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SKU: 9781305574793-SOLUTIONS

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CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

ANSWERS TO LEARNING OBJECTIVES/ LEARNING OBJECTIVES CHECK QUESTIONS AT THE BEGINNING AND THE END OF THE CHAPTER

Note that your students can find the answers to the even-numbered numbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.

1A. ***What is judicial review? How and when was the power of judicial review established?*** The courts can decide whether the laws or actions of the legislative and executive branches of government are constitutional. The process for making this determination is judicial review. The doctrine of judicial review was established in 1803 when the United States Supreme Court decided *Marbury v. Madison*.

2A. ***How are the courts applying traditional jurisdictional concepts to cases involving Internet transactions?*** To hear a case, a court must have jurisdiction over the person against whom the suit is brought or over the property involved in the suit. Generally, courts apply a "sliding-scale" standard to determine when it is proper to exercise jurisdiction over a defendant whose only connection with the jurisdiction is the Internet.

3A. ***What is the difference between the focus of a trial court and an appellate court?*** A trial court is a court in which a lawsuit begins, a trial takes place, and evidence is presented. An appellate court reviews the rulings of trial court, on

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appeal from a judgment or order of the lower court. Basically, trial courts focus on questions of fact, and appellate courts focus on questions of law.

4A. ***What is discovery, and how does electronic discovery differ from traditional discovery?*** Discovery is the process of obtaining information and evidence about a case from the other party or third parties. Discovery entails gaining access to witnesses, documents, records, and other types of evidence. Electronic discovery differs in its subject (e-media rather than traditional sources of information).

5A. ***What are three alternative methods of resolving disputes?*** The traditional method of resolving a legal dispute is through litigation. Alternative methods include negotiation, mediation, and arbitration. In negotiation, the parties attempt to settle their dispute informally without the involvement of a third party acting as mediator. In mediation, the parties attempt to come to an agreement with the assistance of a neutral third party, a mediator, who does not, however, make a decision in the dispute. In arbitration, a neutral third party or a panel of experts hears a dispute and renders a decision.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

BEYOND OUR BORDERS—CRITICAL THINKING

One of the arguments against allowing* sharia *courts in the United States is that we would no longer have a common legal framework within our society. Do you agree or disagree? Why or why not? Arguments in favor of allowing *sharia* courts—or at least permitting the application of *sharia* principles in disputes in U.S. courts or in alternative methods of dispute resolution—include the legal and cultural principle of giving effect to agreements. If the parties to a dispute have agreed to a certain set of standards to govern their situation, those standards could be applied. This would not undercut our common legal framework, but reinforce it. Arguments against allowing *sharia* courts or principles in the United States would most likely center on the conflicts between *sharia* tribunals and standards and state or federal authority, governmental bodies, or law.

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ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—CRITICAL THINKING

The Sixth Amendment guarantees the accused a right of trial by an "impartial jury." How does the use of wireless devices in the courtroom or research on the Internet threaten this right? Jurors are not supposed to be influenced in reaching their decision by anything that is available *outside* of the courtroom. Judges and trial attorneys attempt to control the flow of information to the jurors. Witnesses are named in advance. Judges approve trial exhibits. When jurors are exposed to extrinsic information, such as prejudicial media coverage, they may not reach unbiased opinions about the guilt or innocence of a defendant. If jurors do Internet research about the attorneys on wireless devices, they may form an opinion about the attorneys rather than about just the defendant. If they do extensive Internet research about the defendant, they can also form a non-neutral opinion about him or her that has nothing to do with the case being decided.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE CASES

CASE 2.1—WHAT IF THE FACTS WERE DIFFERENT?

Suppose that Gucci had not presented evidence that Huoqing made one actual sale through his Web site to a resident (the private investigator) of the court's district. Would the court still have found that it had personal jurisdiction over Huoqing? Why or why not? The single sale to a resident of the district, Gucci's private investigator, helped the plaintiff establish that the defendant 's Web site was interactive and that the defendant used the Web site to sell goods to residents in the court's district. It is possible that without proof of such a sale, the court would not have found that it had personal jurisdiction over the foreign defendant. The reason is that courts cannot exercise jurisdiction over foreign defendants unless they can show the defendants had minimum contacts with the forum, such as by selling goods within the forum.

CASE 2.2—CRITICAL THINKING—ETHICAL CONSIDERATION

Does Winstead have an ethical duty to comply with the defendants' discovery request? Discuss. Yes, Winstead has an ethical duty to comply with the defendants' discovery request. At a minimum, there is a legal duty to comply with discovery requests. A court can sanction a party who does not comply. Compliance with the law is the least an ethical businessperson can do.

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CASE 3.3—CRITICAL THINKING—LEGAL CONSIDERATION

In the circumstances of this case, what procedures should govern the arbitration? Discuss. State rules of arbitration should govern the procedures in this situation. In the case, the state intermediate appellate court reversed the lower court's denial of Kroger's motion to compel arbitration, concluding that the arbitration clause in the employment application established the parties agreed to arbitrate their "employment-related disputes." But Kroger was unable to prove that the undated four-page arbitration policy offered in evidence was in effect when Cruise signed the employment application. Thus, the employer could enforce the agreement to arbitrate but not the terms of its arbitration policy.

In the *Cruise* case, the court came to this conclusion based on the same reasoning.

ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. ***Federal jurisdiction***

The federal district court can exercise jurisdiction in this case because the case involves diversity of citizenship. Diversity jurisdiction requires that the plaintiff and defendant be from different states and that the dollar amount of the controversy exceed $75,000. Here, Garner resides in Illinois, and Foreman and his manager live in Texas. Because the dispute involved the promotion of a series of boxing matches with George Foreman, the amount in controversy likely exceeded the required threshold amount.

2A. ***Original or appellate jurisdiction***

Original jurisdiction, because the case was initiated in that court and that is where the trial will take place. Courts having original jurisdiction are courts of the first instance, or trial courts—that is courts in which lawsuits begin, trials take place, and evidence is presented. In the federal court system, the district courts are the trial courts, so the federal district court has original jurisdiction.

3A. ***Jurisdiction in Illinois***

No, because the defendants lacked minimum contacts with the state of Illinois. Because the defendants were located out of the state, the court would have to determine whether they had sufficient contacts with the state for the Illinois to exercise jurisdiction based on a long arm statute. Here, the defendants never came to Illinois, and the contract that they are alleged to have breached was not formed in Illinois.

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Thus, it is unlikely that an Illinois state court would find that sufficient minimum contacts existed to exercise jurisdiction.

4A. ***Jurisdiction in Nevada***
Yes, because the defendants met with Garner and formed a contract in the state of Nevada. A state can exercise jurisdiction over out-of-state defendants under a long arm statute if the defendants had sufficient contacts with the state. Here, the parties met and negotiated their contract in Nevada, and a court would likely hold that these activities were sufficient to justify a Nevada court's exercising personal jurisdiction.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

In this age of the Internet, when people communicate via e-mail, tweets, social media, and Skype, is the concept of jurisdiction losing its meaning? Many believe that yes, the idea of determining jurisdiction based on individuals' and companies' physical locations no longer has much meaning. Increasingly, contracts are formed via online communications. Does it matter where one of the parties has a physical presence? Does it matter where the e-mail server or Web page server is located? Probably not.

In contrast, in one sense, jurisdiction still has to be decided when conflicts arise. Slowly, but ever so surely, courts are developing rules to determine where jurisdiction lies when one or both parties used online systems to sell or buy goods or services. In the final analysis, a specific court in a specific physical location has to try each case.

ANSWERS TO ISSUE SPOTTERS AT THE END OF THE CHAPTER

1A. ***At the trial, after Sue calls her witnesses, offers her evidence, and otherwise presents her side of the case, Tom has at least two choices between courses of actions. Tom can call his first witness. What else might he do?*** Tom could file a motion for a directed verdict. This motion asks the judge to direct a verdict for Tom on the ground that Sue presented no evidence that would justify granting Jan relief. The judge grants the motion if there is insufficient evidence to raise an issue of fact.

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2A. ***Sue contracts with Tom to deliver a quantity of computers to Sue's Computer Store. They disagree over the amount, the delivery date, the price, and the quality. Sue files a suit against Tom in a state court. Their state requires that their dispute be submitted to mediation or nonbinding arbitration. If the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, will a court hear the case? Explain.*** Yes. Submission of the dispute to mediation or nonbinding arbitration is mandatory, but compliance with the decision of the mediator or arbitrator is voluntary.

ANSWERS TO QUESTIONS AND CASE PROBLEMS AT THE END OF THE CHAPTER

BUSINESS SCENARIOS AND CASE PROBLEMS

2–1A. ***Standing to sue***

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this problem, the issue is whether the Turtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Turtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Turtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Thus, the Turtons would have standing to bring their suit.

2–2A. ***Discovery***

Under the work-product rule, attorneys are allowed to protect information that they have gathered as a result of their own skill and diligence. For example, an attorney for a party involved in an auto accident can go out to the scene of the accident and observe the fact that there is a stop sign missing without being under any obligation to divulge such information to his opponent in the lawsuit. Similarly, an attorney who discovers a recently decided case decision supporting his or her theory is under no obligation to share this discovery with the opposing attorney. If attorneys had to share everything, they would be less inclined to expend efforts on behalf of their clients because, in essence, they would be working for both sides at once.

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2–3A. SPOTLIGHT ON THE NATIONAL FOOTBALL LEAGUE—*Arbitration*

An arbitrator's award generally is the final word on the matter. A court's review of an arbitrator's decision is extremely limited in scope, unlike an appellate court's review of a lower court's decision. A court will set aside an award only if the arbitrator's conduct or "bad faith" substantially prejudiced the rights of one of the parties, if the award violates an established public policy, or if the arbitrator exceeded her or his powers.

In this problem, and in the actual case on which this problem is based, the NFLPA argued that the award was contrary to public policy because it required Matthews to forfeit the right to seek workers' compensation under California law. The court rejected this argument, because under the arbitrator's award Matthews could still seek workers' compensation under Tennessee law. Thus, the arbitration award was not clearly contrary to public policy.

2–4A. *Minimum contacts*

No. This statement alone was insufficient to establish that Illinois did not have jurisdiction over the defendant. The court ruled that Med-Express failed to introduce factual evidence proving that the Illinois trial court lacked personal jurisdiction over Med-Express. Med-Express had merely recited that it was a North Carolina corporation and did not have minimum contacts with Illinois. Med-Express sent a letter to this effect to the clerk of Cook County, Illinois, and to the trial court judge. But that was not enough. When a judgment of a court from another state is challenged on the grounds of personal jurisdiction, there is a presumption that the court issuing the judgment had jurisdiction until the contrary is shown. It was not.

2–5A. *Arbitration*

Yes, a court can set aside this order. The parties to an arbitration proceeding can appeal an arbitrator's decision, but court's review of the decision may be more restricted in scope than an appellate court's review of a trial court's decision. In fact, the arbitrator's decision is usually the final word on a matter. A court will set aside an award if the arbitrator exceeded her or his powers—that is, arbitrated issues that the parties did not agree to submit to arbitration.

In this problem, Horton discharged its employee de la Garza, whose union appealed the discharge to arbitration. Under the parties' arbitration agreement, the arbitrator was limited to determining whether the rule was reasonable and whether the employee violated it. The arbitrator found that de la Garza had violated a reasonable safety rule, but "was not totally convinced" that the employer should have treated the violation more seriously than other rule violations and ordered de la Garza reinstated. This order exceeded the arbitrator's authority under the parties' agreement. This was a ground for setting aside the order.

In the actual case on which this problem is based, on the reasoning stated here, the U.S. Court of Appeals for the Fifth Circuit reached the same conclusion.

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2–6A. BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Discovery*

Yes, the items that were deleted from a Facebook page can be recovered. Normally, a party must hire an expert to recover material in an electronic format, and this can be time consuming and expensive.

Electronic evidence, or e-evidence, consists of all computer-generated or electronically recorded information, such as posts on Facebook and other social media sites. The effect that e-evidence can have in a case depends on its relevance and what it reveals. In the facts presented in this problem, Isaiah should be sanctioned—he should be required to cover Allied's cost to hire the recovery expert and attorney's fees to confront the misconduct. In a jury trial, the court might also instruct the jury to presume that any missing items are harmful to Isaiah's case. If all of the material is retrieved and presented at the trial, any prejudice to Allied's case might thereby be mitigated. If not, of course, the court might go so far as to order a new trial.

In the actual case on which this problem is based, Allied hired an expert, who determined that Isaiah had in fact removed some photos and other items from his Facebook page. After the expert testified about the missing material, Isaiah provided Allied with all of it, including the photos that he had deleted. Allied sought a retrial, but the court instead reduced the amount of Isaiah's damages by the amount that it cost Allied to address his "misconduct."

2–7A. *Electronic filing*

No, Faden was not sufficiently diligent in ensuring a timely filing. Diligence in this context requires carefulness and persistence. Excusable delay might be evidenced by proof of circumstances beyond a party's control that prevents a timely filing.

From the facts as stated, it appears that Faden attempted to file her appeal only at the end of the relevant period when the Board's e-filing system was down. But there is no indication that anything prevented her from e-filing at a time when the Board's system was not down, or from mailing or faxing her appeal at any time, before the deadline. Thus, Faden appears to have been neither timely nor diligent in filing her appeal before the deadline.

In the actual case on which this problem is based, the Merit Systems Protection Board dismissed Faden's appeal. The Board found that she was not reasonably diligent in ensuring timely filing. On her further appeal, the U.S. Court of Appeals for the Federal Circuit affirmed.

2-8A. *Corporate contacts*

No, the defendants' motion to dismiss the suit for lack of personal jurisdiction should not be granted. A corporation normally is subject to jurisdiction in a state in which it is doing business. A court applies the minimum-contacts test to determine whether it can

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exercise jurisdiction over an out-of-state corporation. This requirement is met if the corporation sells its products within the state or places its goods in the "stream of commerce" with the intent that the goods be sold in the state.

In this problem, the state of Washington filed a suit in a Washington state court against LG Electronics, Inc., and nineteen other foreign companies that participated in the global market for cathode ray tube (CRT) products. The state alleged a conspiracy to raise prices and set production levels in the market for CRTs in violation of a state consumer protection statute. The defendants filed a motion to dismiss the suit for lack of personal jurisdiction. These goods were sold for many years in high volume in the United States, including the state of Washington. In other words, the corporations purposefully established minimum contacts in the state of Washington. This is a sufficient basis for a Washington state court to assert personal jurisdiction over the defendants.

In the actual case on which this problem is based, the court dismissed the suit for lack of personal jurisdiction. On appeal, a state intermediate appellate court reversed on the reasoning stated above.

2–9A. A QUESTION OF ETHICS—*Agreement to arbitrate*

1. This is very common, as many hospitals and other health-care provides have arbitration agreements in their contracts for services. There was a valid contract here. It is presumed in valid contracts that arbitration clauses will be upheld unless there is a violation of public policy. The provision of medical care is much like the provision of other services in this regard. There was not evidence of fraud or pressure in the inclusion of the arbitration agreement. Of course there is concern about mistreatment of patients, but there is no reason to believe that arbitration will not provide a professional review of the evidence of what transpired in this situation. Arbitration is a less of a lottery that litigation can be, as there are very few gigantic arbitration awards, but there is no evidence of systematic discrimination against plaintiffs in arbitration compared to litigation, so there may not be a major ethical issue.

2. McDaniel had the legal capacity to sign on behalf of her mother. Someone had to do that because she lacked mental capacity. So long as in such situations the contracts do not contain terms that place the patient at a greater disadvantage than would be the case if the patient had mental capacity, there is not particular reason to treat the matter any differently.

CRITICAL THINKING AND WRITING ASSIGNMENTS

2–10A. BUSINESS LAW CRITICAL THINKING GROUP ASSIGNMENT

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1. Rico's could file a motion claiming that a federal court lacked jurisdiction to hear the dispute, but the motion would likely be denied. Because there appears to be diversity of citizenship in the situation set out here, if the amount in controversy exceeds the jurisdictional amount, a suit can be filed in a federal district court.

2. Bento's first option might be to file a motion to set aside the verdict and hold a new trial. This motion will be granted if the judge is convinced, after examining the evidence, that the jury was in error (assuming the trial involved a jury) but does not think it appropriate to issue a judgment for Bento's side. Bento's second option would be to appeal the trial court's judgment, including a denial of the motion for a new trial, to the appropriate court of appeals. An appellate court is most likely to review the case for errors in law, not fact. In any case, the appellate court will not hear new evidence.

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ALTERNATE CASE PROBLEM ANSWERS

CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

2-1A. ***Jurisdiction***

The North Carolina state court held that it had personal jurisdiction over the Florida defendants. On appeal, the North Carolina Court of Appeals agreed. The appellate court initially pointed out that a court can assert "personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. When a corporation purposefully avails itself of the privilege of conducting activities in this State, it is not unreasonable to subject it to suit here." The court pointed out that Health Care advertised Cal-Ban in North Carolina. "Health Care sold the Cal-Ban 3000 capsules to its distributor, defendant CKI Industries, who in turn advertised and sold the drug to defendant Prescott's Pharmacies." The court concluded, "[a]ccordingly," that the defendants "injected Cal-Ban 2000 into the stream of commerce of this State with the expectation that the drug would be purchased by consumers here. The trial court properly exercised personal jurisdiction over defendants."

2-2A. ***Standing to sue***

The court held that the Blues had standing and denied the tobacco companies' motion to dismiss the case. The defendants argued in part that any injury to the plaintiffs was indirect and too remote to permit them to recover, and that it would be too difficult to determine whether the plaintiffs' injuries were due to the defendants' conduct or to intervening third causes. The court reasoned that the damages claimed in this case were separate from the damages suffered by smokers. The plaintiffs "seek recovery only for the economic burden of those medical claims and procedures which they directly paid as a result of tobacco use." The Blues had paid for the smokers' health care, and thus only the Blues could recover those amounts. As to whether the injuries were too remote, the court said that if "as alleged, the defendants conducted a decades long scheme to deceive the American public and its health providers concerning the addictive characteristics and health hazards of their tobacco products, and if they conspired to deprive smokers of safer or less addictive tobacco products, then their actions can properly be characterized as illegal and deliberate criminal fraud." If so, the plaintiffs' injuries would have

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been foreseeable and direct. The court also noted that the plaintiffs might have reliable statistical and expert evidence to show the percentage of damage caused by the defendants' actions.

Note: The Blues filed suits in three federal district courts. Two of the courts refused to dismiss the suits, applying the reasoning set out above. The third court agreed with the defendants, however. See *Regence Blueshield v. Philip Morris, Inc.,* 40 F.Supp.2d 1179 (W.D.Wash.1999). In that case, the court concluded that the Blues' injuries were "derivative" of personal injuries to smokers because it would be impossible to separate the smokers' injuries from those of the insurers and there would thus be a possibility of "duplicative recovery."

2-3A. ***E-jurisdiction***

The court denied Boyer's motion to dismiss the complaint for lack of personal jurisdiction. "[T]he likelihood that personal jurisdiction can be constitutionally exercised [in the context of Internet activities] is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Boyer "posted Internet messages on the Yahoo bulletin board, which included negative information regarding ABFI." He "also sent an e-mail to ABFI's independent auditors, accusing ABFI of 'fraudulent accounting practices' and 'borderline criminal conduct' . . . with the understanding that the independent auditors were situated in Pennsylvania." Also, the court held that the e-mail fell under the state's long-arm statute, which, like other states' long-arm statutes, permits the exercise of jurisdiction "where an act or omission outside the Commonwealth [Pennsylvania] causes harm or tortious injury inside the Commonwealth." Finally, the court reasoned that "its exercise of jurisdiction over Defendant Boyer would not necessarily violate traditional notions of fair play and substantial justice. It is true that as a non-resident individual, Boyer will be burdened in being forced to defend himself in Pennsylvania. However, his conduct appears to be directed towards Pennsylvania where Plaintiff is located and where Plaintiff's auditors are located. Plaintiff's interest in adjudicating its dispute and vindicating its reputation in Pennsylvania appears to be self-evident. . . . In addition, it does seem reasonable and fair to require Boyer to conduct his defense in Pennsylvania since that is where he sent the negative e-mail."

2-4A. ***Arbitration***

The court denied Auto Stiegler's motion. A state intermediate appellate court reversed this ruling, and Little appealed to the California Supreme Court, which held that the appeal provision was unenforceable but which also held that the provision could be cut from the agreement and the agreement could then be enforced. Auto Stiegler argued in part that the "provision applied evenhandedly to both parties." The court stated, "[I]f that is the case, [the defendant fails] to explain adequately the reasons for the $50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants. Given the fact that Auto Stiegler was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it

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imposed the threshold with the knowledge or belief that it would generally be the defendant." The court acknowledged that "parties may justify an asymmetrical arbitration agreement when there is a legitimate commercial need," but added that the "need must be other than the employer's desire to maximize its advantage in the arbitration process. There is no such justification for the $50,000 threshold. The explanation for the threshold . . . that an award in which there is less than that amount in controversy would not be worth going through the extra step of appellate arbitral review . . . makes sense only from a defendant's standpoint and cannot withstand scrutiny."

2-5A. ***Jurisdiction***

The court denied Sharman's motion to dismiss. The court explained that "fairness consists principally of ensuring that jurisdiction over a person is not exercised absent fair warning that a particular activity may subject that person to the jurisdiction of a foreign sovereign." Thus, "the touchstone constitutional inquiry is whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In this case, "Sharman provides its KMD software to millions of users every week . . . . Sharman has not denied and cannot deny that a substantial number of its users are California residents, and thus that it is, at a minimum, constructively aware of continuous and substantial commercial interaction with residents of this forum. Further, Sharman is well aware that California is the heart of the entertainment industry, and that the brunt of the injuries described . . . is likely to be felt here. It is hard to imagine on these bases alone that Sharman would not reasonably anticipate being haled into court in California. However, jurisdiction is reasonable for an important added reason: Sharman's effective predecessor, Kazaa BV, was engaged in this very litigation when Sharman was formed. . . . Because Sharman has succeeded Kazaa BV in virtually every aspect of its business, Sharman reasonably should have anticipated being required to succeed Kazaa BV in this litigation as well. If Sharman wished to structure its primary conduct with some minimum assurance that it would not be haled into court in this forum, it simply could have avoided taking over the business of a company already enmeshed in litigation here."

2-6A. ***Standing to sue***

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this case, the issue is whether the Covingtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Covingtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Covingtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Indeed, this was the conclusion reached by the appellate court in this case. While the trial court found that the Covingtons lacked standing to sue, when the plaintiffs appealed to U.S. Court of Appeals for the Ninth Circuit, that court found that the Covingtons did have standing to assert their claims. The appellate court remanded (sent back) the case to the lower court for a trial.

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2–7A. ***Arbitration***

Based on a recent holding by the Washington state supreme court, the federal appeals court held that the arbitration provision was unconscionable and therefore invalid. Because it was invalid, the restriction on class-action suits was also invalid. The state court reasoned that by offering a contract that restricted class actions and required arbitration, the company had improperly stripped consumers of rights they would normally have to attack certain industry practices. Class-action suits are often brought in cases of deceptive or unfair industry practices when the losses suffered by an individual consumer are too small to warrant a consumer suing. In this case, the alleged added cell phone fees are so small that no one consumer would be likely to litigate or arbitrate the matter due to the expenses involved. Because the arbitration agreement eliminates the possibility of class actions, it violates public policy and is void and unenforceable.

2–8A. ***Venue***

The purpose behind most venue statutes is to ensure that a defendant is not "hailed into a remote district, having no real relationship to the dispute." The events in dispute have no connection to Minnesota. The Court stated: "Looked at through the lens of practicality—which is, after all, what [the venue statute] is all about—Nestlé's motion can really be distilled to a simple question: does it make sense to compel litigation in Minnesota when this state bears no relationship to the parties or the underlying events?" The court answered no to this simple question. The plaintiff resides in South Carolina, her daughter's injuries occurred there, and all of her medical treatment was provided (and continues to be provided) in that state. South Carolina is the appropriate venue for this litigation against Nestlé to proceed.

2-9A. ***Arbitration***

Arbitration can be compelled under a contract's arbitration clause as long as a dispute involves matters covered by the contract provision. In the set of facts in this problem, the terms of the parties' contract are central to the resolution of their dispute. Under the contract, all claims that PRM has against Primenergy go to arbitration because the arbitration clause covers "all disputes." That includes allegations of fraud and theft. Such matters can be resolved by arbitration.

In the actual case on which this problem is based, the court ruled that PRM had to take all complaints about Primenergy to arbitration. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed this ruling.

2–10A. **A QUESTION OF ETHICS**

1. A court can generally exercise personal jurisdiction over a defendant that has had minimum contacts with the forum "necessary to have reasonably anticipated being haled into court there." After minimum contacts have been established, a court can consider whether the exercise of personal jurisdiction comports with "traditional conceptions of fair play."

In this case, the court held that "Rosedale's representations—which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase

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virtual property—constitute sufficient contacts" to support the exercise of personal jurisdiction. The court compared these efforts to an advertising campaign that, for example, urges viewers to call a toll-free phone number to place orders. "This inducement destroys any semblance of . . . passive advertising," which might consist of generalized product promotion that would not support an assertion of jurisdiction.

It was the interactive nature of the marketing scheme, not the Web site, on which the court based its holding. "Rosedale's personal role was to bait the hook for potential customers to make more interactive contact with Linden by visiting Second Life's website. Rosedale's activity was designed to generate additional traffic inside Second Life. He was the hawker sitting outside Second Life's circus tent, singing the marvels of what was contained inside to entice customers to enter. Once inside Second Life, participants could view virtual property, read additional materials about purchasing virtual property, interact with other avatars who owned virtual property, and, ultimately, purchase virtual property themselves. Significantly, participants could even interact with Rosedale's avatar on Second Life during town hall meetings that he held on the topic of virtual property."

As for fairness, the court focused chiefly on the burden that would be imposed on Rosedale to make an appearance. Rosedale did not claim that he could not afford to appear "or that he would otherwise be irreparably prejudiced by litigating" in Pennsylvania. Rosedale had lawyers "on both coasts." Weighed against Rosedale's burden was Pennsylvania's interest in protecting its residents from "allegedly misleading representations that induce them to purchase virtual property" and in vindicating their rights.

2. Under the Federal Arbitration Act (FAA), a court must compel the arbitration of a dispute if there is a valid agreement to arbitrate that covers the dispute. In this case, the court focused primarily on the validity of the agreement.

A critical factor was the manner in which Linden presented the "Terms of Service" (TOS). A participant was effectively told to "take it or leave it"—one who declined could not gain access to Second Life. There was no opportunity for negotiation so that even a participant like Bragg, who was an experienced attorney, could not use his or her skills to negotiate different terms. And there was no reasonable market alternative—Second Life was the only virtual world to recognize its participants' rights in virtual property.

As for the specific TOS, including the arbitration provision, the court emphasized that Linden allowed itself a range of remedies to resolve disputes while limiting Bragg and other participants to the sole remedy of arbitration. In the circumstances of this case, Linden froze Bragg's account, kept the funds that Linden determined were subject to dispute, and told Bragg that he could resolve the dispute only by arbitration, subject to whatever "asymmetrical" amendment Linden might choose to impose. Also, limiting venue to "Linden's backyard appears to be yet one more means by which the arbitration clause serves to shield Linden from liability instead of providing a neutral forum in which to [resolve] disputes." Altogether, these terms were one-sided and thus unfair.

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Chapter 2

Courts and Alternative Dispute Resolution

INTRODUCTION

Despite the substantial amount of litigation that occurs in the United States, the experience of many students with the American judicial system is limited to little more that some exposure to traffic court. In fact, most persons have more experience with and know more about the executive and legislative branches of government than they do about the judicial branch. This chapter provides an excellent opportunity to make many aware of the nature and purpose of this major branch of our government.

One goal of this text is to give students an understanding of which courts have power to hear what disputes and when. Thus, the first major concept introduced in this chapter is jurisdiction. Careful attention is given to the requirements for federal jurisdiction and to which cases reach the Supreme Court of the United States. It might be emphasized at this point that the federal courts are not necessarily superior to the state courts. The federal court system is simply an independent system authorized by the Constitution to handle matters of particular federal interest.

This chapter also covers the nuts and bolts of the judicial process.

Finally, the chapter reviews alternatives to litigation that can be as binding to the parties involved as a court's decree. Thus, alternative dispute resolution, including methods for settling disputes in online forums, is the chapter's third major topic.

Among important points to remind students of during the discussion of this chapter are that most cases in the textbook are appellate cases (except for federal district court decisions, few trial court opinions are even published), and that most disputes brought to court are settled before trial. Of those that go through trial to a final verdict, less than 4 percent are reversed on appeal. Also, it might be emphasized again that in a common law system, such as the United States', cases are the law. Most of the principles set out in the text of the chapters represent judgments in decided cases that involved real people in real controversies.

CHAPTER OUTLINE

I. The Judiciary's Role in American Government

The essential role of the judiciary is to interpret and apply the law to specific situations.

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A. JUDICIAL REVIEW

The judiciary can decide, among other things, whether the laws or actions of the other two branches are constitutional. The process for making such a determination is known as judicial review.

B. THE ORIGINS OF JUDICIAL REVIEW IN THE UNITED STATES

Judicial review was a new concept at the time of the adoption of the Constitution, but it is not mentioned in the document. Its application by the United State Supreme Court came soon after the United States began, notably in the case of *Marbury v. Madison.*

ENHANCING YOUR LECTURE—

JUDICIAL REVIEW IN OTHER NATIONS

The concept of judicial review was pioneered by the United States. Some maintain that one of the reasons the doctrine was readily accepted in this country was that it fit well with the checks and balances designed by the founders. Today, all established constitutional democracies have some form of judicial review—the power to rule on the constitutionality of laws—but its form varies from country to country.

For example, Canada's Supreme Court can exercise judicial review but is barred from doing so if a law includes a provision explicitly prohibiting such review. France has a Constitutional Council that rules on the constitutionality of laws *before* the laws take effect. Laws can be referred to the council for prior review by the president, the prime minister, and the heads of the two chambers of parliament. Prior review is also an option in Germany and Italy, if requested by the national or a regional government. In contrast, the United States Supreme Court does not give advisory opinions; be before the Supreme Court will render a decision only when there is an actual dispute concerning an issue.

FOR CRITICAL ANALYSIS

In any country in which a constitution sets forth the basic powers and structure of government, some governmental body has to decide whether laws enacted by the government are consistent with that constitution. ***Why might the courts be best suited to handle this task? Can you propose a better alternative?***

II. Basic Judicial Requirements

A. JURISDICTION

Jurisdiction is the power to hear and decide a case. Before a court can hear a case, it must have jurisdiction over both the person against whom the suit is brought or the property involved in the suit and the subject matter of the case.

1. Jurisdiction over Persons or Property

Power over the person is referred to as *in personam* jurisdiction; power over property is referred to as *in rem* jurisdiction.

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a. Long Arm Statutes
Generally, a court's power is limited to the territorial boundaries of the state in which it is located, but in some cases, a state's long arm statute gives a court jurisdiction over a nonresident.

b. Corporate Contacts
A corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

ADDITIONAL BACKGROUND—

Long Arm Statutes

A court has personal jurisdiction over persons who consent to it—for example, persons who reside within a court's territorial boundaries impliedly consent to the court's personal jurisdiction. A state **long arm statute** gives a state court the authority to exercise jurisdiction over nonresident individuals under circumstances specified in the statute. Typically, these circumstances include going into or communicating with someone in the state for limited purposes, such as transacting business, to which the claim in which jurisdiction is sought must relate.

The following is New York's long arm statute, New York Civil Practice Laws and Rules Section 302 (NY CPLR § 302).

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED

CHAPTER EIGHT OF THE CONSOLIDATED LAWS
ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

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(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state.

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

2. **Jurisdiction over Subject Matter**
   Subject-matter jurisdiction involves limitations on the types of cases a court can hear—a court of general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court of limited jurisdiction. The limits may be by—

   - The subject of the suit.
   - The sum in controversy.
   - Whether the case involves a felony or a misdemeanor.
   - Whether the proceeding is a trial or an appeal.

3. **Original and Appellate Jurisdiction**
   Courts of original jurisdiction are trial courts; courts of appellate jurisdiction are reviewing courts.

4. **Jurisdiction of the Federal Courts**

   a. **Federal Questions**
   A suit can be brought in a federal court whenever it involves a question arising under the Constitution, a treaty, or a federal law.

   b. **Diversity of Citizenship**
   A suit can be brought in a federal court whenever the amount in controversy is more than $75,000i and the suit t involves—

   - Citizens of different states
   - A foreign country and an American citizen, or
   - A foreign citizen and an American citizen.

   For diversity-of-citizenship purposes, a corporation is a citizen of the state in which it is incorporated and of the state in which it has its principal place of business.

ADDITIONAL BACKGROUND—

Diversity of Citizenship

Under Article III, Section 2 of the United States Constitution, diversity of citizenship is one of the bases for federal jurisdiction. Congress further limits the number of suits that federal courts might otherwise hear by

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setting a minimum to the amount of money that must be involved before a federal district court can exercise jurisdiction.

The following is the statute in which Congress sets out the requirements for diversity jurisdiction, including the amount in controversy.

