IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

JOHN A. CARDEGNA and DONNA REUTER, individually and on behalf of others similarly situated,

Appellants,

vs. **CASE NO: 4D06-3032**

BUCKEYE CHECK CASHING, INC., a foreign corporation, d/b/a CHECKSMART, BUCKEYE CHECK CASHING OF FLORIDA, INC., a foreign corporation d/b/a CHECKSMART and UNKNOWN ENTITIES AND INDIVIDUALS,

Appellees.
_____/

On Appeal from the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida
Case No. 50 2001 CA 001162, Division XXXX OC AJ

INITIAL BRIEF OF APPELLANTS JOHN A. CARDEGNA AND DONNA REUTER, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED

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STATEMENT OF CASE AND FACTS

In February 2001, John Cardegna and Donna Reuter ("Plaintiffs") brought a class action against Buckeye Check Cashing, Inc. and Buckeye Check Cashing of Florida, Inc. ("Defendants" or "Buckeye") in response to Defendants' unlawful scheme of charging and collecting unconscionably usurious interest on consumer "payday" loans resulting in systematic, repeated violations of Florida law. (A1, p. 2). Pursuant to a written loan agreement ("payday loan agreement"), Defendants advanced money to each customer in exchange for a check made out in an amount greater than the advance with the understanding that Defendants would not cash the check for a certain period of time, usually two weeks or until the customer's next payday. (A2). Defendants collected exorbitant interest on these loans, over six times greater than the legal maximum, at annual percentage rates ranging from 126% to 1,317%. (A1, pp. 4, 6). The Florida Supreme Court recently held that such transactions, called "deferred presentment" transactions, constitute loans subject to Florida's prohibitions against usury. *See McKenzie Check Advance of Florida, LLC v. Betts*, 928 So. 2d 1204, 1211 (Fla. 2006).

Defendants' form payday loan agreement contains the following arbitration provisions:

> 1. Arbitration Disclosure. By signing this Agreement, you agree that i[f] a dispute of any kind arises out of this Agreement . . . th[e]n either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 2 below. If

> arbitration is chosen, it will be conducted with the American Arbitration Association (the "AAA") pursuant to the AAA's Commercial Arbitration Rules. . . .
>
> 2. Arbitration Provisions. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement . . . or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision and the Commercial Arbitration Rules in effect at the time the Claim is filed. A party who has asserted a claim in a lawsuit in court may elect arbitration with respect to any claim(s) subsequently asserted in that lawsuit by any other party or parties. . . . There shall be no authority for any claims to be arbitrated on a class action basis. Further, an arbitration can only decide our or your Claim and may not consolidate or join the claims of other persons who may have similar claims. . . . This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act. . . .

(A2). Pursuant to these provisions ("arbitration provision"), Defendants filed a motion to compel arbitration of Plaintiffs' class action. (A3, A4).

In opposition, Plaintiffs argued that the arbitration provision is unenforceable because: 1) the payday loan agreement is an illegal contract and void *ab initio*; and 2) the arbitration provision is procedurally and substantively unconscionable. (A5, p. 3). Each of the parties briefed both of these issues. In July 2001, a hearing was held on Defendants' motion to compel arbitration, at which the trial court expressed great interest in the subject matter and demonstrated its familiarity with the parties' briefing and the salient issues. (A6, pp. 3-8). Defendants contended at

the hearing that the court should consider the validity of the arbitration provision itself. The court, however, focused its attention on the illegality of the contract and whether the contract was void *ab initio*, (A6, pp. 4-8, 11), and directed the parties to "tailor [their] argument . . . to why [the contract] is void ab initio from the initial contract date and why [the Court had] to make that determination and not the arbitrator." (A6, p. 8). Plaintiffs did not argue against the Defendants' contention that the trial court should consider the validity of the arbitration provision, but followed the direction of the court by focusing argument on the illegality issue.

Plaintiffs complied with the court's request by arguing that the payday loan agreement, which bore an annual percentage rate of 376.47%, was criminal in that it exceeds the state's legal maximum interest rate of 45%. (A6, p. 9). To this argument, Defendants again contended that the court need only review the actual arbitration provision, which it contended was facially valid. (A6, p. 11-13). The court redirected Defendants to the only issue it was concerned with—whether the illegality of the contract rendered it void *ab initio*—and explained that it did not consider the facial validity of the arbitration provision to be in issue:

> I don't think there is any dispute that either side will make that's going to stand up in front of me that there isn't a facially valid arbitration provision contained in this document and that the clients didn't have an opportunity to read it and did sign it.
>
> The question that really I think the whole case hinges on is whether if this contract is void ab initio as an illegal contract, number one, is that a decision that the Circuit Court must make rather than the arbitrator, and, if so, whether it needs to be made prior to the cases

> sent to arbitration as alleged by counsel for the plaintiff or whether it needs to be made after arbitration as you're alleging.

