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COURT OF APPEALS

STATE OF NEW YORK

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BROWN & BROWN, INC.,

Appellant,

-against-

No. 92

JOHNSON,

Respondent.

-----  
20 Eagle Street  
Albany, New York 12207  
May 6, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN

Appearances:

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CHIEF JUDGE LIPPMAN: Number 92, Brown &

1 Brown v. Johnson.

2 Counselor, would you like any rebuttal  
3 time?

4 MR. GRIFFITHS: Yes, two minutes, please,  
5 Your Honor.

6 CHIEF JUDGE LIPPMAN: Okay, counselor, go  
7 ahead.

8 MR. GRIFFITHS: Good afternoon, Alun  
9 Griffiths for plaintiff-appellants, may it please the  
10 court.

11 Your Honors, as there are a number of legal  
12 issues - - -

13 CHIEF JUDGE LIPPMAN: Is this against - - -  
14 is this - - - this provision from the Florida main  
15 outfit here, against the public policy of New York?

16 MR. GRIFFITHS: Your Honor, it is not. I  
17 think there are two - - -

18 CHIEF JUDGE LIPPMAN: Why not?

19 MR. GRIFFITHS: Well, there are - - - there  
20 are two points there. Your Honor, first of all, the  
21 standard that this court has established for a public  
22 policy exemption for a choice-of-law clause, which  
23 the Fourth Department determined was reasonable - - -

24 CHIEF JUDGE LIPPMAN: Yeah.

25 MR. GRIFFITHS: - - - is extraordinarily

1 high. It's only in very rare circumstances where - -  
2 -

3 CHIEF JUDGE LIPPMAN: Why isn't this one of  
4 those rare circumstances?

5 MR. GRIFFITHS: Because, Your Honor - - -

6 CHIEF JUDGE LIPPMAN: You don't consider  
7 the burden on the - - - the person who has the - - -  
8 the covenant or the anti-solicitation provision? Why  
9 isn't that contrary to our law?

10 MR. GRIFFITHS: Well, Your Honor, the - - -  
11 the Fourth Department was pointing to one component  
12 of the test set forth - - - tripartite set forth in  
13 Seidman, a hardship to the - - - a hardship to the  
14 employee - - -

15 CHIEF JUDGE LIPPMAN: Well, each component  
16 matters, right?

17 MR. GRIFFITHS: Well, it does, Your Honor,  
18 but we need to look at the core underlying policy  
19 there. And I would submit that the core policy in  
20 New York and Florida in this area is fundamentally  
21 aligned, in the sense that both jurisdictions are  
22 concerned with preserving economic mobility - - -

23 JUDGE STEIN: Yeah, but under Florida law,  
24 that's the prime consideration. Under New York law,  
25 that's one consideration in looking at - - - in

1 looking at a lot of other factors, but it's clear  
2 that - - - it's clear to me that the - - - that the  
3 employee's interest and - - - and also the - - - the  
4 public interest is - - - is a primary consideration  
5 under New York law, and it's - - - it's forbidden  
6 under Florida law.

7 MR. GRIFFITHS: Well, Your Honor, I would  
8 say the public interest is not forbidden under  
9 Florida law. And I think if you look at how the  
10 cases are decided in Florida - - -

11 JUDGE STEIN: Well, the effect on the - - -  
12 on the employee is - - -

13 MR. GRIFFITHS: The particularized effect -  
14 - -

15 JUDGE STEIN: - - - is described.

16 MR. GRIFFITHS: - - - on the employee, and  
17 it's the - - - it's the individualized effect on the  
18 employee. That's the word in the Florida statute.  
19 But if you look at the actual cases as they're  
20 decided, including the cases that they've cited in  
21 their brief, if you look at page 19 of our reply  
22 brief, we've - - - we - - - we've set this out. In  
23 every instance, whether the court is enforcing the  
24 restrictive covenant or limiting it or not enforcing  
25 it, when we look at how - - -

1 CHIEF JUDGE LIPPMAN: Can we limit it?

2 MR. GRIFFITHS: - - - when we look - - -

3 CHIEF JUDGE LIPPMAN: Can we limit it? Can  
4 we say this is all right, and the other is not all  
5 right? Is that practical in relation to Florida law?