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—
(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

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(June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub. L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub. L. 100-702, Title II, §§ 201 to 203, 102 Stat. 4646 ; Oct. 19, 1996, Pub. L. 104-317, Title II, § 205(a), 110 Stat. 3850.)

5. Exclusive versus Concurrent Jurisdiction

When a case can be heard only in federal courts or only in state courts, exclusive jurisdiction exists. Federal courts have exclusive jurisdiction in—

- Cases involving federal crimes, bankruptcy, patents, and copyrights.
- Suits against the United States.
- Some areas of admiralty law.

States have exclusive jurisdiction in—

- Divorces.
- Adoptions.

When both state and federal courts have the power to hear a case, concurrent jurisdiction exists. In such a case, factors for choosing one forum over another include—

- Availability of different remedies.
- Distance to the courthouse.
- Experience or reputation of the judge.
- The court's bias for or against the law, the parties, or the facts in the case.

B. JURISDICTION IN CYBERSPACE

The basic question is whether there are sufficient minimum contacts in a jurisdiction if the only connection to it is an ad on the Web originating from a remote location.

1. The "Sliding-Scale" Standard

One approach is the sliding scale, according to which—

- Doing substantial business online is a sufficient basis for jurisdiction.
- Some Internet interactivity may support jurisdiction.
- A passive ad is not enough on which to base jurisdiction.

2. International Jurisdictional Issues

The minimum-contact standard can apply in an international context. As in cyberspace, a firm should attempt to comply with the laws of any jurisdiction in which it targets customers.

CASE SYNOPSIS—

Case 2.1: *Gucci America, Inc. v. Wang Huoqing*

Gucci America, Inc., a New York corporation, makes footwear, belts, sunglasses, handbags, and wallets. Gucci uses twenty-one trademarks associated with its goods. Wang Huoqing, a resident of the People's Republic of China, offered for sale through his Web sites counterfeit Gucci goods. Gucci hired a private

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investigator in California to buy goods from the sites. Gucci then filed a suit against Huoqing in a federal district court, seeking damages and an injunction preventing further trademark infringement. The court first had to determine whether it had jurisdiction.

The court held that it had personal jurisdiction over Wang Huoqing. The U.S. Constitution's due process clause allows a federal court to exercise jurisdiction over a defendant who has had sufficient minimum contacts with the court's forum. Huoqing's fully interactive Web sites met this standard. Gucci also showed that within the forum Huoqing had made at least one sale—to Gucci's investigator. The court granted Gucci an injunction.

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Notes and Questions

What do the circumstances and the holding in this case suggest to a business firm that actively attempts to attract customers in a variety of jurisdictions? This situation and the ruling in this case indicate that a business firm actively attempting to solicit business in a jurisdiction should be prepared to appear in its courts. This principle likely covers any jurisdiction and reaches any business conducted in any manner.

Is it relevant to the analysis of jurisdiction that Gucci America's principal place of business is in New York state rather than California? Explain. The fact that Gucci's headquarters is in New York state was not relevant to the court's analysis here because Gucci was the plaintiff. Courts look only at the defendant's location or contacts with the forum in determining whether to exercise personal jurisdiction. The plaintiff's location is irrelevant to this determination.

C. VENUE

A court that has jurisdiction may not have venue. Venue refers to the most appropriate location for a trial. Essentially, the court that tries a case should be in the geographic area in which the incident occurred or the parties reside.

D. STANDING TO SUE

Before a person can bring a lawsuit before a court, the party must have standing. The party must have suffered a harm, or been threatened a harm, by the action about which he or she is complaining. The controversy at issue must also be justifiable (real and substantial, as opposed to hypothetical or academic).

III. The State and Federal Court Systems

A. THE STATE COURT SYSTEMS

Many state court systems have a level of trial courts and two levels of appellate courts.

1. Trial Courts

- Trial courts with general jurisdiction include county, district, and superior courts.
- Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts.

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2. **Appellate, or Reviewing, Courts**
In most states, after a case is tried, there is a right to at least one appeal. Few cases are retried on appeal. In about three-fourths of the states, there is an intermediate level of appellate courts.

   a. **Focus on Questions of Law**
   An appellate court examines the record of a case, looking at questions of law and procedure for errors by the court below.

   b. **Defer to the Trial Court's Findings of Fact**
   A trial court is in a better to evaluate the demeanor of witnesses and their testimony and other evidence. An appellate court will challenge a finding of fact only when—

   - It is clearly erroneous.
   - It is contrary to the evidence.
   - There is no evidence to support it.

3. **Highest State Courts**
In all states, there is a higher court, usually called the state supreme court. The decisions of this highest court on all questions of state law are final. If a federal constitutional issue is involved in the state supreme court's decision, the decision may be appealed to the United States Supreme Court.

B. THE FEDERAL COURT SYSTEM
The federal court system is also three-tiered with a level of trial courts and two levels of appellate courts, including the United States Supreme Court.

1. **U.S. District Courts**
Federal trial courts of general jurisdiction are district courts. Federal trial courts of limited jurisdiction include U.S. Tax Courts and U.S. Bankruptcy Courts. Federal district courts have original jurisdiction in federal matters. Some administrative agencies with judicial power also have original jurisdiction.

2. **U.S. Courts of Appeals**
U.S. courts of appeal, or circuit courts of appeal, hear appeals from the decisions of the district courts located within their respective circuits. The decision of a court of appeals is binding on federal courts only in that circuit.

3. **The United States Supreme Court**
The court at the top of the three federal tiers is the United States Supreme Court to which further appeal is not mandatory but may be possible.

   a. **Appeals to the Supreme Court**
   A party may ask the Court to issue a *writ of certiorari*, but the Court may deny the petition. A denial is not a decision on the merits of the case. Most petitions are denied.

   b. **Petitions Granted by the Court**
   Typically, the Court grants petitions only in cases that at least four of the justices view as involving important constitutional questions.

IV. Following a State Court Case

The common law system is an adversary system. Each adversary is entitled to present his or her version of the facts through an advocate. An attorney is the client's advocate.

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- A judge assumes an unbiased role, but this role is not entirely passive. A judge is responsible for the appropriate application of the law and does not have to accept the adversaries' arguments.
- There are rules of procedure to govern the way in which disputes are handled in courts. These rules differ from court to court, but there are similarities.

A. THE PLEADINGS

In a civil case, the pleadings inform each party of the other's claims and specify the issues. The pleadings consist of a complaint and an answer.

1. The Plaintiff's Complaint

The complaint (or petition or declaration) is filed with the clerk of the trial court. It contains—

- A statement alleging jurisdictional facts.
- A statement of facts entitling the complainant to relief.
- A statement asking for a specific remedy.

2. Service of Process

A copy of the complaint and a summons is served on the party against whom the complaint is made. The summons notifies the defendant of his or her options—file a motion to dismiss, file an answer, or default.

3. The Defendant's Answer

An answer admits or denies the allegations in the complaint and sets out any defenses and counterclaims (the plaintiff can file a reply to any counterclaim).

4. Motion to Dismiss

A motion to dismiss may be based on any of several grounds. A motion to dismiss for failure to state a claim on which relief can be granted alleges that according to the law, even if the facts in the complaint are true, the defendant is not liable.

ADDITIONAL BACKGROUND—

Motions to Dismiss and Other Pre-Answer Motions

Besides a plaintiff's failure to state a claim on which relief can be granted, a defendant's pre-answer **motion to dismiss** may be based on the court's lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, and the plaintiff's failure to join a party needed for a just adjudication of the controversy. Or the defendant may raise these defenses in his or her answer. In fact, some of these must be raised at this stage, or they are deemed waived. A defendant may also move for dismissal on the ground of the plaintiff's failure to diligently prosecute his or her claim, or to comply with procedural rules or a court order.

Other pre-answer motions include: a motion for a more definite statement (which may be made if a pleading is so vague or ambiguous that a response cannot reasonably be framed); a motion to strike such matters as, for example, an insufficient defense; and a motion for summary judgment (through which, as discussed below, the moving party asserts that there is no genuine issue of material fact, and he or she is entitled to judgment as a matter of law).

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ADDITIONAL BACKGROUND—

Motions for Judgment on the Pleadings and Other Motions That May Be Made after the Pleadings Are Closed

A **motion for judgment on the pleadings** is more akin to a motion for summary judgment than it is to a motion to dismiss for failure to state a claim on which relief can be granted. The grounds on which motions to dismiss can be made can be divided into four categories, including challenges to the complaint itself. These challenges point to defects on the face of a complaint—that is, a plaintiff may actually have a claim, but has not properly phrased it. A motion for judgment on the pleadings "attack[s] the substantive sufficiency of the allegations." In other words, a motion for judgment on the pleadings challenges not only the sufficiency of an opponent's pleading, but whether a substantive right to relief even exists on the facts as pleaded. (For example, the text notes that this motion would be appropriate if the facts as shown in the pleadings reveal that the applicable statute of limitations has run.) Also, before a motion for judgment on the pleadings can be made, both a complaint and an answer must have been filed (unlike a motion to dismiss for failure to state a claim on which relief can be granted, which is a pre-answer motion).

Other motions that may be made after the pleadings are closed include the defendant's motion to dismiss on the basis of the court's lack of subject matter jurisdiction, or the plaintiff's failure to state a claim on which relief can be granted or to join an indispensable party. At this point, a defendant may also move for dismissal on the ground of the plaintiff's failure to diligently prosecute his or her claim, or to comply with procedural rules or a court order. At this time, a party may also object to the other's failure to state a legal defense to a claim.

B. PRETRIAL MOTIONS

After the pleadings are filed, either party can file a motion for judgment on the pleadings or a motion for summary judgment. A trial might be avoided if no facts are in dispute and only questions of law are at issue. In ruling on a motion for summary judgment, a court can consider evidence outside the pleadings.

C. DISCOVERY

To prepare for trial, parties obtain information from each other and from witnesses through the process of discovery. These devices save time by preserving evidence, narrowing the issues, preventing surprises at trial, and avoiding a trial altogether in some cases.

CASE SYNOPSIS—

Case 2.2: *Brothers v. Winstead*

Phillips Brothers, LP, Harry Simmons, and Ray Winstead were the three members of Kilby Brake Fisheries, LLC, a Mississippi catfish farm. Winstead operated a hatchery for the firm, but with only two profitable years during his eight-year tenure, he was fired. He filed a suit in a Mississippi state court against Kilby Brake and its other members, alleging a corporate freeze-out. The defendants filed a counterclaim of theft. From an award to Winstead of more than $1.7 million, the defendants appealed.

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The Mississippi Supreme Court reversed, and remanded the case holding that Kilby Brake was entitled to discovery regarding Winstead's outside income—the trial court's refusal to allow discovery precluded the jury from finding out what happened to a certain load of fish, and this issue was central to both sides' theories of the case.

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Notes and Questions

What materials might reveal the information about Winstead's finances that the defendants want to know? The defendants sought information about Winstead's finances. Financial documents of any sort could reveal this information. These include tax documents, accounting records, bills of sale and other receipts, contracts, and bank statements. Relevant expenditures could be shown by recurring bills or acknowledgements of payment for utilities, mortgages, and other assessments. Even phone records, e-mail, and paper correspondence could provide proof.

Does the defendants' request for information regarding Winstead's finances follow the guidelines for discovery activity? Yes, the defendants' request for information regarding Winstead's finances follows the guidelines for discovery activity. Generally, discovery is allowed regarding any matter that is not privileged and is relevant to the claim or defense of any party. In this case, Kilby Brake claimed that Winstead sold the firm's fish and kept the income for himself. Winstead's tax returns and other financial documents are relevant to this claim.

Discovery rules protect privileged or confidential material from disclosure—a court can limit the scope of discovery. In the context of the defendants' request for material that would reveal Winstead's finances, for example, the court could require Winstead to submit the material to the judge, who could then decide if it should be disclosed to Kilby Brake.

1. **Depositions and Interrogatories**
   A deposition is a record of the answers of a party or witness to questions asked by the attorneys of both plaintiff and defendant. Interrogatories are written questions asked of a party, who responds in writing.

2. **Requests for Other Information**
   A request for an admission is a request that a party admit the truth of a matter. A request for documents, objects, and entry on land is a request to inspect these items. A request for a physical or mental examination will be granted only if the court decides that the need for the information outweighs the examinee's right of privacy.

3. **Electronic Discovery**
   Information stored electronically, such as e-mail and other computer data, can be the object of a discovery request. This may include data that was not intentionally saved by a user, such as concealed notes and earlier versions.

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a. E-Discovery Procedures
The Federal Rules of Civil Procedure deal specifically with the preservation, retrieval, and production of electronic data.

b. Advantages and Disadvantages
E-mail can provide useful, and sometimes damaging, information. But preserving, providing, and reviewing e-evidence can be time-consuming and expensive.

D. PRETRIAL CONFERENCE
After discovery, a pretrial hearing is held.

E. JURY SELECTION
If the right to a jury trial has been requested, the jury is selected. Prospective jurors undergo *voir dire* (questioning by the attorneys to determine impartiality).

F. AT THE TRIAL

1. Opening Arguments and Examination of Witnesses
Once a jury is chosen, the trial begins with the attorneys' opening statements. Because the plaintiff has the burden of proving his or her case, the plaintiff's attorney presents the plaintiff's evidence and witnesses. The defendant's attorney challenges the evidence and cross-examines the witnesses. After the plaintiff's case, the defendant can move for a directed verdict (or judgment as a matter of law). If this motion is denied, the defendant's attorney presents the defendant's case.

2. Closing Arguments and Awards
After the plaintiff's challenges to the defendant's case, the attorneys present their closing arguments. The jury is instructed in the law that applies and retires to consider a verdict.

G. POSTTRIAL MOTIONS
After the verdict, the losing party can move for a new trial or for a judgment notwithstanding the verdict (judgment *n.o.v.*). If these motions are denied, he or she can appeal.

ADDITIONAL BACKGROUND—

Motions for a Directed Verdict and Motions for Summary Judgment

Under the *Federal Rules of Civil Procedure*, a party may move for a directed verdict: (a) after his or her opponent's opening statement, (b) at the conclusion of the opponent's case, or (c) at the close of all the evidence. Basically, a directed verdict is proper if the party with the burden of *proof* has presented no or insufficient evidence on a critical issue. A party with the burden of *persuasion* on an issue is rarely entitled to a directed verdict, since the party bears the risk of non-persuasion, and usually, reasonable jurors may differ on what evidence to believe. Thus, even if a party with the burden of persuasion produces substantial evidence of, for example, the other party's negligence, so that the jury could reasonably conclude that the other party was negligent, the motion will be denied, since the jury may also disbelieve the evidence.

A **motion for a directed verdict** is a procedural device available in both civil and criminal proceedings in which the trial is by jury. Either side may move for a directed verdict whenever the other side rests—for

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example, after the plaintiff presents his or her evidence, the defendant may move for a directed verdict; after the defendant rests, the plaintiff may so move; after the plaintiff's rebuttal; after the defendant's rejoinder; and so on. On determining that the evidence is such that reasonable jurors could not disagree and, thus, the moving party is entitled to a favorable verdict as a matter of law, the judge grants the motion and takes the case from the jury's consideration.

A **motion for summary judgment** is a procedural device available only in civil proceedings. Either side may move for summary judgment before the trial on any or all of the issue—the defendant at any time (for example, when the pleadings do not allege a contradictory statement of material facts, and thus, there is nothing for a jury to decide); the plaintiff not until after twenty days from commencement of the action or within twenty days after an adverse party moves for summary judgment. On determining that there is no genuine issue of material fact and the moving party is entitled to prevail on the issue or issues as a matter of law, the judge grants the motion. If there is any doubt as to any of the facts necessary to determine the outcome of the issue or issues, the court will deny the motion.

H. THE APPEAL

1. Filing the Appeal

To appeal, the appellant files the record on appeal, which contains the pleadings, a trial transcript, copies of the exhibits, the judge's rulings, arguments of counsel, jury instructions, the verdict, posttrial motions, and the judgment order from the case. The appellant files a brief, which contains statements of facts, issues, applicable law, and grounds for reversal. The appellee files an answering brief.

2. Appellate Review

The court reviews these records, the attorneys present oral arguments, and the court can—

- Affirm the lower court's judgment.
- Reverse the judgment.
- Remand the case to the lower court for proceedings consistent with the appellate opinion.
- Affirm or reverse the lower court's judgment in part.
- Modify the lower court's decision.

3. Appeal to a Higher Appellate Court

If this court is an intermediate appellate court, the losing party can file a petition for leave to appeal to a higher court. If the petition is granted, the appeal process is repeated.

I. ENFORCING THE JUDGMENT

A judgment may not be enforceable because a defendant may not have sufficient assets to pay it.

V. Courts Online

Most courts also have Web sites, though they do not generally contain vast archives of case law.

A. ELECTRONIC FILING

Filing court documents may involve a transfer over the Internet, a transmission via e-mail, or a delivery of a computer disk. The text mentions some of the details of specific systems and their problems. Courts are also using electronic case-management systems.

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B. Cyber Courts and Proceedings

Next on the horizon are virtual courtrooms, or cyber courts. And courts may use online media in other ways—conference or chatting rooms, or virtual visitation for the children of divorced parents, for example.

VI. Alternative Dispute Resolution

The advantage of alternative dispute resolution (ADR) is its flexibility. Normally, the parties themselves can control how the dispute will be settled, what procedures will be used, and whether the decision reached (either by themselves or by a neutral third party) will be legally binding or nonbinding. Approximately 95 percent of cases are settled before trial through some form of ADR.

A. Negotiation

One form of ADR is negotiation, in which the parties attempt to settle their dispute informally, with or without attorneys. They try to reach a resolution without the involvement of a third party.

B. Mediation

In mediation, the parties attempt to negotiate an agreement with the assistance of a neutral third party, a mediator. Mediation is essentially a form of "assisted negotiation." The mediator takes an active role in resolving the dispute but does not make a decision on the matter being disputed.

C. Arbitration

A more formal method of ADR is arbitration, in which a neutral third party or a panel of experts hears a dispute and renders a decision. The decision can be legally binding. Formal arbitration resembles a trial. The parties may appeal, but a court's review of an arbitration proceeding is more restricted than a review of a lower court's proceeding.

1. The Arbitrator's Decision

An arbitrator's award will be set aside only if—

- The arbitrator's conduct or "bad faith" substantially prejudiced the rights of a party.
- The award violates public policy.
- The arbitrator exceeded his or her powers.

2. Arbitration Clauses

Virtually any commercial matter can be submitted to arbitration. Often, parties include an arbitration clause in a contract. Parties can also agree to arbitrate a dispute after it arises.

3. Arbitration Statutes

Most states have statutes (often based on the Uniform Arbitration Act of 1955) under which arbitration clauses are enforced, and some state statutes compel arbitration of certain types of disputes. At the federal level, the Federal Arbitration Act (FAA), enacted in 1925, enforces arbitration clauses in contracts involving maritime activity and interstate commerce.

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4. The Issue of Arbitrability

A court can consider whether the parties to an arbitration clause agreed to submit a particular dispute to arbitration. The court may also consider whether the rules and procedures that the parties agreed to are fair.

ADDITIONAL CASES ADDRESSING THIS ISSUE —

The Issue of Arbitrability

Cases examining **the validity of arbitration agreements** include the following:

- *Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198 (9th Cir. 2002) (an arbitration clause is not unconscionable, and thus it is enforceable, when it contains a provision that grants an employee a meaningful opportunity to opt out of binding arbitration).

- *McCaskill v. SCI Management Corp.,* 285 F.3d 623 (7th Cir. 2002) (an arbitration clause invoked to compel the arbitration of claims of sexual harassment and other employment discrimination is invalid, and thus unenforceable, when it requires that the employee pay all fees).

- *Cash in a Flash Check Advance of Arkansas, L.L.C. v. Spencer,* 348 Ark. 459, 74 S.W.3d 600 (2002) (in a customer's suit against a check-cashing company, alleging that its fees were usurious, an agreement containing an arbitration clause was not legally enforceable due to a lack of mutuality).

5. Mandatory Arbitration in the Employment Context

Generally, mandatory arbitration clauses in employment contracts are enforceable.

CASE SYNOPSIS—

Case 2.3: *Cruse v. Kroger Co.*

Stephanie Cruise applied for a job with Kroger Co.'s Compton Creamery & Deli Kitchen. The application contained a clause requiring arbitration of "employment-related disputes." Cruise was hired. Four years later, she was fired. Cruise filed a suit in a California state court against Kroger, alleging employment discrimination—retaliation, sexual harassment, sexual and racial discrimination, and failure to investigate and prevent harassment and retaliation—as well as wrongful termination in violation of public policy, intentional infliction of emotional distress, and defamation. Kroger filed a motion to compel arbitration. The court held that there was no proof of a written agreement to arbitrate and denied the motion. Cruse appealed.

A state intermediate appellate court reversed. The appellate court concluded that the arbitration clause in the employment application established the parties agreed to arbitrate their "employment-related disputes" and that Cruise's claims fell within the meaning of the agreement.

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Notes and Questions

Considering the relative bargaining power of the parties, was it fair to enforce the arbitration clause in this contract? Yes, because either party could have refused to agree to the contract when it contained the arbitration clause—for example, Cruse could have explicitly refused to agree to the clause when she filled out the application. Of course, such clauses are more likely to be ruled fair and enforceable when the parties are of equal bargaining strength.

How would business be affected if each state could pass a statute allowing parties to void arbitrations? If all states could pass statutes like the one suggested in the question, some parties would probably be less inclined to transact business. An arbitration provision allows a party to limit the burden and expense of settling any disputes. If another party could freely void such an agreement, there would be a greater risk of arbitration in an inconvenient forum, costly formal litigation, or both. That risk increases the perceived costs of doing business, making the business opportunity less attractive.

D. Other Types of ADR

- Methods of "assisted negotiation" have emerged—

  In *early neutral case evaluation*, the parties select a neutral third party (often an expert in the subject of the dispute) to evaluate their positions. This forms the basis for negotiations.

  In a *mini-trial,* each party's attorney argues the party's case. A neutral third party (often an expert in the disputed subject) acts as an adviser. If the parties fail to reach an agreement, the adviser renders an opinion as to how a court would likely decide the issue.

- Characteristics of mediation and arbitration can be combined—

  In *binding mediation*, the mediator can make a legally binding decision.

  In *mediation-arbitration (med-arb),* if mediation is unsuccessful, arbitration is applied.

- Many federal courts use the *summary jury trial (SJT).* The litigants present their arguments and evidence, and a jury renders a nonbinding verdict. Mandatory negotiations follow.

E. Providers of ADR Services

A major provider of ADR services is the American Arbitration Association (AAA). Most of the largest law firms in the nation are members of this nonprofit association. For profit firms around the country also provide dispute-resolution services.

VII. Online Dispute Resolution

When outside help is needed to resolve a dispute, there are a number of Web sites that offer online dispute resolution (ODR). ODR may be best for resolving small to medium business claims, which may not be worth the expense of litigation or traditional ADR. Most online forums do no automatically apply the law of any jurisdiction. Any party may appeal a dispute to a court at any time.

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ADDITIONAL BACKGROUND—

ADR and the Courts

States in which one or more local **state** court has—		States in which one or more **federal** court has—	
Arbitration	**Mediation**	**Arbitration**	**Mediation**
Alabama	Alabama	Alabama	California
Alaska	Alaska	Arizona	Delaware
Arizona	Arizona	California	Florida
California	California	Connecticut	Indiana
Delaware	Connecticut	Florida	Kansas
Florida	Delaware	Georgia	Kentucky
Georgia	Florida	Idaho	Louisiana
Hawaii	Georgia	Michigan	Minnesota
Illinois	Hawaii	Missouri	Missouri
Michigan	Indiana	New Jersey	Nebraska
Minnesota	Illinois	New York	New Jersey
Missouri	Iowa	Ohio	New York
Nevada	Kansas	Oklahoma	North Carolina
New Hampshire	Kentucky	Pennsylvania	Ohio
New Jersey	Louisiana	Rhode Island	Oklahoma
New Mexico	Maine	Texas	Oregon
New York	Michigan	Utah	Pennsylvania
North Carolina	Minnesota	Washington	Rhode Island
Ohio	Missouri		South Carolina
Oregon	Montana		Tennessee
Pennsylvania	Nebraska		Texas
Rhode Island	Nevada		Utah
Texas	New Hampshire		Virginia
Washington	New Jersey		West Virginia
	New Mexico		Washington
	New York		Wisconsin
	North Carolina		
	Ohio		
	Oklahoma		
	Oregon		
	Pennsylvania		
	Rhode Island		
	South Carolina		
	South Dakota		
	Tennessee		
	Texas		
	Utah		
	Vermont		
	Virginia		
	Washington		
	West Virginia		
	Wisconsin		

Source: Richard Reuben, "The Lawyer Turns Peacemaker," *ABA Journal* (August 1996), p. 56.

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TEACHING SUGGESTIONS

1. To impress on students one of the reasons for the legal system's observance of procedural technicalities, emphasize the finality of courts' rulings, that people's lives are often changed by a court's decision. ***If it were the students' person or their property hanging in the balance, would they prefer a series of well-defined steps or a less formal process? What if the decision reached in the less formal process was not binding?***

2. Divide students into small groups and assign one of the text chapter's end-of-chapter problems to each group. Have each group determine whether or not the assigned problem is one that would lend itself to alternative dispute resolution. ***If not, why not? If so, which form of alternative dispute resolution would the group recommend?***

3. Obtain a standard arbitration agreement form from a national arbitration organization such as the American Arbitration Association. Ask students to discuss specific features of these agreements and the factors that might make them hesitant to submit a dispute to arbitration.

4. Some students may find it enlightening to be reminded the law corresponds to the many ways in which people organize the world. That is, the law includes customs, traditions, rules, and objectives that people have held in different circumstances at different times. While it often seems that the law creates meaningless distinctions, it is in fact the real needs of real people that create them.

5. Emphasize the factors—economic and non-economic—in deciding whether or not to pursue legal action. ***Are they prepared to pay for going to court?*** Engaging in legal action can be expensive. A good attorney may charge as much as $300 an hour, or more, plus expenses, and more for trial work. ***Do they have the patience to pursue a case through the judicial system***? Court calendars are crowded. In some cases, it may be years before the matter comes to trial—and then there is the appeal. ***Is there an alternative to legal action?*** A settlement might be preferable to a suit, even if the former represents a lesser dollar amount, once their bottom lines are adjusted for future expenses, time lost, aggravation, and so on. Many controversies lend themselves to faster, less expensive methods of dispute resolution. Students should also be reminded that a decision should only be made with the advice of a competent legal professional.

6. ***What do your students think that jurors discuss when they retire to consider a verdict? What should they discuss?*** Research indicates that discussion in the jury room focuses primarily on what procedures the jury should follow, their opinions about the case, and relevant personal reminiscences. Much less time is spent discussing testimony from the trial and the judge's instructions. In many cases, jury verdicts are not different from the decisions that the judges would have made. Studies reveal that 80 percent of the time, the court agrees with the jury's verdict. In civil cases, judges and juries almost always agree; in criminal cases, a jury is more likely to acquit a defendant than a judge is.

7. All students have different requirements in regards to the amount of study time that they need to prepare for a class or an exam. Everyone faces the same temptation: putting off until tomorrow what should be done today. Your students might be reminded that the best remedy for this temptation is not to give into it but to remain disciplined. They might simply set up a schedule and make every effort to stick to it to achieve their best results.

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Cyberlaw Link

Many jurisdictions have implemented online filing systems, and some have set up cyber courts in which part, or all, of a case is presented online. ***What issues are likely to occur in these circumstances?***

Ask your students to what extent those who send e-mail over the Internet should be liable for the content of their messages in states other than their own (or nations other than the United States). ***Is the existence of a Web site a sufficient basis to exercise jurisdiction?***

DISCUSSION QUESTIONS

1. ***If a corporation is incorporated in Delaware, has its main office in New York and does business in California, but its president lives in Connecticut, in which state(s) can it be sued?*** Delaware, New York, and California—a corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

2. ***Why might a defendant prefer to be sued in one state rather than in another?*** The law, and the circumstances in which the law is applied, vary from state to state. These factors might favor a particular defendant's position in one state over another.

3. ***When can a court exercise jurisdiction over a party whose only connection to the jurisdiction is via the Internet?*** One way to phrase the issue is when, under a set of circumstances, there are sufficient minimum contacts to give a court jurisdiction over a remote party. If the only contact is an ad on the Web originating from a remote location, the outcome to date has generally been that a court cannot exercise jurisdiction. Doing considerable business online, however, generally supports jurisdiction. The "hard" cases are those in which the contact is more than an ad but less than a lot of activity.

4. ***Should a plaintiff be required to serve a defendant with a summons and a copy of a complaint more than once? Why or why not?*** More than one service is not more likely to receive a response. Besides, it would be unfair to the plaintiff to require more than one service. For example, a plaintiff who has provided evidence that a person authorized to receive mail on behalf of a corporation in fact received an item that was mailed to an officer of the corporation should not be held responsible for any failure on the part of the corporate defendant to effectively distribute that mail. ***If a mailed summons actually reached the individual to be served, would that be sufficient to establish valid service, even if the summons was not addressed correctly or was signed for by someone who did not have the authority to do so?*** Probably. If a plaintiff can provide evidence that a corporate officer or an agent for service of process actually received a summons, this would likely be sufficient to establish that the plaintiff substantially effected service.

5. ***What are the advantages of effecting service of process via e-mail?*** The chief advantages are lower cost and faster process. Any businessperson who is involved in litigation will benefit, through lower legal costs, by the time and cost savings resulting from service by e-mail. The legal profession, the court systems, and other plaintiffs will also realize the cost-saving advantages of effecting service of process over the Internet. Federal Rules of Civil Procedure permit service by e-mail in certain circumstances, but generally, a party will have to obtain a court's permission.

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6. ***When may a federal court hear a case?*** Federal courts have jurisdiction in cases in which federal questions arise, in cases in which there is diversity of citizenship, and in some other cases. When a suit involves a question arising under the Constitution, a treaty, or a federal law, a federal question arises. When a suit involves citizens of different states, a foreign country and an American citizen, or a foreign citizen and an American citizen, diversity of citizenship exists. In diversity suits, there is an additional requirement—the amount in controversy must be more than $75,000. Federal courts have exclusive jurisdiction in cases involving federal crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law.

7. ***What are the advantages of discovery?*** Discovery saves time by preserving evidence, narrowing the issues, preventing surprises at trial, and avoiding a trial altogether in some cases. A trial might also be avoided if no facts are in dispute and only questions of law are at issue. Either party then files a motion for summary judgment.

8. ***After a trial, a court issues a judgment that includes a grant of relief for the plaintiff, but the relief is not as much as the plaintiff wanted. Neither the plaintiff nor the defendant is satisfied with this result. Who can appeal to a higher court?*** Either a plaintiff or a defendant, or both, can appeal a judgment to a higher court. An appellate court can affirm, reverse, or remand a case, or take any of these actions in combination. To appeal successfully, it is best to appeal on the basis of an error of law, because appellate courts do not usually reverse on findings of fact.

9. ***What is the principal difference between negotiation and mediation?*** The major difference between negotiation and mediation is that mediation involves the presence of a third party called a mediator. The mediator assists the parties in reaching a mutually acceptable agreement. The mediator talks face to face with the parties and allows them to discuss their disagreement in an informal environment. The mediator's role, however, is limited to assisting the parties. The mediator does not decide a controversy; he or she only aids the process by helping the parties more quickly find common ground on which they can begin to reach an agreement for themselves.

10. ***What is arbitration?*** The process of arbitration involves the settling of a dispute by an impartial third party (other than a court) who renders a *legally binding* decision. The third party who renders the decision is called an arbitrator. Arbitration combines the advantages of third-party decision making—as provided by judges and juries in formal litigation—with the speed and flexibility of rules of procedure and evidence less rigid than those governing courtroom litigation.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Ask your students to visit a court, observe the proceedings, and report their observations. Ask them to find out how long it might be before a petition filed in the court would be granted a hearing—that is, how clogged is the court's calendar) and to what any delay might be attributed.

2. Have students prepare a chart showing the relationships between the various courts having jurisdiction in your state. (There is a digest of each state' courts in Martindale-Hubbell Law Directory, which might be placed on reserve in the library.) Assign a few jurisdiction hypotheticals. ***For example—Through which of these courts could a divorce decree be appealed? Which court(s) would have original jurisdiction in a truck accident involving out-of-state residents (does the dollar amount of injuries and damage make a difference)? Which court(s) would have jurisdiction to render a judgment in a case arising from food poisoning at a local cheeseburger stand that is part of a nationwide corporate chain? In which court(s) could you file a suit alleging discrimination, and if you lost, to which court could you appeal the decision?***

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3. Ask the class to research the reasons behind the earlier hostility of the courts towards arbitration procedures. ***Were they concerned solely with parties being divested of their rights or did they see arbitration as a challenge to their own authority?***

4. Have students investigate the dispute resolution services discussed in this chapter by going online and reading some the disputes submitted for resolution or the results in individual cases (on the ICANN Web site, for example).