(A6, pp. 13-14). The court again instructed the parties to "[l]imit [argument] to the issue of whether [the court has] to make that determination." (A6, p. 15). Nevertheless, Defendants continued to argue the court could not properly review the payday loan agreement as a whole to determine its legality and specifically contended that the most the court could do would be to review the actual arbitration provision and determine whether it is unenforceable because it is procedurally and substantively unconscionable. (A6, pp. 18-19).

The court remained focused on the illegality issue and determined it was bound by *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000)[1], to make the determination of whether the payday loan agreement was illegal, rather than leaving that decision up to the arbitrator. (A6, p. 35). It decided to hold an evidentiary hearing on the issue of illegality and denied the motion for arbitration in the interim. (A6, pp. 37-39; A7).

Defendants immediately appealed the trial court's decision to this Court, arguing the "trial court erroneously denied arbitration on the grounds that the legality of the contract as a whole must be determined prior to ordering arbitration

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[1] In *Party Yards*, the Fifth District held that a trial court must decide in the first instance whether a contract is illegal for violation of Florida's usury laws before sending the parties to arbitration under the terms of that contract. 751 So. 2d at 123-24.

[because] courts must decide only whether the arbitration clause itself is tainted with illegality or some other defect, not whether the whole contract suffers from such an infirmity." (A8, p. 11). Defendants requested this Court "reverse the trial court and remand this action to the trial court with instructions to consider only the validity of the arbitration provision itself, not the contract as a whole, in deciding the motion to compel arbitration." (A8, p. 26). Defendants also requested that that the parties delay conducting an evidentiary hearing or conducting any discovery until the appeal was decided. (A9).

Plaintiffs argued this Court should affirm the trial court's denial of arbitration because the "arbitration provision is unenforceable for two reasons. First, the agreement between the parties is on its face an illegal contract because of the feloniously criminal usurious rates charged by Buckeye and is void ab initio. Second, the arbitration provision should be deemed unenforceable because it is procedurally and substantively unconscionable as the arbitration agreement is a contract of adhesion in that the financially desperate borrowers have no meaningful choice, and it requires a waiver of important legal rights including the remedy provided through a class action." (A10, p. 13).

In reply, Defendants contended, *inter alia*, that the issue of the unconscionability of the payday loan agreement arbitration provision was not preserved for appellate review because Plaintiffs did not raise the argument at the

hearing before the trial court and because the issue was never decided by the trial court, which based its decision solely on illegality. (A11, pp. 6-7, 13).

This court, in *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228, 230-32 (Fla. 4th DCA 2002), reversed the trial court's order denying arbitration and remanded for further proceedings after determining that challenges made to the underlying contract, rather than specifically to the validity of the arbitration provision, must be made by the arbitrator in the first instance, not the trial court. This Court declined to address the unconscionability issue:

> Appellees filed a memorandum in opposition to Appellant's motion to compel arbitration in which they argued that the arbitration agreement should not be enforced because it is contained in an illegal usurious contract and is, therefore, void ab initio. Appellees also asserted that the arbitration clause was unconscionable. However, Appellant correctly points out that at the hearing before the trial court, Appellees did not argue that the arbitration provision was unconscionable. Accordingly, the issue of unconscionability is not properly before this court for review. *See Parlier v. Eagle-Picher Indus., Inc.*, 622 So. 2d 479 (Fla. 5th DCA 1993).

Id. at 229.

Plaintiffs successfully petitioned for review by the Florida Supreme Court, which held "that an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio" and quashed this Court's opinion. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005). The authority of this

opinion was short-lived, however, as the United States Supreme Court reversed and remanded after recently ruling that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1210 (2006). The Florida Supreme Court then withdrew its prior opinion and approved of this Court's decision reversing the trial court's denial of Defendants' motion to compel arbitration. *Cardegna v. Buckeye Check Cashing, Inc.*, 930 So. 2d 610, 611 (Fla. 2006).

