine. Among other relevant language, it reads:

> ANY DISPUTE THAT IN ANY WAY RELATES TO OR ARISES OUT OF THIS AGREEMENT OR FROM ANY EQUIPMENT, PRODUCTS AND SERVICES YOU RECEIVE FROM US (OR FROM ANY ADVERTISING FOR ANY SUCH PRODUCTS OR SERVICES), INCLUDING ANY DISPUTES YOU HAVE WITH OUR EMPLOYEES OR AGENTS, WILL BE RESOLVED BY ONE OR MORE NEUTRAL ARBITRATORS . . ..

The Customer Agreement further specifies that the "FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT." The Customer Agreement also provides that Verizon "may change prices or any other term of your Service or this agreement at any time . . .." Other provisions limit Verizon customers' rights with respect to disputes over billing and service interruptions.[3]

The trial court denied Verizon's "Motion to Compel Arbitration and to Stay Proceedings" on September 9, 2020. When doing so, the court held that the arbitration provision was "both procedurally and substantively unconscionable, and a contract of adhesion." Further, the court held the provision "was not a negotiated contract" and "does not comport with the reasonable expectations of the parties" because an individual purchasing a new mobile device "would not reasonably expect that any and all disputes, especially like those regarding the allegations herein, would have to be resolved by arbitration . . .."

Verizon now appeals, requesting the court reverse the trial court's denial of its Motion to Compel Arbitration and direct the trial court to enter an order compelling Plaintiff to submit to

[3] The record also contains undisputed evidence that Verizon is a telecommunications company that sells wireless products and services.

arbitration and stay the litigation. Verizon raises three interrelated points. In Point I, it argues that the trial court erred in applying the Missouri Uniform Arbitration Act (MUAA), rather than the Federal Arbitration Act (FAA). In Points II and III, Verizon contends that the arbitration provision was not unconscionable or a contract of adhesion and met the parties' reasonable expectations, contrary to the trial court's conclusions.

Standard of Review

The trial court's factual determinations regarding the existence of a valid, enforceable arbitration agreement will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. banc 2012); *see also Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 436 (Mo. banc 2020). Where there is no factual dispute or the question is one of contract interpretation, review is *de novo*. *Theroff*, 591 S.W.3d at 436.[4]

Discussion

The FAA provides that arbitration agreements "involving commerce" are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §§ 1-2. The latter provision is sometimes referred to as the FAA's "savings clause." *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 806 (Mo. banc 2015). The FAA's purpose is to place arbitration agreements on equal footing with other contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The phrase "involving commerce" is a broad one, and extends the reach of the FAA to any contract affecting interstate commerce. *Bull v. Torbett*, 529 S.W.3d 832, 838 (Mo. App. W.D. 2017). Because the present matter involves the sale or transaction of wireless

[4] Unlike some other cases involving the interpretation or enforcement of an arbitration agreement, the present matter does not include a "delegation provision" directing the arbitrator to determine the issue of arbitrability. *Cf. Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 114 (Mo. banc 2018).

telephones and services, interstate commerce is involved and the FAA applies. Accordingly, the issue is whether the arbitration provision is revocable under any grounds involving a Missouri contract and as allowed by the FAA's savings clause.[5] In *Brewer*, 364 S.W.3d at 491-92, the Missouri Supreme Court recognized that application of state-law contract defenses in connection with the FAA's savings clause requires a fact-specific "case-by-case" approach.

Here, the parties' arguments focus on two issues: (1) whether the contract was unconscionable, and (2) whether it was an unenforceable contract of adhesion. As a matter of Missouri law, either of these is a reason to revoke or decline to enforce "any contract," and neither is specific to arbitration agreements. *See Brewer*, 364 S.W.3d at 487 (recognizing unconscionability analysis as a "traditional" part of Missouri contract law); *Estrin Const. Co. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 419 (Mo. App. W.D. 1981) (applying contract of adhesion analysis to an insurance contract); *Hartland Computer Leasing Corp. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527-28 (Mo. App. E.D. 1989) (applying contract of adhesion analysis to a lease dispute). Either theory would therefore fall within the FAA's savings clause. *See Brewer*, 364 S.W.3d at 492 (FAA permits consideration of "generally applicable state law contract defenses"). We hold the arbitration provision is an unenforceable contract of adhesion and affirm on that basis without reaching the question of unconscionability.