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 2: In ***International Shoe Co. v. State of Washington,*** the state of Washington sought unemployment contributions from the International Shoe Company based on commissions paid to its sales representatives who lived in the state. International Shoe claimed that its activities within the state were not sufficient to manifest its "presence." It argued that (1) it had no office in Washington; (2) it employed sales representatives to market its product in Washington, but no sales or purchase contracts were made in the state; and (3) it maintained no inventory in Washington. The company claimed that it was a denial of due process for the state to subject it to suit. The Supreme Court of Washington ruled in favor of the state, and International Shoe appealed to the United States Supreme Court.

The United States Supreme Court affirmed the Washington Supreme Court's decision—International Shoe had sufficient contacts with the state to allow the state to exercise jurisdiction constitutionally over it. The Court found that the activities of the Washington sales representatives were "systematic and continuous," resulting in a large volume of business for International Shoe. By conducting its business within the state, the company received the benefits and protections of the state laws and was entitled to have its rights enforced in state courts. Thus, International Shoe's operations established "sufficient contacts or ties with the state * * * to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligation" that the company incurred there.

Footnote 7: In ***Zippo Manufacturing Co. v. Zippo Dot.Com, Inc.,*** a federal district court proposed three categories for classifying the types of Internet business contact: (1) substantial business conducted online, (2) some interactivity through a Web site, and (3) passive advertising. Jurisdiction is proper for the first category, improper for the third, and may or may not be appropriate for the second. Zippo Manufacturing Co. (ZMC) makes, among other things, "Zippo" lighters. ZMC is based in Pennsylvania. Zippo Dot Com, Inc. (ZDC), operates a Web page and an Internet subscription news service. ZDC has the exclusive right the domain names "zippo.com," "zippo.net," and "zipponews.com." ZDC is based in California, and its contacts with Pennsylvania have occurred almost exclusively over the Internet. Two percent of its subscribers (3,000 of 140,000) are Pennsylvania residents who contracted over the Internet to receive its service. ZDC has agreements with seven ISPs in Pennsylvania to permit their subscribers to access the service. ZMC filed a suit in against ZDC, alleging trademark infringement and other claims, based on ZDC's use of the word "Zippo." ZDC filed a motion to dismiss for lack of personal jurisdiction. Holding that ZDC's connections to the state fell into the first category, the court denied the motion.

Footnote 22: Buckeye Check Cashing, Inc., cashes personal checks for consumers in Florida. For each transaction, a consumer signs a "Deferred Deposit and Disclosure Agreement," which states that in a dispute of any kind, "either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration." John Cardegna and others filed a suit in a Florida state court against Buckeye, alleging that its "finance charge"

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represented an illegally high interest rate in violation of state law. Buckeye filed a motion to compel arbitration. The court denied the motion. On Buckeye's appeal, a state intermediate appellate court reversed, but on the plaintiffs' appeal, the Florida Supreme Court reversed again. Buckeye appealed.

In ***Buckeye Check Cashing, Inc. v. Cardegna,*** the United States Supreme Court reversed and remanded. A challenge to the validity of a contract as a whole, and not specifically to an arbitration clause contained in the contract, must be resolved by an arbitrator. The Federal Arbitration Act "allows a challenge to an arbitration provision 'upon such grounds as exist at law or in equity for the revocation of any contract.' There can be no doubt that 'contract' . . . must include contracts that later prove to be void. Otherwise, the grounds for revocation would be limited to those that rendered a contract voidable—which would mean (implausibly) that an arbitration agreement could be challenged as voidable but not as void."

Does the holding in this case permit a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void? Yes. "But," in the words of the Court, "it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." This is why the Court ruled that arbitration provisions are separately enforceable.

If the Court had ruled in favor of the respondents, how might its holding have affected the interpretation of other statutes? One answer to this question is best illustrated by the Court's example. "[T]he Sherman Act * * * states that '[e]very contract * * * in restraint of trade * * * is hereby declared to be illegal.' Under respondents' reading of 'contract,' a bewildering circularity would result: A contract illegal because it was in restraint of trade would not be a 'contract' at all, and thus the statutory prohibition would not apply."

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ALTERNATE CASE PROBLEMS

CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

2-1. Jurisdiction. Cal-Ban 3000 is a weight loss drug made by Health Care Products, Inc., a Florida corporation, and marketed through CKI Industries, another Florida corporation. Enticed by North Carolina newspaper ads for Cal-Ban, the wife of Douglas Tart bought the drug at Prescott's Pharmacies, Inc., in North Carolina for her husband. Within a week, Tart suffered a ruptured colon. Alleging that the injury was caused by Cal-Ban, Tart sued Prescott's Pharmacies, CKI, the officers and directors of Health Care, and others in a North Carolina state court. CKI and the Health Care officers and directors argued that North Carolina did not have personal jurisdiction over them because CKI and Health Care were Florida corporations. How will the court rule? Why? [*Tart v. Prescott's Pharmacies, Inc.,* 118 N.C.App. 516, 456 S.E.2d 121 (1995)]

2–2. Standing to Sue. Blue Cross and Blue Shield insurance companies (the Blues) provide 68 million Americans with health-care financing. The Blues have paid billions of dollars for care attributable to illnesses related to tobacco use. In an attempt to recover some of this amount, the Blues filed a suit in a federal district court against tobacco companies and others, alleging fraud, among other things. The Blues claimed that beginning in 1953, the defendants conspired to addict millions of Americans, including members of Blue Cross plans, to cigarettes and other tobacco products. The conspiracy involved misrepresentation about the safety of nicotine and its addictive properties, marketing efforts targeting children, and agreements not to produce or market safer cigarettes. The defendants' success caused lung, throat, and other cancers, as well as heart disease, stroke, emphysema, and other illnesses. The defendants asked the court to dismiss the case on the ground that the plaintiffs did not have standing to sue. Do the Blues have standing in this case? Why or why not? [*Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.,* 36 F.Supp.2d 560 (E.D.N.Y. 1999)]

2–3. E-Jurisdiction. American Business Financial Services, Inc. (ABFI), a Pennsylvania firm, sells and services loans to businesses and consumers. First Union National Bank, with its

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principal place of business in North Carolina, provides banking services. Alan Boyer, an employee of First Union, lives in North Carolina and has never been to Pennsylvania. In the course of his employment, Boyer learned that the bank was going to extend a $150 million line of credit to ABFI. Boyer then attempted to manipulate the stock price of ABFI for personal gain by sending disparaging e-mails to ABFI's independent auditors in Pennsylvania. Boyer also posted negative statements about ABFI and its management on a Yahoo bulletin board. ABFI filed a suit in a Pennsylvania state court against Boyer, First Union, and others, alleging wrongful interference with a contractual relationship, among other things. Boyer filed a motion to dismiss the complaint for lack of personal jurisdiction. Could the court exercise jurisdiction over Boyer? Explain. [*American Business Financial Services, Inc. v. First Union National Bank,* __ A.2d __, 2002 WL 433735 (Pa.Comm.Pl. 2002)]

2–4. Arbitration. Alexander Little worked for Auto Stiegler, Inc., an automobile dealership in Los Angeles County, California, eventually becoming the service manager. While employed, Little signed an arbitration agreement that required the submission of all employment-related disputes to arbitration. The agreement also provided that any award over $50,000 could be appealed to a second arbitrator. Little was later demoted and terminated. Alleging that these actions were in retaliation for investigating and reporting warranty fraud and thus were in violation of public policy, Little filed a suit in a California state court against Auto Stiegler. The defendant filed a motion with the court to compel arbitration. Little responded that the arbitration agreement should not be enforced in part because the appeal provision was unfairly one sided. Is this provision enforceable? Should the court grant Auto Stiegler's motion? Why or why not? [*Little v. Auto Stiegler, Inc.,* 29 Cal.4th 1064, 63 P.3d 979, 130 Cal.Rptr.2d 892 (2003)]

2–5. Jurisdiction. KaZaA BV was a company formed under the laws of the Netherlands. KaZaA distributed KaZaA Media Desktop (KMD) software, which enabled users to exchange, via a peer-to-peer transfer network, digital media, including movies and music. KaZaA also operated the KaZaA.com Web site, through which it distributed the KMD software to millions of California residents and other users. Metro-Goldwyn-Mayer Studios, Inc., and other parties in the entertainment industries based in California filed a suit in a federal district court against KaZaA and others, alleging copyright infringement. KaZaA filed a counterclaim, but while legal action was pending, the firm passed its assets and its Web site to Sharman Networks, Ltd., a company organized under the laws of Vanuatu (an island republic east of Australia) and doing business principally in Australia. Sharman explicitly disclaimed the assumption of any of KaZaA's liabilities. When the plaintiffs added Sharman as a defendant, Sharman filed a motion to dismiss on the ground that the court did not have jurisdiction. Would it be fair to subject Sharman to suit in this case? Explain. [*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,* 243 F.Supp.2d.1073 (C.D.Cal. 2003)]

2–6. Standing to Sue. Michael and Karla Covington live in Jefferson County, Idaho. When they bought their home, a gravel pit was across the street. In 1995, the county converted the pit to a landfill. Under the county's operation, the landfill accepted major appliances, household garbage, spilled grain, grass clippings, straw, manure, animal carcasses, containers with

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hazardous content warnings, leaking car batteries, and waste oil, among other things. The deposits were often left uncovered, attracting insects and other scavengers and contaminating the groundwater. Fires broke out, including at least one started by an intruder who entered the property through an unlocked gate. The Covingtons complained to the state, which inspected the landfill, but no changes were made to address their concerns. Finally, the Covingtons filed a suit in a federal district court against the county and the state, charging violations of federal environmental laws. Those laws were designed to minimize the risks of injuries from fires, scavengers, groundwater contamination, and other pollution dangers. Did the Covingtons have standing to sue? What principles apply? Explain. [*Covington v. Jefferson County,* 358 F.3d 626 (9th Cir. 2004)]

2–7. Arbitration. Kathleen Lowden sued cellular phone company T-Mobile USA, Inc., contending that its service agreements were not enforceable under Washington state law. Lowden moved to create a class-action lawsuit, in which her claims would extend to similarly affected customers. She contended that T-Mobile had improperly charged her fees beyond the advertised price of service and charged her for roaming calls that should not have been classified as roaming. T-Mobile moved to force arbitration in accordance with provisions that were clearly set forth in the service agreement. The agreement also specified that no class-action lawsuit could be brought, so T-Mobile asked the court to dismiss the class-action request. Was T-Mobile correct that Lowden's only course of action would be to file for arbitration personally? Explain. [*Lowden v. T-Mobile USA, Inc.,* 512 F.3d 1213 (9th Cir. 2008)]

2–8. Venue. Brandy Austin used powdered infant formula to feed her infant daughter shortly after her birth. Austin claimed that a can of Nestlé Good Start Supreme Powder Infant Formula was contaminated with *Enterobacter sakazakii* bacteria, which can cause infections of the bloodstream and central nervous system, in particular, meningitis (inflammation of the tissue surrounding the brain or spinal cord). Austin filed an action against Nestlé in Hennepin County District Court in Minnesota. Nestlé argued for a change of venue because the alleged tortious action on the part of Nestlé occurred in South Carolina. Austin is a South Carolina resident and gave birth to her daughter in that state. Should the case be transferred to a South Carolina venue? Why or why not? [*Austin v. Nestle USA, Inc.,* 677 F.Supp.2d 1134 (D.Minn. 2009)]

2–9. Arbitration. PRM Energy Systems owned patents licensed to Primenergy, LLC, to use in the United States. Their contract stated that "all disputes" would be settled by arbitration. Kobe Steel of Japan was interested in using the technology represented by PRM's patents. Primenergy agreed to let Kobe use the technology in Japan without telling PRM. When PRM learned about the secret deal, the firm filed a suit against Primenergy for fraud and theft. Does this dispute go to arbitration or to trial? Why? [*PRM Energy Systems v. Primenergy, LLC,* 592 F.3d 830 (8th Cir. 2010)]

2–10. A QUESTION OF ETHICS

Narnia Investments, Ltd., filed a suit in a Texas state court against several defendants, including Harvestons Securities, Inc., a securities dealer. (Securities are documents evidencing the

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ownership of a corporation, in the form of stock, or debts owed by it, in the form of bonds.) Harvestons is registered with the state of Texas and thus may be served with a summons and a copy of a complaint by serving the Texas Securities Commissioner. In this case, the return of service indicated that process was served on the commissioner "by delivering to JoAnn Kocerek defendant, in person, a true copy of this [summons] together with the accompanying copy(ies) of the [complaint]." Harvestons did not file an answer, and Narnia obtained a default judgment against the defendant for $365,000, plus attorneys' fees and interest. Five months after this judgment, Harvestons filed a motion for a new trial, which the court denied. Harvestons appealed to a state intermediate appellate court, claiming that it had not been served in strict compliance with the rules governing service of process. [*Harvestons Securities, Inc. v. Narnia Investments, Ltd.,* __ S.W.3d __, 2007 WL 64227 (Tex.App.—Houston [14 Dist.] 2007)]

1. Harvestons asserted that Narnia's service was invalid in part because "the return of service states that process was delivered to 'JoAnn Kocerek' " and did not show that she "had the authority to accept process on behalf of Harvestons or the Texas Securities Commissioner." Should such a detail, if it is required, be strictly construed and applied? Should it apply in this case? Explain.

2. Whose responsibility is it to see that service of process is accomplished properly? Was it accomplished properly in this case? Why or why not?

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United States District Court,
S.D. California.
NATIONAL FOOTBALL LEAGUE Players Association, on its own behalf and on behalf of Bruce Matthews,
Plaintiff,
v.
NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, and Tennessee Titans, Defendants.

No. 10CV1671 JLS (WMC).
Jan. 5, 2011.

Matthew M. Walsh, Maya Dharwarkar, Dewey & Leboeuf LLP, Los Angeles, CA, Adam J. Kaiser, Jeffrey L. Kessler, Jeffrey H. Newhouse, Dewey & Leboeuf LLP, New York, NY, for Plaintiff.

Daniel L. Nash, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, Rex S. Heinke, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, CA, for Defendants.

ORDER (1) GRANTING DEFENDANTS' MOTION TO CONFIRM ARBITRATION AWARD AND (2) DENYING PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

JANIS L. SAMMARTINO, District Judge.

On August 5, 2010, an arbitrator ruled that Bruce Matthews could pursue a workers' compensation claim in California but that the claim must proceed under Tennessee law, if at all. In response, the National Football League Players Association (NFLPA or Plaintiff) brought suit on behalf of itself and Matthews to vacate the arbitration award. Presently before the Court is Defendants National Football League Management Council (NLFMC) and Tennessee Titans' (collectively Defendants) motion to confirm arbitration award (Doc. 23 (Mot. to Confirm) and Plaintiff's motion to vacate arbitration award. (Doc. 24 (Mot. to Vacate).) After consideration, the Court finds that the arbitrator did not manifestly disregard the law and the award is not contrary to public policy. Thus, the Court **GRANTS** Defendants' motion to confirm arbitration award and **DENIES** Plaintiff's motion to vacate arbitration award. The arbitration award granted on August 5, 2010, is **CONFIRMED.**

BACKGROUND

Bruce Matthews played football in the National Football League (NFL) from 1983 to 2002. (Compl.¶ 12.) As a member of the NFL, Matthews was bound by a collective bargaining agreement (CBA) negotiated between the NFLMC, on behalf of the teams, and the NFLPA, on behalf of all NFL players. (Compl.¶ 19.) The CBA provides that all disputes involving the CBA or the player contract be submitted to final and binding arbitration. (*See* Compl. ¶ 18; Mot. to Confirm, Declaration of Daniel Nash, Ex. A at Art. IX, Sec. 1.)

During his NFL career, Matthews was employed by the Houston Oilers and its successor in interest, the Tennessee Titans. (Doc. 9 at 9-10.) Matthews' contract with the Titans stated that "all issues of law, issues of fact, and matters related to workers compensation benefits shall be exclusively determined by and exclusively decided in accordance with the internal laws of the State of Tennessee without resort to choice of law rules." (*Id.* at 10.)

Approximately five years after he left the NFL, Matthews filed a workers' compensation claim in California. (*Id.*) This ran contrary to the CBA and Matthews' contract with the Titans, and the Titans and the NFLMC filed a grievance against Matthews for "improper[ly] filing and pursuing claims ... in violation of [Matthews'] NFL Player Contract." (Compl., Ex. A at 2.)

The grievance was arbitrated. At issue was whether Matthews violated his player contract with the Titans by "filing a claim for workers' compensation benefits in California and requesting that the claim be processed under California law." (*Id.*) On August 5, 2010, the arbitrator found that Matthews violated his player contract. The arbi-

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trator issued an arbitration award forcing Matthews to proceed under Tennessee law:

> [Matthews] is not precluded under Paragraph 26D from filing his workers compensation claim in California. However, [Matthews] is required to proceed under Tennessee law, and accordingly shall cease and desist from attempting to persuade the California tribunals to apply California law in violation of Paragraph 26D of the Player's Contract. Further, under this order [Matthews] is required to withdraw from the California proceeding, should the California tribunals ultimately deny the application of Tennessee law.
>
> (*Id.* at 18.)

Unsatisfied with the arbitration award, Plaintiff filed suit, requesting the Court vacate the arbitration award pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. After the relevant pleadings had been filed (Docs. 9 & 19), the parties filed the dueling motions at hand. Defendants' motion argues that the arbitration award should be upheld. And like clockwork, Plaintiff's argues the opposite.

JURISDICTION AND LEGAL STANDARD

"Section 301 of the Labor Management Relations Act authorizes the district courts to enforce or vacate an arbitration award entered pursuant to a collective bargaining agreement." *Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc., of Ariz.,* 84 F.3d 1186, 1190 (9th Cir.1996). The review is limited and deferential, however. *Id.* at 1190. In reviewing an award, this Court does not sit to hear claims of factual or legal error. *S. Cal. Gas Co. v. Utility Workers Union of Am., Local 132,* 265 F.3d 787, 792 (9th Cir.2001). Instead, the Court's task is "to review the procedural soundness of the arbitral decision." *Haw. Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.,* 241 F.3d 1177, 1180-81 (9th Cir.2001).

Nonetheless, in a narrow set of situations, the Court may vacate an arbitration award. "Vacatur of an arbitration award under § 301 of the LMRA is warranted: (1) when the award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice; (2) where the arbitrator exceeds the boundaries of the issues submitted to him; (3) when the award is contrary to public policy; or (4) when the award is procured by fraud." *S. Cal. Gas Co.,* 265 F.3d at 792-93.

An arbitration award may also be vacated because of the arbitrator's "manifest disregard of the law." *Comedy Club, Inc. v. Improv West Assocs.,* 553 F.3d 1277, 1289 (9th Cir.2009). The Court notes, however, it is not clear this basis for vacatur is available in § 301 reviews. The "manifest disregard ground for vacatur is shorthand for a statutory ground under the [Federal Arbitration Act], specifically 9 U.S.C. § 10(a)(4)." *Id.* at 1290. And the Ninth Circuit has not resolved the issue whether the Federal Arbitration Act (FAA) speaks to suits brought under § 301. *See New United Motor Mfg., Inc. v. United Auto Workers Local 2244,* 617 F.Supp.2d 948, 954 n. 6 (N.D.Cal.2008). Nonetheless, the FAA is often used as a guide when forming the federal common law of labor arbitration under § 301. *Id.* Thus, this Court will assume, without deciding, that the "manifest disregard of the law" basis for vacatur is available in § 301 actions.

ANALYSIS

The August 5 arbitration award allowed Matthews to file a workers compensation claim in California. But it required that the claim be adjudicated under Tennessee law, if at all. The question before the Court is whether the award should be vacated. Procedurally, the Court is faced with a motion to vacate and a motion to confirm. But given the Court's posture on review, the null result is confirmation of the award. The onus rests on Plaintiff to establish a basis for vacatur. *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms,* 74 F.3d 169, 174 (9th Cir.1995).

Plaintiff makes three arguments for overturning the arbitration award. First, Plaintiff argues that the award is contrary to California law and public policy. (Mot. to Vacate at 6.) Second, Plaintiff argues that the award is contra-

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ry to federal labor law. (*Id.* at 9.) And finally, Plaintiff argues that the award violates the Full Faith and Credit Clause. (*Id.* at 12.)

Given Plaintiff's arguments and the legal framework for reviewing arbitration awards, there are two bases for possibly vacating the August 5 award: because the arbitrator manifestly disregarded the law and because the award is contrary to public policy. The Court will consider vacatur under these two banners.

1. Manifest Disregard of the Law

Plaintiff argues that the arbitrator manifestly disregarded the Full Faith and Credit Clause of the United States Constitution when rendering its arbitration award. (Mot. to Vacate at 12.) The argument is problematic in light of the legal standard.

"The manifest disregard exception requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *Collins v. D.R. Horton, Inc.,* 505 F.3d 874, 879 (9th Cir.2007) (internal quotations omitted). Thus, the Court may not vacate an arbitration award even in the face of an erroneous interpretation of the law. *Id.* To vacate on this basis, the moving party must "show the arbitrator understood and correctly stated the law, but proceeded to disregard the same." *Id.* (internal citations and formatting omitted). Moreover, the "governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable." *Id.*

The parties and the Court agree that the arbitrator did not consider the Full Faith and Credit Clause when rendering its decision. (*See* Mot. to Vacate, Ex. A.) Plaintiff takes it a step further and argues that the failure to consider is a manifest disregard of the law and warrants vacatur. (Mot. to Vacate at 12.) But this argument is flawed; while it references the legal standard, it ignores the actual law. It is not clear from the record "that the arbitrator [ ] recognized the applicable law and then ignored it." *Comedy Club, Inc.,* 553 F.3d at 1290. Thus, the Court cannot vacate the arbitration award on this basis.

The Court recognizes, nonetheless, that an arbitration award violating the Full Faith and Credit Clause is problematic. But that possibility is better considered under the "violates public policy" rubric. The Court will, therefore, consider the Full Faith and Credit argument in the next section.

2. Public Policy

In this section, the Court considers whether the August 5 arbitration award is contrary to public policy and should be vacated.

A. Legal Standard

The "contrary to public policy" analysis has two main parts. *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173,* 886 F.2d 1200, 1212 (9th Cir.1989). The Court must first delineate a public policy that is "explicit, well-defined, and dominant." *S. Cal. Gas Co.,* 265 F.3d at 794-95 (internal quotations omitted). Such delineation must be made from "reference to the laws and legal precedents and not from general considerations of proposed public interest." *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 43, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Second, the public policy must be "one that specifically militates against the relief ordered by the arbitrator." *Stead Motors,* 886 F.2d at 1212-13. Moreover, "[w]here more than one public policy is germane to an arbitration award, [the Court] must engage in balancing of the relevant policies to determine whether to apply the public policy exception to vacate the arbitral award." *Va. Mason Hosp. v. Wash. St. Nurses Ass'n,* 511 F.3d 908, 917 (9th Cir.2007). The party seeking vacatur bears the burden of showing that the award violates public policy. *Foster Poultry Farms,* 74 F.3d at 174.

B. Discussion

The parties raise several policies germane to an arbitration award denying recovery under California law. Plain-

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tiff argues that California policy prevents contractual waivers of its workers' compensation protections and that federal policy prevents unions and employees from agreeing to violate minimum labor standards. (Mot. to Vacate at 10.) Also relevant is the policy evinced by the Full Faith and Credit Clause. In response, Defendants raise two countervailing policy considerations. Defendants argue that there is a policy favoring collective bargaining and arbitration and that California favors enforcing choice-of-law agreements. (Mot. to Confirm at 1.) The Court considers the applicability of each policy and balances them against each other.

(1) California Public Policy

The Court begins with California labor law and cases interpreting it. California Labor Code § 5000 states that "[n]o contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division." Cal. Lab.Code § 5000. Based on § 5000 and case law, Plaintiff argues there is a policy that "an employment agreement purporting to waive the employee's rights under California's workers' compensation statute is void as a matter of law." (Mot. to Vacate at 7.) And because the August 5 arbitration award "holds that the NFLPA and NFLMC contractually waived the right of Matthews to seek workers' compensation benefits under California Labor Code § 3600," the award "cannot be squared with California's public policy" and must be vacated (*Id.* at 8-9.)

The predecessor statute to § 5000, containing the same language, was interpreted in *Alaska Packers Ass'n v. Industrial Accident Commission of California,* 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935). And the Court begins with *Alaska Packers* in its search for an explicit, well-defined, and dominant public policy.

Alaska Packers involved three things, an employee, an employer, and a California workers' compensation award. The employee had signed a contract in California and agreed "to be bound by the Alaska Workmen's Compensation Law." *Alaska Packers,* 294 U.S. at 538. A short time later, the employee applied for and received California workers' compensation. *Id.* The employer disagreed with the award and fought it up to the United States Supreme Court. The employer argued that Labor Code § 5000 [FN1] was "invalid under the due process and the full faith and credit clauses of the Federal Constitution." *Id.* at 539.

FN1. To benefit comprehension, the Court refers to the statute as § 5000 even though the Supreme Court considered the predecessor statute.

The employer's due process argument is relevant here.[FN2] The *Alaska Packers* employer argued that § 5000 violated due process because the statute "denies validity to the agreement that the parties should be bound by the Alaska Workmen's Compensation Act." *Id.* The Supreme Court disagreed. It noted that due process prevents a state from restricting or controlling the obligation of contracts executed and performed without the state. *Id* at 540. But because the contract was "entered into within [California], ... its terms, its obligation, and its sanctions are subject, in some measure to the legislative control of the state." *Id.* at 540-41. Moreover, the facts indicated that without workers' compensation in California, the employee and similarly situated parties would be without remedy. *Id.* at 541. And thus, the Court held that California "had a legitimate public interest in controlling and regulating this employer-employee relationship" and it would not violate due process to apply § 5000's ban on contracts waiving California workers' compensation. *Id.* at 522.

FN2. This Court discusses the full faith and credit issue below.

Alaska Packers was favorably cited more than seventy years later, when a contract stood between an employee and California workers' compensation. *See Bowen v. Workers' Comp. Appeals Bd.,* 73 Cal.App.4th 15, 86 Cal.Rptr.2d 95 (Cal.Ct.App.1999). The Bowen court held that "an employer ... cannot, simply by adding a contract clause ..., deny an employee ... California wokers' compensation benefits where the employee accepts an offer of employment in California." *Id.* at 26, 86 Cal.Rptr.2d 95. "Such a contract clause ... would violate section 5000 prohibiting contracts exempting employers from liability under the California Workers' Compensation Act and frustrate California's interests in protecting employees hired in California and injured elsewhere." *Id.* at 27, 86 Cal.Rptr.2d

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95.

After considering *Alaska Packers* and *Bowen,* this Court draws a public policy different from Plaintiff's. California law does not provide an explicit, well-defined, and dominant public policy barring all contractual waivers of California workers' compensation. It has, instead, evinced a nuanced analysis in which courts considered the extent of California's interest in providing workers' compensation. *Alaska Packers* explicitly noted that the employee entered into the contract in California and had little chance of remedy elsewhere. *Alaska Packers,* 294 U.S. at 542. The case also indicated that it was unnecessary to consider what effect should be given to § 5000 if the parties' relationship to California gave California "a lesser interest in protecting the employee." *Id.* at 543.

Indeed, even Plaintiff's briefing indicates that the policy is not so explicit, well-defined, or dominant. Plaintiff argues that "the bible of workers' compensation law explained that ... *Alaska Packers* began to develop the general test which inquires whether any incidents of the injury that are important and relevant to workers' compensation fall within the local state." (Doc. 36 at 5 (internal quotations and formatting omitted).) If there were an explicit, well-defined, and dominant policy against waiving of California workers' compensation, considerations of California's interest in protecting the employee would be unnecessary.

Certainly, there are situations in which California Labor Code § 5000 rightfully overrides a contract agreeing to workers' compensation based on another state's laws. But the Court is not in a position to determine whether this is one of those situations. The Court is charged with determining only whether there is a explicit, well-defined, dominant public policy militating against the arbitration award. And through this lens, the fact that California's policy is limited to certain situations belies the existence of a blanket policy. Thus, the Court finds that existing law does not provide an explicit, well-defined, and dominant public policy explicitly militating against an arbitration award preventing Matthews from obtaining relief under California law.

(2) Full Faith and Credit Clause

Plaintiff's Full Faith and Credit Clause argument is that the arbitration award "impos[es] the law of Tennessee upon the state of California," and the imposition violates the Full Faith and Credit Clause. (Mot. to Vacate at 12.) The question facing the Court is whether the Full Faith and Credit Clause evinces an explicit, well-defined, and dominant public policy specifically militating against the relief ordered by the arbitrator.

The Full Faith and Credit Clause provides, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. A corollary to this rule concerns the extent one state must defer to another. This issue was addressed in two cases, both of which were discussed by the parties, and both of which the Court will consider here: *Alaska Packers* and *Pacific Employers Insurance Co. v. Industrial Accident Commission of California,* 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939).

As noted before, the employee in *Alaska Packers* was contractually "bound by the Alaska Workmen's Compensation Law." *Alaska Packers,* 294 U.S. at 538. But a short time later, the employee applied for and received California workers' compensation. *Id.* A full faith and credit issue arose because the Alaska and California workers' compensation statutes were in direct conflict regarding the employee's workers' compensation remedy. At the Supreme Court, the employer argued that the Alaska worker's compensation statute provided remedy for an injury occurring in Alaska, and "that California courts denied full faith and credit to the Alaska statute by refusing to recognize it as a defense to the application of an award under the California statute." *Alaska Packers,* 294 U.S. at 539. The *Alaska Packers* Court indicated that the proper resolution of this conflict under the Full Faith and Credit Clause would be to "appra[ise] the governmental interests of each jurisdiction, and turn[ ] the scale of decision according to their weight." *Alaska Packers,* 294 U.S. at 548. And after appraising and turning, the Court found that Alaska's interests were not superior to that of California's. Thus, California "had the right to enforce its own laws in its own courts." *Id.* at 550.

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Pacific Employers provided a similar situation. The employee was employed in Massachusetts and was sent to California, temporarily, for business. While in California, the employee suffered a work related injury. The employee instituted a workers' compensation claim under California law and succeeded.

The insurance carrier, in charge of paying the employee, argued that California, "in applying the California [workers' compensation act] and in refusing to recognize the Massachusetts [workers' compensation act] as a defense, had denied [Massachusetts]" the full faith and credit of its laws. *Pacific Employers,* 306 U.S. at 497. In the face of this argument, the Supreme Court turned to *Alaska Packers.* And it came to the same conclusion. The Court held that "[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Id.* at 503. Thus, the Full Faith and Credit Clause did not prevent California from exerting its own workers' compensation law.

Plaintiff draws, from these cases, the argument that "it is unconstitutional for [a] state to try to project its laws across state lines." (Mot. to Vacate at 13.) Moreover, Plaintiff argues that the arbitrator's award "seeks to expressly project Tennessee law across state lines by requiring that Tennessee law apply to Matthews's California workers' compensation claim." (*Id.*) Thus, according to Plaintiff, the August 5 award is contrary to the policy set forth by the Full Faith and Credit Clause and accompanying case law.

This Court disagrees. Plaintiff's argument is that the award projects Tennessee law into California, forcing California to apply Tennessee law. But the Full Faith and Credit Clause does not always prevent this. Both *Alaska Packers* and *Pacific Employers* indicated the importance of determining each states' interest in the matter before determining whether one state should apply the law of another. *See Alaska Packers,* 294 U.S. at 548; *Pacific Employers,* 306 U.S. at 503. Thus, the Full Faith and Credit Clause and the case law do not evince an explicit, well-defined, and dominant public policy specifically militating against an award requiring Matthews to pursue his workers' compensation claim under Tennessee law, if at all.

(3) Federal Law

Plaintiff's final argument is that the arbitration award is contrary to federal law. Plaintiff begins by arguing that federal law prevents collective bargaining agreements from undercutting a state's workers' compensation benefits. (Mot. to Vacate at 11.) Plaintiff then argues that "an arbitration award that requires an employee to forfeit rights he would otherwise be permitted to exercise under state workers' compensation laws is contrary to law, illegal, and must be vacated." (*Id.* at 11-12.)

Based on Plaintiff's arguments, the Court is faced with two issues: one concerning the validity of a collective bargaining agreement and the other with an arbitration award. The first argument can be resolved summarily. The Court is not reviewing the collective bargaining agreement, and there is no indication that the collective bargaining agreement itself undercuts any state's workers' compensation benefits.

As for the second argument-that an arbitration award must be vacated if it requires an employee to forfeit rights otherwise exercisable under state workers' compensation law-the Court finds that it does not apply. First, neither case Plaintiff cited stands for the proffered proposition. (*See* Mot. to Vacate at 11-12.) And second, to the extent the policy exists, it does not specifically militate against the arbitration award; Plaintiff falsely assumes Matthews has a right to receive California workers' compensation. That is to say, a policy preventing Matthews from waiving California workers' compensation if he is eligible for it does not apply if he is ineligible for it. The Court is not in a position to make findings regarding Matthews' eligibility for California workers' compensation. But the Court can determine that federal law does not evince a policy specifically militating against this arbitration award. And it does so here. Federal public policy is not a basis for vacating the arbitration award.

(4) Conclusion

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What is apparent in this analysis is the Court's extremely limited review. The Court can determine only whether there exists an explicit, well-defined, and dominant public policy specifically militating against the arbitrator's award. Plaintiff provided the Court with three bases for deriving public policy: California law, the Full Faith and Credit Clause of the Constitution, and federal law. And after considering those bases, the Court concludes there is not an explicit, well-defined, and dominant public policy specifically militating against the arbitrator's award.[FN3]

FN3. Consequently, the Court will not discuss Defendants' countervailing policy considerations.