6 MR. GRIFFITHS: You mean, in terms of the  
7 application of Florida law?

8 CHIEF JUDGE LIPPMAN: Yeah, we said - - -  
9 if we're - - -

10 MR. GRIFFITHS: Well, Your Honor - - -

11 CHIEF JUDGE LIPPMAN: - - - if we're saying  
12 some of it is anathema in New York, some of it is  
13 okay, is that a workable thing?

14 MR. GRIFFITHS: I would say none of it is  
15 anathema in any sense, but, Your Honor, I - - - it's  
16 - - -

17 CHIEF JUDGE LIPPMAN: Assuming some of it  
18 is, can you pick and choose? Could we pick and  
19 choose?

20 MR. GRIFFITHS: It's - - - it's - - - what  
21 you should do, Your Honor, is apply Florida law  
22 across the board, unless and until in its application  
23 to a specific issue, that gives rise to something  
24 that becomes repugnant or fundamentally obnoxious - -  
25 - or truly obnoxious to use the court's term, to a

1 fundamental New York policy.

2 JUDGE ABDUS-SALAAM: But why isn't it,  
3 counsel, a not - - - why is it obnoxious to say that  
4 you cannot consider the economic impact on a - - - on  
5 a given individual when you're applying this  
6 particular - - -

7 MR. GRIFFITHS: Well, it's - - - you cannot  
8 consider, Your Honor, the - - - the - - - the - - -  
9 the individualized hardship on that individual, and  
10 that could mean a number of things. It could mean,  
11 for example, while a twenty-five mile geographical  
12 restriction on the employee in terms of non-  
13 solicitation, might impose some hardship on that  
14 person, because she would not - - - he, she or he  
15 would need to move outside of that area. That's the  
16 kind of thing the Florida courts do not consider.

17 But they do consider - - - and if you look  
18 at the cases, they - - - they - - - they examine very  
19 carefully whether that employee will be able to  
20 continue practicing their profession. So they'll  
21 say, like in the Med - - - Medi-Weightloss cases,  
22 which they cited, where the - - - where the covenants  
23 were enforced, in each case the court looked at  
24 whether this weight-loss counselor would have  
25 employment opportunities out - - - and then - - - and

1 they consu - - - concluded that they would, because  
2 it was geographically and temporarily - - -  
3 temporarily limited to the twenty-five mile zone of -  
4 - -

5 CHIEF JUDGE LIPPMAN: Counselor, if we say  
6 Florida law is no good and is - - - is obnoxious or  
7 whatever you want to call it, what happens if we use  
8 New York law in your case?

9 MR. GRIFFITHS: Well, and again, we feel  
10 just as strongly, Your Honor, that on the record - -  
11 - the very limited record now before the court - - -  
12 there was no basis for the Fourth Department to  
13 conclude, as a matter of law, that B&B, the Brown &  
14 Brown - - -

15 CHIEF JUDGE LIPPMAN: So you want to let  
16 the complaint go forward, and then see if there's bad  
17 faith or whatever and - - -

18 MR. GRIFFITHS: That would be a - a - a - -  
19 an appropriate outcome here, Your Honor, we would - -  
20 - we would - - - we would submit, referring this back  
21 to the trial court and allowing the parties to - - -  
22 to develop a full record. The - - - the - - - the  
23 burden on defendants on - - - although, our ultimate  
24 burden at trial would be to prove an absence of  
25 coercion or overreaching, their burden on this motion

1 would be to show that as a matter of law, there was  
2 no way that Brown & Brown could prove an absence of  
3 overreach - - - and they haven't done that.

