IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ROY BROWN, et al.,	)	
Respondents,	)	
	)	
v.	)	**WD84613**
	)	
CHIPOTLE SERVICES, LLC, et al.,	)	**FILED: March 8, 2022**
Appellants.	)	

Appeal from the Circuit Court of Jackson County
The Honorable Justine Del Muro, Judge

Before Division Two: Alok Ahuja, P.J., and
Edward R. Ardini, Jr. and Janet L. Sutton, JJ.

Kourtney Cunningham, Zhyesia Jameson, and Roy Brown (the "Employees"), jointly filed suit in the Circuit Court of Jackson County against Chipotle Mexican Grill, Inc., Chipotle Services, LLC, and Chipotle Mexican Grill of Colorado, LLC (collectively "Chipotle"). The Employees alleged claims of unlawful discrimination and retaliation in employment. Chipotle moved to compel arbitration of the Employees' claims. The circuit court denied Chipotle's motion, and it appeals. Because Chipotle failed to submit competent evidence to the circuit court establishing the existence of any arbitration agreements, we affirm the circuit court's denial of Chipotle's motion to compel arbitration.

Factual Background

The Employees each worked at a Chipotle restaurant on Main Street in Kansas City beginning in 2016 or 2017. The employment of each of the Employees terminated in 2019.

On February 1, 2021, the Employees filed suit against Chipotle in the circuit court. In their Petition, each of the Employees alleged claims for discrimination, harassment, and retaliation in employment based on race or color, in violation of the Missouri Human Rights Act (or "MHRA"), ch. 213, RSMo. In addition, Cunningham alleged that Chipotle had retaliated against her for seeking compensation for a workplace injury, in violation of Missouri's Workers' Compensation Law, § 287.780.[1]

On May 18, 2021, Chipotle filed a motion to compel arbitration. Chipotle claimed that each Employee electronically reviewed and signed an Agreement to Arbitrate when they were hired. Chipotle contended that, under the Agreement to Arbitrate, the Employees agreed to submit to binding arbitration "any and all disputes, claims, and controversies arising out of or relating to . . . the parties' employment relationship."

In support of its motion to compel arbitration, Chipotle attached as exhibits two unnotarized declarations, each of which was submitted "under penalty of perjury." The first declaration was signed by Robert J. Mollohan, Jr., an attorney representing Chipotle in this case. Mollohan's declaration stated that he had asked the Employees to agree to submit their disputes to arbitration, but that they had refused.

The second unsworn declaration was executed by Caroline Barcelona, a "People Experience Partner" for Chipotle. Barcelona's declaration explained that, at the time the Employees were hired, they were required to "complete the onboarding process" before starting their employment with Chipotle. Barcelona's declaration stated that "[o]nboarding refers to the process through which employees formalize and finalize their employment relationship with Chipotle and is done

[1] Statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated by the 2021 Cumulative Supplement.

through Workday, which is Chipotle's human resources software." According to Barcelona's declaration, new employees were required to accept the terms of an Agreement to Arbitrate as part of the onboarding process. Barcelona stated that new employees were given "unique log-in credentials" which should not be available to any other individual completing the onboarding process. New employees were instructed to "e-sign" the relevant onboarding documents "by marking the 'I Agree' box . . . and clicking on the 'Submit' button" in the Workday software. Barcelona attached to her declaration the Agreements to Arbitrate which she contended were in effect at the time each of the Employees began their employment with Chipotle. She also attached spreadsheets generated by the Workday software, which indicated the date and time at which each Employee had purportedly reviewed and accepted the Agreement to Arbitrate and other onboarding documents.

Nothing in Barcelona's declaration indicates that she ever communicated directly with any of the Employees, or that she personally had any role in their hiring or onboarding at the Main Street Chipotle restaurant. Although Barcelona's declaration states that restaurant workers are employed by Chipotle Services, LLC, a subsidiary of Chipotle Mexican Grill, Inc., Barcelona does not identify herself as an officer or employee of Chipotle Services, LLC, but instead as a "People Experience Partner" for an unidentified "Chipotle" entity.

The Employees filed suggestions in opposition to Chipotle's motion to compel arbitration. In their opposition, the Employees moved to strike the Barcelona and Mollohan declarations for "being hearsay, lacking foundation, and being based on speculation."

