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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

AUG 25 2022

SC Court of Appeals

Benjamin H. Culbertson., Circuit Court Judge

Appellate Case No.: 2019-000451
Published Opinion No. 5934 (S.C. Ct. App. Filed Aug. 10, 2022)

Nicole Lampo Respondent,

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, Appellants.

RESPONDENT'S PETITION FOR REHEARING

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This is an employment case involving an electronic, automatic opt in arbitration agreement. The overarching issue in this case is whether a click-wrap “acknowledgement” pop up formed an arbitration agreement, as a matter of law, where Respondent did not affirmatively accept the underlying arbitration agreement, but also did not take any action to opt out of it.

Respondent, in this Petition for Rehearing, argues:

1. The Court, regardless of its decision on actual notice, overlooked that a contract was never formed in this case to begin with.
2. The Court should have referred the fact questions of actual notice and contract formation to the jury under 9 U.S.C. § 4.

In light of the above, Respondent, Nicole Lampo, respectfully requests that this Court reconsider its order and either (1) find no contract exists in this case as a matter of law, or (2) remand to the Circuit Court with instructions to conduct a fact finding under 9 U.S.C. § 4 on whether a valid contract to arbitrate has been formed.

1. THE COURT OVERLOOKED THAT THERE IS NO ACCEPTANCE IN THIS CASE.

The Circuit Court in this case found that “there is insufficient evidence of an acceptance to justify compelling arbitration.” (R. pp. 4). In oral argument, the Circuit Judge recognized the fundamental problem in Appellants’ argument that its offer to arbitrate was accepted by default (based on Respondent’s failure to affirmatively opt out of it) by making the following analogy:

THE COURT: So you’re saying by not opting out she accepted.

MR. REEVES: That is exactly what I was leading into is that by, by acknowledging it, and which we can show through the system that she acknowledged, and –

THE COURT: But I mean, is that contract law? If I offer you to sell my house and you tell – and I say, “You don’t contact me back and tell me you don’t want to do it.” Then we’ve got a contract and you got to buy my house?

(R. pp. 153:23-154:6). Next, the Court pointed out that continued employment was not a condition of the arbitration agreement in this case. This point is important to a distinction between this case and the authority relied on in the Court of Appeals' decision which Respondent claims was overlooked:

MR. REEVES: Continued employment, Your Honor as well.

THE COURT: Okay.

MR. REEVES: That, that from that point on her not accepting it did not lead to her termination. This was not a take it or leave it.

THE COURT: Well, I thought I read in here where it was not a condition of employment.

MR. REEVES: It was not a condition of employment, but she, but she continued – she, she had the right to opt out. She didn't opt out and then continued to work for the company.

THE COURT: But I mean, how is continuing to work for the company acceptance?

MR. REEVES: Well, or the –

THE COURT: She was – I mean, even if she opted out she was going to continue to work for the company.

MR. REEVES: Correct, but I believe, Your Honor, the fact that she, she acknowledged – she received and acknowledged this arbitration agreement and did not opt out that would be the acceptance, but not opting out of it.

(R. p. 154:7-25). Finally, the Circuit Court succinctly crystalized the base question in this case as follows:

THE COURT: So the legal question is whether or not rejection of an offer or failure to reject an offer is acceptance[?]

MR. REEVES: Correct, Your Honor.

(R. pp. 155:1-4). (Emphasis added). The answer to that simple question should be “no.”

Respectfully, Respondent contends that, by focusing first on the more complex, technological aspects of this case,¹ the Court of Appeals overlooked the simpler threshold question in this case that can be answered with basic contract law. Not rejecting an offer does not equate to acceptance.

This Court, focusing first on actual notice (discussed below), overlooked the threshold question posed by the Circuit Court of “whether or not . . . failure to reject an offer is acceptance[?]” Fundamentally, both an offer and an acceptance are required to form a contract under South Carolina law, and there is no acceptance here. *Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 368, 593 S.E.2d 170, 173 (Ct. App. 2004) (“The necessary elements of a contract are offer, acceptance, and valuable consideration.”). There is no legal basis to allow an offeror to manufacture acceptance on the part of an offeree simply by writing into their offer a duty to reject.