CONCLUSION

Plaintiff argues that the arbitration award granted on August 5, 2010, should be vacated because the arbitrator showed a manifest disregard of the law and because the arbitration award is contrary to public policy. The Court finds both of these bases for vacatur unavailing. Thus, the Court **GRANTS** Defendants' motion to confirm the arbitration award and **DENIES** Plaintiff's motion to vacate the arbitration award. The August 5, 2010 arbitration award is **CONFIRMED.**

IT IS SO ORDERED.

S.D.Cal.,2011.
National Football League Players Ass'n v. National Football League Management Council
Slip Copy, 2011 WL 31068 (S.D.Cal.)

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Court of Appeals of North Carolina.
SEAL POLYMER INDUSTRIES–BHD, Plaintiff,
v.
MED–EXPRESS, INC., USA, Defendant.

No. COA11–1101.
Feb. 7, 2012.

Background: Seller filed notice of filing a foreign judgment, seeking to satisfy Illinois judgment against buyer on debt related to sale of two freight containers of latex gloves. Buyer filed motion for relief from foreign judgment and notice of defense. The Superior Court, Buncombe County, Alan Z. Thornburg, J., denied buyer's motion and found the judgment enforceable, and buyer appealed.

Holdings: The Court of Appeals, Martin, C.J., held that:
(1) buyer's statement in motion for relief was insufficient to establish lack of personal jurisdiction and rebut presumption that Illinois judgment was entitled to full faith and credit, and
(2) lack of findings of fact did not preclude enforcement.

Affirmed.

West Headnotes

[1] Judgment 228 815

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k815 k. Adjudications Operative in Other States. Most Cited Cases

Buyer's statement in motion for relief that it was incorporated under North Carolina law, had its principal place of business in North Carolina, and that it had "no minimum contacts with the State of Illinois" was insufficient to establish lack of personal jurisdiction in Illinois and rebut presumption that Illinois judgment in favor of seller was entitled to full faith and credit. West's N.C.G.S.A. § 1C–1705(a).

[2] Judgment 228 815

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k815 k. Adjudications Operative in Other States. Most Cited Cases

In a proceeding for enforcement of a foreign judgment, the introduction into evidence of an authenticated copy of the judgment establishes a presumption that it is entitled to full faith and credit. West's N.C.G.S.A. § 1C–1705(b).

[3] Judgment 228 815

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts

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228k815 k. Adjudications Operative in Other States. Most Cited Cases

The judgment debtor may rebut the presumption that a foreign judgment established by an authenticated copy is entitled to full faith and credit upon a showing that the rendering court did not have jurisdiction over the parties. West's N.C.G.S.A. § 1C–1705(b).

[4] Judgment 228 823

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k823 k. Enforcement in Other States. Most Cited Cases

The judgment creditor seeking to enforce a foreign judgment is not required to bring forth any evidence to show that no defenses available to the debtor are valid. West's N.C.G.S.A. § 1C–1705(b).

[5] Judgment 228 818(4)

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k818 Want of Jurisdiction
228k818(4) k. Presumptions as to Jurisdiction. Most Cited Cases

When a judgment of a court of another state is challenged on the grounds of jurisdiction, there is a presumption the court had jurisdiction until the contrary is shown. West's N.C.G.S.A. § 1C–1705(a).

[6] Judgment 228 823

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k823 k. Enforcement in Other States. Most Cited Cases

Lack of findings of fact in both Illinois foreign judgment and in North Carolina order enforcing the judgment did not render the judgment unenforceable. West's N.C.G.S.A. § 1C–1705(a).

[7] Judgment 228 219

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k219 k. Contents in General. Most Cited Cases

Judgment 228 222

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General

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228k221 Designation of Amount
228k222 k. In General. Most Cited Cases

Judgment 228 ⚷244

228 Judgment
228VI On Trial of Issues
228VI(B) Parties
228k244 k. Designation of Parties. Most Cited Cases

Illinois judgments are valid if they state the name of the defendant and amount of the judgment; they do not need to contain findings of fact to be enforceable.

[8] Trial 388 ⚷392(1)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k392 Requests for Findings
388k392(1) k. Necessity for Request. Most Cited Cases

In North Carolina, either party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required.

[9] Appeal and Error 30 ⚷846(5)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k846 Trial by Court in General
30k846(5) k. Necessity of Finding Facts. Most Cited Cases

Where no written findings are made, proper findings are presumed, and therefore, the Court's role on appeal is to review the record for competent evidence to support the presumed findings.

Appeal by defendant from order entered 21 June 2011 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 January 2012.

Robert J. Deutsch, P.A., by Tikkun A.S. Gottschalk, for plaintiff-appellee.

Stephen Barnwell, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Med–Express, Inc., USA appeals from an order denying its motion for relief from a foreign judgment and enforcing a 14 March 2011 judgment from an Illinois court. For the following reasons, we affirm the order of the trial court.

On 11 December 2009, plaintiff, Seal Polymer Industries–BHD, filed a complaint in the Circuit Court of Cook

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County, Illinois, to collect a debt in the amount of $104,000.00, plus interest and costs, from defendant related to the sale of two freight containers of latex gloves. Defendant informed plaintiff that, rather than filing an answer, it would not make an appearance based on its belief that it had no contacts with Illinois and would attack the judgment based on personal jurisdiction in the event that plaintiff thereafter tried to enforce the judgment in North Carolina. Defendant also sent a letter to this effect to the Clerk of Cook County, Illinois, and to the trial court judge, the Honorable Judge Ronald Bartkowicz. Judge Bartkowicz ultimately entered an order, which contained no written findings of fact, awarding $104,040.00 to plaintiff on 14 March 2011.

Plaintiff filed a Notice of Filing Foreign Judgment and a copy of the Illinois judgment in Buncombe County Superior Court on 3 May 2011 pursuant to N.C.G.S. § 1C–1704, along with an affidavit from its attorney affirming that the judgment is final and unsatisfied. Defendant filed a Motion for Relief from Foreign Judgment and Notice of Defense. After a hearing, the superior court denied defendant's motion for relief and ruled that the Illinois judgment is enforceable under N.C.G.S. §§ 1C1701 through 1C–1705. Defendant appeals.

The sole issue on appeal is whether the trial court erred in denying defendant's Motion for Relief from Foreign Judgment and Notice of Defense and concluding that the Illinois judgment is enforceable in North Carolina.

[1] Defendant first contends its Motion for Relief contained evidence which rebutted the presumption that the foreign judgment was enforceable, and consequently, the trial court erred in enforcing the foreign judgment. We disagree.

[2][3][4][5] Under N.C.G.S. § 1C–1705 (a), a "judgment debtor may file a motion for relief from, or notice of defense to, [a] foreign judgment ... on [any ground] for which relief from a judgment of this State would be allowed." N.C. Gen.Stat. § 1C–1705(a) (2011). The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit in North Carolina. N.C. Gen.Stat. § 1C–1705(b) (2011). In a proceeding for enforcement of a foreign judgment, the introduction into evidence of an authenticated copy of the judgment establishes a presumption that it is entitled to full faith and credit. *Lust v. Fountain of Life, Inc.,* 110 N.C.App. 298, 301, 429 S.E.2d 435, 437 (1993). The judgment debtor may rebut this presumption "upon a showing that the rendering court did not have ... jurisdiction over the parties." *Id.* The judgment creditor, however, is not required to bring forth any evidence to show that no defenses available to the debtor are valid. *Id.* at 302, 429 S.E.2d at 437. "[W]hen a judgment of a court of another state is challenged on the grounds of jurisdiction ... there is a presumption the court had jurisdiction until the contrary is shown." *Thrasher v. Thrasher,* 4 N.C.App. 534, 540, 167 S.E.2d 549, 553 (1969).

In the instant case, plaintiff had the burden of proving that the foreign judgment is entitled to full faith and credit. Plaintiff met this burden by attaching an authenticated copy of the Illinois judgment to its Notice of Filing Foreign Judgment. Thus, defendant needed to present evidence to rebut the presumption that the judgment is enforceable by asserting a defense under N.C.G.S. § 1C–1705 (a). In its Motion for Relief from Foreign Judgment and Notice of Defense, defendant failed to present any evidence or assert any factual allegations which would support a finding that the Illinois court lacked personal jurisdiction. Rather, defendant merely stated that it was incorporated under North Carolina law, had its principal place of business in North Carolina, and that it had "no minimum contacts with the State of Illinois." This conclusory statement alone is insufficient to establish the affirmative defense of lack of personal jurisdiction. *See Ft. Recovery Indus., Inc. v. Perry,* 57 N.C.App. 354, 356–57, 291 S.E.2d 329, 331 (1982). Therefore, defendant has failed to rebut the presumption that the Illinois judgment is entitled to full faith and credit.

[6] Defendant next contends the foreign judgment is not enforceable because neither the Illinois order, nor the North Carolina order enforcing it, include findings of fact. We disagree.

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[7][8][9] Illinois judgments are valid if they state the name of the defendant and amount of the judgment; they do not need to contain findings of fact to be enforceable. *See Bell Discount Corp. v. Pete Weck's Auto Serv., Inc.,* 4 Ill.App.2d 397, 124 N.E.2d 674, 675 (Ill.App.Ct. 1st Dist.1954). In North Carolina, "[e]ither party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required." *Bruggeman v. Meditrust Acquisition Co.,* 138 N.C.App. 612, 615, 532 S.E.2d 215, 217, *appeal dismissed and disc. review denied,* 353 N.C. 261, 546 S.E.2d 90 (2000). "Where no [written] findings are made, proper findings are presumed," and therefore, "our role on appeal is to review the record for competent evidence to support these presumed findings." *Id.* at 615, 532 S.E.2d 215, 532 S.E.2d at 217–18. The admission of an authenticated copy of the Illinois judgment established a presumption that there was no defect in personal jurisdiction, which defendant was then required to rebut. As discussed above, defendant failed to introduce factual evidence that the Illinois trial court lacked personal jurisdiction over it because it merely recited that it was a North Carolina corporation that did not have "minimum contacts" with Illinois. Therefore, because defendant has not rebutted the presumption that there was personal jurisdiction in the instant case, we hold that the trial court did not err in enforcing the Illinois judgment.

Affirmed.

Judges McGEE and CALABRIA concur.

N.C.App.,2012.
Seal Polymer Industries-BHD v. Med-Exp., Inc., USA
--- S.E.2d ----, 2012 WL 375446 (N.C.App.)

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† **Declined to Follow by** State ex rel. AMFM, LLC v. King, W.Va., January 24, 2013
23 So.3d 1092
Court of Appeals of Mississippi.

COVENANT HEALTH & REHABILITATION OF PICAYUNE, LP and Covenant Dove, Inc., Appellants
v.
Nellie LUMPKIN, by and Through Fred LUMPKIN, Next Friend, Appellee.

No. 2007-CA-00449-COA. | Dec. 15, 2009.

Synopsis
Background: Patient, through her husband and next friend, filed suit against nursing home, seeking damages for personal injuries that allegedly occurred during her stay at its facility. Nursing home moved to compel arbitration. The Circuit Court, Pearl River County, Prentiss Greene Harrell, J., refused to compel arbitration, and nursing home appealed.

Holdings: On rehearing, the Court of Appeals, Ishee, J., held that:

[1] sufficient consideration supported arbitration clause;

[2] negligence and malpractice claims fell within scope of arbitration clause; and

[3] the clause was unconscionable and unenforceable.

Affirmed and remanded.

Attorneys and Law Firms

***1093** John L. Maxey, Paul Hobart Kimble, Jackson, attorneys for appellants.

F.M. Turner, attorney for appellee.

EN BANC.

***1094 MODIFIED OPINION ON MOTION FOR REHEARING**

ISHEE, J., for the Court.

¶ 1. Covenant Health & Rehabilitation of Picayune, LP and Covenant Dove, Inc.'s (Covenant Health), motion for rehearing is granted; the original opinion is withdrawn, and this opinion substituted therefor.

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This case turns upon the effect of an arbitration agreement contained within a standard nursing home admission's contract required by Covenant Health for nursing home admissions. After this Court issued its initial opinion, and while this case was pending in this Court upon the motion for rehearing, the supreme court issued *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds,* 14 So.3d 695 (Miss.2009). As is discussed in the final issue addressed in this opinion, *Estate of Moulds* compels this Court to grant the Lumpkin's motion for rehearing and affirm the Pearl River Circuit Court's decision to refuse to compel arbitration.

¶ 2. Nellie Lumpkin, through her husband and next friend Fred Lumpkin, filed suit against Covenant Health seeking damages for personal injuries that allegedly occurred during her stay at its facility. Covenant Health subsequently moved to compel arbitration of the case based on the arbitration clause found in its standard admissions agreement. The circuit court refused to compel arbitration, finding the admissions agreement substantively unconscionable and void as a matter of law. Aggrieved, Covenant Health appealed, seeking enforcement of the arbitration provision. Lumpkin asked this Court to affirm the decision of the circuit court, and find that either: (1) no arbitration agreement was ever created, because Lumpkin's daughter lacked capacity to bind Lumpkin to arbitration or, in the alternative, that the arbitration clause fails for lack of consideration; or (2) the arbitration clause is void due to fraud in the inducement and substantive unconscionability. In our original opinion, we rejected both arguments and reversed and remanded. However, in light of *Estate of Moulds,* we find that the requirement that Lumpkin's claims be arbitrated, coupled with an additional unconscionable provision in the admissions agreement, rendered the arbitration clause unconscionable and unenforceable. We, therefore, affirm the judgment of the circuit court and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶ 3. On April 11, 2003, Lumpkin was admitted to the Picayune Convalescent Center (owned and operated by Covenant Health). She was accompanied by her daughter, Beverly McDaniel. Due to several illnesses, including Parkinson's disease, psychosis, and dementia, which prevented Lumpkin from fully participating in the admissions process, McDaniel filled out all the admissions paperwork and signed the admissions agreement. That agreement contained, among other things, an arbitration clause requiring both parties to submit to arbitration in the event any dispute arose between them.

¶ 4. Lumpkin left the Picayune Convalescent Center on December 23, 2004. In November 2006, she filed suit against Covenant Health, alleging negligent treatment and malpractice during her stay at the center. On December 11, 2006, Covenant Health filed its motion to compel arbitration, which was based on the arbitration clause contained in the admissions agreement used at the time Lumpkin was admitted to the Picayune Center. In March 2007, the circuit court denied Covenant Health's motion to compel arbitration, and it is from that ruling that Covenant Health appealed.

***1095** ¶ 5. In our original opinion, we found that eight specific clauses of the admissions agreement were identical to clauses previously found unconscionable by the supreme court. *Covenant Health & Rehab Picayune, L.P. v. Lumpkin,* 2007-CA-00449-COA (¶ 22) (Miss.Ct.App. Mar. 9, 2009) (citing *Covenant Health Rehab of Picayune, L.P. v. Brown,* 949 So.2d 732, 737-41 (¶¶ 14-25) (Miss.2007)).

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However, we went on to find in light of relevant supreme court precedent that the arbitration agreement itself was enforceable. We held:

> We cannot, however, agree with the remainder of Lumpkin's argument, that because of these unconscionable provisions we must void the entire contract, or that the arbitration clause as a whole should be voided. In *Brown,* when faced with exactly the same unconscionable language, the supreme court chose to merely sever the unconscionable portions of the admissions agreement and the offending portion of the arbitration clause, and enforce the remaining sections, including compelling the parties to arbitrate. Given the striking similarity of these two cases, including the fact that they involve substantially identical admissions agreements, we are compelled to do the same here as the supreme court did in *Brown.* Accordingly, we find that the admissions agreement, absent the offending language, is substantively conscionable and the parties are bound by it, including its arbitration clause.

Lumpkin, 2007-CA-00449-COA at (¶ 23).

¶ 6. Subsequent to our initial decision, the supreme court decided *Estate of Moulds,* in which it held that an arbitration agreement identical to that present in this case was unconscionable and, therefore, unenforceable. *Estate of Moulds,* 14 So.3d at 703(¶ 26). Accordingly, we must reexamine our analysis of this issue in light of the supreme court's guidance.

DISCUSSION

[1] [2] ¶ 7. This Court reviews orders denying motions to compel arbitration de novo. *Vicksburg Partners, L.P. v. Stephens,* 911 So.2d 507, 513 (¶ 9) (Miss.2005). Although not directly raised by either party in this case, as a threshold issue this Court must determine whether the Federal Arbitration Act (FAA) controls the arbitration agreement presented here. Our supreme court has previously held that "singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce." *Id.* at 515 (¶ 16). In this case, as in *Vicksburg Partners,* "since the arbitration clause is a part of a contract (the nursing home admissions agreement) evidencing in the aggregate economic activity affecting interstate commerce, the [FAA] is applicable...." *Id.* at 515-16 (¶ 18). Nevertheless, even though the FAA is applicable, "applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the [FAA]." *Estate of Moulds,* 14 So.3d at 699(¶ 9) (quoting *East Ford, Inc. v. Taylor,* 826 So.2d 709, 713 (¶ 10) (Miss.2002)).

¶ 8. Having made the determination that the arbitration agreement in this case is governed by the FAA, we must next determine if that arbitration agreement is valid. Again we are guided by our supreme court, which has stated that: "In determining the validity of a motion to compel arbitration under the FAA, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration ***1096** agreement." *Taylor,* 826 So.2d at 713 (¶ 9). The second prong involves an inquiry

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into "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." *Id.* at 713 (¶ 10) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

[3] ¶ 9. With respect to the first prong of the analysis outlined above, "[t]o determine whether the parties agreed to arbitration, we simply apply contract law." *Terminix Int'l, Inc. v. Rice,* 904 So.2d 1051, 1055 (¶ 9) (Miss.2004). Regarding this prong of our inquiry, Lumpkin asserts that her daughter, Beverly, lacked the capacity to consent to arbitration as her healthcare surrogate and, in the alternative, that the arbitration clause is void because it lacked sufficient consideration. We address each of these issues below.

I. Beverly McDaniel possessed the capacity to bind her mother to arbitration.

¶ 10. Lumpkin asserts that her daughter, Beverly McDaniel, did not have the capacity to bind her to arbitration while acting as her healthcare surrogate under the Uniform Health-Care Decisions Act. Miss.Code Ann. §§ 41-41-201 to -229 (Rev.2009). Lumpkin does not dispute that McDaniel was, in fact, acting as her healthcare surrogate for the purposes of that section when she was admitted to the Picayune Convalescent Center.

¶ 11. Our supreme court addressed this very issue in *Brown.* In *Brown,* the plaintiffs, as administrators of the estate of their deceased mother, filed a wrongful-death suit against the nursing home in which their mother resided prior to death. *Brown* at 735 (¶ 1). An adult daughter of the deceased signed the admissions agreement as the "responsible party" for her mother upon admission to the facility. *Id.* The defendants filed a motion to compel arbitration based on the admissions agreement, and the trial court denied that motion. On appeal, the supreme court held that the adult daughter of the patient, acting as a healthcare surrogate, had the authority to contractually bind her mother in healthcare matters under our Uniform Health-Care Decisions Act. *Id.* at (¶ 3).

[4] ¶ 12. In reversing the trial court's denial of the motion to compel arbitration in *Brown,* the supreme court implicitly upheld that the surrogate's authority to bind the patient extended to the arbitration clause in the admissions agreement. In this case, because Lumpkin does not dispute that her daughter was acting as her healthcare surrogate for the purposes of the Uniform Health-Care Decisions Act, we see no reason to depart from the supreme court's holding in *Brown.* Therefore, we find that a healthcare surrogate, acting under the provisions of the Uniform Health-Care Decisions Act, is capable of binding his or her patient to arbitration. Accordingly, we find that Lumpkin's argument on this issue is without merit.

II. The arbitration clause does not fail for lack of consideration.

[5] ¶ 13. Lumpkin also asserts that the arbitration clause should fail for lack of consideration. She relies solely on the affidavit of Keri Ladner, the facility administrator for Covenant Health, in making this argument. Lumpkin points to Ladner's statement, that Lumpkin would not have been refused admission to the facility had she objected to the arbitration agreement, as evidence that the arbitration clause lacked consideration; therefore, the arbitration clause should be stricken from the admissions agreement.

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[6] [7] ¶ 14. We first note that Ladner's statements are irrelevant to the issue ***1097** of consideration. The only thing her statements represent is an admission that, in retrospect, Lumpkin's daughter could have entered into a more beneficial contract for her mother had she bargained for it. Simply because one party to a contract later admits that the other party could have successfully bargained for more beneficial terms at the time the contract was formed does not mean that the element of the contract not bargained for is void for lack of consideration. In any contract, "[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration." *Theobald v. Nosser,* 752 So.2d 1036, 1040 (¶ 15) (Miss.1999).

[8] [9] ¶ 15. Second, even if Ladner's statements were relevant to this issue, this Court would be prevented from considering them by the parol evidence rule. It is a well-settled principle of contract law that "a written contract cannot be varied by prior oral agreements. Moreover, as an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible." *Carter v. Citigroup, Inc.,* 938 So.2d 809, 818(¶ 41) (Miss.2006) (quoting *Stephens v. Equitable Life Assurance Soc'y of the United States,* 850 So.2d 78, 83 (¶ 14) (Miss.2003)). Although parol evidence is sometimes admissible when there has been, among other things, a showing that a contract contains ambiguous language, here there has been no such showing. Neither party has even suggested that there is any ambiguity in the agreement.

¶ 16. Without such a showing, we must look to the agreement of the parties in order to determine whether there was sufficient consideration. Again, in any contract, "[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration." *Theobald,* 752 So.2d at 1040 (¶ 15).

¶ 17. Here, there is clearly sufficient consideration to support the arbitration agreement. Both parties undertook duties toward one another under the admissions agreement. Covenant Health promised to provide care and assistance to Lumpkin. Lumpkin promised to pay Covenant Health for its service. The arbitration clause was one portion of that exchange, and it obligated both parties to arbitrate any dispute between them. The mutuality of exchange found throughout the admissions agreement provides ample evidence that there was sufficient consideration to support the arbitration clause; therefore, we find that the arbitration clause does not fail for lack of consideration.

III. The dispute is within the scope of the arbitration clause.

[10] [11] ¶ 18. Although not directly addressed by either party in this appeal, under our standard of review in this case, this Court must determine that the dispute between the parties falls within the scope of the arbitration agreement in order to compel arbitration. To do so, we look to the language of the arbitration clause itself. In this case, that language is very clear. The arbitration clause states that "[t]he Resident and Responsible Party agree that any and all claims, disputes, and/or controversies between them and the Facility or its Owners, officers, directors, or employees shall be resolved by binding arbitration...." Clearly, the arbitration clause was meant to apply to any dispute, regardless of its nature, that arose between the facility and Lumpkin, including her current claims of negligence and malpractice. ***1098**

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Consequently, we find that the dispute between Lumpkin and Covenant Health falls within the scope of the arbitration clause.

IV. The arbitration clause does not violate any external legal constraints.

¶ 19. Having determined that a valid arbitration agreement exists, and that the current dispute falls within the scope of that agreement, we now turn to the second prong of the test set out in *East Ford,* which involves an inquiry into "whether legal constraints external to the parties' agreement foreclose arbitration of those claims." *East Ford,* 826 So.2d at 713 (¶ 10) (quoting *Mitsubishi Motors Corp.,* 473 U.S. at 626, 105 S.Ct. 3346). The supreme court has stated that, under the second prong of the *East Ford* test, "applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the [FAA]." *Id.*

¶ 20. Lumpkin specifically asserts two of the defenses listed above, fraud and substantive unconscionability, in her argument to sustain the ruling of the trial court and void the arbitration clause.

A. Beverly was not fraudulently induced into signing the admissions agreement.

[12] [13] ¶ 21. Lumpkin argues that her daughter, Beverly, was fraudulently induced into signing the admissions agreement. She again relies on the affidavit of Ladner, the facility administrator, and the fact that Ladner stated that acceptance of the arbitration clause was not a necessary precondition to her admittance to the facility. This statement does not give rise to a defense of fraud. As a contract defense, "[f]raud in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract." *Lacy v. Morrison,* 906 So.2d 126, 129 (¶ 6) (Miss.Ct.App.2004).

[14] ¶ 22. The defense of fraud in the inducement would be appropriately raised if, for instance, Ladner had made material misrepresentations to Beverly when she signed the admissions agreement, and those misrepresentations had been meant to, and did, induce Beverly to sign the agreement. However, the facts indicate that this is not what happened. As we noted above, all that Ladner's statements demonstrate is that Beverly could have potentially bargained for a better deal from the facility, i.e., one that did not include the arbitration clause. However, the admissions agreement itself did not contain any false information; it simply contained terms that could have been altered had Beverly attempted to do so. The fact that she failed to bargain for those terms does not constitute fraud any more than it constitutes a lack of consideration; therefore, Beverly was not fraudulently induced into signing the admissions agreement.

B. The arbitration clause is substantively unconscionable.

[15] ¶ 23. We come now to the final issue raised in this appeal. Lumpkin correctly points out that the admissions agreement her daughter signed contains several clauses that have exactly the same language as clauses in other nursing home admissions agreements that our supreme court has explicitly held are unconscionable. In fact, the admissions agreement in this case appears to be identical to the one ***1099** at

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issue in *Brown,* discussed above.[1] Specifically, the following sections were held to be unconscionable in *Brown:* (1) the language in section C5 requiring forfeiture by the resident for all claims except those for willful acts, (2) the language in section C8 waiving liability for the criminal acts of individuals, (3) the "grievance resolution process" set out in sections E5 and E6, (4) the language limiting the recovery of actual damages in section E7, (5) the language limiting the recovery of punitive damages in section E8, (6) the language in section E12 requiring the resident to pay all costs if the resident attempts to avoid or challenge the grievance resolution process, and (7) the language of section E16 that purports to change the statute of limitations were all held to be unconscionable in *Brown.* Moreover, the last line of the arbitration clause itself contains language identical to language the supreme court struck from the arbitration clause that was at issue in *Brown.* Seeing no reason to depart from the supreme court's findings in *Brown,* we agree with Lumpkin's assertion that these clauses in her admissions agreement contain unconscionable language as well.

[1] *See Brown,* 949 So.2d at 737-41 (¶¶ 14-25) for an exhaustive discussion of why these particular aspects of the admissions agreement are unconscionable, including the language of the offending clauses. *See also Vicksburg Partners,* 911 So.2d at 525(¶ 48) and *Pitts v. Watkins,* 905 So.2d 553, 555-58 (¶¶ 9-20) (Miss.2005) for discussions of the unconscionability of similar terms found in other admissions agreements.

¶ 24. Nevertheless, in our original opinion, we found that while we had "misgivings" about the arbitration clause, in light of *Brown's* holding that the cumulative effect of the unconscionable provisions did not render the entire contract unenforceable, and that an identical arbitration clause was enforceable, we reversed the circuit court's holding that the arbitration clause at issue was unenforceable. *Lumpkin,* 2007-CA-00449-COA (¶¶ 21-23) (citing Brown, 949 So.2d at 741 (¶ 25)). In *Moulds,* the supreme court revisited this issue. The *Moulds* court surveyed out-of-state cases dealing with similar contracts. *Moulds,* 14 So.3d at 703-06 (¶¶ 26-34). *Moulds* then went on to hold that an arbitration clause identical to that found in the case at bar was unconscionable and unenforceable, and overruled its prior precedent. *Id.* at 706 (¶ 35).

¶ 25. In revisiting the issue of whether the arbitration clause at issue is unconscionable in light of *Moulds,* we hold that the circuit court did not err in refusing to compel arbitration, and we remand this issue to the circuit court for further proceedings consistent with this opinion.

¶ 26. **THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY IS AFFIRMED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**
KING, C.J., LEE AND MYERS, P.JJ., IRVING, GRIFFIS, BARNES AND ROBERTS, JJ., CONCUR.
CARLTON AND MAXWELL, JJ., NOT PARTICIPATING.

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Chapter 2

Courts and Alternative Dispute Resolution

Case 2.1

N.D.Cal.,2011.
Gucci America v. Wang Huoqing
Slip Copy, 2011 WL 30972 (N.D.Cal.)
United States District Court,
N.D. California.
GUCCI AMERICA, Plaintiff,
v.
WANG HUOQING, Defendant.
No. C 09-05969 CRB.
Jan. 5, 2011.
ORDER ADOPTING REPORT AND RECOMMENDATION, GRANTING DEFAULT JUDGMENT AGAINST DEFENDANT, AND ENTERING PERMANENT INJUNCTION
CHARLES R. BREYER, District Judge.

The Court has reviewed Magistrate Judge Spero's Report and Recommendation. The Court finds the Report correct, well-reasoned, and thorough, and ADOPTS it in every respect. Accordingly, the Court GRANTS default judgment against Defendant Wang Huoqing on Plaintiffs' trademark infringement and false designation of origin claims. The Court awards statutory damages to each Plaintiff in the following amounts: for Gucci America, Inc. $440,000; for Bottega Veneta International S.A.R.L. $4,000; and for Balenciaga S.A. $8,000. The Court awards prejudgment interest to each Plaintiff in the following amounts: for Gucci America, Inc. $12,768.92; for Bottega Veneta International S.A.R.L. $116.08; and for Balenciaga S.A. $232.16. Additionally, the Court awards $233.33 in costs to each Plaintiff on the basis of Defendant's trademark infringement.

Further, a permanent injunction is hereby ENTERED against the Defendant as follows:

Defendant and his respective officers, agents, servants, employees, and attorneys, and all persons acting in concert and participation with him are hereby permanently restrained and enjoined from:

(a) manufacturing or causing to be manufactured, importing, advertising, or promoting, distributing, selling or offering to sell

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counterfeit and infringing goods using the Plaintiffs' Marks;
(b) using the Plaintiffs' Marks in connection with the sale of any unauthorized goods;
(c) using any logo, and/or layout which may be calculated to falsely advertise the services or products of Defendant offered for sale or sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop. com, myokshop.com, and myrshop.com and/or any other website or business, as being sponsored by, authorized by, endorsed by, or in any way associated with Plaintiffs;
(d) falsely representing himself as being connected with Plaintiffs, through sponsorship or association;
(e) engaging in any act which is likely to falsely cause members of the trade and/or of the purchasing public to believe any goods or services of Defendant offered for sale o[r] sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business are in any way endorsed by, approved by, and/or associated with Plaintiffs;
(f) using any reproduction, counterfeit, copy or colorable imitation of the Plaintiffs' Marks in connection with the publicity, promotion, sale or advertising of any goods sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop .net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, including, without limitation, footwear, belts, sunglasses, handbags, wallets, hats, necklaces, bracelets, scarves, ties, and/or umbrellas;
(g) affixing, applying, annexing or using in connection with the sale of any goods, a false description or representation, including words or other symbols tending to falsely describe or represent goods offered for sale or sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, as being those of Plaintiffs or in any way endorsed by Plaintiffs;
(h) offering such goods in commerce;
(i) otherwise unfairly competing with Plaintiffs;
(j) secreting, destroying, altering, removing, or otherwise dealing with the unauthorized products or any books or records which contain any information relating to the importing, manufacturing, producing, distributing, circulation, selling, marketing, offering for sale, advertising, promoting, renting or displaying of all unauthorized products which infringe the Plaintiffs' Marks; and
(k) effecting assignments or transfers, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth above.
Finally, the Court orders as follows:
(l) In order to give practical effect to the Permanent Injunction, the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com are hereby ordered to be immediately transferred by Defendant, his assignees and/or successors in interest or title, and the Registrars to Plaintiff Gucci's control. To the extent the current Registrars do not facilitate the transfer of the domain names to Plaintiffs' control within ten (10) days of receipt of this judgment, the United States based Registry shall, within thirty (30) days, transfer the Subject Domain Names to a United States based Registrar of Plaintiffs' choosing, and that Registrar shall transfer the Subject Domain Names to Plaintiff Gucci; and
(m) Upon Plaintiffs' request, the top level domain (TLD) Registries for the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com and myrshop.com shall place the websites on Registry Hold status within thirty (30) days of receipt of this Order, thus removing them from the TLD zone files maintained by the Registries which link the websites to the IP addresses where the associated websites are hosted.
IT IS SO ORDERED.

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Case 2.2

Miss.,2014.
Brothers v. Winstead
129 So.3d 906
Supreme Court of Mississippi.
Phillips BROTHERS, Kilby Brake Fisheries, LLC and Harry Simmons
v.
Ray WINSTEAD.
No. 2011–CA–01846–SCT.
Jan. 9, 2014.
WALLER, Chief Justice, for the Court:

1. Defendants Phillips Brothers, Kilby Brake Fisheries, LLC, and Harry Simmons seek review of a $1,724,923 judgment in favor of Ray Winstead for shareholder and employment claims. Finding multiple errors, we reverse and render in part; and remand in part.