Besides moving to strike her declaration, the Employees also contended that Barcelona's declaration did not constitute competent evidence because she lacked personal knowledge concerning: what the Employees were instructed at the time they were hired; whether and how they were issued any log-in credentials to access

the onboarding documents; or the nature of any documents they may have reviewed or electronically signed at the time of their hiring. The Employees also pointed out that the Agreements to Arbitrate attached to Barcelona's declaration were undated. The Employees asserted that, "[t]o the extent the objections [to Barcelona's declaration] are not sustained, then the Court should instead find the declaration, including exhibits, by Ms. Barcelona not to be credible and reject her baseless claims and conclusions." The Employees also contended that the Agreements to Arbitrate were not enforceable because they were not supported by consideration; because Chipotle had never manifested its assent to the Agreements; and because the Agreements violated the Employees' right to a jury trial as guaranteed by the Missouri Constitution.

In its reply suggestions in support of its motion, Chipotle argued among other things that "[t]he Declarations in Support of Chipotle's Motion Are Admissible and Dispositive."

The circuit court denied Chipotle's motion to compel arbitration. Its order did not state any basis for its ruling.

Chipotle appeals the order denying its motion to compel arbitration, as authorized by § 435.440.1(1). *See Holm v. Menard, Inc.*, 618 S.W.3d 669, 672 n.1 (Mo. App. W.D. 2021).

Standard of Review

Generally, the question of whether a motion to compel arbitration should have been granted is one of law, which is reviewed *de novo*. *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. 2005). "'However, issues relating to the existence of an arbitration agreement are factual and require our deference to the trial court's findings.'" *Trunnel v. Mo. Higher Educ. Loan Auth.*, 635 S.W.3d 193, 197 (Mo. App. W.D. 2021) (quoting *Miller v. Securitas Sec. Servs. USA Inc.*, 581 S.W.3d 723, 728 (Mo. App. W.D. 2019), in turn quoting *Baier v. Darden Rests.*, 420

S.W.3d 733, 736 (Mo. App. W.D. 2014)). Thus, as in any other case in which a circuit court has resolved factual issues, "in an appeal from a circuit court's order overruling a motion to compel arbitration when there is a dispute as to whether the arbitration agreement exists, the circuit court's judgment 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." *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 436 (Mo. 2020) (footnote omitted) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976)).

Discussion

"A motion to compel arbitration first requires the trial court to determine whether a valid arbitration agreement exists." *Baier*, 420 S.W.3d at 737 (citation omitted); *see also, e.g.*, *Miller*, 581 S.W.3d at 729 (quoting *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. 2006)); *Bertocci v. Thoroughbred Ford, Inc.*, 530 S.W.3d 543, 550 (Mo. App. W.D. 2017).

"The party seeking to compel arbitration has the burden of proving the existence of a valid and enforceable arbitration agreement." *Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 683 (Mo. App. E.D. 2015) (citing *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 737 (Mo. App. W.D. 2011)); *accord Baier*, 420 S.W.3d at 737. For Chipotle to establish that valid arbitration agreements existed, it was required to prove that the Employees had assented to agreements containing an arbitration clause. *Theroff*, 591 S.W.3d at 437.

In order to satisfy its burden to prove the existence of enforceable arbitration agreements, Chipotle was required to submit *competent evidence* establishing that the Employees in fact manifested their assent to the Agreements to Arbitrate. "A motion is not self-proving, and the movant has the burden of proving the allegations contained therein." *St. Louis Bank v. Kohn*, 517 S.W.3d 666, 674 (Mo. App. E.D. 2017) (citation omitted); *see also, e.g.*, *Holmes v. Union Pac. R.R. Co.*, 617 S.W.3d

853, 861 (Mo. 2021). In particular, "[e]xhibits attached to motions filed with the trial court are not evidence and are not self-proving." *Bertocci*, 530 S.W.3d at 551 (quoting *Ryan v. Raytown Dodge Co.*, 296 S.W.3d 471, 473 (Mo. App. W.D. 2009)); *see also Powell v. State Farm Mut. Auto Ins. Co.*, 173 S.W.3d 685, 689 (Mo. App. W.D. 2005) (motion properly denied where "exhibits were not in the form of affidavits and were never introduced into evidence"); *Kulaga v. Kulaga*, 149 S.W.3d 570, 573 n. 6 (Mo. App. W.D. 2004). "The authenticity of a document cannot be assumed"; instead, "what it purports to be must be established by proof. Thus, before a document can be admitted into evidence and considered by the [circuit] court, its proponent must show that it is, in fact, what it is purported to be." *Asset Acceptance v. Lodge*, 325 S.W.3d 525, 528 (Mo. App. E.D. 2010).