Defendants wasted no time in filing another motion to compel arbitration in the trial court. (A12). In support of their motion, Defendants filed a memorandum of law in which they argued that Plaintiffs waived their unconscionability challenge at the July 2001 hearing before the trial court and that this waiver became the "law of the case" when this Court issued its opinion in *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002). (A13). In spite of Plaintiffs' maintaining their entitlement to have an evidentiary hearing on the issue of the unconscionability of the arbitration clause, (A14; A15, pp. 5-8), the trial court granted Defendants' motion and entered an order compelling arbitration. (A16). Plaintiffs appeal this order.

SUMMARY OF ARGUMENT

The trial court erred in granting Defendants' motion to compel arbitration on the grounds of law of the case and waiver. In opposition to Defendants' motion to compel arbitration, Plaintiffs persistently and specifically argued in their responsive briefing that the arbitration provision contained in the payday loan agreement is procedurally and substantively unconscionable. Plaintiffs, who had briefed the issue and were prepared to develop evidence of unconscionability, did not waive this argument by failing to raise it at the July 2001 hearing because there was no need to raise the argument at that time. The trial court found the illegality of the payday loan agreement to be dispositive in that it rendered the arbitration provision unenforceable.

Furthermore, this Court did not hold in *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002), that Plaintiffs waived their unconscionability challenge to the arbitration provision. This Court held that the unconscionability of the arbitration provision was not before it for review because the trial court had not ruled on the issue and there was insufficient record evidence to consider that argument, which was due to Defendants' appeal taking place prior to Plaintiffs' opportunity to present evidence on unconscionability. In the event the Court finds its opinion in *Buckeye* did hold that Plaintiffs waived their unconscionability challenge to the arbitration provision, the Court should

reconsider and correct this portion of the opinion in order to avoid the manifest injustice that will result to Plaintiffs and the putative class members if they are forever barred from having a hearing at which they can present evidence demonstrating that the arbitration provision in the payday loan agreement is procedurally and substantively unconscionable.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING APPELLEE BUCKEYE'S MOTION TO COMPEL ARBITRATION

A. PLAINTIFFS DID NOT WAIVE THEIR ARGUMENT THAT THE ARBITRATION PROVISION IN THE PAYDAY LOAN AGREEMENT IS UNCONSCIONABLE.

Where a party's allegations of unconscionability raise issues of fact, and the evidence is disputed, the party is entitled to an evidentiary hearing on the matter. *See Linden v. Auto Trend, Inc.*, 923 So. 2d 1281, 1282-83 (Fla. 4th DCA 2006); *Chapman v. King Motor Co. of S. Fla.*, 833 So. 2d 820, 821 (Fla. 4th DCA 2002). Plaintiffs alleged that the arbitration provision in the payday loan agreement is unconscionable because Plaintiffs, individuals of modest means and in dire financial need, entered into the payday loan agreement under conditions and pressures that prevented them from understanding the import of the agreement or agreeing to the arbitration provision. (A5, pp. 8-9). Because these facts are disputed by Defendants, Plaintiffs are entitled to an evidentiary hearing on the matter, but have been denied such a hearing by the trial court's order compelling arbitration. Plaintiffs have not waived their right to an evidentiary hearing because they have not intentionally or voluntarily relinquished this right, nor have they engaged in conduct implying that they waived this right. Reviewing the trial court's order compelling arbitration *de novo, see Fonte v. AT&T*, 903 So. 2d 1019, 1023 (Fla. 4th DCA 2005); *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 179

(Fla. 3d DCA 2005), this Court should reverse and remand for the trial court to hold an evidentiary hearing at which Plaintiffs can demonstrate the procedural and substantive unconscionability of the payday loan agreement arbitration provision.

"Waiver is the intentional or voluntary relinquishment of a known right or conduct which warrants an inference of the relinquishment of a known right." *Marine Environmental Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003) (citation omitted). Plaintiffs did not waive their right to challenge the arbitration provision of the payday loan agreement on the ground of unconscionability, not did they act as if they did. Plaintiffs specifically raised this issue in their briefing in opposition to Defendants' motion to compel arbitration and in opposition to Defendants' appeal of the trial court's initial denial of Defendants' motion.