4 JUDGE STEIN: Well - - - well, if you look  
5 at the timing of it, if you look at the agreement  
6 itself, if you look at what's in the record, what - -  
7 - what more - - - what issues of fact would there be  
8 to actually - - -

9 MR. GRIFFITHS: Well - - -

10 JUDGE STEIN: - - - try at a hearing?

11 MR. GRIFFITHS: Well, Your Honor, - one  
12 issue of fact would be the de - - - would be the  
13 defendant Johnson's state of mind as she was - - - as  
14 she - - - as she was coming in to that first day of  
15 work. It's not just the first day of work; it's  
16 what's leading up to it. And there are significant  
17 gaps in the record. It doesn't - - - she - - - this  
18 is a - - -

19 JUDGE STEIN: Well, how does her state of  
20 mind prove or disprove the employer's bad faith?

21 MR. GRIFFITHS: Well, it's - - - it's the -  
22 - - well, I would say, it - - - it - - - it - - - it  
23 certainly - - - it certainly goes to the issue of  
24 whether there was coercion, her state of mind. And I  
25 think you need to look at this person - - - not as

1 somebody fresh out of college or getting her first  
2 job, but rather as a sophisticated professional. She  
3 had a good job at Blue Cross. She was moving on to a  
4 better job here. She - - - she - - -

5 JUDGE ABDUS-SALAAM: So are you - - - are  
6 you suggesting that because she was getting a better  
7 job, that's sort of equivalent to getting some sort  
8 of promotion and - - -

9 MR. GRIFFITHS: It - - -

10 JUDGE ABDUS-SALAAM: - - - she therefore  
11 got some benefit from - - -

12 MR. GRIFFITHS: I - - - I believe it  
13 absolutely is, Your Honor. I - - - I believe - - -  
14 and - - - and I - - -

15 JUDGE ABDUS-SALAAM: But - - - but if  
16 that's true, why then didn't the employer show her or  
17 tell her about the restrictive covenant before the  
18 first day of employment?

19 MR. GRIFFITHS: Well, Your Honor, and I - -  
20 - I think the evidence would show, on - - - on - - -  
21 on a full record, that in fact she was aware that  
22 there was an employment agreement, and - - - and that  
23 goes to the need for a deposition. Here is somebody  
24 at Blue Cross with a good job wanting to move on to  
25 another job; I think it's reasonable to ask credibly

1 - - -

2 JUDGE ABDUS-SALAAM: Was there someone from  
3 your side who says that she was told or provided a  
4 copy of a handbook or some sort of - - --

5 MR. GRIFFITHS: Your Honor, on the first  
6 day of work, she was not pressured into signing that  
7 agreement. She - - - we encouraged her, in fact, to  
8 look at it, to consider it. We pointed out the  
9 restricted covenant - - -

10 JUDGE ABDUS-SALAAM: Well, she's already  
11 now changed her position. She's left one job and  
12 come to another job, so - - -

13 MR. GRIFFITHS: But - - - but - - -

14 JUDGE ABDUS-SALAAM: - - - even if she had  
15 four more days to look at it, you're saying then if  
16 she signed it, she's on board, but if she doesn't,  
17 now she has no job?

18 MR. GRIFFITHS: We're - - - we're not  
19 saying that, Your Honor. And in fact, what we're  
20 saying, and - - - and this is - - - this is in the  
21 record as well, that - - - that - - - that other  
22 employees who have joined Brown & Brown have  
23 consulted with their attorneys before - - - before  
24 signing the agreement, and there's nothing in the  
25 record saying that - - - that she wouldn't have a job

1 if she didn't sign it exactly as written.

2 The fact is, you know, an em - - - an  
3 employment agreement is - - - is - - - is a customary  
4 part of the - - - of the job she was in. There's  
5 every good reason to think she would have known that  
6 coming in. And on the record now before the court,  
7 when - - - there hasn't even been a deposition of  
8 this individual, it's just - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 You'll have your rebuttal. Let's - - -

11 MR. GRIFFITHS: Thank you.

12 CHIEF JUDGE LIPPMAN: - - - let's hear from  
13 your adversary.

14 MR. ZARLOCK: May it please the court,  
15 Preston Zarlock for the respondents. I just want to  
16 address two issues - - -

17 CHIEF JUDGE LIPPMAN: Counsel, let me start  
18 by asking you, why shouldn't we have some discovery  
19 here?

20 MR. ZARLOCK: Well, first of all, at the  
21 time the summary judgment motion was made, they  
22 hadn't asked for any discovery. We had served  
23 discovery demands and received responses. They had  
24 served no demands. It's a red herring. This issue  
25 wasn't raised before the trial court, and it was only

1 raised at the Appellate Division.