Affidavits are generally considered to be hearsay and are not admissible as evidence at trial, absent a stipulation of the parties. *See, e.g.*, *Fields v. State*, 625 S.W.3d 479, 483 (Mo. App. W.D. 2021); *Fed. Nat'l Mortg. Ass'n v. Bostwick*, 414 S.W.3d 521, 529 n.7 (Mo. App. W.D. 2013). Rule 55.28 expressly authorizes the use of affidavits as proof supporting the factual allegations in a motion, however. Rule 55.28 provides that, "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

To establish the existence of arbitration agreements to which the Employees had assented, Chipotle submitted the declaration of Caroline Barcelona. Attached to the Barcelona declaration were documents purporting to show that each of the Employees reviewed an Agreement to Arbitrate over the internet, and electronically accepted the terms of the Agreement.

The Barcelona declaration was not competent evidence, however, to establish the authenticity of the documents attached to it. Missouri law requires authenticity

to be proven, such as by "pleadings, affidavits, interrogatories, requests for admissions, or testimony." *Bertocci*, 530 S.W.3d at 551; *see Hinton v. Proctor & Schwartz, Inc.*, 99 S.W.3d 454, 458-59 (Mo. App. E.D. 2003). An affidavit "is a written declaration on oath sworn to by a person before someone authorized to administer such oath," such as a notary public. *Piva v. Piva*, 610 S.W.3d 395, 399 (Mo. App. E.D. 2020) (citation omitted). Where a "purported affidavit [does] not include an oath sworn to before someone authorized to administer an oath," it is "merely an unsworn statement," and does not constitute competent evidence supporting the factual allegations contained in a motion. *Hinton*, 99 S.W.3d at 458-59 (citation omitted); *accord Jordan v. Peet*, 409 S.W.3d 553, 559 n.2 (Mo. App. W.D. 2013) (signed witness statements "were not affidavits" where they were not attested before a person authorized to administer oaths); *State ex rel. Nixon v. McIntyre*, 234 S.W.3d 474, 477-78 (Mo. App. W.D. 2007).

In this case, although Barcelona's declaration stated that she executed it "under penalty of perjury," it was not sworn before a notary or other person authorized to administer oaths. It therefore could not serve as competent evidence to establish the authenticity of the documents attached to it, including the Agreements to Arbitrate and the Workday software records which purportedly reflected the Employees' review and acceptance of the Agreements.

Chipotle argues that Barcelona's declaration was sufficient under § 509.030, and that an affidavit was accordingly not required. Section 509.030 states: "*pleadings* need not be verified or accompanied by affidavit . . . . Any statutory requirement that *pleadings* be acknowledged under oath, verified or notarized may be satisfied by a declaration that the pleading is made under penalty of perjury." (Emphasis added.) Section 509.030 applies exclusively to "pleadings". Chipotle's motion to compel arbitration was not a "pleading," however. This is made clear by

§ 509.010, which lists the "pleadings" required in civil actions in Missouri state courts:

> There shall be a petition and an answer; and there shall be a reply if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party petition if leave is given to summon a person who was not an original party; and there shall be a third-party answer, if a third-party petition is served. *No other pleading shall be required* except that the court may order a reply to an answer or a third-party answer.

(Emphasis added.) A similar definition appears in Rule 55.01.

Chipotle also cites 28 U.S.C. § 1746, which gives unnotarized declarations made under penalty of perjury the same "force and effect" as affidavits in proving "any matter." 28 U.S.C. § 1746 is inapplicable in this state-court proceeding, however. *See Baker v. State*, 796 S.W.2d 426, 427 (Mo. App. S.D. 1990) ("'The federal law controls, of course, as to procedure in federal courts, and the state law controls as to procedure in state courts. Otherwise, turmoil results.'" (quoting *O'Such v. State*, 423 So.2d 317, 319 (Ala. Crim. App. 1982)); *see also, e.g.*, *Discovision Assocs. v. Fuji Photo Film Co.*, 898 N.Y.S.2d 11, 12 (App. Div. 2010); *Toledo Bar Ass'n v. Neller*, 809 N.E.2d 1152, 1153-54 (Ohio 2004); *McMillan v. State*, 769 S.W.2d 675, 676 n.1 (Tex. App. 1989). Chipotle suggests that 28 U.S.C. § 1746 should be applicable here, because the enforceability of the Agreements to Arbitrate is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Even though Chipotle may be seeking to enforce *substantive* rights arising under the Federal Arbitration Act, however, Missouri's *procedural* rules apply to proceedings under the Act which are brought in state court. *Nitro Distrib.*, 194 S.W.3d at 351; *Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W.3d 476, 481 (Mo. App. E.D. 2010).