Facts & Procedural History

2. In March 2000, Kilby Brake Fisheries, LLC, was formed as a catfish hatchery and farm. An operating agreement was signed by the three members—Harry Simmons, Phillips Brothers, LP, and Ray Winstead. The Kilby Brake operating agreement provided each member a one-third percent ownership stake in Kilby Brake. At the start of the LLC, bank loans were made and signed by all three members as guarantors. There were three loans: one in the amount of $300,300 (for the purchase of inventory), one in the amount of $201,040 (the purchase of equipment), and one in the amount of $300,900 (revolving line of credit to be used for operating expenses). Shortly after Kilby Brake was formed, Phillips and Simmons purchased an adjacent catfish farm ("the Wise Place") to be used to support the Kilby Brake operation. Winstead declined to be a part of the purchase of the Wise Place.

3. The members agreed that Winstead would be the hatchery operator and, for his work, he would receive $30,000 per year from Kilby Brake and use of a company truck, and Kilby Brake would pay for his and his family's housing on the farm, utilities, and health insurance. Winstead, as hatchery operator, was subject to the direction of Simmons, serving as the manager under the operating agreement. Simmons, under the Kilby Brake operating agreement, was authorized to carry out the business functions of the hatchery, including borrowing money and check-writing.

4. Kilby Brake's records indicated it was profitable for only two of the almost eight years while Winstead was the hatchery operator. Simmons fired Winstead in late 2007.

5. In September 2009, Winstead filed a complaint against Kilby Brake, Harry Simmons, Chat Phillips, Simmons Farm Raised Catfish, Inc., Five Mile Fisheries, Inc., and H.D. Simmons Corp. in the Circuit Court of Yazoo County.[FN1] His complaint was amended to add Phillips Brothers, LP, as a defendant. Winstead alleged that Simmons and Phillips Brothers had failed to pay him his agreed-upon salary, asserting claims of fraud, breach of fiduciary duty, corporate freeze-out, conversion, slander, slander *per se,* and tortious interference with business relations. He also requested an accounting and dissolution of the LLC.

FN1. Harry Simmons and Phillips Brothers were members of a number of other entities involved in the catfish

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industry. The partners' other companies also were named as defendants in Winstead's complaint.

6. Along with their answers, Simmons, Phillips and Kilby Brake (Defendants) filed counterclaims against Winstead asserting theft, conversion, usurpation of corporate opportunities, tortious interference with business relations, conversion, theft by deception, breach of contractual and fiduciary duties, and unjust enrichment. They requested replevin and judicial dissolution. The counterclaims alleged that Winstead took Kilby Brake property for his personal use, provided property to others to use, and sold property, including fish products, food products, equipment, chemicals and fuel without authorization, while retaining all profits. The trial court granted Winstead's motion to dismiss the claims of tortious interference with Kilby Brake's business relations and claims that were barred by the three-year statute of limitations.

7. Trial commenced in April 2011 and, at the completion, a jury awarded Winstead compensatory damages in the amount of $1,160,000 and punitive damages against Simmons of an additional $100,000. The court also awarded Winstead attorneys' fees and costs in the amount of $464,923, bringing the total judgment against Harry Simmons and Phillips Brothers to $1,724,923. Further, the court awarded post-judgment interest at a rate of eight percent. Defendants appealed. The jury denied three of Defendants' four counterclaims—theft, unjust enrichment, and breach of fiduciary duty. Kilby Brake prevailed on its replevin counterclaim, and the jury ordered that Winstead return the company truck to Kilby Brake.

8. Defendants filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a motion for new trial, which were denied. Although both parties asked in their pleadings for the LLC to be dissolved, they were unable to agree about the terms of dissolution. In the final judgment, the parties' claims for judicial dissolution were dismissed without prejudice. No issue is made of this dismissal on appeal. Because of the many issues in this case, we will discuss the facts relevant to each issue below.

DISCUSSION

9. The issues raised by the three defendants in this appeal fall into six categories: (1) Whether the admission of testimony regarding an oral agreement for cash contributions violated the parol evidence rule; (2) whether there was sufficient evidence to support Winstead's award for fraud; (3) whether there was sufficient evidence to support Winstead's award for corporate freeze-out; (4) whether there was sufficient evidence to support Winstead's award for breach of fiduciary duty; (5) whether Kilby Brake is entitled to a new trial; (6) whether Winstead met the requisite elements of slander *per se?*

I. Whether the admission of testimony regarding an oral argument for case contributions violated the parol evidence rule.

[1] 10. Winstead asserted that Simmons and Phillips Brothers had agreed to provide $600,000 in paid-in capital from cash contributions for the purchase of the startup equipment and fish inventory. Over Simmons and Phillips Brothers' objections, the trial court allowed Winstead to testify to this alleged oral agreement because the operating agreement was “silent as to the contributions.” Winstead's expert also was permitted to testify, over objections, that he believed it was the intent of Simmons and Phillips to pay $600,000 in capital, out of cash.

[2][3] 11. “Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder.” *Facilities, Inc. v. Rogers–Usry Chevrolet, Inc.,* 908 So.2d 107 (Miss.2005) (quoting *Miss. State Highway Comm'n v. Patterson Enters. Ltd.,* 627 So.2d 261, 263 (Miss.1993)). An appellate court applies a *de novo* standard of review for questions of law. *Starcher v. Byrne,* 687 So.2d 737, 739 (Miss.1997).

12. The relevant portion of the Kilby Brake operating agreement at issue is set out as follows:

ARTICLE VI

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CAPITAL CONTRIBUTIONS AND CAPITAL ACCOUNTS

Section 6.1 *Initial Capital Contributions.* As initial capital contributions to the Company, the Members shall contribute the Property more particularly described in Schedule "A".[FN2]

FN2. See Schedule "A," attached as an exhibit to this opinion.

Section 6.2 *Additional Contributions.* Except as set forth in Section 6.1 above, no Member shall be required to make any capital contributions.

[4][5][6][7][8][9][10] 13. "The primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.,* 857 So.2d 748, 752 (Miss.2003) (citing *Kight v. Sheppard Bldg. Supply, Inc.,* 537 So.2d 1355, 1358 (Miss.1989)). In contract construction cases, the court's focus is on the language of the contract. *Royer Homes,* 857 So.2d at 752 (citing *Turner v. Terry,* 799 So.2d 25, 32 (Miss.2001); *Osborne v. Bullins,* 549 So.2d 1337, 1339 (Miss.1989)). A court should look to the "four corners" of a contract to determine how to interpret it. *McKee v. McKee,* 568 So.2d 262, 266 (Miss.1990). It is well established that "parol extrinsic evidence is not admissible to add to, subtract from, vary or contradict written instruments, contractual in nature, and which are valid, complete, unambiguous and unaffected by accident, mistake or fraud." *Byrd v. Rees,* 251 Miss. 876, 171 So.2d 864, 867 (Miss.1965). "Our concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *In re Estate of Fitzner,* 881 So.2d 164 (Miss.2003) (citing *Simmons v. Bank of Miss.,* 593 So.2d 40, 42–43 (Miss.1992)). If the language in the contract is clear and unambiguous, the intent of the contract must be effectuated. *Rotenberry v. Hooker,* 864 So.2d 266, 270 (Miss.2003); *see also Pfisterer v. Noble,* 320 So.2d 383, 384 (Miss.1975). "The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Burton v. Choctaw County,* 730 So.2d 1, 6 (Miss.1997) (quoting *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss.1987)).

14. This Court has said that "silence alone does not necessarily create an ambiguity as a matter of law." *Facilities, Inc. v. Rogers–Usry Chevrolet, Inc.,* 908 So.2d 107, 115 (Miss.2005). In *Facilities, Inc.,* this Court found that, although the Court of Appeals held that a lease agreement between the parties was not ambiguous, the Court of Appeals improperly considered extrinsic or parol evidence in the analysis portion of its opinion. *Id.* at 110. We found that, although the lease agreement was *silent* as to whether the bonus rent would apply to new vehicle sales at the subject property, it was *not ambiguous* and, therefore, Rogers–Usry was not required to pay bonus rent for sales that did not occur on the leased property. *Id.* at 115–16 ("It is the *silence, not the language of the* [operating agreement], that has created this dispute. However, silence alone does not necessarily create an ambiguity as a matter of law") (emphasis in original). Further, we noted this concept is not novel and has been adopted in a number of jurisdictions. *Id.*

15. The Kilby Brake operating agreement is clear. It states "no member shall be required to make any capital contributions" except as provided in Schedule A.[FN3] Nothing is listed in Schedule A. Kilby Brake was financed by the three loans totaling more than $800,000, which Winstead signed for and subsequently renewed as a one-third partner. For more than eight years, Winstead never raised an issue about the capital investment. Winstead's expert testified that it was not unusual to leave capital contributions blank for completion at closing. No amounts were ever filled in or added.

FN3. See Schedule "A," attached as an exhibit to this opinion.

16. Constraining our review to the "four corners" of the document, it is clear the language used in the Kilby Brake operating agreement is not ambiguous. Thus, it was error for the trial court to go outside the operating agreement to interpret the intent of the parties. Because the trial court never should have considered the offer to make cash contributions, the interest-expense-savings portion of Winstead's corporate freeze-out damage award also is without

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merit. We thus reverse the judgment of the trial court on its parol-evidence finding as well as the damages awarded and render judgment in favor of Simmons on this portion of Winstead's freeze-out damages. Having limited our review to the admissible evidence, we now address the merits of Defendants' claims.

II. Whether there was sufficient evidence to support Winstead's award for fraud.

17. Winstead's theory of recovery for fraud was based on two claims. The first is that Simmons and Phillips Brothers purchased the Wise Place in their names only, with funds from Kilby Brake. The second is that money was withheld fraudulently from his salary. Winstead was awarded a total of $140,000 for fraud: $90,000 for one-third of the value of the Wise Place and $50,000 for money withheld from his paychecks. Simmons and Phillips Brothers were both found liable and both moved for JNOV, arguing Winstead had failed to prove all of the elements of fraud by clear and convincing evidence or, in the alternative, that the overwhelming weight of the evidence required a new trial.

[11][12][13][14][15] 18. The standard of review for the denial of a motion for JNOV is *de novo. InTown Lessee Assocs., LLC v. Howard,* 67 So.3d 711, 718 (Miss.2011). We consider the facts in the light most favorable to the nonmoving party. *Natchez Elec. & Supply Co. v. Johnson,* 968 So.2d 358, 361 (Miss.2007). " 'If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render.' " *Leaf River Forest Prods., Inc. v. Ferguson,* 662 So.2d 648, 659 (Miss.1995) (quoting *Munford, Inc. v. Fleming,* 597 So.2d 1282, 1284 (Miss.1992)). We will affirm the denial of JNOV if there is substantial evidence in support of the verdict. *Natchez Elec. & Supply Co.,* 968 So.2d at 362. "Substantial evidence is information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions." *Id.* (citations omitted).

[16][17] 19. In order to recover for fraud, a plaintiff must prove the following elements: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury." *Holland v. Peoples Bank & Trust Co.,* 3 So.3d 94, 100 (Miss.2008) (citations omitted). These elements must be proven by clear and convincing evidence. *Bank of Shaw v. Posey,* 573 So.2d 1355, 1363 (Miss.1990). Clear and convincing evidence is of such a high order that "this Court held that the 'overwhelming weight of the evidence' falls short of being 'clear and convincing.' " *In the Interest of C.B.,* 574 So.2d 1369, 1375 (Miss.1990) (quoting *Aponaug Mfg. Co. v. Collins,* 207 Miss. 460, 42 So.2d 431, 434 (1949)).

A. The Wise Place

[18] 20. The Wise Place is a catfish farm located adjacent to Kilby Brake. Winstead testified that Simmons informed him that "they had gotten the Wise Place" and that it was his understanding "that, basically, Kilby Brake bought the Wise Place." Simmons testified that he and Phillips Brothers purchased the Wise Place and the equipment thereon individually and allowed Kilby Brake to use it as part of the hatchery operation. He further testified that Winstead was unwilling to join in the purchase because he did not feel that a bank would lend him more money. The deed to the property was dated April 12, 2000, and was recorded in the names of Harry Simmons and Phillips Brothers.

21. At trial, Simmons initially testified that the purchase price of the Wise Place was $190,000, however, he later explained that the total purchase price for the land and equipment was $230,000. Phillips also testified that the purchase price for the land at the Wise Place was $190,000, but that the equipment that came with the deal was an additional cost. Simmons and Phillips Brothers permitted Kilby Brake to use the Wise Place, rent free, and even gave the proceeds from the sale of the Wise Place equipment to Kilby Brake. Although Kilby Brake did not pay rent for use of the Wise Place, Kilby Brake spent $78,305.70 to make improvements to the pond walls and access roads to benefit Kilby Brake.

22. At the start of the company, Kilby Brake secured three loans from BankPlus, which were signed by all

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members, totaling $800,000. Simmons testified that they paid $400,000 for inventory and $200,000 for equipment, which left $200,000 in operating capital. A Kilby Brake bank statement from March 2000 was submitted into evidence showing that $610,000 was deposited into the account. Winstead's attorney thoroughly questioned Simmons about the purchase of the Wise Place and the March 2000 bank statement, claiming this is where the $190,000 came from to purchase the Wise Place. Simmons denied this, later testifying that he recalled purchasing the Wise Place with Phillips Brothers using cash.

23. The record contains no evidence that Kilby Brake funds were used to purchase the Wise Place. Winstead's forensic accountant, Robert Alexander, testified that *no* Kilby Brake funds were used to purchase the property, and neither Simmons nor Phillips *ever* took any money from the Kilby Brake account, whether salary, dividends, or other distributions. The deed to the Wise Place was in the name of Simmons and Phillips Brothers and was on record at the Humphreys County Courthouse. Interestingly, the jury form stated Simmons and Phillips Brothers were guilty of a material misrepresentation and all nine elements of fraud but then stated the jury found Simmons and Phillips Brothers not guilty of "misappropriat[ing] and convert[ing] Kilby Brake Fisheries' funds or property...."

24. This Court finds that insufficient evidence, much less clear and convincing evidence, was presented to prove the funds to purchase the Wise Place came from Kilby Brake. Further, Winstead's mere assertion that he thought Kilby Brake owned the Wise Place is not enough to carry his burden that he was defrauded by Simmons and Phillips Brothers. We find that the trial court erred by failing to grant Defendants' motion for JNOV for the claim of fraud surrounding the purchase of the Wise Place. Thus, we reverse and render judgment on this issue in favor of Simmons and Phillips Brothers.

B. Withheld Pay

[19] 25. The jury ruled Winstead was defrauded by Phillips Brothers and Simmons with regard to withholdings from his paycheck over the course of his employment at Kilby Brake. Whether Winstead was owed money based on the amounts withheld from his paycheck was heavily contested by both sides. Winstead claims improper deductions were taken from his paychecks and he was never paid the amount he was promised. Simmons claims Winstead actually owed Kilby Brake for personal charges and cash advances. Both sides produced documents which were admitted into evidence showing records of payments and deductions. Based on Winstead's stated $30,000 annual salary, Alexander calculated that Winstead was owed $50,000 in withheld pay over eight years. The jury found Phillips Brothers and Simmons liable for $25,000 each.

26. In *Natchez Electric Supply Inc.,* the plaintiff was seeking to recover on an open account. Despite some uncontroverted charges by the defendant, the jury returned a defense verdict with no recovery for the plaintiff. Because the record contained undisputed evidence of one party's obligation to pay another, this Court held "no reasonable and fair-minded juror in the exercise of fair and impartial judgement" could find the obligating party owed absolutely nothing. *Natchez Elec. & Supply Co., Inc.,* 968 So.2d at 363. The case at bar bears striking similarities.

27. In the record we find Winstead admitting to making personal charges on his Kilby Brake account for some items that were indisputably personal, such as multiple deer-rifle scopes, dog food, and hunting accessories. When asked if the purchase of a "Gobbler's Lounge," used for turkey hunting, was for Kilby Brake, Winstead responded, "[n]o sir. That would be a personal item for me." It was further undisputed that Winstead charged Kilby Brake for gasoline used at his father's hunting camp in Durant. Winstead's damages for lost pay were based on testimony that money was taken out of all his paychecks; however, payroll records indicate that Winstead was actually paid in excess of his $30,000 annual salary for four of his eight years with Kilby Brake. What is more, Winstead admitted he had received cash advances on his paycheck and that money subsequently would be taken out to repay the advances. Because fault was apportioned between Phillips Brothers and Simmons, we address both separately.

28. As to Phillips Brothers, we can find no proof of any involvement in the decision-making process regarding the execution of Winstead's checks. Contractually, Simmons was the manager and supervised Winstead. The only

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testimony in the record regarding Winstead's salary was between Simmons and Winstead. Further, all actions on Winstead's pay checks, including any deductions, were made by Simmons and his bookkeepers, not by Phillips Brothers. Winstead even testified that he and Phillips had very little contact, and when they did, they "didn't discuss the farm a whole lot." Nothing in the record indicates Phillips Brothers ever made a representation to Winstead regarding his pay at all. Thus, there is no evidence at all that Phillips Brothers fraudulently withheld pay from Winstead's salary. We therefore reverse and render judgment in favor of Phillips Brothers.

29. With regard to Simmons, Winstead admitted at trial that he knew deductions were taken from his paycheck for cash advances and for personal charges he made on his Kilby Brake account. Although Winstead disagreed that some of the charges were personal in nature, there was no dispute that he was aware Simmons was making deductions. We find no clear and convincing evidence in the record that any pay shortage which may have occurred was caused by a fraudulent representation made by Simmons upon which Winstead relied. Thus, we reverse the judgment against Simmons for fraud with regard to withheld pay.

30. However, Kilby Brake may be liable to Winstead for any improper deductions from Winstead's pay that may have occurred, or Winstead may be liable to Kilby Brake if it is shown he still owes money to Kilby Brake for charges made on his account. We find Winstead's own testimony, coupled with other evidence in the record, provides overwhelming evidence, based upon which no reasonable and fair-minded juror in the exercise of fair and impartial judgment could award Winstead the full amount that he alleged was taken from each of his paychecks.

31. In addition, for reasons discussed below, we reverse and remand this issue to the trial court for a new trial to determine any amounts Kilby Brake may owe Winstead or vice versa.

III. Whether Winstead proved the requisite elements of corporate freeze-out.

32. As early as 1913, this Court used the term 'frozen out' when it held that a chancery court could appoint a receiver for a corporation to wind up the business at the insistence of minority stockholders "when it shall appear that by gross mismanagement ... the rights of the stockholders ... are being put in jeopardy." *Brent v. B.E. Brister Sawmill Co.,* 103 Miss. 876, 60 So. 1018, 1022 (1913). Since that time, Mississippi courts began to recognize freeze-out [FN4] as a distinctly individual and direct cause of action, separate from a derivative action. *See, e.g., Bluewater Logistics, LLC v. Williford,* 55 So.3d 148 (Miss.2011); *Missala Marine Serv., Inc. v. Odom,* 861 So.2d 290 (Miss.2003); *Fought v. Morris,* 543 So.2d 167 (Miss.1989); *Cook v. Wallot,* —— So.3d ——— (Miss.Ct.App.2013); *Knights' Piping, Inc. v. Knight,* 123 So.3d 451 (Miss.Ct.App.2012), *cert. denied,* 2011–CT–00409–SCT, 123 So.3d 450 (Oct. 3, 2013). This Court recognized in *Fought v. Morris* that "the distinctive characteristics and needs" of closely held corporations made them different from traditional corporations. *Fought v. Morris,* 543 So.2d 167, 169 (Miss.1989).

FN4. Other jurisdictions use the term "squeeze out."

[20] 33. A closely held corporation is a "business entity with few shareholders, the shares of which are not publicly traded." *Fought v. Morris,* 543 So.2d 167, 169 (Miss.1989). This Court has held that limited-liability corporations with few members resemble closely held corporations. *See Bluewater Logistics, LLC v. Williford,* 55 So.3d 148, 161 (Miss.2011). Minority shareholders in closely held corporations are particularly vulnerable, because they usually lack the control the majority has and there is seldom a fair market available for selling their shares. *Fought,* 543 So.2d at 170 (citing *Orchard v. Covelli,* 590 F.Supp. 1548, 1557 (W.D.Pa.1984); *aff'd* 802 F.2d 448 (3rd Cir.1986)). Thus, if a dispute arises between the minority member and the majority, it is usually the case that a "minority shareholder can neither profitably leave, nor safely stay with, the corporation." *Fought,* 543 So.2d at 171.

34. Because of their size, membership in closely held corporations resembles that of a partnership rather than a traditional corporation with directors and stockholders. In its most classic form, a freeze-out of the minority shareholders by the majority occurs when the majority purposefully denies the minority member from sharing proportionally in corporate earnings or gains. This could be accomplished by a number of techniques. For example,

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the majority could refuse to declare dividends, pay themselves exorbitant salaries, or sell corporate assets to themselves at inadequate prices. *See* F.H. O'Neal and R. Thompson, *O'Neal's Oppression of Minority Shareholders* § 3.02 (2d ed.1985). The freeze-out cause of action, therefore, addresses the central problem: the majority, through its right of control, intentionally reduces or eliminates the minority shareholder's right to corporate earnings or gains coupled with virtual inability of the minority member to withdraw or sell.

35. Although the jury instructions used at trial in the case before us state there are "elements" to the corporate freeze-out cause of action, no specific elements were set out. This Court previously has said that "[c]orporate freeze-out is an intentional tort that is committed with *willful* and *wanton* disregard for the right of the shareholder who is frozen out." *Missala Marine Serv., Inc. v. Odom,* 861 So.2d 290, 295 (Miss.2003) (emphasis added); *Bluewater,* 55 So.3d at 163 (upholding chancellor's finding that willful and grossly negligent breach of the operating agreement constituted freeze-out). Recognizing the problems inherent in close corporations, the *Fought* Court held that majority shareholder actions in these close corporations must "be 'intrinsically fair' to the minority interest." 543 So.2d at 171 (*overruling Ross v. Biggs,* 206 Miss. 542, 40 So.2d 293 (1949)). The Court went on to define expressly the relationship between those in control and minority members, stating "[d]irectors and officers of a corporation stand in a fiduciary relationship to the corporation and its stockholders. These duties include exercising the utmost good faith and loyalty in discharge of the corporate office." *Id.* (citations omitted). We noted recently that the *Fought* rationale "applies with equal force" to limited-liability companies. *Bluewater Logistics, LLC v. Williford,* 55 So.3d 148, 161 (Miss.2011).

[21][22] 36. Using traditional elements for an intentional-tort claim and reviewing the above-discussed cases, we find that, in order to prove a claim of corporate freeze-out, the plaintiff must establish: (1) the existence of a legally defined duty owed to or right of a minority shareholder arising out of his or her ownership interest in a corporation; (2) the intentional or willful breach of that duty by the majority or controlling shareholder(s); (3) that the breach proximately caused plaintiff's direct injury; and (4) the fact and extent of injury. *See generally* Prosser & Keeton, *On the Law of Torts* § 30 (5th ed.1984). When we evaluate the duties and the alleged breach of these duties, we will look to the parties' agreements and applicable state law. In the case of Kilby Brake, LLC, that would be applicable caselaw, the Kilby Brake operating agreement, and the March 2000 version of the Mississippi Limited Liability Company Act. *See* Miss. Laws Ch. 402, §§ 1–87, *repealed by* Revised Mississippi Limited Liability Company Act, 2010 Miss. Laws Ch. 532, § 1, eff. Jan. 1, 2011. *See also* Miss.Code Ann. §§ 79–29–101 to 79–29–1317 (Rev.2013).

37. In his argument for freeze-out, Winstead alleged Simmons and Phillips Brothers took actions to exclude Winstead from his ownership interest in Kilby Brake without justification and in willful disregard of Winstead's rights. Winstead's amended complaint states this conduct did not "allow him to in any way participate as a true managing shareholder during his eight years with Kilby Brake." In support of this claim, Winstead argued Phillips and Simmons did not make alleged cash contributions to start the LLC; they misappropriated funds from Kilby Brake; Simmons made detrimental loans for the company without his consent; and Simmons did not allow him to inspect the company books. After he was fired as hatchery operator and moved off the farm, Winstead claimed Simmons and Phillips Brothers mismanaged Kilby Brake to his detriment. The jury found only Simmons guilty of freezing out Winstead.

38. As noted above, we found the alleged promise of cash contributions inadmissable and that Winstead had failed to prove Simmons or Phillips Brothers committed fraud by misappropriating funds from Kilby Brake; thus, these arguments as a basis for his freeze-out claim are without merit. The only remaining claims by Winstead are that Simmons improperly fired him, made detrimental loans to the LLC, refused to share financial records with Winstead, and that Simmons and Phillips Brothers mismanaged Kilby Brake after he was fired in 2008. Thus, we look to see if these claims give rise to a cause of action for corporate freeze-out.

1. Participation as a Managing Shareholder

[23] 39. The Kilby Brake operating agreement named Harry Simmons as manager. It stated that Simmons, as manager, had "full and complete authority, power and discretion to manage and control the business, affairs, and

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properties of [Kilby Brake]....” Further, the operating agreement gave Simmons alone the power to acquire property from any person, to borrow money from banks or other members of Kilby Brake on the terms Simmons deemed appropriate, control the business affairs of the company and to make “all decisions regarding those matters.” Winstead admitted at trial he signed the operating agreement and understood all of the terms. Although Winstead asserted he “managed” the day-to-day operations, he admitted he was not named as a manager of Kilby Brake anywhere in the operating agreement and that his title was hatchery operator. Simmons never needed Winstead's permission to borrow money on behalf of Kilby Brake. Further, it is evident from the record that, had Simmons not borrowed the money from his other entities, Kilby Brake would have ceased business operations. When asked whether Simmons had the authority as manager to borrow money to be sure that payroll was made, Winstead answered affirmatively.

40. We find nothing in the record that would lead to the conclusion that Winstead could participate in Kilby Brake as a managing shareholder. Further, Simmons, as the only manager of Kilby Brake, did not use his control of Kilby Brake to violate any terms of the operating agreement, thereby breaching the duty he owed to Winstead. Thus, Winstead's argument that he was frozen out of the LLC because he was denied participation as “a true managing shareholder” in the company is without merit.

2. Winstead's Termination as Hatchery Operator

[24] 41. Although many commentators point to being fired by management as possible evidence a minority member in a closely held corporation has been frozen out, the Fifth Circuit has held that in employment-at-will states like Mississippi, nonmanaging members of a closely held corporation do not have “fiduciary-rooted entitlements to their jobs.” *Hollis v. Hill,* 232 F.3d 460, 470 (5th Cir.2000). *See also Knights' Piping, Inc. v. Knight,* 123 So.3d at 459 (Miss.Ct.App.2012) (“a majority shareholder does not breach his fiduciary duty when he terminates a minority shareholder if he has ‘acted pursuant to a legitimate business purpose.’ ”). There is nothing in the Kilby Brake operating agreement that could be construed as guaranteeing Winstead employment with Kilby Brake. Further, there was certainly enough evidence in the record to suggest Simmons was acting pursuant to a legitimate business purpose in firing Winstead.

42. Simmons had designated authority as manager to terminate Winstead. Though not required, Simmons had several arguable causes to fire Winstead. Winstead made several personal charges on his Kilby Brake account, even after he was told not to. Winstead used Kilby Brake employees, while they were being paid by Kilby Brake, to make improvements to his deer camp and to work in his father's ham store during the holidays. Kilby Brake equipment also was used to make improvements to Winstead's deer camp. The survival ratio of fish was around forty to fifty percent under Winstead and increased to seventy-five percent after he left the hatchery. Most importantly, the business was profitable for only two of the eight years Winstead ran the day-to-day operations at the hatchery. Thus, we find Simmons presented sufficient evidence to show he acted pursuant to a legitimate business purpose, and Winstead's firing did not, by itself, constitute a freeze-out of his interest.

3. Inspection of Kilby Brake Finances

[25] 43. The Kilby Brake operating agreement states that every member, at their own expense, “shall have the right to inspect, copy, and audit [Kilby Brake's] books and records at any time during normal business hours without notice to any other member or the manager.” It also states each member “shall be furnished [with] ... a copy of the balance sheet of [Kilby Brake]” for each accounting period. The records for Kilby Brake all were held at Kilby Brake's principal place of business, which was Simmons's office in Yazoo City.

44. The record shows Simmons proposed that either he or Winstead leave the company in mid-to-late 2007. Winstead alleged that he was interested in purchasing Kilby Brake, but that Simmons failed to provide him with appropriate company financial information that he needed to obtain a loan from a bank. Simmons testified he could not recall the last time that he had sent a balance sheet to Winstead and he doubted that he had sent one since Winstead moved off the farm in January 2008. He further admitted that Winstead remained a member of the LLC,

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was entitled to the records, and that he continued to send them to Phillips Brothers. However, Simmons delivered 3,500 pages of financial documents relating to Kilby Brake to Winstead's accountant in Canton in June 2008.

45. Winstead never presented any evidence to show he was denied access to Kilby Brake's offices and records or that he even attempted to "inspect, copy, and audit" the records at his own expense, which, under the operating agreement, he had a right to do without notice to Simmons. However, as manager and keeper of the records, Simmons also had a duty under the operating agreement to furnish his other partners with balance sheets for each accounting period, which he admittedly did not do for Winstead once he was fired.

46. Although Simmons arguably breached his duty to Winstead by not providing the balance sheets to him, Winstead did not present any evidence on how these acts damaged him. The purpose of trying to obtain the financial documents from Simmons was to try and get financing to purchase Kilby Brake. Winstead had a right under the operating agreement to inspect and copy Kilby Brake's books without Simmons's permission. And Simmons eventually delivered the voluminous documents to Winstead's accountant prior to filing suit; thus, we find this claim to be without merit.

4. Mismanagement in 2008

[26] 47. Winstead's claim for mismanagement was submitted to the jury in the same instruction as his freeze-out claim. Winstead received damages on his mismanagement claim in both his award for freeze-out and breach of fiduciary duty. The jury instruction stated that, to prove a claim for mismanagement, "Winstead must show by a preponderance of the evidence that during his corporate freeze-out, Harry Simmons and Phillips Brothers made decisions, purchases, or acquisitions without his consent and that *these actions devalued the business, and in turn, Plaintiff's ownership interest.*" (Emphasis added.) Winstead's argument alleges Simmons's mismanagement of Kilby Brake caused a lack of corporate gains and devalued his interest. Thus, it clear from his amended complaint and the jury instruction at trial that these allegations are better viewed as a derivative claim on behalf of Kilby Brake and not a direct cause of action for corporate freeze-out. *See Mathis v. ERA Franchise Systems, Inc.,* 25 So.3d 298, 303 (Miss.2009) ("[I]n determining whether the action belongs to the corporation or the individual, the focus of the inquiry is whether the corporation or the individual suffered injury.").

48. In the case *sub judice,* Winstead presented a number of claims that were derivative because he sought relief on behalf of Kilby Brake, and his injury was based on his ownership in the company. This Court requested supplemental briefing on the issue of whether it was error for the circuit court to allow the claims to proceed without making a determination of whether the " *Murray* exceptions [FN5]" applied, which would permit Winstead to bring the derivative claims in a direct action. *See Derouen v. Murray,* 604 So.2d 1086, 1091 (Miss.1992).

> FN5. The Murray exceptions allow for derivative claims to be tried as direct actions if the trial judge finds that doing so will not: "(i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons." *Derouen v. Murray,* 604 So.2d 1086, 1091 n. 2 (Miss.1992).

[27] 49. Although the trial court did not apply the *Murray* exceptions, Defendants never challenged whether Winstead should be permitted to bring the derivative claims in a direct action; therefore, we find the derivative claims were tried by implied consent, and the pre-trial procedural requisites that apply in derivative actions were waived. *See id.* We also find that the trial court was not required to consider, *sua sponte,* whether Winstead was entitled to bring the derivative claims as a direct action; therefore, the trial court did not err in failing to address the issue.

[28][29] 50. Alabama, like Mississippi, has held that managers in a closely held corporation owe a duty to act fairly to minority interests. *See Burt v. Burt Boiler Works, Inc.,* 360 So.2d 327, 331 (Ala.1978). We find persuasive the statement of the Alabama Supreme Court that the freeze-out cause of action "is not a panacea for any and all conduct undertaken ... that could be deemed 'unfair' to the minority." *Stallworth v. AmSouth Bank of Alabama,* 709

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So.2d 458, 468 (Ala.1997). "[A] minority shareholder cannot parlay a wrong committed primarily against the corporation, which gives rise to a derivative claim only, into a personal recovery of damages under a squeeze out theory by simply stating the injury to the corporation is also 'unfair' to him as well." *Id.* at 467. Even though we find this language to be persuasive, Winstead claimed the mismanagement of Kilby Brake factored into his freeze-out. Thus, we review this claim in light of the elements we have cited above for corporate freeze-out, which necessarily include proving the conduct complained of was willful and wanton and that it proximately caused individual damages.

51. Winstead argued at trial and in his brief that, after he was fired, "Simmons undertook activities which negatively affected Kilby's financial sustainability and further devalued Winstead's interest." Winstead presented evidence that, in the year following his term as hatchery operator, Kilby Brake's sales decreased by seventy-six percent, from $756,451.64 in 2007 to $181,146.44 in 2008. Winstead's expert, Alexander, testified that, while Winstead was operator, Kilby Brake's sales consistently were close to $775,000 per year. Alexander further testified that, although the economy was bad, the economy was not the cause of the nearly eighty-percent decline in sales. In fact, Kilby Brake's sales were back up in 2009.