“General contract principles of state law apply to arbitration clauses governed by the FAA.” *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (S.C. 2001).² “Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit.” *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff’d sub nom. Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007).

¹ Those aspects include: clickwrap acknowledgment, electronically distributed agreement, automatic opt in, manual opt out.

² Much of Appellants’ argument was premised on the oft-misstated principle that the FAA “favors arbitration.” This Court correctly recognized that “favoring arbitration agreements” pursuant to the FAA means treating them with the same deference as other contracts and not disfavoring arbitration agreements, as they were at common law prior to the FAA. The Supreme Court very recently addressed this in the employment law context in *Morgan v. Sundance*. “[T]he FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules. [internal citation omitted] Our frequent use of that phrase connotes something different. ‘Th[e] policy,’ we have explained, ‘is merely an acknowledgment of the FAA’s commitment to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.’” *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713, 212 L. Ed. 2d 753 (2022).

As this Court acknowledged: “Because the core of the FAA is consent, arbitration may be compelled only when the parties have agreed to it.” *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 70). *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

This Court focused its determination, in the first instance, on whether Respondent had actual notice of Amedisys’ offer to arbitrate and then determined, as a secondary consideration, that Respondent accepted that offer merely by continuing to work and failing to opt out. *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71). The Court made its holding on acceptance based on its prior decision in *Towles v. United HealthCare Corp.* 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999). The Court overlooked marked distinctions both with respect to the substance of the “Acknowledgement” in *Towles* and the circumstances in *Towles*.

In *Towles*, an employee signed “a code of Conduct and Employee Handbook Acknowledgement Form” that stated “the provisions in this Handbook are guidelines, and **except for the provisions of the Employment Arbitration policy**, do not establish a contract or any particular terms or a condition of employment between myself and [United].” *Towles*, 524 S.E. 2d 839, 842 (Emphasis added). The Employee Arbitration Policy was “summarized in the acknowledgement.” (*Id.*) *Towles* “signed the Acknowledgment which provided in pertinent part:

I acknowledge that I have received a copy of the United HealthCare Corporation (UHC) code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.

...

At-Will Employment

I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and [United].

...

I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy.

Towles, 524 S.E.2d at 845. (Emphasis added). The *Towles* Court found that the above acknowledgment, that specifically described arbitration and said that *Towles* would be bound to arbitrate, “constituted a specific communication of an offer which conditioned *Towles*’s continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract.” *Towles*, 524 S.E.2d 845.

The Court of Appeals’ opinion, in this case, overlooks serious differences between *Towles* and this case. **First**, the “Acknowledgement” in this case was an undetailed pop-up that read:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGMENT FORM

By clicking “Acknowledge” below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today’s date, you will be bound by it, which will affect your legal rights.**

By clicking the “Acknowledge” button below on this screen, I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials.

(R. p. 52). Whereas, the acknowledgement in *Towles* specifically said:

I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I **agree** to submit all employment related disputes based on a legal claim to arbitration under [United’s] policy.

Towles, 524 S.E.2d 845. (Emphasis added). **Second**, the offer in *Towles* “conditioned *Towles*’ continued employment on his acceptance of the Employment Arbitration policy” which “*Towles* [therefore] accepted [] by continuing in his employment.” Yet here, the agreement was explicitly not a condition of employment. (R. p. 65) (“Arbitration is not a mandatory condition of Employee’s employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement.”); *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 72) (“To be sure, Amedisys did not mandate arbitration as a condition of employment.”). **Third**, *Towles* also differs from this case in the way the acknowledgments were presented. In *Towles*, the acknowledgement was physically presented to and signed by the employee; whereas here a nondescript pop-up led to a landing page with “links to all of the Amedisys’ Arbitration materials.” (R. p. 46, ¶ 6). (R. p. 52).