Chipotle also asserts that, because the Employees did not present any *evidence* to dispute that they agreed to the arbitration agreements, their assent to those agreements was uncontroverted, and Chipotle was excused from proving the

existence of the agreements through competent evidence. We disagree. In opposing Chipotle's motion to compel arbitration the Employees objected to the admissibility of Barcelona's declaration, and also attacked the probative value of her declaration. Thus, the Employees argued, among other things, that the Barcelona declaration was unpersuasive because it was not based on personal knowledge, attached undated documents, and because it failed to give details concerning the manner in which the arbitration agreements were made available to the Employees and later executed. The Employees plainly *contested* Chipotle's attempt to show that they had agreed to the Agreements to Arbitrate. Chipotle's factual claims were accordingly not conclusive or binding on the circuit court, and Chipotle was required to prove its assertions. *See White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. 2010) ("While a party can contest evidence by putting forth evidence to the contrary, a party also can contest evidence by cross-examination, or by pointing out internal inconsistencies in the evidence," or by "arguing . . . that the witness is not credible as apparent from the witness's demeanor, or because of the witness's bias or the witness's incentive to lie." (citations omitted)).

Finally, Chipotle argues that the Employees should not be permitted to now argue for affirmance based on the fact that the Barcelona declaration was not notarized, because they did not object to her declaration on that basis in the circuit court. As an initial matter, we note that the Employees <u>*did*</u> move to strike the Barcelona declaration for "being hearsay, lacking foundation, and being based on speculation." In response, Chipotle defended the admissibility of Barcelona's declaration in the reply suggestions it filed in support of its motion to compel arbitration. While the Employees' objections may not have been particularly specific, the Employees <u>*did*</u> object to the admissibility of Barcelona's declaration on grounds which were broad enough to comprehend the declaration's lack of

notarization, and Chipotle was put on notice of its need to defend the declaration's competence.

But more fundamentally, Chipotle's argument ignores the fact that the Employees are not *the appellants* in this case, seeking to overturn the circuit court's order. Rules requiring that claims of error be preserved in the circuit court do not apply equally to appellants and respondents. Generally, the requirement that claims first be raised in the circuit court is applied to *appellants*, based on the notion that an appellate court "'will not, on review, convict a lower court of error on an issue which was not put before it to decide.'" *State v. Bales*, 630 S.W.3d 754, 761 n.8 (Mo. 2021) (quoting *Johnson v. State*, 580 S.W.3d 895, 899 n.3 (Mo. 2019)); *see also, e.g.*, *Holmes*, 617 S.W.3d at 859 (quoting *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. 1982)). We presume on appeal that a circuit court's decisions are correct, and "it is appellant's burden to dislodge us from th[at] presumption" and establish reversible error. *Marck Indus., Inc. v. Lowe*, 587 S.W.3d 737, 743 (Mo. App. S.D. 2019). An appellant "'cannot stand idly by not making an objection and not bringing to the attention of the trial court [its alleged] errors; gamble on a favorable verdict; and then, when the result is adverse, complain.'" *Paulson v. Dynamic Pet Prods., LLC*, 560 S.W.3d 583, 593 (Mo. App. W.D. 2018) (citation omitted).

The rule is different for arguments which will result in *affirmance* of the circuit court's decision. "[A]ppellate courts are 'primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result,' and the trial court's judgment must be 'affirmed if cognizable under any theory,' regardless of whether the trial court's reasoning is wrong or insufficient." *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 736 (Mo. 2017) (quoting *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. 2014)); *see also, e.g.*, *St. Luke's Hosp. v. Benefit Mgmt. Consultants, Inc.*, 626 S.W.3d 731, 753 (Mo. App. W.D. 2021). Where

the circuit court does not specify the reasons for a decision, this Court "will affirm if the holding is correct on any tenable basis." *Johnson v. Otey*, 299 S.W.3d 308, 310 (Mo. App. S.D. 2009). Our identification of arguments which will uphold the circuit court's judgment is not limited to issues raised by the respondent. Indeed, "'[a] respondent is not required to file a brief, . . . and he does not have the burden on appeal to establish the correctness of the judgment.'" *State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 34 n.5 (Mo. 2008) (quoting *Lakin v. Postal Life & Cas. Ins. Co.*, 316 S.W.2d 542, 549 (Mo. 1958)).

Consistent with these principles, the Missouri Supreme Court has held that an appellate court should uphold a circuit court's evidentiary rulings, even on grounds different from those asserted by the respondent in the circuit court. Thus, in a case in which the appellant argued that he was entitled to a new trial because the circuit court had improperly excluded evidence, the Supreme Court explained:

> "[I]t is well settled that if the action of the trial court was proper on any ground, although not asserted, such action will be upheld." *Franklin v. Friedrich*, 470 S.W.2d 474, 476 (Mo. 1971). As a result, "it is immaterial on what ground the objection or ruling was made or whether such ground is good; and the sufficiency of the reason need not be considered." *Id*.