52. None of the parties disputes that sales were low in 2008 and, of course, each side blames the other. Simmons testified that sales were low because there were no fish in 2008 and attempted to show that Winstead was responsible for the missing fish by either taking them or mismanaging the farm. Members of Kilby Brake's staff testified that, when the ponds were seined in 2008, there was a remarkably low number of fish. However, evidence showed that the seining and feed expenses in 2008 were higher than they were in 2007. Simmons testified this was because he had to restock the ponds to replace the fish that were missing. Winstead argued that the increase in food and seining costs indicated there were fish at Kilby Brake that were not reported. In sum, a sharp dispute exists in the record as to what happened to the fish.

53. A number of witnesses testified that if Winstead had moved the millions of missing fish, someone would have known. In fact, testimony was presented that it would be nearly impossible to move the fish in the night and that moving the fish would require a crew of six men, two tractors, a seine and reel, and a boat to move a million fish. However, there was also testimony that large amounts of "swim-up fry" could be moved in a standard ice chest. Alexander stated that he could not testify that the defendants caused the drop in sales; however, he testified that the sales should have occurred if the parties had carried on normal business in Winstead's absence.

54. To carry his claim for corporate freeze-out, Winstead was required to demonstrate that Simmons intentionally and willfully used his control of Kilby Brake in 2008 in a way that harmed Winstead individually. We find Winstead failed to prove that Simmons "willfully and wantonly" mismanaged Kilby Brake in a manner that harmed Winstead alone.

5. Conclusion on Corporate Freeze-out

55. Taken as a whole, Winstead failed to prove that he was frozen out of Kilby Brake by Simmons. The record does not indicate that Simmons used his position in control of Kilby Brake to breach a duty he owed to Winstead by denying him his proportional share of any corporate benefits. The reality is the record does not reflect any corporate gains whatsoever. Winstead's expert testified that neither Simmons nor Phillips Brothers ever received any payment from Kilby Brake in the form of salary, dividends, or any other distribution. None of the actions undertaken by Simmons, which Winstead might have felt to be unfair to him, circumvented the powers delegated to Simmons under the Kilby Brake operating agreement. When viewing Winstead's complaints for freeze-out in light of the agreements of the parties and applicable law, we find Simmons did nothing to willfully breach the duty he owed to Winstead. Therefore, for the reasons stated above, we reverse and render the judgment of corporate freeze-out against Simmons.

IV. Whether Simmons and Phillips Brothers breached a fiduciary duty they owed Winstead.

[30] 56. The jury found both Simmons and Phillips Brothers breached a fiduciary duty they owed to Winstead and

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awarded him $395,000, being two thirds of Alexander's valuation of the missing fish sales in 2008 due to mismanagement. Simmons and Phillips Brothers argued first that they did not breach a duty owed to Winstead or, in the alternative, Winstead's damages were speculative and amounted to a double recovery. Winstead counters that a plaintiff who proves breach of a fiduciary duty is entitled to the damages incurred as a result of the breach.

57. In his amended complaint, Winstead argued Simmons and Phillips Brothers "negligently, carelessly, and intentionally failed to perform their duties as ... managing officers of Kilby Brake so that the assets of Kilby Brake ... were mismanaged, wasted, diverted to and converted by the defendants...." A breach of fiduciary duty owed to Kilby Brake should be separated from Winstead's corporate freeze-out claim, which is an individual claim for Simmons's intentional breach of the duty owed directly to Winstead that caused him personal damages, separate and apart from any damages to Kilby Brake. *See Fought,* 543 So.2d at 171 (" 'any attempt [by the majority] to squeeze out a minority shareholder must be viewed as a breach of his fiduciary duty ....' ") (quoting *Orchard v. Covelli,* 590 F.Supp. 1548, 1557 (W.D.Pa.1984), *aff'd* 802 F.2d 448 (3d Cir.1986)). By contrast, a claim that Simmons breached his fiduciary duty through mismanagement or dissipation of corporate assets belongs to the corporation because the wrong necessarily damages the corporation and damages Winstead only derivatively. [FN6] *See Mathis,* 25 So.3d at 304.

FN6. We make this distinction to emphasize that the corporate freeze-out cause of action is distinct from a general breach of fiduciary duty because of the injury involved. Indeed, if a plaintiff proves he or she has been intentionally frozen out, that cause of action would also be the support for an award of personal damages for a breach of fiduciary duty. However, if the wrong directly damages the corporation and its assets from waste, conversion, and mismanagement, the claim is the corporation's.

58. This Court held in *Fought* that directors and officers in a closely held corporation stood in a fiduciary relationship with the corporation and its members. *Fought,* 543 So.2d at 171; *see also Bluewater,* 55 So.3d at 161 (holding the *Fought* rationale "applies with equal force" to limited liability companies). Before we look to any common-law standards of care, we look to the agreement of the parties. The Kilby Brake operating agreement and *Fought* lead us to conclude that Simmons, as manager, owed a fiduciary duty to the other members of Kilby Brake. However, the operating agreement also indemnified Simmons from any actions he took on behalf of Kilby Brake as long as he "conducted himself in good faith" and reasonably believed "his conduct was in [Kilby Brake's] best interest." Thus, for Winstead to succeed on his claim that Simmons's mismanagement of Kilby Brake in 2008 breached the fiduciary duty Simmons owed Kilby Brake, he must first establish that Simmons was at the very least in breach of the Kilby Brake operating agreement. Because Simmons and Phillips Brothers both were found to have breached the duties they owed to Winstead, we discuss them separately.

59. It is clear from the record that Winstead ran the day-to-day operations at the farm. After he was fired, Simmons took over this responsibility and hired a new hatchery operator, Dan Bradshaw. Importantly, Phillips Brothers was never involved in decision-making in the day-to-day operations of Kilby Brake. There is no proof that any employee from Phillips Brothers visited Kilby Brake at the time the fish went missing or that any fish were moved to property in which Phillips Brothers had an interest. If anything, the damages resulting from the mismanagement of Kilby Brake in 2008 were detrimental to the Phillips Brothers' one-third interest in the company as well. Although as co-members of Kilby Brake, each party owed a fiduciary duty to the other, Winstead presents no evidence that this duty was breached by Phillips Brothers with regard to the mismanaged assets in 2008. Thus, we reverse the jury's judgment on this claim and render a decision in favor of Phillips Brothers.

60. Simmons, as manager of Kilby Brake, owed a duty to Winstead even after he was fired. As noted above, both parties presented plenty of evidence and conjecture as to what caused the missing fish sales in 2008. However, as will be discussed below, we find prejudicial error in the trial court's decisions to prevent Kilby Brake from discovering and cross-examining Winstead on certain financial items that will necessitate a new trial on whether Simmons breached a fiduciary duty he owed to Winstead. Because we also find error in Winstead's damages for breach of fiduciary duty, we discuss those first.

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A. Damages for Breach of Fiduciary Duty

[31] 61. Winstead received one third of the value of his interest in Kilby Brake as calculated by his expert in his damages for corporate freeze-out.[FN7] This calculation included one third of the value of the missing fish sales from 2008. Winstead received the other two-thirds of the value of the missing fish sales in his damages for breach of fiduciary duty. Due to the numerous errors in Winstead's expert's valuation of what Kilby Brake was worth and the amount of the missing fish sales and because Kilby Brake also was improperly limited in its discovery and cross-examination of Winstead as discussed in Issue V *supra,* we must reverse and remand for a new trial with regard to any breach of fiduciary duty.

FN7. Alexander calculated the value of Kilby Brake as follows:

KILBY BRAKE VALUE AT 9/30/09			
Initial equity investment	600,000		
Cumulative interest exp savings to 9/09	459,303		
Missing sales from 2008	591,191	<>	See separate damage calculation
"But for" Value at 9/09	**$ 1,515,534**		
Value for 1/3 ownership interest	**$ 505,178**		**Ray Winstead's ownership interest**
Adjustment for Inventory value increase			
Unadjusted inventory at 9/09	1,375,589		
Price increase - 25%	343,897		
Inventory valued at current prices	**1,719,486**	<>	Revised inventory value
KILBY BRAKE VALUE WITH INVENTORY AT TODAY'S PRICES			
Kilby Brake value from above	1,515,534		
Price adjustment	343,897		
"But for" value at today's prices	**1,859,432**	<>	Revised Kilby Brake value
Value for 1/3 ownership interest	**$ 619,811**	<>	**Ray Winstead's ownership interest**

62. To begin, Alexander erroneously used the alleged promise of cash contributions at the formation of the LLC and cumulative interest savings to help determine a faulty starting value of Kilby Brake addressed in Issue I *supra.* In addition, Alexander calculated the price of the mismanaged assets, being the missing fish sales in 2008, to be $591,191 and added this number into his total valuation of Kilby Brake. Because we reverse and render the findings of the trial court on the alleged cash contributions and cumulative interest expense savings, the only damages left to assess are the damages for the missing fish sales.

63. Winstead was required to provide substantial proof of damages that he suffered so the jury could have a reasonable basis to assess his loss. *Missala Marine,* 861 So.2d at 294. This Court has held that the plaintiff has the burden of proving any amount of damages with reasonable certainty. *Adams v. U.S. Homecrafters, Inc.,* 744 So.2d 736, 740 (Miss.1999). However, this Court also has noted that "a measure of speculation and conjecture attends even damage proof all would agree reasonably certain." *Wall v. Swilley,* 562 So.2d 1252, 1256 (Miss.1990). This Court has stated that it will not overturn a jury's verdict unless no reasonable juror could find damages in the amount that the jury awarded. *Missala Marine Services,* 861 So.2d 290, 295 (Miss.2003) (citing *Wal–Mart Stores, Inc. v. Johnson,* 807 So.2d 382, 389 (Miss.2001)).

64. Alexander testified that, in the year after Winstead left the hatchery, fish sales were seventy-six percent lower than they had been throughout the company's existence. He opined that the low sales indicated that either Kilby Brake was mismanaged in 2008, or that the sales were under reported by Simmons and Phillips Brothers. To reach the value of the missing fish sales, Alexander found the difference between the average of the gross sales that occurred in 2007 and 2009 versus the gross sales that occurred in 2008: a $591,000 difference. To get to $591,000,

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Alexander also added a speculative twenty-five percent increase to the price of fingerlings, thus increasing the value of the assets. However, this price increase took place in 2011, long after Winstead filed suit to dissolve Kilby Brake in 2009. Winstead was awarded one-third of Alexander's valuation of the missing fish sales in his corporate freeze-out damages and the other two thirds of this value in his breach-of-fiduciary-duty damages, arguing Simmons and Phillips Brothers received a disgorgement of profits from their breach.

[32] 65. There are several problems with Alexander's valuation of the mismanaged assets which require a new trial on these damages. To calculate lost profits as damages, the lost profits a party must prove are the "net profits as opposed to gross profits." *Ballard Realty Co. Inc. v. Ohazurike,* 97 So.3d 52, 62 (Miss.2012) (quoting *Lovett v. E.L. Garner, Inc.,* 511 So.2d 1346, 1353 (Miss.1987)); *Puckett Machinery Co. v. Edwards,* 641 So.2d 29, 37 (Miss.1994) ("[T]his Court has held that in calculating the loss of profits, the loss to be calculated is that of net profits, not gross profits."). "To ascertain net profits, a party must deduct such items as overhead, depreciation, taxes and inflation." *Lovett,* 511 So.2d at 1353. Alexander testified that he added the $591,000 into the value of Kilby Brake "to account for those fish that should have been there but have not been sold." However, his valuation of the total amount of lost profits from missing fish sales failed to account for items such as overhead, labor, taxes, or debt. Indeed, the valuation simply calculated the gross amount of missing fish sales.

66. Further, Winstead filed suit in September 2009 for, among other things, dissolution of Kilby Brake. In valuing the business, both experts stated at trial that they used the date Winstead filed suit as the valuation date. Inexplicably, Alexander adjusted the price of the missing fish sales by increasing their value by twenty-five percent to "current prices" to account for what he deemed an increase in value from 2009–2011. Any valuation on his right to recover for the 2008 lost fish sales ended the date he filed suit in September of 2009 to dissolve the LLC. *See, e.g., Hollis v. Hill,* 232 F.3d 460, 472 (5th Cir.2000) (holding the presumptive valuation date on a freeze-out claim to be the date of filing the suit). Both experts stated at trial they used that date in their valuation of Kilby Brake. The use of this date will allow the Court to take into account both parties' actions, inactions and business decisions which affected the value of the business from the time Winstead left Kilby Brake until suit was filed. Alexander's calculations were purely speculative in nature and artificially inflated the value of Kilby Brake. Therefore, we are compelled to reverse and remand for a new trial on issues regarding any breach of fiduciary duty with regard to the loss of fish inventory.

V. Whether Kilby Brake is entitled to a new trial.

[33] 67. During discovery, Winstead produced his tax returns from 2006 to 2009 which showed substantial income as coming from the Winstead Cattle Company. The only other income listed on Winstead's tax returns was from Kilby Brake and his wife's job. Winstead had also produced two Forms 1099 from a fish farmer named Scott Kiker, which did not appear on his tax returns. Kilby Brake's theory was the entries for "cattle" represented income from sales of Kilby Brake fish Winstead was brokering and thus, it sought to compel production of all of the Winstead Cattle Company's financial records. Winstead admitted in his deposition and again at trial that the Winstead Cattle Company did no actual business, and it was simply his hunting camp. The trial court denied Kilby Brake's motion to compel discovery into Winstead's finances.

68. While cross-examining Winstead, counsel for Kilby Brake began to question him about the two Forms 1099 Winstead had produced in discovery showing income from Kiker. Winstead testified that he would often act as a middle man if he knew of a farmer who was in need of fish and another who had fish for sale; taking a commission for brokering the deal. Kilby Brake's counsel was not allowed to question Winstead about where this income from brokering fish sales appeared on the tax returns, because the returns were prepared by Winstead's accountant. The trial court ruled Winstead did not have personal knowledge of the returns and thus, the returns were inadmissable hearsay.

[34][35] 69. A trial court's discovery orders will not be disturbed unless there is an abuse of discretion. *Dawkins v. Redd Pest Control Co., Inc.,* 607 So.2d 1232, 1235 (Miss.1992). This Court said where "important information is denied a litigant reversal will obtain." *Id.* " '[A]dmission or suppression of evidence is within the discretion of the trial

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judge and will not be reversed absent an abuse of that discretion.' " *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.,* 716 So.2d 200, 210 (Miss.1998) (citation omitted) (quoting *Sumrall v. Mississippi Power Co.,* 693 So.2d 359, 365 (Miss.1997)). Even if an abuse of discretion has occurred, "for a case to be reversed on the admission or exclusion of evidence, it must result in prejudice and harm or adversely affect a substantial right of a party." *Terrain Enter., Inc. v. Mockbee,* 654 So.2d 1122, 1131 (Miss.1995) (citations omitted).

70. Kilby Brake's attorney made a proffer that he would have questioned Winstead on where the income from Kiker appeared on his income tax return and whether it was indicated under the Winstead Cattle Company entry, because Winstead already had testified Winstead Cattle Company did no business and was merely a hunting camp. Winstead cited *U.S. Fidelity & Guaranty Co. v. Whitfield* as authority for the proposition that it is inadmissible hearsay for a witness who did not prepare a tax return to testify as to that tax return because he lacks personal knowledge. *See U.S. Fid. & Guar. Co. v. Whitfield,* 355 So.2d 307 (Miss.1978). However, this case is easily distinguishable.

71. In *U.S. Fidelity,* the insured's witness, a certified public accountant (CPA), testified as to the amount of the loss the insured sustained after a fire, basing it on the inventory reflected in the insured's federal income tax return. *Id.* at 309. This Court held that, because the witness CPA did not prepare the insured's tax return nor discuss it with the actual preparer, the witness CPA's testimony "was rank hearsay." *Id.* In the case at bar, Kilby Brake was questioning Winstead about his own tax return. The signature line of the federal income tax return, Form 1040, states that, under the penalty of perjury, the signer has examined the return and believes it to be true and complete. Further, any information used by Winstead's accountant in calculating Winstead's income tax return would have come from Winstead. Thus, we find the trial court's decision not to allow Kilby Brake to cross examine Winstead on his tax return because he lacked personal knowledge was error.

72. Winstead argues that, if there were any errors in the trial court's decisions, they were harmless. However, the record indicates a third Form 1099 from Kiker to Winstead was found in the company truck which Winstead returned after the jury verdict against him on Kilby Brake's replevin claim. Further, Kiker testified that he had received a load of fish from Kilby Brake that Winstead claimed Simmons was going to "drain'em in the ditch." Kiker testified there was no paperwork on the transaction; that he sold this load of fish, gave Winstead a commission and did not pay Kilby Brake for the sales.

73. From the evidence noted above, we find the trial court's refusal to allow both discovery into the finances of Winstead and questions concerning Winstead Cattle Company on his tax return prevented Kilby Brake and the jury from finding out whether Winstead was selling fish from Kilby Brake and disguising it on his income tax returns, thereby prejudicing Kilby Brake's ability to present its case. What happened to the fish inventory was central to both parties' theories of the case. Importantly, the decisions by the trial court denied Kilby Brake the ability to present its case as to what happened to the fish. The record shows there were years in which Winstead received substantial income from brokering fish sales, almost $20,000 in one year. He admitted that Winstead Cattle Company did no business and was simply his hunting camp, yet it made significant amounts of money. We therefore reverse the trial court's decision to deny discovery into the finances of Winstead and remand for a new trial on Winstead and Kilby Brake's breach-of-fiduciary-duty claims, as they pertain to the missing fish sales. Specifically, Kilby Brake should be allowed discovery into the finances of Winstead concerning outside income and specifically the stated income from Winstead Cattle Company.

VI. Whether Winstead met the requisite elements of slander *per se.*

[36] 74. The jury found Simmons guilty of slander *per se* and awarded Winstead $5,000 on this claim. Simmons argues that Winstead never presented any evidence that he made slanderous statements about Winstead prior to judicial proceedings. Further, Simmons argues no witnesses testified that he published the alleged slanderous statements about Winstead. Finally, Simmons argues truth as a defense and that he was entitled to his opinion of Winstead as a hatchery operator.

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[37][38] 75. To prove slander, Winstead had the burden to prove the following elements: (1) a false and defamatory statement concerning the plaintiff; (2) unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Franklin v. Thompson,* 722 So.2d 688, 692 (Miss.1998) (citations omitted). Because publication is an essential element to slander, "if the words were spoken only to the complaining party or to his agent, representing him in the matter discussed ... it is not such a publication as will support an action for slander." *Kirk Jewelers v. Bynum,* 222 Miss. 134, 75 So.2d 463 (1954).

76. In Mississippi, statements are actionable *per se* if they are:

> (1) Words imputing the guilt or commission of some criminal offense involving moral turpitude and infamous punishment. (2) Words imputing the existence of some contagious disease. (3) Words imputing unfitness in an officer who holds an office of profit or emolument, either in respect of morals or inability to discharge the duties thereof. (4) Words imputing a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business; and in this and some other jurisdictions (5) words imputing to a female a want of chastity.

Speed v. Scott, 787 So.2d 626, 632 (Miss.2001) (quoting *W.T. Farley, Inc. v. Bufkin,* 159 Miss. 350, 132 So. 86, 87 (1931)).

[39][40][41] 77. Further, "[t]he slander ... must be clear and unmistakable from the words themselves and not be the product of any innuendo, speculation or conjecture." *Baugh v. Baugh,* 512 So.2d 1283, 1285 (Miss.1987). If the language is actionable *per se,* general damages are presumed to result. *McCrory Corp. v. Istre,* 252 Miss. 679, 173 So.2d 640, 646 (1965) (citations omitted). It is well settled that truth is a complete defense to a charge of slander. *Franklin,* 722 So.2d at 692.

[42][43] 78. When analyzing a slander claim, Mississippi courts first determine if "the occasion called for a qualified privilege" and if a qualified privilege does exist, "the Court must then determine whether the privilege is overcome by malice, bad faith, or abuse." *Eckman v. Cooper Tire & Rubber Co.,* 893 So.2d 1049, 1052 (Miss.2005) (citing *Garziano v. E.I. Du Pont De Nemours & Co.,* 818 F.2d 380, 386–87 (5th Cir.1987) (applying Mississippi law)). One of the qualified privileges recognized by this Court protects communications between employers and their employees. *See Holland v. Kennedy,* 548 So.2d 982, 987 (Miss.1989). In speaking of this privilege, this Court held: "[t]he law guards jealously the right to the enjoyment of a good reputation, but public policy, ... the interests of society, and sound business demand that an employer ... be permitted to discuss freely with an employee, or his chosen representative, charges made against the employee affecting the latter's employment." *Killebrew v. Jackson City Lines,* 225 Miss. 84, 82 So.2d 648, 650 (1955). In describing the contours of the employer/employee privilege, this Court held " '[w]hen qualified privilege is established, statements or written communications are not actionable as slanderous or libelous absent bad faith or malice if the communications are limited to those persons who have a legitimate and direct interest in the subject matter.' " *Young v. Jackson,* 572 So.2d 378, 383 (Miss.1990) (quoting *Bush v. Mullen,* 478 So.2d 313 (Miss.1985) (internal citations omitted)).

79. In his amended complaint, Winstead asserted claims for slander and slander *per se* against Simmons. In his count for slander, he accused Simmons of telling members of the catfish farming community that Winstead stole fish from Kilby Brake. In his complaint for slander *per se,* he asserted the statements which were inherently defamatory were the statements adopted in his slander argument. The trial court granted Simmons's motion for a directed verdict on Winstead's slander claim but denied his motion on the slander *per se* claim.

80. No witnesses testified that Simmons told them Winstead was stealing fish from Kilby Brake. The only evidence in the record of Simmons stating Winstead stole fish was when he read his deposition testimony on the stand. Winstead's attorney asked if Simmons had ever used the word stealing when talking about Winstead.

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Simmons responded “not to my recollection.” Winstead's attorney then asked Simmons to read from his prior deposition testimony. Simmons read the relevant portion, in which he stated, “I knew we needed to get out of this situation ... when he was falsifying fish movement tickets ... [i]t was stealing from, from one of my other entities.”

81. Although Simmons said Winstead was stealing from Kilby Brake, Winstead did not put on any proof that Simmons published these statements to third parties. Simmons's deposition testimony was about why he fired Winstead. Further, it was in response to a question from Winstead's attorney about why Winstead was fired. Winstead's response was published only to Winstead's chosen representative and regarded charges made against Winstead affecting his employment. Thus, we find no merit in this argument.

82. The other evidence Winstead argues proves his slander *per se* claim developed during trial. Simmons was asked by Winstead's counsel whether he believed that Winstead could not run a successful operation because he was golfing, hunting, drinking, and gambling all of the time. Simmons responded he believed so, and that he probably said that to people. Therefore, the only evidence in front of the jury on this claim was Simmons's own admission that he “probably” expressed his belief to other people. The record does not reveal the identities of these other parties.

83. Testimony from other witnesses indicated that Winstead drank to excess at times, hunted often, golfed, and had gambled in a weekly card game regularly for years. All this occurred while he was working for Kilby Brake. Further, it was undisputed that Kilby Brake was successful for only two of the eight years Winstead was hatchery operator. However, no witness testified that he or she could say Winstead's golfing, hunting, drinking, or gambling interfered with his abilities to operate Kilby Brake.

84. Winstead bore the burden to prove by a preponderance of the evidence that Simmons published the above statements to parties outside of those within the circle of privileged individuals and that these statements were indeed false. We find that, alone, the statements of Simmons that he probably had expressed his belief to others insufficient for Winstead to carry the burden that Simmons's statement were published to unprivileged third parties or that they were even false. Therefore, we reverse the judgment for slander *per se* and render a decision in favor of Simmons.

CONCLUSION

85. We reverse the judgment of the Yazoo County Circuit Court and remand this case for a new trial on whether Winstead or Kilby Brake is entitled to any damages regarding Winstead's pay and personal charges. In addition, we reverse and remand for a new trial on the breach-of-fiduciary-duty claim as to liability and damages for the missing fish and any damages that may occur as a result. We also reverse and render all claims against Phillips Brothers. Further, we reverse and render the claims for corporate freeze-out and slander *per se* against Simmons. Because we reverse for a new trial, we also reverse all awards of punitive damages, attorneys' fees, and interest.

86. **REVERSED; REMANDED IN PART; RENDERED IN PART.**

Case 2.3

Cal.App. 2 Dist., 2015
Cruise v. Kroger Co.
233 Cal.App.4th 390, 183 Cal.Rptr.3d 17, 39 IER Cases 1165, 15 Cal. Daily Op. Serv. 652, 2015 Daily Journal D.A.R. 823

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Court of Appeal,

Second District, Division 3, California.

Stephanie CRUISE, Plaintiff and Respondent,

v.

KROGER CO. et al., Defendants and Appellants.

B248430

Filed 1/20/2015

ALDRICH, J.

Defendants and appellants Kroger Co., Kroger Manufacturing, Compton Creamery, Keith Oldenkamp, Steve Kuebbing, Jesse Turner, Keith Henry, Jill McIntosh and Tony Ramirez (sometimes collectively referred to as Kroger or the Kroger defendants) appeal an order denying their motion to compel arbitration of an employment discrimination action filed by plaintiff and respondent Stephanie Cruise (Cruise).[FN1]

FN1. An order denying a motion to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a); *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1122, 135 Cal.Rptr.3d 832.)

All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

At the time Cruise applied for employment with Kroger in 2007, she completed an employment application which contained an arbitration clause requiring arbitration of employment-related disputes. The employment application also incorporated by reference Kroger's Mediation & Binding Arbitration Policy (Arbitration Policy or Policy).

The trial court denied Kroger's motion to compel arbitration, ruling that Kroger failed to meet its burden to prove the existence of an arbitration agreement. The trial court was not persuaded the undated four-page arbitration policy attached to Kroger's moving papers was extant at the time Cruise read and signed the employment application, and that it was the same Arbitration Policy to which the employment application referred.

We conclude the arbitration clause in the employment application, standing alone, is sufficient to establish the parties agreed to arbitrate their employment-related disputes, and that Cruise's claims against Kroger fall within the ambit of the arbitration agreement. The only impact of Kroger's inability to establish the contents of the 2007 Arbitration Policy is that Kroger failed to establish the parties agreed to govern their arbitration by procedures different from those prescribed in the California Arbitration Act (CAA) (§ 1280 et seq.). Therefore, the arbitration is to be governed by the CAA, rather than by the procedures set forth in the employer's Arbitration Policy. Accordingly, the order denying the motion to compel arbitration is reversed with directions to grant the motion.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Events preceding litigation.*

On October 20, 2007, Cruise completed and signed an employment application for the position of Human Resources Assistant Manager at Compton Creamery & Deli Kitchen, and appeared for an interview at that location.

The employment application included the following provision, which Cruise separately initialed, and which stated in relevant part: "*MANDATORY FINAL & BINDING ARBITRATION:* I acknowledge and understand that the Company has a Dispute Resolution Program that includes a Mediation & Binding Arbitration Policy (the 'Policy') applicable to all employees and applicants for employment.... I acknowledge, *understand and agree that the Policy is incorporated into this Employment Application by this reference as though it is set forth in full,* that except for claims or disputes arising out of the terms and conditions of any applicable CBA [collective bargaining agreement] ('Excluded Disputes') the Policy applies to any employment-related disputes that exist or arise between Employees and the Company or 'Compton Creamery' (as defined in the Policy) that would constitute cognizable claims or causes of action in a court or government agency under applicable law including individual statutory claims or disputes ('Covered Disputes'), that Covered Disputes are such claims or disputes that have to do with an Employee's seeking, attempted, actual, or alleged employment with the Company or Compton Creamery (or any of them) other than Excluded Disputes, and that the Policy requires that any Employee who wishes to initiate or participate in formal proceedings to resolve any Covered Disputes must submit the claims or disputes to final and binding arbitration in accordance with the Policy. I acknowledge, understand, and

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agree that (1) if any Covered Disputes exist or arise between me and the Company or Compton Creamery (or any of them), other than any Excluded Disputes, I am bound by the provisions, terms and conditions of the Policy which provides for mediation and mandatory final and binding arbitration of any Covered Disputes; (2) I am and will hereafter be deemed and treated as an 'Employee' as defined in the Policy for the purposes thereof, (3) there are no judge or jury trials of any Covered Disputes permitted under the Policy, (4) I waive any right that I have or may have to a judge or jury trial of any Covered Disputes, (5) I waive any right that I have or may have to have any formal dispute resolution proceedings concerning any Covered Disputes take place in a local, state, or federal court or agency and to have such proceedings heard or presided over by an active local, state, or federal judge, judicial officer, or administrative officer, (6) all Covered Disputes must be heard, determined and resolved only by an Arbitrator through final and binding arbitration in accordance with the Policy, (7) the Company likewise agrees to mandatory final and binding arbitration of any Covered Disputes, whether initiated or participated in by me or by the Company, in accordance with the Policy, and (8) *I have received a copy of the Policy or one has been made available to me through the Company's Human Resource Manager, 2201 South Wilmington Ave., Compton, CA 90220.*" (Italics added.)

The above mentioned Arbitration Policy was not attached to the employment application and Cruise stated the Policy was not provided to her at the time she applied for employment.

On December 7, 2007, seven weeks after Cruise submitted the employment application, she was hired by Compton Creamery. On April 1, 2012, her employment was terminated.

2. *Proceedings.*

Cruise initially filed a discrimination complaint with the Department of Fair Employment & Housing, obtained a right to sue letter, and filed suit against the Kroger defendants.

The operative first amended complaint, filed August 30, 2012, alleged statutory causes of action pursuant to the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) for retaliation, sexual harassment, sexual and racial discrimination, failure to investigate and prevent harassment and retaliation, as well as common law claims for wrongful termination in violation of public policy, intentional infliction of emotional distress and defamation. The complaint also included a demand for a jury trial.

a. *Kroger's motion to compel arbitration.*

On November 29, 2012, the Kroger defendants filed a motion to compel arbitration and stay judicial proceedings. Kroger contended a valid agreement to arbitrate exists; Cruise was bound by the arbitration clause in the signed employment application and by Kroger's four-page Arbitration Policy; Kroger was entitled to enforce the arbitration agreement; and the arbitration agreement extended to all of Cruise's claims against Kroger.

b. *Cruise's opposition to motion to compel arbitration.*

Cruise contended, inter alia, she never signed an arbitration agreement with Kroger. The arbitration clause in the employment application was "vague," "brief" and unenforceable. As for the four-page Arbitration Policy on which Kroger also relied, that was merely an undated, unauthenticated page from a Ralphs handbook that was not provided to Cruise when she applied for the position. Cruise asserted Kroger's failure to provide her with a copy of the Arbitration Policy meant that no contract was formed with respect to the undisclosed terms. (*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 702, 74 Cal.Rptr.3d 210 (*Metters*).) Cruise further argued that even assuming the Arbitration Policy was properly presented to her, it was unconscionable, both procedurally and substantively.

c. *Trial court's ruling.*

On January 25, 2013, the matter came on for hearing. On April 12, 2013, the trial court denied the motion to compel arbitration and set forth its rationale in an extensive written ruling, which stated, inter alia:

"The Defendants have failed to meet their burden to prove the existence of a signed arbitration agreement. *Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 74 Cal.Rptr.3d 210.[FN2]

FN2. In *Metters,* defendant Ralphs Grocery Co. moved to compel arbitration claiming the employee had entered into a binding arbitration agreement when he filled out a dispute resolution form. (161 Cal.App.4th at p. 698, 74 Cal.Rptr.3d 210.) However, the dispute form failed to warn the employee that he was agreeing to binding arbitration. The dispute

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form, which was titled Notice of Dispute & Request for Resolution, "did not alert [the employee] he was agreeing to anything, let alone arbitration." (*Id.* at pp. 702–703, 74 Cal.Rptr.3d 210.) *Metters* concluded substantial evidence supported the trial court's finding that there was no valid arbitration agreement. (*Id.* at p. 704, 74 Cal.Rptr.3d 210.)

"1. Defendants have failed to prove the existence of a written agreement to arbitrate....

"2. The defendants present Exhibit 'A' to the Snell declaration as the signed arbitration agreement. However, Exhibit 'A' to the Snell declaration consisted merely of pages from a Ralph's employee handbook. The Snell declaration does not state that this document was ever given to plaintiff. Plaintiff submits a declaration in opposition stating that she never received the Ralphs employee handbook. (See Cruise Declaration). *There is no date on the document and the Snell declaration does not state whether that document existed in 2007.*" (Italics added.)

The trial court further found that in any event, the Arbitration Policy submitted by Kroger was unconscionable, both procedurally and substantively. It found procedural unconscionability on the ground Cruise was required to accept the Arbitration Policy in order to apply for employment. It found substantive unconscionability on the grounds that (1) the Arbitration Policy limited the selection of potential arbitrators, by prohibiting the American Arbitration Association (AAA) and the Judicial Arbitration & Mediation Services (JAMS) from administering any arbitration held pursuant to the Arbitration Policy, and (2) the Arbitration Policy required each of the parties to bear half of the expense of the arbitration fees at the outset of the arbitration proceeding, contrary to *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*).

The trial court entered an order denying Kroger's motion to compel arbitration and stay the action.

This timely appeal followed.