A contract of adhesion is a form contract created and imposed by a stronger party on a weaker one. *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003); *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 697 (Mo. banc 1982). These contracts are often

[5] The MUAA contains a "savings clause" that is identical in wording to the one in the FAA. § 435.350 RSMo. (arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"). Thus, while we conclude that Verizon is correct in its contention that the FAA, not the MUAA, governs enforceability of the Customer Agreement (Point I in its brief), that conclusion does not warrant reversal because under either statute the ultimate issue is the same: Whether the arbitration provision in the Customer Agreement is revocable on general grounds applicable to any contract in Missouri.

described as being on a "take this or nothing" basis. *Id*. "[T]hey are not expected to be read . . .." *Estrin Const. Co.*, 612 S.W.2d at 419. Adhesion contracts are not "inherently sinister and automatically unenforceable." *Swain*, 128 S.W.3d at 107. The bulk of contracts signed in this country are form contracts and "much of modern business is done on terms dictated by one contract party to another who has no voice in its formulation." 1 Corbin on Contracts § 1.4 (Rev. ed. 1993); *see also Swain*, 128 S.W.3d at 107. Any rule automatically invalidating this kind of contract would be "completely unworkable." *Hartland Computer Leasing Corp*, 770 S.W.2d at 527. When a contract of adhesion exists, the writing is not necessarily unenforceable. *Id.* But pursuant to Missouri law, courts review adhesion contracts to ensure that the contract matches the parties' "reasonable expectations." *Id*.; *Swain*, 128 S.W.3d at 107.

The Customer Agreement in this matter is an adhesion contract. Plaintiff is an individual customer and Verizon is a sophisticated corporation. Signed by Plaintiff, the 2015 store receipt loosely refers to the settlement of disputes by arbitration, but does not contain the contract terms. In particular, the store receipt does not contain language regarding which disputes would be subject to arbitration, including language Verizon relies on regarding disputes with its employees. Instead, the store receipt language simply refers Plaintiff to the online Customer Agreement that is only accessible on the Verizon website and outside the receipt's boundaries. The Customer Agreement was later identified by Verizon as a particular version (dated July 24, 2015) rather than as a negotiated document specific to Plaintiff or Verizon's transaction with Plaintiff.

Additionally, the Customer Agreement language consists of ten pages of single-spaced text, with pages seven through nine specifying the enforceable arbitration language Verizon advocates. This arbitration language is printed in all capital letters and extends beyond one page

in length. The transaction structure screams of "take this or nothing," effectively nullifying any meaningful negotiation opportunity. In fact the Customer Agreement expressly states that once the customer activates the telephone, the customer is obligated to the terms and conditions of the Agreement, whether or not they have read it. Following a 2015 retail transaction, the "store receipt" obliged Plaintiff to agree to terms memorialized on the Verizon website purportedly controlling a cause of action filed in 2020. These facts do not necessarily invalidate Verizon's Customer Agreement because Missouri law recognizes that this form of contract is "a natural concomitant of our mass production-mass consumer society," (*Swain*, 128 S.W.3d at 107), but these facts are sufficient to show that the Customer Agreement was a contract of adhesion.[6]

After concluding Verizon's Customer Agreement is a contract of adhesion, Missouri law requires the court to scrutinize whether the agreement comports with "the objectively reasonable expectations of the parties." *Hartland Computer Leasing Corp.*, 770 S.W.2d at 527-28. A party is not bound by terms of a "contract of adhesion which are outside and beyond the reasonable expectations of the person signing the contract." *Heartland Health Sys., Inc. v. Chamberlin*, 871 S.W.2d 8, 10-11 (Mo. App. W.D. 1993). Such provisions are unenforceable. *Hartland Computer Leasing Corp*, 770 S.W.2d at 527 (citing Corbin on Contracts); *Swain*, 128 S.W.3d at 107; *Am. Nat. Prop. & Cas. Co. v. Wyatt*, 400 S.W.3d 417, 426-27 (Mo. App. W.D. 2013) (holding pollution exclusion in homeowner's insurance policy unenforceable when applied to carbon monoxide poisoning under the "reasonable expectations" rule). The "reasonable expectations" test is objective; it applies the expectations of the "average member of the public who accepts

[6] Challenging this conclusion, Verizon relies on two cases, *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W.3d 918, 922 (Mo. App. W.D. 2009), and *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 857 (Mo. banc 2006), in which there was evidence and testimony that the contracts in question were negotiable in all respects. The record in the present case does not contain any such evidence.

such a contract, not the subjective expectations of an individual adherent." *Hartland Computer Leasing Corp*, 770 S.W.2d at 527-28.

Missouri law provides additional, more specific guidance when considering the party's "reasonable expectations." In short, the court is obliged to consider the contractual language as well as "the totality of the circumstances surrounding the transaction." *Id*. at 527. Moreover, "[t]he reasonable expectations of the parties are gathered not only by the words of the supposed contract, but by all the circumstances of the transaction." *Heartland Health Sys., Inc.*, 871 S.W.2d at 11.