"Whether there is a waiver depends not . . . on counting the number of missed opportunities (hearings, motions, etc.) to raise an issue, but on whether the party had sufficient incentive to raise the issue in the prior proceedings." *U.S. v. Ticchiarelli*, 171 F.3d 24, 32-33 (1st Cir. 1999) (citation omitted). Here, Plaintiffs had no incentive to raise their unconscionability argument at the July 2001 hearing, after Plaintiffs had already briefed the issue, because the trial court found the illegality of the payday loan agreement was dispositive in that, pursuant to *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000), it rendered the

arbitration provision unenforceable. The trial court repeatedly advised the parties to limit their arguments to this issue and determined that it could deny arbitration on this ground without holding an evidentiary hearing. (A6, pp. 8, 13-15). Even if Plaintiffs had specifically argued unconscionability of the arbitration provision at this hearing, nothing would have come of it because the trial court's ruling on the alternative ground was immediately appealed by Defendants, who then requested Plaintiffs delay any evidentiary hearing or discovery until the appeal was resolved. (A9). Plaintiffs should not now be penalized with an order compelling arbitration for agreeing to delay further proceedings before the trial court, including an evidentiary hearing on the unconscionability issue, while an appeal was pending that could potentially render any further proceedings in opposition to the enforceability of the arbitration provision unnecessary.

Defendants argued below that Plaintiffs specifically waived their right to challenge the unconscionability provision when telling the trial court that they were not making an argument that the arbitration provision is "facially invalid." (A6, p. 14). For a provision to be facially invalid, it must not be possible to legally apply the provision to any factual situation. *See State v. Efthimiadis*, 690 So. 2d 1320, 1322 (Fla. 4th DCA 1997). An arbitration provision cannot be unconscionable on its face because an unconscionability challenge necessarily involves issues of fact, which is the reason that such a challenge requires an

evidentiary hearing before the trial court. *See Bellsouth Mobility v. Christopher*, 819 So. 2d 171, 173 (Fla. 4th DCA 2002) (holding that where a contract *on its face* appeared to have a substantively unconscionable arbitration provision, an evidentiary hearing needed to be held on the issue of whether the arbitration provision was procedurally unconscionable); *Chapman v. King Motor Co. of S. Fla.*, 833 So. 2d 820, 821-22 (Fla. 4th DCA 2002) (reversing and remanding for evidentiary hearing on issues of procedural and substantive unconscionability where the arbitration provision raised substantive unconscionability concerns *on its face*). As an arbitration provision cannot be deemed unconscionable on its face, Plaintiffs could not have waived their unconscionability challenge when conceding that the arbitration provision is not facially invalid in that proof will be required to support a finding of the provision's invalidity.

The facts not only reflect that Plaintiffs did not waive their argument that the arbitration provision itself is unconscionable, but that their behavior was entirely reasonable and appropriate throughout the previous proceedings in the trial court and in this Court, in light of the trial court's own entirely understandable approach to the question of the enforceability of the arbitration provision.

Simply put, the question of whether the arbitration provision is unconscionable is an extremely fact-laden question. Ever since the U.S. Supreme Court decided the case of *Green Tree Financial Corp. - Alabama v. Randolph*, 531 U.S. 79

(2000), consumer plaintiffs challenging the unconscionability of particularly unfair mandatory arbitration clauses (such as Buckeye's) have been required to pull together extensive factual records. As a perfect illustration of the kind of fact and proof-intensive cases that plaintiffs must set forth, the U.S. District Court in *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff'd with respect to unconscionability*, 319 F.3d 1126, 1149-50 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003), traces through a great many of the factual issues that must be litigated when plaintiffs argue that a particular arbitration clause is unconscionable. To prove here, as did the plaintiffs in *Ting*, for example, that Buckeye's arbitration provision was promulgated in a manner that was procedurally unconscionable, Plaintiffs would be wise to put in evidence that (a) Buckeye's arbitration provision is an adhesive one that was imposed by the stronger party on a take-it-or-leave it basis; (b) Buckeye's arbitration provision was promulgated in a manner designed to ensure that normal consumers would never notice, read, or understand it; and (c) all or nearly all of Buckeye's competitors impose similar arbitration provisions upon their consumers, so that Plaintiffs had no meaningful choice, as that phrase is used in the law of unconscionability. To prove each of these points, Plaintiffs would need to present testimony and other evidence.

Similarly, to prove the substantive unconscionability of the provision of Buckeye's arbitration provision that bans class actions, Plaintiffs, following the

Ting model, would put before the court expert testimony demonstrating that these claims could not be effectively brought on an individual basis, and that the effect of the ban on class actions would be to render the entire contract exculpatory in nature.