This Court’s analysis focused on the third distinction (how the agreements were presented/in-person vs. electronic) and found that distinction was not enough to differ from the holding in *Towles*. However, the Court of Appeals’ opinion overlooked the significance of the first two distinctions discussed above (the content of the acknowledgment and assent as a condition of employment) in applying *Towles* holding to this case. Those distinctions were material to the holding in *Towles*. The reasoning in favor of arbitration in *Towles* does not transfer to this case where the acknowledgement in this case:

- 1) Did not describe the material terms of the arbitration agreement within its four corners and say “I agree to submit all employment related disputes . . . to arbitration[.]” and
- 2) Did not condition continued employment on assenting to the arbitration agreement.

The Montana Supreme Court has directly declined to extend *Towles* to a similar acknowledgment for lack of specificity within the four corners of the acknowledgment. The arbitration agreement in that case, similar to this case, did not “contain unambiguous language of consent to

binding arbitration.” *Hubner v. Cutthroat Commc’ns, Inc.*, 2003 MT 333, ¶ 23, 318 Mont. 421, 430, 80 P.3d 1256, 1262 (2003); *distinguishing Towles*, 524 S.E. 2d 839 (“Unlike Cutthroat’s language, this language made clear to the signing employee what they were agreeing to by signing the handbook.”). The Montana Supreme Court, addressing *Towles* and another case, held that “[t]he arbitration agreements in each of these cases are of no help to [the Employer] because, unlike the language at issue here, each contains unambiguous language that clearly indicated the employee was agreeing to binding arbitration.” *See also, Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 533, 135 P.3d 129, 142 (2006), *as corrected* (May 30, 2006) (Distinguishing *Towles* because the acknowledgement in *Towles* specifically stated that all provisions in the Handbook were merely guidelines “except for the provisions” of the “arbitration policy.”).

In this case, there is no record evidence that Respondent e-signed the arbitration agreement, scrolled through it, or even accessed it. The Circuit Court appropriately held that this absence of evidence of an acceptance was fatal to the arbitration agreement at issue. This Court’s opinion applied *Towles* to find assent based on Respondent clicking “I Acknowledge” on a nondescript pop-up and continuing to work without opting out. Considering that critical distinctions between this case and *Towles* were overlooked, the above should not be enough to form a contract. Inherently, there is an obvious difference between affirming “I agree” regarding the terms of an agreement and clicking “I acknowledge.” *Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 533, 135 P.3d 129, 142 (2006), *as corrected* (May 30, 2006) (“Here, Douglass merely acknowledged his receipt and understanding of the items presented to him.”) Continuing to work pursuant to a separate at-will contractual agreement is also not enough to manifest assent on its own; especially here, where unlike in *Towles*, agreeing to arbitration was not a condition of continued employment. *See, Shaffer v. ACS Gov't Servs., Inc.*, 321 F. Supp. 2d 682, 688 (D. Md. 2004) (finding continued employment, “particularly” where the employee did not sign a “explicit consent or acknowledgement form” was not enough to create an agreement

to arbitrate)³; *see also*, *Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 380, 548 S.E.2d 207, 208 (2001) (Continued at-will employment is not sufficient consideration to support a noncompete agreement); *and Hall v. UBS Fin. Servs. Inc.*, 435 S.C. 75, 85, 866 S.E.2d 337, 341 (2021) (“All at-will employment relationships . . . are contractual relationships.”).

This Court relied on its prior decision in *Towles* to reverse the Circuit Court’s decision that no arbitration agreement was formed in this case due to lack of acceptance by the Respondent. This Court should reconsider its decision because there are distinctions between *Towles* and the facts of this case which were overlooked and which were not addressed by the Court of Appeals in its opinion.

2. FACT ISSUES ON ACTUAL NOTICE AND THE MAKING OF A CONTRACT IN THIS CASE SHOULD HAVE BEEN REFERRED TO A JURY.

If the Court finds that Respondent has not established that she did not accept Amedisys’s arbitration agreement as a matter of law; then the appropriate result would be to direct a jury trial be held to determine whether a contract to arbitrate has been formed.

This is consistent with 9 U.S.C. § 4 which states that if the making of a contract to arbitrate is at issue and a jury trial has been demanded (*See*, R. pp. 11, 22-23 (¶¶ 93-108) then a jury trial should be ordered.

