IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

AMERICAN GENERAL LIFE & ACCIDENT INSURANCE COMPANY AND BRIAN MUSE, APPELLANTS

VS.

AMANDA EDWARDS, DEXTRA DAVIS, HILDA JOHNSON, HEATHER DAVIS, BRIAN WALDEN, KIMBERLY TAYLOR, DONNA SMITH, APPELLEES

No. 2010-CA-00795

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI FIRST JUDICIAL DISTRICT

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REPLY BRIEF OF APPELLANTS

Oral Argument Not Requested

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. Summary of the Reply 1

II. Argument 2

A. The AGLA Employees' Brief and Affidavits Misstate the Facts. 2

B. Regardless, the AGLA Employees' Claims Arose After They Became Applicants. 3

C. The AGLA Employees Do Not Address Several Issues Raised by AGLA. 4

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Couch v. City of D'Iberville,
656 So.2d 146 (Miss. 1995) 4

Fletcher v. Lyles,
999 So.2d 1271 (Miss. 2009) 4

Stringfellow v. Stringfellow,
451 So.2d 219 (Miss. 1984) 3

I. Summary of the Reply

The AGLA Employees do not dispute that they are parties to multiple valid and binding arbitration agreements with their former employer, AGLA. The sole basis on which they seek to avoid arbitration of the claims they bring against AGLA and Brian Muse is that the alleged misrepresentations and fraudulent conduct on which their claims are founded "occurred prior to the Appellees' signing of the Employment Applications." (Appellees' Brief at 4)

This argument is flawed for several reasons. First, the factual basis on which the argument is premised is mistaken. That is, the AGLA Employees repeatedly claim that they became applicants on the date that they began employment. In fact, and to the contrary, each AGLA Employee applied, in writing, for employment with AGLA weeks and/or months before they started work and it was at that time that they became "applicants" and at that time they became bound by the EDRP.

More importantly, at the time the AGLA Employees signed agreements to arbitrate, none of their claims existed. At most, one element of some of their claims was present – the alleged negligent and fraudulent misrepresentations. None of the other elements of these claims had occurred and, accordingly, their claims did not arise until after they became bound to arbitrate. The AGLA Employees offer no rebuttal – either factual or legal – to this point. Likewise, the AGLA Employees do not address AGLA's arguments that their other claims arose entirely after they commenced employment and, finally, that one AGLA Employee, Donna Smith, was employed by AGLA in another office all along and had been bound by the EDRP for several years before being recruited for the new position.[1]

[1] The trial court's order similarly failed to address these points. (R. 354)

II. Argument

A. The AGLA Employees' Brief and Affidavits Misstate the Facts.

The AGLA Employees devote a substantial portion of their Brief to the "fact" that they did not become "applicants" until they signed the documents attached to AGLA's Motion to Compel Arbitration. (Appellees' Brief at 8-11) The evidentiary basis for this argument is set forth in the AGLA Employees' affidavits in which each states, under oath, that he or she applied for employment and became an applicant on the date of the "employment application" attached to AGLA's Motion to Compel Arbitration. However, the document referenced in these affidavits is not an employment application, it is an employment agreement, signed when each started work (not when each applied for work). Accordingly, these sworn statements – whether intentionally misleading or merely negligent and sloppy – are untrue.

For example, Amanda Edwards states that she *applied* for employment on May 16, 2007 and that the fraudulent misstatements were made to her before that date. (R. 261, ¶¶ 1-3) Yet, the May 16, 2007 document to which Edwards refers is her employment agreement, which she signed when she started work. (R. 73-80) Edwards became an applicant some weeks before the day she started work and, indeed, the undisputed record evidence proves this to be the case. Edwards's actual employment application[2] is also in the record and it reveals that she applied for employment, at a minimum, over five weeks earlier, on April 9, 2007.

The same inaccurate statement is repeated in each AGLA Employee's affidavit. Each AGLA Employee states that he or she became an applicant on the date that he or she actually signed an employment agreement and started work with AGLA. The record establishes the inaccuracy of these averments and proves that the AGLA Employees became applicants weeks

[2] Edwards and the other AGLA Employees' job applications are in the record without objection to their content or admissibility.

or months before the date that they signed their employment agreement (which they mislabeled as "employment application"). (R. 73–134, 195–236)

This discrepancy between the AGLA Employees' affidavits and the undisputed facts is notable because it renders the AGLA Employees' affidavits irrelevant for purposes of this Court's analysis. That is because these affidavits say nothing more than that the actual alleged fraudulent statements and/or misrepresentations took place before they started work, *i.e.*, the date of their employment agreements. No one disputes this – specifically, no one disputes that Brian Muse's recruitment of the AGLA Employees occurred before they started work since that, obviously and necessarily, is how the recruitment process works. But, the AGLA Employees' affidavits do not address the timing of the alleged fraud relative to their actual employment applications. Thus, the AGLA Employees' repeated assertion that Brian Muse's alleged statements and/or misrepresentations occurred before they became applicants for employment lacks any foundation in the record and should be disregarded.