At the time that this case passed before the trial court for the first time, the trial court was faced with two possible arguments: the argument that the arbitration clause could not be enforced because the principal purpose of the contract was criminal and illegal in its entirety; and the argument that the arbitration clause was unconscionable. The former argument, which was purely legal, could be decided under existing precedent and would exert few judicial resources. In an efficient and wise decision under the law existing at the time, the trial court directed Plaintiffs to focus upon the illegality argument. Although Plaintiffs made clear that they were prepared to go forward with the unconscionability argument as well, the trial court made clear that it only wished to hear argument on the legality issue.

Now, in an exercise of hindsight, Buckeye faults Plaintiffs for following the trial court's clear directions and not insisting upon putting forth an extensive legal and factual argument on the unconscionability issue as well, claiming this constitutes a "knowing relinquishment" of the right to ever raise those points. If Buckeye's unrealistically strict version of the idea of waiver ever becomes the law, then parties in this state will be put in the position of attempting to "force" trial

courts to hear extensive evidence on every possible point that might come up in a case even where the trial court tells the parties that it wishes to limit the scope of litigation at a given stage, and trial courts will necessarily be sharply challenged in their ability to control the pace and scope of litigation in cases before them.

Nothing in the law of waiver justifies punishing Plaintiffs for respecting the guidance and instruction of the trial court, and nothing in the law of waiver required Plaintiffs to put on an extensive evidentiary presentation in which the trial court was understandably then uninterested.

As Plaintiffs specifically raised an unconscionability challenge to the enforceability of the arbitration provision in its written response to Defendants' motion to compel arbitration, and Plaintiffs have not yet the opportunity to present evidence to demonstrate the procedural and substantive unconscionability of the provision, the trial court erred in granting Defendants' motion to compel arbitration.

B. THIS COURT'S OPINION IN *BUCKEYE CHECK CASHING, INC. V. CARDEGNA*, 824 So. 2d 228 (Fla. 4th DCA 2002), DID NOT RESULT IN PLAINTIFFS' PURPORTED WAIVER OF THEIR UNCONSCIONABILITY ARGUMENT BECOMING THE LAW OF THE CASE.

Defendants argued below that this Court held Plaintiffs waived their unconscionability argument in *Buckeye Check Cashing, Inc. v. Cardegna*, 842 So. 2d 228 (Fla. 4th DCA 2002), requiring the trial court to grant Defendants' motion to compel arbitration under the law of the case doctrine. As demonstrated above, Plaintiffs did not waive their unconscionability challenge. Furthermore, this Court did not hold that Plaintiffs waived this challenge; this Court held that the unconscionability challenge was not properly before it for review because the issue had not been decided by the trial court. Thus, the Court should reverse and remand with instructions that the trial court hold an evidentiary hearing on the unconscionability of the arbitration provision in the payday loan agreement and the class action ban contained therein.

"The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001) (citation omitted). The following language in *Buckeye* demonstrates this Court did not find that Plaintiffs waived their unconscionability challenge:

> Appellees filed a memorandum in opposition to Appellant's motion to compel arbitration in which they argued that the arbitration agreement should not be enforced because it is contained in an illegal usurious contract and is, therefore, void ab initio. Appellees also asserted that the arbitration clause was unconscionable. However, Appellant correctly points out that at the hearing before the trial court, Appellees did not argue that the arbitration provision was unconscionable. Accordingly, the issue of unconscionability is not properly before this court for review. *See Parlier v. Eagle-Picher Indus., Inc.*, 622 So. 2d 479 (Fla. 5th DCA 1993).

Buckeye Check Cashing, Inc. v. Cardegna, 824 So. 2d 228, 229 (Fla. 4th DCA 2002).

The plain meaning of this language is that because the trial court denied Defendants' motion to compel arbitration solely on the ground of the illegality of the payday loan agreement, the issue of whether the arbitration provision is unconscionable was not before the appellate court. *See State v. Naveira*, 873 So. 2d 300, 304 (Fla. 2004) (holding that where defendant alleged two grounds for discharge, but the trial court ruled only on single ground that it found dispositive, only that single ground was before the appellate court for review). In an abundance of caution, Plaintiffs raised their unconscionability argument in their *Buckeye* answer brief, although the trial court's judgment could not have been affirmed on the basis of this argument because an evidentiary hearing on the matter had not yet been held. *See Wagner v. Strickland*, 908 So. 2d 549, 551 n.1 (Fla. 1st DCA 2005) (stating that tipsy coachman rule under which appellate court may

affirm trial court on alternative ground applies only if the alternate ground is supported by the record).