This Court acknowledged that “Usually, the question of whether an employee has received actual notice is for the jury[.]” *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71) (However, the sentence continues by finding the Court

³ The relevant language from that decision is persuasive:

The decision to forfeit one’s right to a judicial forum is significant and requires a more affirmative action than simply continued employment. The Court is not convinced that Plaintiff bound himself to an arbitration agreement—particularly, where he has not signed an explicit consent or acknowledgment form—simply because he did not quit his job by a certain date.

Shaffer v. ACS Gov’t Servs., Inc., 321 F. Supp. 2d 682, 688 (D. Md. 2004).

could decide actual notice was “conclusively prove[n]” here). Further, issues of offer, acceptance, and contract formation should also be submitted to the jury “if the evidence is conflicting or raises more than one reasonable inference[.]” *Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003); *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) (“A trial court should submit to the jury the issue involving the existence of a contract where its existence is questioned and the evidence is either conflicting or admits of more than one inference.”).

This Court, with its focus on the interplay between *Towles* and Respondent clicking “acknowledge” on the pop-up in this case, held that Appellants had “conclusively prove[n]” actual notice as a matter of law. *See, Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71).⁴ As discussed above, the Court’s focus on *Towles* overlooked two other key distinctions with *Towles*. The first distinction, that the content of this acknowledgment is far less descriptive than the acknowledgement in *Towles*, undercuts the suggestion that actual notice (and assent more generally) has been “conclusively prove[n]” on these facts. Given that there is more to distinguish *Towles* from this case than the electronic vs. nonelectronic presentation of the acknowledgements, which was the principal focus of this Court’s analysis, the decision that a contract was formed in this case should have been left to the jury.

It appears incompatible for this Court to find that a contract was formed as a matter of law on the one hand and then later opine that “the arbitration agreement designed by Amedisys may well be at the outer limits of what constitutes a valid offer to modify the terms an employment agreement

⁴ The opinion’s technology-heavy focus is particularly pronounced on this issue. By way of example, the opinion discusses how an e-signature has the same force and effect as a written signature pursuant to S.C. Code Ann. § 26-6-70. Yet the Court does not consider (at least not to the same degree of depth) whether clicking “Acknowledge” amounted to an e-signature establishing assent or acceptance to arbitrate based on the face of this acknowledgment. Respondent respectfully asserts, perhaps due to her counsel’s own focus on many of the technological aspects of this case, that this Court overlooked that an underlying contract still was not formed (or at least not formed *as a matter of law*) under basic contract law principles.

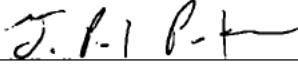
to add an arbitration agreement.” *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 72). Seemingly, this relative language – “may well be at the outer limits” – indicates that there are underlying jury issues. *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014) (“What happens when it’s just not clear whether the parties opted for or against arbitration? The FAA tells district courts to ‘proceed summarily to the trial’ of the relevant facts.”) (Citing, 9 U.S.C. § 4). *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) (“Moreover, the party who is contesting the making of the agreement has the right to have the issue presented to a jury.”) *El Hoss Eng’g & Transp. Co. v. Am. Indep. Oil Co.*, 289 F.2d 346, 351 (2d Cir. 1961) (“These issues should not be determined on affidavits, but rather a full trial should be had.”). This relative language about “outer limits,” alongside the other distinctions with *Towles* that were overlooked, justifies reassessing whether the issues of contract formation in this case should be decided by a jury. Respondent respectfully argues that reconsideration of this Court’s decision to decide a contract was formed, as a matter of law, is warranted.

CONCLUSION

Respondent respectfully requests this Court reconsider this matter based on the arguments made above and find either (1) that an agreement to arbitrate has not been formed as a matter of law, or (2) that a jury trial must be held to determine the fact issues underlying contract formation in this case.

(Signature block on Following Page)

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PROOF OF SERVICE

I do hereby certify that I have served the **Respondent's Petition for Rehearing** by electronic mail and by depositing a copy of the documents in the United States Mail, postage pre-paid, addressed to Appellant's attorneys of record, at the following addresses:

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