B. Regardless, The AGLA Employees' Claims Arose After They Became Applicants.

The AGLA Employees state:

> Had the claims asserted in the Complaint occurred after the effective date of each of the Appellees' application, Appellees would rightfully be subject to the Employment Dispute Resolution Plan and would be entitled to only one avenue of recourse, that being arbitration.

(Appellees' Brief, at 10) This is precisely the case here, and assists in explaining how Judge Kidd erred in his ruling below.

Particularly, at the time of the AGLA Employees' applications – the correct applications that is, not the mistakenly labeled employment agreements – each were still employed and none had acted on the alleged misconduct of Brian Muse. (R. 195-236) Mississippi law is unequivocally clear that the mere making of a false statement is not enough to create legal

liability; a plaintiff must also have acted in reliance on the statement and have incurred damages as a result. *Stringfellow v. Stringfellow*, 451 So.2d 219, 221 (Miss. 1984) (noting that reliance is an element of fraud); *Fletcher v. Lyles*, 999 So.2d 1271, 1277 (Miss. 2009) (noting that damages is an element in claims of fraud, fraudulent inducement, breach of the duty of good faith and fair dealing, and negligent misrepresentation); *Couch v. City of D'Iberville*, 656 So.2d 146, 150 (Miss. 1995) (a claim for negligence requires proof of damages). None of that could possibly have occurred until the AGLA Employees quit their jobs and it is undisputed that all of them did so after they agreed to arbitration.

The AGLA Employees' focus on whether the EDRP is retroactive in nature is completely misplaced.[3] AGLA is not seeking to apply the EDRP to claims that arose before the AGLA Employees signed arbitration agreements or before they applied for work. Rather, AGLA is specifically seeking to enforce the EDRP in accordance with its terms, which covers claims of applicants, like the AGLA Employees. Since the claims arose after the AGLA Employees completed employment applications (containing arbitration provisions), the issue of whether the EDRP has retroactive application is irrelevant.

C. The AGLA Employees Do Not Address Several Issues Raised by AGLA.

At least two claims raised by the AGLA Employees arise from events that purportedly occurred during their employment. These claims, for accounting and unjust enrichment are based on the assertion that AGLA "reaped the benefit of the commission taken from the products sold by Plaintiffs." The AGLA Employees did not sell products or generate commissions until

[3] As is the AGLA Employees' "example" contained on pages 11-12 of their Brief. To the point, in that "example" all of the elements of fraud and/or negligent misrepresentation (and specifically, reliance and damages) occurred prior to any application for employment. Indeed, in the AGLA Employees' "example" none of the AGLA Employees ever made application with AGLA for employment and, consequently, would have never signed any arbitration agreements commensurate therewith. AGLA and Muse would agree that the claims illustrated in this "example" would not be subject to arbitration insofar as there would exist no arbitration agreements between the parties.

after they became employees and, therefore, undisputedly were covered by the EDRP. The AGLA Employees do not address this argument in their Brief.

Second, the AGLA Employees do not address the fact that Donna Smith was a current AGLA employee at the time she was recruited by Brian Muse. Smith (formerly Stingley) has been bound by the EDRP since 2005 and, therefore, was covered by the EDRP long before she ever had contact with Muse. The AGLA Employees offer no argument to support the trial court's finding that her claims "arose prior to applying for employment."

Finally, the AGLA Employees do not dispute that the EDRP covers claims against Brian Muse. The EDRP extends to claims brought against AGLA employees and former employees, such as Muse. Accordingly, all claims against all Defendants should be arbitrated.

CONCLUSION

The AGLA Employees' claims are subject to arbitration under the AGLA EDRP. The trial court erred in finding otherwise. For the reasons stated herein and in Appellants' Brief, the decision of the trial court should be reversed.

AMERICAN GENERAL LIFE & ACCIDENT INSURANCE COMPANY AND BRIAN MUSE

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CERTIFICATE OF SERVICE

I certify that I have this day mailed a true and correct copy of the above Reply Brief of Appellants to the following:

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The Honorable Winston Kidd
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THIS the 20th day of May, 2011

R. Jarrad Garner