Here, Verizon asks the court to enforce an arbitration provision that exceeds the scope of what reasonable parties expect. A reasonable party signing a sales receipt might understandably expect the writing to address common, ordinary service provider disputes, such as billing matters, service quality or product and warranty issues. Terms in the Customer Agreement make repeated reference to billing or services interruption disputes, and limit customers' rights with respect to those topics. This reinforces the likelihood that a reasonable party signing a sales receipt in a retail setting would not anticipate that they were altering their legal position on issues affecting personal matters and privacy in the manner alleged here.

The totality of the circumstances is compelling. Verizon attempts to obligate Plaintiff to the terms and conditions of its elusive Customer Agreement. Plaintiff's signature appears on a receipt referencing the Customer Agreement that is located elsewhere, specifically on the Verizon website. Admittedly, the receipt mentions settling disputes by arbitration, but the reference is restricted to only a portion of a single sentence. Further, the phrase simply refers to arbitration and does not describe, specify or define any binding conditions of arbitration. Only electronically accessible, the separately located Customer Agreement also lacks Plaintiff's

signature. Equally noteworthy, Verizon asks the court to enforce an agreement between the parties from 2015 but apply it to an incident occurring during a separate transaction in 2020, beyond the boundaries of an ordinary telephone contract. In reality, anyone from a lawyer learned in contract law to a layperson of limited ability would struggle to read, review and reach an understanding of such a substantial legal document in the setting presented, an in-store consumer retail sale. Applying the "reasonable expectations" rule to the totality of the circumstances surrounding the transaction requires invalidating the arbitration provision as to Plaintiff's claims.

In reaching this conclusion, we do not create a categorical rule that matters like this one are not arbitrable, nor do we conclude that the arbitration provision in Verizon's Customer Agreement is generally unenforceable. Rather, applying the lesson of *Brewer* and its companions when reviewing the relevant standards on a "case-by-case" basis, we conclude that a reasonable party signing a store receipt to acquire a wireless telephone would not expect that they were consenting to provisions affecting their legal protections from the kind of misconduct alleged by Plaintiff. Accordingly, the Customer Agreement's adhesive arbitration provision is unenforceable to compel arbitration involving such a claim.

Verizon offers two main arguments attempting to show the arbitration provision did comport with the parties' reasonable expectations. First, Verizon points out that the Customer Agreement (but not the store receipt) contained language expressly providing that disputes with Verizon employees would be arbitrable, and states that Plaintiff therefore had "notice" of this. In a contract of adhesion, however, "[t]he printed words of contract alone . . . are not enough to disclose the expectations of the parties." *Estrin Const. Co.*, 612 S.W.2d at 419.

Verizon advocates eloquently that the circumstances affecting Plaintiff are rooted in her "dispute" with the Verizon employee, as memorialized in the Customer Agreement and effectively triggering arbitration. However, the contractual language is only a portion of the court's consideration, and the court must also weigh "the circumstances of the transaction" when evaluating the reasonable expectations of the parties. *Heartland Health Sys., Inc.*, 871 S.W.2d at 11. And the collective circumstances are noteworthy. Although Plaintiff signed a store receipt following a routine retail transaction, Verizon relies on the unsigned 2015 Customer Agreement to govern tortious misconduct occurring years later that lacks any connection to the normal course of telecommunication business. Verizon's argument fails because it attempts to expand the arbitrable issues to misconduct affecting Plaintiff's privacy and personal matters and the typical, ordinary customer would not enter an agreement expecting a telephone contract to govern personal matters affecting privacy in the manner alleged in this case.

Second, Verizon points out that Missouri law has enforced arbitration agreements affecting employment discrimination claims that may, in some cases, involve conduct that is analogous to what is alleged in this case. But the cases cited show this did not involve adhesion contracts and therefore did not apply the "reasonable expectation" standard. Under that standard, as applied to the facts and circumstances of this case, the Customer Agreement's arbitration provision is unenforceable.

Verizon contends that the trial court stated in its order that arbitration agreements which are contracts of adhesion are unenforceable, citing § 435.350 RSMo. Verizon contends that the imposition of such a categorical rule for arbitration agreements when no such rule exists for adhesion contracts generally would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. Reading the decision below as a whole, however,

the trial court clearly did not apply such a broad rule. Instead, the court accurately articulated the requirement that an adhesive contract will be enforceable so long as it comports with the parties' reasonable expectations. Following its analysis, the court concluded that the arbitration agreement was unenforceable because it did not comply with the legal standard. As it held, the arbitration agreement "does not comport with the reasonable expectations of the parties" because an individual exchanging a new mobile device "would not reasonably expect that *any* and all disputes, especially like those regarding the allegations herein, would have to be resolved by arbitration." This conclusion was correct.

Conclusion

The judgment of the trial court is affirmed.

Thom C. Clark, Judge

Sherri B. Sullivan, P.J., concurs.
Lisa P. Page, J., concurs.