Furthermore, the existence of the tipsy coachman doctrine demonstrates that "an appellee, in arguing for the affirmance of a judgment, is not limited to legal arguments expressly asserted as grounds for the judgment in the court below. It stands to reason that the appellee can present any argument supported by the record even if not expressly asserted in the lower court." *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999). Thus, Plaintiffs failure to argue at the hearing that the arbitration provision in the payday loan agreement is unconscionable would not have resulted in Plaintiffs, who were the appellees in *Buckeye*, waiving that argument for appellate purposes. Accordingly, this Court's opinion in *Buckeye* must be interpreted to mean that this Court declined to address the unconscionability issue briefed by Plaintiffs because the trial court did not rule on the issue and the issue had not been developed in the record such that the court could affirm on that ground under the tipsy coachman doctrine.

Defendants, however, argued below that this Court must have intended to hold that Plaintiffs waived the unconscionability argument because the case cited, *Parlier v. Eagle-Picher Indus., Inc.*, 622 So. 2d 479 (Fla. 5th DCA 1993), is a waiver case. While Defendants' are correct that *Parlier* is a waiver case, the case does not hold that an *appellee* waives an argument by failing to raise it in

proceedings below; the case holds that an *appellant* who failed to raise an argument before the trial court cannot raise that argument on appeal as a ground for reversing the trial court. *Id*. at 480-81 (holding that appellants "cannot now assert another reason on appeal for a ruling in their favor not raised before the trial judge" because "[t]here is a general rule of appellate review, based on practical necessity and fairness to the opposing party and the trial judge, that issues not timely raised below will not be considered on appeal"). Clearly, *Parlier* does not stand for the proposition that an *appellee* is barred from raising arguments on appeal that it did not raise below, and, even if *Parlier* did stand for this proposition, such holding would be contrary to Florida Supreme Court doctrine, which permits an appellee to raise on appeal any argument supported by the record in defense of the trial court's order. *See Radio Station WQBA*, 731 So. 2d at 645.

Furthermore, in the event this Court determines that *Buckeye* held that Plaintiffs' waived their challenge to the unconscionability of the arbitration provision, and such waiver became the law of the case, Plaintiffs request the Court reconsider this issue and relieve them from this holding. "[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" *Fla. Dep't of Transportation v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001) (quoting *Strazzulla v. Hendrick*, 177 So. 2d 1, 5 (Fla. 1965)). The trial court's application of the law of

the case doctrine in this case has resulted in a manifest injustice in that Plaintiffs will never be able to have an evidentiary hearing on the issue of the unconscionability of the arbitration provision contained in the payday loan agreement, when statutory and case law clearly entitle Plaintiffs to such a hearing. *See* § 682.03, Fla. Stat.; *Houchins v. King Motor Co. of Fort Lauderdale, Inc.*, 906 So. 2d 325, 329 (Fla. 4th DCA 2005). Instead, the trial court ordered that an arbitrator must determine whether Plaintiffs' class action may be brought under the arbitration agreement.[2]

As an appellee is entitled to raise any argument on appeal in support of affirming the trial court's ruling, regardless of whether the argument was raised below, this Court's opinion in *Buckeye* should be read to mean nothing more than this Court declined to consider the unconscionability argument because record evidence had not yet been developed on that issue and the trial court had not yet ruled on that issue. In the alternative, if the Court finds *Buckeye* did hold that Plaintiffs waived their unconscionability argument, and this holding became the law of the case, the Court should reconsider and correct that ruling in order to prevent the manifest injustice that will result if Plaintiffs are forever denied an

[2] "THE COURT: I'm not making any ruling whatsoever as to class action, I'm just directing you to arbitration. . . . And [the class action] issue will be in front of the arbitrator too. . . . All those issues[, including unconscionability of the class action waiver,] are in front of the arbitrator." (A15, pp. 16-17).

evidentiary hearing on their challenge to the procedural and substantive unconscionability of the arbitration provision in the payday loan agreement.

CONCLUSION

Plaintiffs respectfully request the Court reverse the trial court's order compelling arbitration and remand for an evidentiary hearing on the unconscionability of the arbitration provision and class action ban in the payday loan agreement.

Respectfully submitted this 8th day of August, 2006.

RICCI~LEOPOLD, P.A.

s/Diana L. Martin

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellants' Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Initial Brief being submitted is in Times New Roman 14-point font.

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