CONTENTIONS

Kroger contends: the Federal Arbitration Act (FAA) governs the instant arbitration agreement; California and federal law favor arbitration; the trial court erred as a matter of law in holding that no valid contract to arbitrate exists, in that Cruise expressed her assent to the terms of the Arbitration Policy by her initials and signature on the employment application, the Arbitration Policy was properly incorporated by reference, and Cruise is charged with knowledge of the terms of the Arbitration Policy and is deemed to have assented thereto; the trial court erred in ruling the Arbitration Policy was procedurally and substantively unconscionable; the trial court should sever any offending provisions and order arbitration; Cruise must arbitrate against all of the defendants; and the trial court proceeding should be stayed pending arbitration.

DISCUSSION

1. *The undisputed evidence establishes the parties agreed to arbitrate their employment disputes.*

[1]Under "both federal and state law, *the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate.*" (*Cheng–Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683, 57 Cal.Rptr.2d 867, italics added.)

[2]The instant employment application, which was signed by Cruise, contained the following provision, which Cruise separately initialed, and which stated in relevant part: "*MANDATORY FINAL & BINDING ARBITRATION: I acknowledge and understand that the Company has a Dispute Resolution Program that includes a Mediation & Binding Arbitration Policy (the 'Policy') applicable to all employees and applicants for employment.... I acknowledge, understand and agree that the Policy is incorporated into this Employment Application by this reference as though it is set forth in full, ... the Policy applies to any employment-related disputes that exist or arise between Employees and the Company ... and that the Policy requires that any Employee who wishes to initiate or participate in formal proceedings to resolve any Covered Disputes must submit the claims or disputes to final and binding arbitration in accordance with the Policy.*" (Italics added.)

The above language eliminates any argument the parties did not agree to arbitrate their employment-related disputes.

[3]Further, in view of the above provision, Cruise cannot contend her claims against Kroger fall outside the scope of arbitrable issues. " 'In California, the general rule is that arbitration should be upheld unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute.' " (*Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315, 231 Cal.Rptr. 315.) Cruise's statutory causes of action against Kroger pursuant to FEHA (Gov. Code, § 12900 et seq.) for retaliation, sexual harassment, sexual and racial discrimination, failure to investigate and prevent harassment

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and retaliation, as well as her common law claims for wrongful termination in violation of public policy, intentional infliction of emotional distress and defamation, are all “employment-related disputes” within the meaning of the above arbitration clause, and therefore clearly are covered disputes subject to the arbitration agreement.

Thus, there is no question the parties agreed to arbitrate their employment-related disputes, and that Cruise's claims against Kroger fall within the ambit of the arbitration agreement. Therefore, Kroger is entitled to enforce the agreement to arbitrate.

2. *No merit to Cruise's contention the arbitration agreement lacked mutuality because it only required the employee to submit to arbitration.*

[4]Cruise's contention that the employment application only subjected the applicant/employee to arbitration is meritless. The arbitration provision in the employment application stated in pertinent part: “(7) the Company likewise agrees to mandatory final and binding arbitration of any Covered Disputes, whether initiated or participated in by me or by the Company, in accordance with the Policy.” This language disposes of Cruise's assertion that Kroger did not waive its right to a jury trial.

Further, the fact that only Cruise manually signed the employment application is of no moment. In *Lara v. Onsite Health, Inc.* (N.D. Cal. 2012) 896 F.Supp.2d 831 (*Lara*), the employee contended the arbitration agreement lacked mutuality because the employer did not sign it. In response, the employer argued its intent to be bound was evidenced by the fact that the arbitration agreement was printed on its company letterhead. (*Id.* at p. 844.)

The *Lara* court concluded the employer intended to be bound by the agreement and that its letterhead was intended to authenticate the agreement. (*Lara, supra,* 896 F.Supp.2d at p. 844.) It explained: “The signature of a party to be bound by a contract ‘need not be manually affixed, but may in some cases be printed, stamped or typewritten.’ *Marks v. Walter G. McCarty Corp.,* 33 Cal.2d 814, 820 [205 P.2d 1025] (1949) (citations omitted). However, if there is no manual signature, it must still be shown ‘that the name relied upon as a signature was placed on the document or adopted by the party to be charged with the intention of authenticating the writing. In other words the defendant must intend to appropriate the name as a signature.’ *Id.*; see also *Donovan v. RRL Corp.*, 26 Cal.4th 261, 277 [109 Cal.Rptr.2d 807, 27 P.3d 702] (2001) (The appearance of the defendant's name in an advertisement constituted an offer; therefore, the defendant's intent to authenticate his or her name as a signature can be established from the face of the advertisement).” (*Lara, supra,* 896 F.Supp.2d at p. 844.)

Lara found the employer “intended to be bound by the Arbitration Agreement. First, [the employer's] intent is evidenced by the fact that the Agreement is printed on its company letterhead and, because [the employer] submitted its offer of employment in this manner, the Court finds that [the employer] intended to authenticate its name as a signature.... Second, [the employer's] intent to be bound is further evidenced by the fact that it presented the Agreement to [the employee] as part of its New Hire packet, with a letter explaining that [the employee] must complete and sign all documents to be processed.... Third, the Agreement itself binds both parties to arbitration, repeatedly referring to ‘you and Onsite Health, Inc.,’ or ‘you and the Company.’ ... This language establishes that both parties are bound to arbitrate any disputes, with the exception of injunctive relief. Thus, the Agreement is written in terms of both parties' obligations and evidences [the employer's] intent to be bound. See *Armendariz,* 24 Cal.4th at 117–118, 99 Cal.Rptr.2d 745, 6 P.3d 669 (recognizing the ‘modicum of bilaterality’ required in an arbitration agreement).” (*Lara, supra,* 896 F.Supp.2d at p. 844.)

Here, we readily conclude Kroger intended to be bound by the arbitration clause in its employment application. Kroger's intent is evidenced by the fact that the employment application was printed on its company letterhead and the arbitration clause declared Kroger's intent to be bound by thereby [“(7) the Company likewise agrees to mandatory final and binding arbitration of any Covered Disputes”]. Under these circumstances, we conclude Kroger intended to intended to authenticate its name as a signature, so as to bind both parties to arbitration.

3. *The impact of the trial court's finding that Kroger failed to establish the precise terms of the Arbitration Policy.*

[5]Kroger's moving papers were supported by the declaration of Savarda Kia Snell, Human Resource Manager for Compton Creamery. The Snell declaration, dated November 28, 2012, provided in relevant part at paragraph 3: “Attached hereto as Exhibit A is a true and correct copy of the Mediation & Binding Arbitration Policy (referred to in Defendants' Memorandum of Points and Authorities as the ‘Arbitration Policy’).” Exhibit A to the Snell declaration consisted of a four-page document captioned “RALPHS GROCERY COMPANY [¶] DISPUTE RESOLUTION PROGRAM [¶] MEDIATION & BINDING ARBITRATION POLICY.” Kroger asserted said document was a copy of the operative Arbitration Policy which was incorporated by reference into the employment

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application which Cruise executed five years earlier, on October 20, 2007.

However, the trial court was not persuaded the undated four-page arbitration policy attached to the Snell declaration was extant at the time Cruise read and signed the employment application, and that it was the same Arbitration Policy to which the employment application referred.

Nonetheless, Kroger's inability to establish the precise language of the Arbitration Policy which was in effect at the time of Cruise's hiring in 2007, does not support the trial court's conclusion that Kroger "failed to prove the existence of a written agreement to arbitrate." The undisputed evidence, specifically, the employment application, is sufficient to establish the existence of a written agreement to arbitrate the employment-related disputes pled herein by Cruise. Therefore, Kroger's inability to establish the precise terms of the Arbitration Policy does not relieve Cruise of the obligation to arbitrate.

[6]The only impact of Kroger's inability to establish the contents of the 2007 Arbitration Policy is that Kroger failed to establish that the parties agreed to govern their arbitration by procedures different from those prescribed in the CAA (§ 1280 et seq.). Unless the parties otherwise agree, the conduct of an arbitration proceeding is controlled by the CAA. (See, e.g., §§ 1281.6, 1282, 1282.2.) Here, because Kroger failed to establish an agreement to the contrary, the instant arbitration proceeding is to be governed by the procedures set forth in the CAA. Because this arbitration is controlled by California statutory and case law, Cruise's arguments that Kroger's Arbitration Policy is unconscionable, both procedurally and substantively, are meritless.[FN3]

FN3. A "compulsory predispute arbitration agreement is not rendered unenforceable just because it is required as a condition of employment or offered on a 'take it or leave it' basis." (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1122–1123, 88 Cal.Rptr.2d 664.) With respect to appointment of the arbitrator, section 1281.6 provides that where the parties' arbitration agreement fails to provide a method of appointing an arbitrator, the method prescribed in section 1281.6 shall control. (See *HM DG, Inc. v. Amini* (2013) 219 Cal.App.4th 1100, 1107, 162 Cal.Rptr.3d 412 [parties need not agree upon a specific method for appointing an arbitrator to form a binding arbitration agreement].) Finally, with respect to apportionment of costs, *Armendariz* held "a mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges *the employer* to pay all types of costs that are unique to arbitration." (24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669, italics added.)

Nothing herein should be construed as enabling an employer to enforce a missing arbitration agreement. Here, the movant employer successfully established the *existence* of an agreement to arbitrate, based on the language of the arbitration clause contained in the employment application; however, the employer failed to establish the contents of the purported four-page Arbitration Policy setting forth the procedures which would govern the arbitration. The language of the arbitration clause in the instant employment application, standing alone, was sufficient to establish the *existence* of an agreement by the parties to arbitrate employment-related disputes. While the parties' agreement to arbitrate is enforceable, the employer's inability to establish the contents of its Arbitration Policy precludes the employer from enforcing the provisions of said policy. Instead, the arbitration proceeding is to be conducted in accordance with the procedures set forth in the CAA as well as applicable case law.

In concluding the arbitration proceeding is to be governed by the procedures set forth in the CAA, this court is not rewriting the arbitration agreement or severing any objectionable provisions in the four-page Arbitration Policy in order to save the arbitration agreement. (*Armendariz, supra,* 24 Cal.4th at p. 122, 99 Cal.Rptr.2d 745, 6 P.3d 669 [trial court has "some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement"].) The applicability of the CAA's procedures is the product of Kroger's inability to establish the contents of the purported four-page Arbitration Policy. Because Kroger failed to establish an agreement binding the parties to alternative procedures, the instant arbitration proceeding is to be governed by the procedures set forth in the CAA.

DISPOSITION

The order denying the motion to compel arbitration and stay the action is reversed with directions to grant the motion. The parties shall bear their respective costs on appeal.

We concur:

KITCHING, Acting P.J.

KLEIN, J.[FN*]

FN* Retired Presiding Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to

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article VI, section 6 of the California Constitution.

Supplemental Case Printout for: *Adapting the Law to the Online Environment*

Del.Supr.,2014.
Baird v. Owczarek
93 A.3d 1222
Supreme Court of Delaware.
Thomas BAIRD, Plaintiff Below, Appellant,
v.
Frank R. OWCZAREK, M.D., Eye Care of Delaware LLC, and Cataract and Laser Center, LLC, Defendants Below, Appellees.
No. 504, 2013.
Submitted: May 14, 2014.
Decided: May 28, 2014.
HOLLAND, Justice:

This is an appeal from a final judgment of the Superior Court that was entered after a jury verdict in favor of defendants-appellees, Frank R. Owczarek, M.D. ("Dr. Owczarek"), Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC (collectively, the "Appellees"). The plaintiff-appellant, Thomas Baird ("Baird"), appeals on a number of grounds. We have concluded that the Superior Court's failure to conduct *any* investigation into alleged egregious juror misconduct (internet research), which violated the Superior Court's direct instruction to refrain from consulting outside sources of information, constituted reversible error. In addition, the Superior Court's failure to exclude evidence of informed consent in this medical negligence action also constituted reversible error. Accordingly, the judgments of the Superior Court are reversed and this matter is remanded for a new trial. [FN1]

FN1. We do not address the other evidentiary issues raised by Baird in this appeal but instead hold that those evidentiary rulings shall not constitute the law of the case at a new trial.

Facts

On January 27, 2004, Baird underwent a LASIK [FN2] procedure on both eyes performed by Dr. Owczarek. On October 14, 2009, Baird underwent a second LASIK surgery on his left eye—a LASIK "enhancement." Baird alleged that as a result of the surgeries, he developed post-LASIK ectasia, a vision-threatening corneal disease that required a DALK [FN3] procedure.

FN2. Laser–Assisted *In Situ* Keratomileusis.

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FN3. Deep Anterior Lamellar Keratoplasty.

On September 30, 2011, Baird filed a medical negligence action, alleging that the Dr. Owczarek was negligent, not during his performance of the surgeries themselves, but in his decision to perform the surgeries in the first place. Baird also brought a claim based on a lack of informed consent, which he later withdrew.

Having withdrawn his informed consent claim, Baird moved to exclude the defense of assumption of risk and evidence of informed consent. In the same motion, Baird requested that the trial judge exclude the expert testimony of Dr. Steven Siepser, the defendant's standard of care expert. The trial judge denied the motions, but agreed to give a limiting instruction on the issue of informed consent.

An eight-day trial began on April 1, 2013. The jury returned a verdict in favor of the defendants. Over a two-week period following the trial, Juror No. 6 left a telephone message with Baird's counsel and repeatedly attempted to contact the trial judge to inform him of juror misconduct. Eventually, Juror No. 6 wrote a letter to the trial judge alleging that Juror No. 9 had done internet research during the jury's deliberations. Baird moved for a new trial based upon the allegations of misconduct by Juror No. 6. After hearing oral argument, the trial judge summarily denied the motion for a new trial without conducting any investigation.

Delaware Constitution

The historical origins of the right to trial by jury which is provided for in the Delaware Constitution was reviewed by this Court in *Claudio v. State.* [FN4] When the Delaware Constitution of 1792 was adopted, the right to trial by jury set forth in the federal Bill of Rights as the Sixth [FN5] and Seventh [FN6] Amendments to the United States Constitution was only a protection against action by the federal government.[FN7] In *Claudio,* this Court noted that when Delaware adopted its Constitution in 1792, notwithstanding the ratification of the first ten amendments or federal Bill of Rights in 1791, it did not create "a mirror image of the United States Constitution" with regard to trial by jury.[FN8]

FN4. *Claudio v. State,* 585 A.2d 1278 (Del.1991).

FN5. The Sixth Amendment pertains to criminal trials. For a discussion of the history of trial by jury in criminal proceedings in Delaware *see Claudio v. State,* 585 A.2d 1278 (Del.1991).

FN6. The Seventh Amendment pertains to civil trials and provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no *fact* tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII (emphasis added). For a discussion of the history of trial by jury in civil proceedings in Delaware *see McCool v. Gehret,* 657 A.2d 269 (Del.1995).

FN7. *Barron v. Mayor of Baltimore,* 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

FN8. *Claudio v. State,* 585 A.2d at 1289.

Following the adoption of the Fourteenth Amendment to the United States Constitution, the Sixth Amendment right to trial by jury in *criminal* proceedings has been deemed to have been incorporated by the Due Process clause and now also provides protection against state action.[FN9] Nevertheless, the United States Supreme Court has not held that the Seventh Amendment's guarantee of jury trials in *civil* proceedings was made applicable to the states by the incorporation doctrine [FN10] with the adoption of the Fourteenth Amendment to the United States Constitution.[FN11] Accordingly, the right to a jury trial in civil proceedings has always been and remains exclusively protected by provisions in the Delaware Constitution.[FN12]

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FN9. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

FN10. *See McDonald v. City of Chicago,* 561 U.S. 742, 130 S.Ct. 3020, 3034 n. 12, 177 L.Ed.2d 894 (collecting cases where federal Bill of Rights have been incorporated) & n. 13 (collecting cases where federal Bill of Rights have not been incorporated) (2010).

FN11. *Minneapolis & St. Louis R.R. v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916); *Walker v. Sauvinet,* 92 U.S. 90, 23 L.Ed. 678 (1876).

FN12. *McCool v. Gehret,* 657 A.2d 269 (Del.1995).

Jury Determines Facts

When the Delaware Constitution was rewritten in 1897, the General Assembly included several significant provisions regarding the right to trial by jury. Article I of the 1897 Delaware Constitution was denominated for the first time as the "Bill of Rights." Section 4 of that article provided for the right to trial by jury as "heretofore." Article IV, Section 19 was a new addition in the 1897 Constitution and provided: "Judges shall not charge juries with respect to matters of *fact,* but may state the questions of *fact* in issue and declare the law." [FN13] The reason given during the Constitutional Debates for the adoption of Section 19 was to ensure "that Judges shall confine themselves to their business, which is to adjudge the law and leave *juries to determine the facts.*" [FN14]

FN13. Del. Const. art. IV, § 19 (emphasis added).

FN14. 3 *Constitutional Debates* at 1730 (emphasis added). *See Storey v. Camper,* 401 A.2d 458, 463 n. 4 (Del.1979).

In *Storey,* this Court characterized Section 19 as perpetuating Delaware's commitment to trial by jury in civil actions at law with regard to *issues of fact.*[FN15] In examining when a trial judge may set aside a jury verdict, this Court described Delaware's long history of commitment to trial by jury.[FN16] We explained that Section 19 reaffirmed Delaware's commitment to the common law principles regarding trial by jury:

FN15. *Storey v. Camper,* 401 A.2d at 462–65.

FN16. *Id.*

> In the policy of the law of this state, declared by the courts in numberless decisions, the *jury is the sole judge of the facts* of a case, and so jealous is the law of this policy that by express provision of the Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury. [FN17]

FN17. *Id.* at 462 (quoting *Philadelphia, B. & W. R. Co. v. Gatta,* 85 A. 721, 729 (Del.1913)) (emphasis added).

[1][2][3] Accordingly, under the Delaware Constitution, an essential element of the right to trial by jury is for verdicts to be based solely on *factual determinations* that are made from the evidence presented at trial. [FN18] The accused's rights to confrontation, cross-examination and the assistance of counsel [FN19] assure the accuracy of the testimony which the jurors hear and safeguard the proper admission of other evidence.[FN20] *Those rights can be exercised effectively only if evidence is presented to the jury in the courtroom,*[FN21] where that evidence can be subjected to the adversarial process under the authoritative guidance of a trial judge. These principles are equally applicable to the parties' rights in a Delaware civil jury trial. In addition, the Delaware Constitution provides that, in a civil proceeding that is appealed to this Court, "from a verdict of a jury, the findings of the jury, if supported by the evidence, shall be conclusive." [FN22]

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FN18. *Hughes v. State,* 490 A.2d 1034, 1040 (Del.1985).

FN19. *Turner v. Louisiana,* 379 U.S. 466, 473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

FN20. *Smith v. State,* 317 A.2d 20, 23 (Del.1974).

FN21. *Id.*

FN22. Del. Const. art. IV, § 11(1)(a) (emphasis added).

Ascertaining Juror Misconduct

[4] The right to an impartial jury is compromised if even one juror is improperly influenced.[FN23] This Court has recognized the difficulty which a party has in *proving actual prejudice within a jury panel.*[FN24] That difficulty is attributable to the sanctity of the jury's deliberations and the common law prohibition against jurors impeaching their own verdict. Accordingly, this Court has held "that a flat prohibition against receiving post-verdict testimony from jurors would contravene another important public policy: that of 'redressing the injury of the private litigant where a verdict was reached by a jury that was not impartial.' " [FN25]

FN23. *Styler v. State,* 417 A.2d 948, 951–52 (Del.1980).

FN24. *Massey v. State,* 541 A.2d 1254, 1257–58 (Del.1988).

FN25. *Sheeran v. State,* 526 A.2d 886, 895 (Del.1987) (citing *Patterson v. Colorado,* 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907)).

The need to accommodate the conflicting policies of preserving the sanctity of a jury's deliberations and the parties' right to an impartial jury, has resulted in the recognition of a distinction between extrinsic and intrinsic influences upon a jury's verdict.[FN26] D.R.E. 606(b) codifies the common law prohibition against inquiry into the jurors' mental processes, [FN27] but also provides an exception:

FN26. *Id.*

FN27. It has been codified in Delaware Rule of Evidence 606(b):

> COMPETENCY OF JUROR AS WITNESS. *Inquiry into Validity of Verdict or Indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether **any outside influence** was improperly brought to bear upon **any** juror.[FN28]

FN28. *Id.* (emphasis added).

Egregious Circumstance Test

[5] In an effort to address the evidentiary limitations caused by precluding any inquiry into a juror's mental

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processes, this Court has adopted an inherently prejudicial egregious circumstance test.[FN29] To succeed on a claim of improper jury influence, a party must either prove that he or she was "identifiably prejudiced" by the juror misconduct or prove the existence of " 'egregious circumstances,'—i.e., circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice." [FN30] The presumption of prejudice can be rebutted, however, by a post-trial investigation conducted by the trial judge.[FN31]

FN29. *Massey v. State,* 541 A.2d at 1258–59.

FN30. *Sykes v. State,* 953 A.2d 261 (Del.2008).

FN31. *Remmer v. United States,* 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

Juror Internet Research Improper

[6] In this case, the Superior Court clearly and appropriately instructed the jury that they were not to "... use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, computer; the Internet, any Internet service, or any text or instant messaging service; or Internet chat room, blog, or website such as Facebook, My Space, LinkedIN [sic], YouTube or Twitter to communicate to anyone any information in this case or conduct any research about this case until I accept your verdict." [FN32]

FN32. *See* Appellant's Op. Br.App. at A–1211.

Baird argues that Juror No. 9's internet research was an improper extraneous influence and was an "egregious circumstance" that raised a presumption of prejudice. We agree. Internet research provides a juror with access to information that was not admitted into evidence and consists of written "text" that is inadmissible into evidence under any circumstance.

This Court has held that "charts" admitted into evidence, which included explanatory "text" cannot be distinguished in a principled way from a "text from learned treatises" which the policy underlying D.R.E. 803(18) prohibits from going into the jury room during deliberations.[FN33] Delaware Rule of Evidence 803(18) states:

FN33. *Berry v. Cardiology Consultants, P.A.,* 935 A.2d 255 (Del.2007).

> [t]o the extent called to the attention of an expert witness upon cross-examination, or relied upon by him in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the *statements may be read into evidence but may not be received as exhibits.*

According to *Weinstein and Berger,* the purpose of Rule 803(18) is to help "ensure that the jurors will not be unduly impressed by the treatise, and that they will not use the text as a starting point for conclusions untested by expert testimony...." [FN34] The *Handbook of Federal Evidence* notes that the "provision attempts to prevent jurors from overvaluing the written word...." [FN35] *Jones on Evidence Civil and Criminal* states:

FN34. 4 *Weinstein and Berger, United States Rules,* ¶ 803(18)[02], at 803–375 (1995).

FN35. Michael H. Graham, *Handbook of Federal Evidence* § 803:18, at 415 (6th ed.2006).

> The last sentence of the rule permits the attorney to read relevant passages from the treatise into evidence to bolster, or as the basis of questions to challenge the witness, but neither the treatise itself, or the relevant passages, may be received as exhibits. **This restriction is intended to prevent jurors from attempting to**

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interpret or apply the treatise on their own independent of the testimony of the expert witness(es) who are questioned about it.[FN36]

FN36. 5 *Jones on Evidence Civil and Criminal,* § 35:28, at 317 (7th ed. 2003) (emphasis added).

[7] Internet research by a juror is an improper extrinsic influence that is an egregious circumstance because it has the prospect of being so inherently prejudicial that it raises a presumption of prejudice. Several decades ago, this Court held "fairness and, indeed, the integrity of the judicial process, make it imperative that jurors receive information about the case only as a corporate body in the courtroom." [FN37] "Nothing is more repugnant to our traditions of justice than to be at the mercy of witnesses [or written text] one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted." [FN38] The following rationale is applicable to internet research by a juror:

FN37. *Smith v. State,* 317 A.2d at 23.

FN38. *Torres v. Allen Family Foods,* 672 A.2d 26, 31 (Del.1995).

> Had evidence of such matters been offered and admitted over his objections, it would have been reversible error. If the admission of such evidence in the trial, where he at least might have had opportunity to meet and perchance explain the damaging facts, would be prejudicial, it cannot be less so when the facts are brought to the attention of the jurors in the jury room by one of their fellows whose word, of course, the others have no reason to doubt and without the knowledge or consent of defendant nor with any opportunity for him to explain the facts or rebut the unfavorable inferences. [FN39]

FN39. *Hughes v. State,* 490 A.2d at 1045 n. 13.

Jurors cannot render a fair verdict when *facts* to support the basis for that verdict do not appear in the record evidence that was presented to them in the courtroom. Similarly, a judge may not investigate issues of fact on the internet, when a judge sits as the fact finder without a jury.[FN40]

FN40. *Tribbitt v. Tribbitt,* 963 A.2d 1128 (Del.2008).

Further Investigation Mandatory

[8] Under D.R.E. 606(b), "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror." [FN41] Thus, testimony about "extrinsic" influences is permissible under the rule. The trial judge acknowledged that under the rules of evidence, Juror No. 6 would be permitted to testify about the "something" that was researched by Juror No. 9.

FN41. D.R.E. 606(b).

Nevertheless, the trial judge did not call Juror No. 6 to testify. The trial judge explained why he concluded that the circumstances alleged in the letter from Juror No. 6 did warrant further investigation:

> The circumstances do not come close to warranting a new trial or further investigation here because Juror No. 6 has not stated with any detail what Juror No. 9 researched online. Juror No. 6 has not explained (if she even knows) what Juror No. 9 "looked up" on the internet. Any prejudice is thus completely speculative. In other words, Plaintiff has not shown that here is a "reasonable probability" that what Juror No. 9 researched online affected the verdict.

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[9] Baird argues that the Superior Court abused its discretion in finding that Juror No. 6 could, pursuant to D.R.E. 606(b), testify that Juror No. 9 did internet research, but in failing to call her to testify or conduct any further investigation to determine the content of the outside research. We agree. Generally, "[t]he trial court has discretion to decide that allegations of juror misconduct are not sufficiently credible or specific to warrant investigation." [FN42] However, once the trial court has been presented with evidence of internet research by a juror it is incumbent on the trial judge to conduct an investigation.

FN42. *Black v. State,* 3 A.3d 218, 221 (Del.2010).

[10][11] Internet research by a juror is intolerable misconduct because it is an extrinsic influence that has the potential to prejudicially compromise the jury's function under the Delaware Constitution to *determine facts* exclusively based upon evidence that is presented in the courtroom. Accordingly, we hold that where, as here, a juror makes allegations that one or more jurors violated a direct instruction of the trial judge to refrain from conducting internet research, such allegations represent an egregious circumstance giving rise to a rebuttable presumption of prejudice from exposure to an improper extrinsic influence. The presumption of prejudice can be rebutted by an investigation.[FN43]

FN43. *Black v. State,* 3 A.3d 218, 220 (Del.2010).

[12][13] An investigation is mandatory when there is an allegation of internet research by a juror. The trial judge must determine whether the alleged internet research actually occurred; if it occurred, the content of the outside research; whether the content of the internet research prejudiced the errant juror; and whether the results of the internet research were communicated to other jurors. If after the trial judge's investigation there is sufficient evidence to rebut the presumption of prejudice, the trial judge may deny a motion for a new trial. If, however, the opposing party fails to rebut the presumption of prejudice arising from a showing of an egregious circumstance (internet research), the trial judge must grant a motion for a new trial.

In this case, the allegation of internet research by a juror presented an egregious circumstance. It raised a rebuttable presumption of prejudice by an extrinsic influence that may have been rebutted by a post-trial investigation. The trial judge's failure to conduct *any* investigation was an abuse of discretion and reversible error.[FN44] Since the presumption of prejudice was not rebutted, the unexpanded, uncontradicted record reflects that parties' rights under the Delaware Constitution, to have the case exclusively decided by evidence that was presented to the jury in the courtroom, were violated.

FN44. *Black v. State,* 3 A.3d 218, 221 (Del.2010). *Accord Gov't of the Virgin Islands v. Weatherwax,* 20 F.3d 572, 578 (3d Cir.1994) ("We have emphasized the importance of questioning jurors whenever the integrity of their deliberations is jeopardized.... failure to evaluate the nature of the jury misconduct or the existence of prejudice require[s] a new trial."). *See also United States v. Bristol–Martir,* 570 F.3d 29 (1st Cir.2009); *United States v. Resko,* 3 F.3d 684 (3d Cir.1993) (failure to adequately investigate the prejudicial effect of jury misconduct on the jury's deliberations). *See also* George L. Blum, Annotation, *Prejudicial Effect of Juror Misconduct Arising from Internet Usage,* 48 A.L.R.6th 135 (2009).

Informed Consent Forms Improperly Admitted

[14] After Baird withdrew his claim for lack of informed consent, his counsel filed a motion *in limine* which sought to preclude the presentation of several pieces of evidence. Among the evidence objected to was the various informed consent forms signed by Baird prior to his surgeries. In the motion, Baird's counsel argued that the informed consent evidence "bears only upon issues relating to Plaintiff's withdrawn informed consent claim." "Therefore, they now have no probative value to any issues remaining in this action. Moreover, the consent forms would prejudice, confuse and mislead the jury."

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In a pretrial conference, the trial judge addressed the various parts of Baird's motion *in limine,* including the informed consent evidence. The trial judge denied Baird's motion after finding that the informed consent forms were relevant as part of "the work-up done by the defendant" in the context of an elective procedure. The trial judge then requested that Baird's counsel "take the lead" in drafting a jury instruction that would inform the jury about the proper use of the evidence. The jury instructions ultimately contained the following language:

> Informed consent is not a valid defense to a medical negligence action. Plaintiff-patient cannot consent to the negligence of a defendant-doctor. The fact that the defendant-doctor may have informed the plaintiff of certain known and accepted risks, does not excuse him of liability for any negligence.
>
> When determining whether or not Dr. Owczarek committed medical negligence, you may not, and should not, consider any evidence of Mr. Baird's consent or any warnings given by Dr. Owczarek, as evidence that Mr. Baird consented to Dr. Owczarek's negligence, if any.

[15] In Delaware, assumption of risk is not a valid defense to a medical negligence action as a matter of public policy.[FN45] This Court has never addressed the question of whether evidence of informed consent may be entered into evidence in a medical negligence case where the plaintiff makes no claim for lack of informed consent. That question has been addressed, however, by courts in a number of other jurisdictions. Those cases "uniformly have concluded that evidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent." [FN46] We agree.

FN45. *See Storm v. NSL Rockland Place, LLC,* 898 A.2d 874, 885 (Del.Super.2005).

FN46. *Hayes v. Camel,* 283 Conn. 475, 927 A.2d 880, 889 (2007) (finding that trial court abused its discretion by allowing into evidence informed consent forms in a claim for negligence, but finding error harmless). *See also Waller v. Aggarwal,* 116 Ohio App.3d 355, 688 N.E.2d 274, 275–76 (1996) (finding that the issue of informed consent, and therefore evidence thereof, was irrelevant to plaintiff's claim of negligence and carried great potential for jury confusion); *Liscio v. Pinson,* 83 P.3d 1149, 1156 (Colo.App.2003) (finding that evidence pertaining to a patient's informed consent may be unfairly prejudicial and irrelevant to a negligence claim, but finding no reversible error because plaintiff "opened the door"); *Wright v. Kaye,* 267 Va. 510, 593 S.E.2d 307, 317 (2004) (finding reversible error where trial court failed to grant plaintiff's motion *in limine* to exclude evidence of informed consent where no claim for lack of informed consent); *Warren v. Imperia,* 252 Or.App. 272, 287 P.3d 1128 (2012) (trial court did not abuse its discretion in excluding evidence of informed consent in a medical malpractice case where no "lack of informed consent" claim was brought because the evidence was irrelevant and, to the extent relevant, unfairly prejudicial and confusing to the jury); *Schwartz v. Johnson,* 206 Md.App. 458, 49 A.3d 359, 371–75 (Md.Ct.Spec.App.2012) (trial court did not abuse its discretion in excluding evidence of informed consent because irrelevant to claim for medical malpractice without a "lack of informed consent" claim and overly prejudicial or confusing to jury even if relevant).

In order to be admissible at trial, evidence must be relevant. [FN47] Relevant evidence, as defined by Delaware Rule of Evidence 401, is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [FN48] D.R.E. 401's definition of relevance contains aspects of materiality and probative value.[FN49] This Court has said that "evidence is material if it is offered to prove a fact that is of consequence to the action[, and it] has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be." [FN50]

FN47. *Stickel v. State,* 975 A.2d 780, 782 (Del.2009).

FN48. D.R.E. 401.

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FN49. *Stickel v. State,* 975 A.2d at 783 (citing *Lilly v. State,* 649 A.2d 1055, 1060 (Del.1994)).

FN50. *Id.*

Dr. Owczarek argues that the evidence of informed consent, especially the consent forms Baird signed, was relevant to the work-up done prior to the surgery, which Dr. Owczarek contends was put at issue during trial. In addition, Dr. Owczarek submits that the consent forms were relevant to the historical context of Baird's treatment and the fact that the surgery was elective. We conclude that Dr. Owczarek's arguments are without merit.