Lozano v. BNSF Ry. Co., 421 S.W.3d 448, 451 (Mo. 2014).

In the *Franklin* case on which *Lozano* relied, an exhibit showing the plaintiff's prior criminal conviction was admitted at trial on the theory that it impeached the plaintiff's credibility. 470 S.W.2d at 475-76. The Supreme Court held that admission of the exhibit for impeachment was erroneous; yet it nevertheless affirmed, based on a determination that the exhibit was admissible as "an admission or declaration against interest." *Id.* at 476. Similarly, in *Barlow v. Thornhill*, 537 S.W.2d 412 (Mo. 1976), the Supreme Court held that the circuit court had erroneously excluded an exhibit on the basis that it was hearsay; the Court nevertheless upheld the circuit court's evidentiary ruling, because the statements

contained in the challenged exhibit did not constitute admissible expert opinions. *Id.* at 421-22. This Court has likewise upheld evidentiary rulings on grounds different from those advocated by the respondent in the circuit court. *See, e.g.*, *Payne v. Cornhusker Motor Lines, Inc.*, 177 S.W.3d 820, 839–40 (Mo. App. E.D. 2005); *Foster v. Barnes-Jewish Hosp.*, 44 S.W.3d 432, 438–39 (Mo. App. E.D. 2001).

With a single notable exception, the cases Chipotle cites requiring preservation of arguments in the circuit court all involve arguments asserted *by an appellant*. As discussed above, however, respondents are not subject to the same preservation obligations as appellants, and those cases are accordingly not controlling here.

The one outlier case cited by Chipotle is *Kleim v. Sansone*, 248 S.W.3d 599 (Mo. 2008). In *Kleim*, a circuit court dismissed a will-contest petition on the basis that it lacked subject matter jurisdiction over the petition because the petition had been filed prematurely, before the contested will had been admitted to probate. *Id.* at 600-01. The Missouri Supreme Court rejected the circuit court's jurisdictional ruling. *Id.* at 602. The Court then refused to consider the respondent's alternative argument that the dismissal of the petition could be affirmed on the basis that the contestant had failed to timely serve the petition on all of the beneficiaries named in the will. The Court held that this issue was not properly before it, because the respondent "raises the issue for the first time on appeal." *Id.* The Court cited the principle that "[a] party on appeal generally 'must stand or fall' by the theory on which he tried and submitted his case in the court below." *Id.* (citation omitted). The Court's ruling appears to have been animated by its belief that the will contestants' failure to timely serve the beneficiaries was excusable due to the circuit court's rulings, and because of the legal uncertainty surrounding the jurisdictional issue. *Id.* at 603. Whatever the basis or continuing validity of this aspect of the *Kleim* decision, we are bound to follow the Court's more recent statement in *Lozano*,

that an evidentiary ruling may be affirmed on grounds not asserted by the respondent in the circuit court.

The Employees moved to strike Barcelona's declaration in the circuit court on the basis that it was inadmissible. We presume that the Employees' motion to strike was one of the grounds on which the circuit court relied in denying Chipotle's motion to compel arbitration. The objections the Employees asserted in their motion to strike were broad enough to include Barcelona's failure to swear to her statements before an officer authorized to administer oaths. In these circumstances, it is irrelevant whether or not the Employees specifically argued that Barcelona's declaration was incompetent because it was not notarized.

Because the Barcelona declaration, and the attachments to that declaration, are not competent evidence to establish the existence of an arbitration agreement between Chipotle and the Employees, Chipotle's motion to compel arbitration necessarily fails. *See Ryan v. Raytown Dodge Co.*, 296 S.W.3d 471, 473 (Mo. App. W.D. 2009) (arbitration proponent failed to prove the existence of an arbitration agreement where it merely attached the purported agreement to its motion to compel arbitration, but did not establish its authenticity "by the usual methods such as pleadings, affidavits, interrogatories, requests for admissions, or testimony"); *AJM Packaging v. Crossland Constr. Co.*, 962 S.W.2d 906, 910-11 (Mo. App. W.D. 1998) (the unsupported assertion in a motion to compel arbitration, that an attached exhibit was the parties' arbitration agreement, was insufficient to prove the agreement's existence).

The existence of an arbitration agreement between the parties is a threshold issue. *See Theroff*, 591 S.W.3d at 437. Chipotle's failure to prove the existence of the claimed arbitration agreements through competent evidence is dispositive of this appeal.

Conclusion

The circuit court's order denying Chipotle's Motion to Compel Arbitration is affirmed.

Alok Ahuja, Judge

All concur.