In this case, Baird originally brought claims for lack of informed consent and for medical malpractice. Significantly, however, Baird dismissed his claim for lack of informed consent prior to trial. Once Baird's claim for lack of informed consent was removed from the suit, the consent forms Baird signed pre-surgery became irrelevant, because assumption of the risk is not a valid defense to a claim of medical negligence,[FN51] and because evidence of informed consent is neither material or probative of whether Dr. Owczarek met the standard care in concluding that Baird was an eligible candidate for the surgery.[FN52] Therefore, the evidence should have been excluded pursuant to D.R.E. 401.

FN51. *Storm v. NSL Rockland Place, LLC,* 898 A.2d 874, 885 (Del.Super.2005).

FN52. *Schwartz v. Johnson,* 206 Md.App. 458, 49 A.3d 359, 374–75 (Md.Ct.Spec.App.2012).

Even if relevant, "evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading he jury...." [FN53] Informing the jury of a plaintiff's consent does not help a defendant show that he was not negligent. Evidence of informed consent in a medical malpractice action could confuse the jury by creating the impression that consent to the surgery was consent to the injury.[FN54] Therefore, because evidence of informed consent in this case carried a clear danger of confusing the jury, even if the evidence would have been otherwise relevant, it should have been excluded pursuant to D.R.E. 403. The trial judge's failure to do so was an abuse of its discretion.

FN53. D.R.E. 403.

FN54. *Schwartz v. Johnson,* 206 Md.App. 458, 49 A.3d 359, 374 (Md.Ct.Spec.App.2012) (citing *Hayes v. Camel,* 283 Conn. 475, 927 A.2d 880, 888–89 (2007)).

Conclusion

The judgment of the Superior Court is reversed, and the matter is remanded for a new trial.

Supplemental Case Printout for: *Landmark in the Law*

U.S.Dist.Col.,1803.
Marbury v. Madison
1 Cranch 137, 5 U.S. 137, 1803 WL 893 (U.S.Dist.Col.), 2 L.Ed. 60
Supreme Court of the United States

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William MARBURY
v.
James MADISON, Secretary of State of the United States.

Feb. 1803.

MARSHALL.

****1 *138** The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of *original* jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution. An act of congress repugnant to the constitution cannot become a law. The courts of the U. States are bound to take notice of the constitution. A commission is not necessary to the appointment of an officer by the executive-Semb. A commission is only *evidence* of an appointment.

Delivery is not necessary to the validity of letters patent. The President cannot authorize a secretary of state to omit the performance***139** of those duties which are enjoined by law.

A justice of peace in the district of Columbia is not removable at the will of the President. When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete. A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.

***137** At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the 4th day of this term. This rule having been duly served,

Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive journals respecting the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31 January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state and not bound to disclose any facts relating to the business or transactions in the office.

****2** Mr. Lee observed, that to shew the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the President. In the first his duty is to the United States or its citizens; in the other his duty is to the President; in the one he is an independent, and an accountable officer; in the other he is dependent upon the President, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1. p. 359, entitled “an act for establishing an executive department, to be denominated the department of foreign affairs.”The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, “Be it enacted, &c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States,

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agreeable to the constitution, relative to correspondencies, commissions***140** or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given and the duties imposed by this act, no mandamus will lie. The secretary is responsible only to the President. The other act of congress respecting this department was passed at the same session on the 15th September 1789, vol. 1, p. 41, c. 14, and is entitled "An act to provide for the safe keeping of the acts, records, and seal of the United States, and for other purposes."The first section changes the name of the department and of the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they ***141** shall have been signed by the President. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office the President cannot take from his custody the seal of the United States, nor prevent him from recording, and affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the secretary of state, respecting which ***142** they cannot be bound to answer. Such are the facts concerning foreign correspondencies, and confidential communications between the head of the department and the President. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the secretary of state. He refuses. Surely he may be compelled by mandamus to give it. But in order to obtain a mandamus, I must shew that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, on a motion for a mandamus, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

****3** The court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

****4** Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question "who gave him that

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information;" and the court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were ***143** recorded, as he had not had recourse to the book for more than twelve months past.
Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but believed, and was almost certain, that Mr. Marbury's and col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the peace signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams for his signature. After being signed he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.
Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.
The questions being written were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.
****5 *144** 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and
2d. He ought not to be compelled to answer any thing which might tend to criminate himself.
Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objection of Mr. Wagner and Mr. Brent. He stated that the duties of a secretary of state were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the President, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the President, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose any thing which might tend to criminate himself.
Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.
The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it ***145** is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.
Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.
The court granted it and postponed further consideration of the cause till the next day.
At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.
The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.
****6** To the other questions he answered that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether any of them constituted Mr. Marbury, col. Hooe, or col. Ramsay, justices of the peace; there were when he went into the office several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general

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commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.
***146** Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for colonel Hooe, and one for William Harper.
Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions;
1st. Whether the supreme court can award the writ of mandamus in any case.
2d. Whether it will lie to a secretary of state in any case whatever.
3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state.
The argument upon the 1st question is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.
This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of mandamus and prohibition. 3. Inst. 70, 71. ***147** Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied where there is another *adequate, specific, legal remedy.*
The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations as congress shall make. The term “appellate jurisdiction” is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.
****7** Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says that a writ of mandamus is “a command issuing in the king's name from the court of king's bench, and directed to any *person,* corporation or inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty,* and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, *and has no other specific means of compelling its performance.”*
In the Federalist, vol. 2, p. 239, it is said, that the word “appellate” is not to be taken in its technical sense, as used in reference to appeals in the course of the *civil* law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings***148** of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.
Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, sec. 13, have expressly given the supreme court the power of issuing writs of mandamus. The words are, “The supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office,* under the authority of the United States.”
Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.
****8** This court has entertained jurisdiction on a mandamus in one case, and on a prohibition in another. In the case of the United States v. judge Lawrence, 3. Dal. Rep. 42, a mandamus was moved for by the attorney general at the instance of the French minister, to compel judge Lawrence to issue a warrant against captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of mandamus, was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The mandamus

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was refused, because the case in which it was required, was not a proper one to support the motion. In the case of the United States v. judge Peters a writ of prohibition was granted, 3. Dal. Rep. 121, 129. This was the celebrated case of the French ***149** corvette the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion was made to the supreme court in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the *secretary at war,* commanding him to place Chandler on the invalid pension list. After argument, the court refused the mandamus, because the two acts of congress respecting invalids, did not support the case on which the applicant grounded his motion. The case of the United States v. Hopkins, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States loan. Upon argument the mandamus was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2d. The second point is, can a mandamus go to a secretary of state in any case? It certainly cannot in *all* cases; nor to the President in *any* case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the President, he is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, ***150** should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, *to any person holding offices under the authority of the United States."*

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1, p. 43, copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the President who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a mandamus to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

****9** In this respect there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge Patterson inquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered so to do by the President.

Mr. Lee replied, that after the President has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the President has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record, and deliver***151** it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether in the present case a writ of mandamus ought to be awarded to James Madison, secretary of state.

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of Congress passed the 27th of Feb. 1801, entitled "An act concerning the district of Columbia," ch. 86, sec. 11 and 14; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, sec. 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought therefore to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained

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observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. ***152** This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of state.
****10** It only remains now to consider whether a mandamus to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law."
It is the general principle of law that a mandamus lies, if there be no other *adequate, specific, legal* remedy; 3 *Burrow,* 1067, *King v. Barker, and al.* This seems to be the result of a view of all the cases on the subject.
The case of Rex.v. Borough of Midhurst, 1. Wils. 283, was a mandamus to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of Rex v. Dr. Hay, 1. W.Bl.Rep. 640, a mandamus issued to admit one to administer an estate.
A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.
It lies to compel a ministerial act which concerns the public. 1. Wilson, 283, 1. Bl.Rep. 640-although there be a more tedious remedy, Str. 1082, 4 Bur. 2188, 2 Bur. 1045; So if there be a legal right, and a remedy in equity, 3. Term Rep. 652. A mandamus lies to obtain admission into a trading company.Rex v. Turkey Company, 2 Bur. 1000.Carthew 448. 5 Mod. 402; So it lies to put the corporate seal to an instrument. 4. Term.Rep. 699; to commissioners of the excise to grant a permit, 2 Term.Rep. 381; to admit to an office, 3 Term.Rep. 575; to deliver papers which concern the public, 2 Sid. 31. A mandamus will sometimes lie in a ***153** doubtful case, 1 Levinz 123, to be further considered on the return, 2 Levinz, 14. 1 Sidersin, 169.
It lies to be admitted a member of a church, 3. Bur. 1265, 1043.
****11** The process is as ancient as the time of Ed.2d. 1 Levinz 23.
The first writ of mandamus is not peremptory, it only commands the officer to do the thing or shew cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding, if not, a peremptory mandamus is then awarded.
It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.
On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and had been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.
It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.
Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.
Opinion of the court.
At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus ***154** should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.
No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.
These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.
In the order in which the court has viewed this subject, the following questions have been considered and decided.
1st. Has the applicant a right to the commission he demands?
2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?
The first object of inquiry is,
1st. Has the applicant a right to the commission he demands?
His right originates in an act of congress passed in February 1801, concerning the district of Columbia.
After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.
***155** It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the

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county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.
****12** In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.
The 2d section of the 2d article of the constitution, declares, that, "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."
The third section declares, that "he shall commission all the officers of the United States."
An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."
These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:
1st. The nomination. This is the sole act of the President, and is completely voluntary.
2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.
***156** 3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."
The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.
Although that clause of the constitution which requires the President to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer, who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.
****13** It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.
These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.
***157** This is an appointment made by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.
But at what stage does it amount to this conclusive evidence?
The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shewn that he has done everything to be performed by him.
Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.
The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.
Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when

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the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed, converting the department ***158** of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President:""Provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the President therefore."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

****14** It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and ***159** the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the President *personally,* the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office: It never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission *after* it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences ***160** of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

****15** It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission, is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to enquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that

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the original had existed, and that the appointment had been made, but, not that the original had been transmitted. If indeed it should appear that ***161** the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees, to be paid by a person requiring a copy, are ascertained by law. Can a keeper of a public record, erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

****16** Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one, nor the other, is capable of rendering the appointment a non-entity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who ***162** has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?

****17 *163** The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."

And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged ***164** with that class of cases which come under the description of *damnum absque injuria* -a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the

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attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

****18** By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.***165** No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, " but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol.3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political powers, in the ***166** exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

****19** But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court.

***167** The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed

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cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

****20** That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice ***168** of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, “a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.”

Lord Mansfield, in 3d Burrows 1266, in the case of the *King v. Baker, et al.* states with much precision and explicitness the cases in which this writ may be used.

“Whenever,” says that very able judge, “there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and ***169** has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.”In the same case he says, “this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.”

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice.”Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

****21** These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered ***170** by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive,

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could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is ***171** again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

****22** But where he is the head of a good department is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain an adjudication of the supreme court of the United ***172** States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case-the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

****23** The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable, at the will of the executive; and being so ***173** appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld

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from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present ***174** case; because the right claimed is given by a law of the United States.

****24** In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

***175** If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

****25** It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to ***176** appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate

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jurisdiction.
The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.
The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.
That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.
This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.
The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited***177** and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
****26** If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.
If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.
It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
***178** So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.
That it thus reduces to nothing what we have deemed the greatest improvement on political institutions-a written constitution-would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.
****27** The judicial power of the United States is extended to all cases arising under the constitution.

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***179** Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
This is too extravagant to be maintained.
In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?
There are many other parts of the constitution which serve to illustrate this subject.
It is declared that "no tax or duty shall be laid on articles exported from any state."Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.
The constitution declares that "no bill of attainder or *ex post facto* law shall be passed."
If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?
"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."
Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?
From these, and many other selections which might be made, it is apparent, that the framers of the constitution***180** contemplated that instrument, as a rule for the government of *courts,* as well as of the legislature.
Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?
The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution,* and laws of the United States."
Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?
****28** If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.
It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.
Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.
The rule must be discharged.

√Supplemental Case Printout for: *Beyond Our Borders*

Tex.App.-Fort Worth,2003.
Jabri v. Qaddura
108 S.W.3d 404
Court of Appeals of Texas,
Fort Worth.
Saadallah JABRI and Aida Jabri, Appellants,

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v.

Jamal QADDURA, Appellee.

and

Rola Qaddura, Appellant,

v.

Jamal Qaddura and Osama Qaddura, Appellees.

Nos. 2-02-415-CV, 2-02-416-CV.

May 8, 2003.

DIXON W. HOLMAN, Justice.

These consolidated appeals involve the denial of Appellants' motions to stay litigation and compel arbitration under the Texas General Arbitration Act. We reverse and render judgment in favor of Appellants.

BACKGROUND

The parties to this litigation:

There are five parties to these two consolidated appeals: a husband and wife, the wife's parents, and the husband's brother.

Rola Qaddura and Jamal Qaddura were married on September 3, 1993. Previously, on August 28, 1993, they had signed an "Islamic Society of Arlington Islamic Marriage Certificate" which reflects that the ***407** "dowry for the bride" was: "One-half of the value of the house located at 2206 Gladstone. This is in addition to $40,000 Fourty [sic] Thousand U.S. Dollars the payment of which is deferred."

On October 19, 1999, Rola filed for divorce. She sought sole managing conservatorship of the parties' two children, child support, division of the parties' estate, and enforcement of the terms of the Islamic Marriage Certificate. Rola subsequently sued Jamal's brother, Osama Qaddura, as a third-party defendant, alleging he was engaged in a conspiracy with Jamal whereby Jamal was wrongfully transferring community assets to Osama, including a house on Vesta Via Court.

Jamal filed a counterclaim seeking sole managing conservatorship and child support. He sought a declaration that the Islamic Marriage Certificate was unenforceable because it was induced by Rola by fraud. He also alleged a separate cause of action against Rola for "defamation and false light," in which he sought $250,000 actual damages and $1,000,000 exemplary damages.

Osama filed a counterclaim seeking a declaratory judgment that he is the sole owner of the house on Vesta Via Court (with no right of reimbursement by Rola or Jamal) and of a specific bank account.

On January 18, 2002, Jamal filed a separate suit seeking a protective order against Rola's parents (the children's grandparents), Saadallah Jabri and Aida Jabri, alleging the children had been injured while in their care.

The partial summary judgment:

On April 27, 2001, the trial court granted Jamal's motion for partial summary judgment in the divorce case. The court found: the "purported Islamic Dowry agreement" is not an enforceable agreement under Texas law, nor is it a valid or qualified premarital agreement under the Texas Family Code; the house on Gladstone Drive is the separate property of Jamal; the house on Vesta Via Court is owned by Osama; and two certificates of deposit (for $102,348 and $5,398) are currently non-existent and neither party has a claim of reimbursement for the monies. Accordingly, the trial court's partial summary judgment ordered that Rola take nothing on these claims.

The Arbitration Agreement:

On September 25, 2002, all five parties signed an "Arbitration Agreement." This document recites, in full, that the parties:

after consultation with their respective attorneys, agree to submit all claims and disputes among them to arbitration by the TEXAS ISLAMIC COURT, 888 s. Greenville Ave., suite 188, Richardson, Texas, as follows:

A. Cause No. 322-291577-99, styled "In the Matter of the Marriage of Rola Jabri Qadura and Jamal Qaddura and In the Interest of Noor Qaddura and Farah Qaddura Minor children", pending in the 322nd Judicial District Court of Tarrant County, Texas.

B. Cause No. 76-184050-00, Styled "Jamal Qaddura Versus Saadallah Jabri", pending in the 67th Judicial District Court of Tarrant County, Texas.[[[[[FN1]

FN1. Cause No. 76-184050-00 is not part of these consolidated appeals and is not pending before this court.

C. Cause No. NO. 322-328238-02 (FORMERLY 325-328238-02), styled "Jamal Qaddura v. Saadallah Jabri and Aida Jabri" pending in ***408** the 322 Judicial District Court of Tarrant County, Texas.

1.The Parties agree to arbitrate all existing issues among them in the above mentioned Cause Numbers in the appropriate District Court, which includes the Divorce Case, the child custody of the [sic] Noor Qaddura and Farah Qaddura, the determination of each party's responsibilities and duties according to the Islamic rules of law by Texas Islamic Court.

2.All parties agree to sign the Texas Islamic Court required legal forms, and each party pays his required fees.

3.The panel of arbitrators of Texas Islamic Court will be formed according to the rules and regulations of Texas Islamic Court. However, the parties agree and suggest the following names for the panel:

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.Mujahid Bakhash, the Imam of the Islamic Association of Tarrant County, Fort Worth, Texas.
.Main El-quda, the Imam of the Islamic Society of Arlington, Arlington, Texas.
.Abdel Salam Abu-Nar, the Imam of Dar Assalam Islamic Center, Arlington, Texas
4.Each Party will submit all of his documents, exhibits, and evidence to Texas Islamic Court.
5.The parties agree that the Ruling of the Texas Islamic Court in the above mentioned Cause Numbers is Binding, and Final, and no party will take any appeal or future legal action of any matter afterwards.
6.Each party will cause the above cause numbers to be abated pending the decision by the arbitrators, and submit the decision of the arbitrators for adoption by the respective courts. The parties will ask the courts to refer the cases for arbitration to Texas Islamic court within "Seven Days" from the establishment of the Texas Islamic Court panel of Arbitrators. The assignment must include ALL cases, including those filed against or on behalf of other family members related to the parties. Each party will notify the other party, Texas Islamic Court, and their respective attorneys, in writing of the assignment of all the above Cause Numbers from the above appropriate District Court to Texas Islamic Court.
All five parties signed this Arbitration Agreement, as did the attorneys for Jamal, Rola, and Saadallah. The document was witnessed by four other individuals whose signatures are on the document. At the hearing on Appellants' motion to compel arbitration, Appellants' attorney explained the circumstances regarding the parties' decision to submit to arbitration:
The parties got together and approached my client, Rola Qaddura, with the proposal that they submit this to arbitration. The parties got together over the weekend. They all signed it and then directed their attorneys to take whatever legal action was necessary to enforce the arbitration.
On September 30 and October 3, 2002, the same five parties, and the same two attorneys, signed a document entitled "Stipulations and Agreements Covering Arbitration." This document reiterates much of the binding language of the Arbitration Agreement and specifies that the parties agree to be bound by the rules of arbitration of the Texas Islamic Court.
A dispute arose among the parties over the scope of the issues that were subject to arbitration under the Arbitration Agreement, and on October 7, 2002 Rola filed a motion in the divorce suit seeking to stay ***409** litigation and compel arbitration.[FN2] Saadallah and Aida filed an identical motion in the protective order suit. Appellees did not file written objections or responses to Appellants' motions.

FN2. *See*TEX. CIV. PRAC. & REM.CODE ANN. §§ 171.021, 171.025 (Vernon Supp.2003).

The hearing in the trial court:

On November 14, 2002, the trial court held a hearing on Appellants' motion to compel arbitration. The court heard argument of counsel, and Appellants established that the signatures on the Arbitration Agreement and the stipulations document were authentic.[FN3] The attorney representing Rola, Saddallah, and Aida and the attorney representing Jamal told the court their clients could not agree on what issues were covered by the Arbitration Agreement.

FN3. Osama did not attend the hearing. His attorney informed the court that the attorney was not present when the two arbitration documents were signed, he did not sign the documents on behalf of his client, and he could not agree that the signature on the documents belonged to his client. The court, however, determined the signature belonged to Osama.

Appellants argued it covered every issue raised in the pending lawsuits, including those issues upon which the trial court had previously entered interlocutory rulings (specifically, the matters covered by the partial summary judgment, which ruling Appellants emphasized was interlocutory and subject to being changed by the court until final judgment is entered).[FN4] Appellants told the court that since there was a dispute about the scope of the Arbitration Agreement, pursuant to the Texas General Arbitration Act it was the court's duty to decide what the Arbitration Agreement covered.

FN4. Appellants' attorney stated that after she became involved in the case she filed a motion to set aside the partial summary judgment.

Appellee Jamal argued in favor of arbitration but claimed the Arbitration Agreement only covered those issues that had not been previously determined by the court (that is, the Arbitration Agreement excluded the subject matter of the prior partial summary judgment). Appellee Osama's attorney stated he revoked his client's signature and consent to the Arbitration Agreement.[FN5]

FN5. Osama's attorney attempted to persuade the trial court to sever the partial summary judgment from the remainder of the case so the judgment in favor of his client could be final. The court denied the motion to sever.

The trial court determined the parties disagreed regarding the scope of the Arbitration Agreement and it therefore was not valid or binding. The court denied Appellants' motions to stay litigation and compel arbitration. The trial court did not make findings of fact or conclusions of law.[FN6] Rola, Saadallah, and Aida have appealed the court's orders refusing to compel arbitration and denying a stay of the pending proceedings.[FN7]

FN6. *See*TEX.R.APP. P. 28.1 ("The trial court need not, but may-within 30 days after the order is signed-file findings of fact and conclusions of law.").

FN7. The divorce suit is appeal no. 2-02-416-CV; the protective order suit is appeal no. 2-02-415-CV. This court previously granted Appellants' motion to consolidate the two suits for purposes of appeal.

THE TEXAS GENERAL ARBITRATION ACT

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The Texas General Arbitration Act provides:

§ 171.001. Arbitration Agreements Valid

***410** (a) A written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that:

(1) exists at the time of the agreement; or

(2) arises between the parties after the date of the agreement.

(b) A party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.

TEX. CIV. PRAC. & REM.CODE ANN. § 171.001. A court shall order the parties to arbitrate on application of a party showing an agreement to arbitrate, and the opposing party's refusal to arbitrate. *Id.*§ 171.021(a). If a party opposing the application denies the existence of the agreement, the court shall summarily determine that issue. *Id.*§ 171.021(b). The court shall order the arbitration if it finds for the party that made the application. *Id.* An order compelling arbitration must include a stay of any proceeding subject to section 171.025. *Id.*§§ 171.021(b), 171.025.

[1][2][3][4] A party seeking to compel arbitration must establish the existence of an arbitration agreement, and show that the claims raised fall within the scope of the agreement. *In re Oakwood Mobile Homes, Inc.,* 987 S.W.2d 571, 573 (Tex.1999) (orig.proceeding). Once the party establishes a claim within the arbitration agreement, the trial court must compel arbitration and stay its own proceedings. *Id.; Ikon Office Solutions, Inc. v. Eifert,* 2 S.W.3d 688, 693 (Tex.App.-Houston [14th Dist.] 1999, no pet.). The trial court may summarily decide whether to compel arbitration on the basis of affidavits, pleadings, discovery, and stipulations of the parties. *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 269 (Tex.1992) (orig.proceeding). The court must conduct an evidentiary hearing, however, when there are disputed material facts. *See id.*

[5][6][7] In the instant case, the parties did not deny the existence of the written Arbitration Agreement, they differed over which claims fell within the scope of the Agreement. Arbitration is strongly favored under federal and state law. *Cantella & Co. v. Goodwin,* 924 S.W.2d 943, 944 (Tex.1996) (orig.proceeding); *Prudential Sec. Inc. v. Marshall,* 909 S.W.2d 896, 898 (Tex.1995) (orig.proceeding). Any doubts regarding the scope of an arbitration agreement should be resolved in favor of arbitration. *Cantella,* 924 S.W.2d at 944; *Merrill Lynch, Pierce, Fenner & Smith v. Eddings,* 838 S.W.2d 874, 880 (Tex.App.-Waco 1992, writ denied). Every reasonable presumption must be decided in favor of arbitration. *See Ikon,* 2 S.W.3d at 693.

STANDARD OF REVIEW ON APPEAL

[8][9][10] On appeal, we must determine whether the trial court's ruling as to the scope of the Arbitration Agreement was an abuse of discretion. *See Am. Employers' Ins. Co. v. Aiken,* 942 S.W.2d 156, 159 (Tex.App.-Fort Worth 1997, no writ). We must decide whether the trial court's ruling was arbitrary and unreasonable, that is, made without reference to any guiding rules or principles. *See Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex.1990); *Southwest Health Plan, Inc. v. Sparkman,* 921 S.W.2d 355, 357 (Tex.App.-Fort Worth 1996, no writ). The trial court's legal conclusions are reviewed by us *de novo. See Ikon,* 2 S.W.3d at 693.

[11][12][13][14][15] Whether the Arbitration Agreement imposes a duty to arbitrate the claims in a particular dispute is a matter of contract interpretation. *See Am. Employers' Ins.,* 942 S.W.2d at 159; *BDO Seidman v. Miller,* 949 S.W.2d 858, 860 (Tex.App.-Austin 1997, writ dism'd w.o.j.) (op. on reh'g). Whether a contract is ambiguous is a question of law. ***411***Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.,* 940 S.W.2d 587, 589 (Tex.1996). If there is no ambiguity, the construction of the written instrument is a question of law for the court. *City of Pinehurst v. Spooner Addition Water Co.,* 432 S.W.2d 515, 518 (Tex.1968). Our primary goal in construing a written contract is to ascertain and give effect to the intent of the parties as expressed in the instrument. *See Balandran v. Safeco Ins. Co.,* 972 S.W.2d 738, 741 (Tex.1998); *Nat'l Union Fire Ins. Co. v. CBI Indus.,* 907 S.W.2d 517, 520 (Tex.1995). If a written contract is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law. *Nat'l Union,* 907 S.W.2d at 520; *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex.1983).

[16][17] An ambiguity does not arise simply because parties advance differing interpretations of the terms of a contract. *Columbia Gas,* 940 S.W.2d at 589; *Forbau v. Aetna Life Ins. Co.,* 876 S.W.2d 132, 134 (Tex.1994); *Sun Oil Co. v. Madeley,* 626 S.W.2d 726, 727 (Tex.1981). For an ambiguity to exist, the language of the contract must remain uncertain or subject to two or more reasonable interpretations after applying the pertinent rules of construction. *Columbia Gas,* 940 S.W.2d at 589.

[18][19][20] In construing the Arbitration Agreement, we are to examine all parts of the document and the circumstances surrounding the formulation of the contract. *See id.; Nat'l Union,* 907 S.W.2d at 520; *Forbau,* 876 S.W.2d at 133. We must consider all of the provisions with reference to the entire Arbitration Agreement; no single provision will be controlling. *See Coker,* 650 S.W.2d at 393; *Cook Composites, Inc. v. Westlake Styrene Corp.,* 15 S.W.3d 124, 132 (Tex.App.-Houston [14th Dist.] 2000, pet. dism'd). Only where a contract is determined to be ambiguous after application of the rules of construction may the courts consider parol evidence of the parties' interpretations. *Nat'l Union,* 907 S.W.2d at 520; *Sun Oil Co.,* 626 S.W.2d at 732. Where there is a broad arbitration clause, arbitration of a particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Kline v. O'Quinn,* 874 S.W.2d 776, 782 (Tex.App.-Houston [14th Dist.] 1994, writ denied), *cert. denied,* 515 U.S. 1142, 115 S.Ct. 2579, 132 L.Ed.2d 829 (1995).

DISCUSSION

[21][22] In three issues Appellants contend: the Arbitration Agreement is valid and binding and encompasses any dispute or matter

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upon which the trial court could subsequently rule at trial, including the claims made the basis of the prior interlocutory partial summary judgment (issues one and three); and the trial court erred in holding the Arbitration Agreement was invalid for the lack of signature of Osama's trial attorney (issue two).

We summarily overrule issue two because there is no indication in the record that the trial court's ruling was based upon the lack of signature of Osama's attorney on the Arbitration Agreement.

In response to issues one and three, Appellee Jamal asserts the trial court properly denied arbitration because there was no "meeting of the minds" inasmuch as the parties could not agree on the scope of the Agreement and Appellants offered no evidence regarding the Agreement.[FN8]

FN8. Appellee Osama is proceeding pro se on appeal and has not filed an appellee's brief.

As mentioned earlier, the trial court determined the parties' signatures on the ***412** Arbitration Agreement were authentic. Appellants were not required to offer additional evidence in order for the trial court to make a ruling regarding the validity of the Agreement. *See Jack B. Anglin Co.,* 842 S.W.2d at 269. Applying contract construction principles, we must review the entire Arbitration Agreement to determine whether it is so worded that it can be given a certain or definite legal meaning or interpretation. *See Coker,* 650 S.W.2d at 393. An examination of the document reveals:

• "[the parties] agree to submit *all claims and disputes among them* to arbitration...." [Emphasis added.]

• "The Parties agree to arbitrate *all existing issues among them in the above mentioned Cause Numbers* in the appropriate District Court, which includes the Divorce Case, the child custody of the [sic] Noor Qaddura and Farah Qaddura, the determination of each party's responsibilities and duties according to the Islamic rules of law...." [Emphasis added.]

• The Arbitration Agreement *lists with specificity the exact cause numbers,* case styles, and names of the trial courts in which the three causes that are subject to the Agreement are pending.

• The document states that the parties agree the ruling of the arbitration panel is "Binding, and Final, and no party will take any appeal or future legal action of any matter afterwards."

• The Arbitration Agreement concludes with the recitation that each party will cause the above cause numbers to be abated pending the decision of the arbitrators, and will ask the courts to refer the cases for arbitration within seven days from the establishment of the panel of arbitrators. Further, "[t]he assignment must include **ALL** cases, including those filed against or on behalf of other family members related to the parties."

[23] The Arbitration Agreement does not contain any language purporting to except the applicability of the Agreement to certain issues, causes of action, or claims between the parties.

[24][25] Jamal asserts that the issues disposed of by the partial summary judgment were no longer "existing issues" at the time the Arbitration Agreement was signed; therefore, the Agreement does not encompass these matters. A summary judgment that does not dispose of all parties and issues in the pending suit is interlocutory and not appealable unless a severance of that phase of the case is ordered by the trial court. *City of Beaumont v. Guillory,* 751 S.W.2d 491, 492 (Tex.1988). It is proper for a trial court to reconsider and reverse its prior interlocutory ruling on a partial summary judgment. *Elder Const., Inc. v. City of Colleyville,* 839 S.W.2d 91, 92 (Tex.1992), citing *Cunningham v. Eastham,* 465 S.W.2d 189, 192 (Tex.Civ.App.-Houston [1st Dist.] 1971, writ ref'd n.r.e.). Accordingly, the partial summary judgment in this case was interlocutory and subject to being reconsidered and set aside by the trial court. The trial court could elect to re-examine the evidence on which the partial summary judgment was based and could subsequently conclude that it does not support the judgment. *See Cunningham,* 465 S.W.2d at 192. Therefore, the issues addressed in the partial summary judgment were not finally disposed of and remained pending between the parties at the time the Arbitration Agreement was signed.

Additionally, an examination of the circumstances surrounding the formation of the Arbitration Agreement reveals that although the partial summary judgment had ***413** been granted on several issues,[FN9] the parties' pleadings still sought considerable relief:

FN9. The court held the Islamic Marriage Certificate was unenforceable, the house on Gladstone Drive is the separate property of Jamal, the house on Vesta Via Court belongs to Osama, and two certificates of deposit were never the community property of Rola and Jamal and belong solely to Osama.

The divorce case:

Rola and Jamal: Each wants to be appointed sole managing conservator of the two children, with the possessory conservator ordered to pay child support. Each requests the court divide the parties' community property-Rola seeks a disproportionate share for herself, Jamal states he wants a just and right distribution. Rola wants Jamal to pay her attorney's fees.

In his counterclaim, Jamal alleges a separate cause of action against Rola for "defamation and false light," in which he seeks $250,000 actual damages and $1,000,000 exemplary damages.

Rola and Osama: Rola seeks reimbursement for all community funds tendered to Osama by Jamal, whether in the form of a business or in community assets or in cash.

In his counterclaim, Osama seeks attorney's fees from Rola or from the community estate of Rola and Jamal.

The protective order case:

Jamal filed an application for a protective order pursuant to section 81.001 of the Texas Family Code, seeking to protect his two

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children from their maternal grandparents. *See*TEX. FAM.CODE ANN. § 81.001 (Vernon 2002). The court master held a hearing on the application and denied it on February 27, 2002; Jamal was ordered to pay the grandparents' attorney $3,350 in attorney's fees. The next day, Jamal filed a notice of appeal from the master's recommendation. The record before us does not contain any further orders or judgments in this case.

As evidenced by a review of the issues that have yet to be addressed by the trial court in these two cases, the parties still had much to resolve on the date the Arbitration Agreement was signed.

Applying the pertinent rules of contract construction, we conclude the Arbitration Agreement is worded so that it can be given only one certain or definite legal meaning or interpretation, and it is therefore not ambiguous. We hold that as a matter of law the plain language of the Arbitration Agreement expresses the intent of the parties that the scope of the Agreement include all claims raised by the parties' pleadings in the two cases before us up until September 25, 2002, the date the Agreement was signed by the parties. The scope of the Arbitration Agreement therefore includes all claims and matters previously ruled upon by the trial judge in the partial summary judgment. Accordingly, we hold that the trial court abused its discretion in finding the Arbitration Agreement to be invalid and in denying Appellants' motions to stay litigation and compel arbitration under the Texas General Arbitration Act. We sustain Appellants' first and third issues.

CONCLUSION

We reverse the trial court's orders denying Appellants' motions to stay litigation and to compel arbitration in these two consolidated cases. We render judgment that the Arbitration Agreement signed by the parties is valid and enforceable and covers all disputes between the parties that arose prior to the date the parties signed the Arbitration Agreement, including***414** all matters that were the subject of the partial summary judgment previously granted by the trial court.

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