2 Secondly - - -

3 CHIEF JUDGE LIPPMAN: Are there any issues  
4 of fact - - -

5 MR. ZARLOCK: No.

6 CHIEF JUDGE LIPPMAN: - - - as to what went  
7 on in terms of your client and what they tried to do?

8 MR. ZARLOCK: No, it is absolutely  
9 undisputed in the record. They submitted an  
10 affidavit and what - - - they submitted several  
11 affidavits on the summary judgment motion. What  
12 those affidavits said was that on her first day of  
13 work was the - - - when she was first presented with  
14 this. Now they tried to say, of course, that at that  
15 time she could have done X or she could have done Y,  
16 but it is absolutely undisputed in the record that  
17 she didn't see it, they didn't mention it, until the  
18 very first day of her job - - -

19 JUDGE ABDUS-SALAAM: Why is that bad faith,  
20 though, counsel? Why is it - - - isn't it kind of  
21 common knowledge that when you start a job there  
22 might be some sort of - - - I don't know - - -

23 JUDGE FAHEY: Paperwork.

24 JUDGE ABDUS-SALAAM: - - - yeah, paperwork,  
25 things that you have to be aware of, and as your

1           adversary points out, this was not her first job.

2                   MR. ZARLOCK:  It's true that it wasn't her  
3           first job, Your Honor, but it - - - it was her - - -  
4           she was leaving a place where she did not have such  
5           an agreement at Blue Cross and Blue Shield and coming  
6           to, you know, a somewhat different environment,  
7           albeit still in the insurance case.  So she wouldn't  
8           have knowledge of that - - -

9                   JUDGE PIGOTT:  How long did she work there  
10          at B&B?

11                   MR. ZARLOCK:  She worked from 2006 to, I  
12          believe, 2011.

13                   JUDGE PIGOTT:  You see what strikes me is,  
14          as - - - as Judge Abdus-Salaam is saying, you know,  
15          you - - - you take on a job, and all of a sudden,  
16          somebody says, well, by the way, we don't provide  
17          healthcare; we don't provide dental.  We don't - - -  
18          you know, you got to join a union.  And - - - and I  
19          don't think it's bad faith, you know, when - - - I  
20          mean, when people go to a job and you find out there  
21          are conditions that you didn't otherwise - - -  
22          otherwise know.  And where the Appellate Division  
23          said that they failed to show that she received a  
24          benefit for her signature, I just thought that was a  
25          non sequitur.  I - - -

1 MR. ZARLOCK: Well, I think - - - I think,  
2 Judge - - - to address one issue that come - - - has  
3 come up a couple of times. The Appellate Division  
4 did use the words "bad faith," okay. But I think if  
5 you look at this court's decision in BDO and also  
6 this court's decision in Columbia Ribbon, it - - - it  
7 said, look, the employer - - - you know, essentially  
8 the covenant is overbroad, undisputed. The - - -

9 JUDGE PIGOTT: The covenant is overbroad?

10 MR. ZARLOCK: The restrictive covenant is  
11 overbroad, yes.

12 JUDGE PIGOTT: In this case?

13 MR. ZARLOCK: Yes.

14 JUDGE PIGOTT: Who said that?

15 MR. ZARLOCK: Well, the Fourth Department  
16 said it, but the reason - - -

17 JUDGE PIGOTT: Yeah, but - - - but when I  
18 looked at it, what they said is, don't take our  
19 clients. And then - - - and all we're saying is the  
20 clients you got and the ones you got in the pipeline.  
21 I thought it was extremely restrictive.

22 MR. ZARLOCK: No, actually - - - the - - -  
23 the - - - actually, this covenant is not limited to  
24 the ones you work with. It's limited to any customer  
25 of any kind of BBNY.

1 CHIEF JUDGE LIPPMAN: Why couldn't - - -

2 JUDGE PIGOTT: Well, yeah - - -

3 CHIEF JUDGE LIPPMAN: Why couldn't we apply  
4 it to just the ones she worked with?

5 MR. ZARLOCK: Well, that would be what this  
6 court said in BDO, you know, it is overbroad, and  
7 then the employer must demonstrate - - - you know,  
8 quoting this court's analysis - - - the employer must  
9 demonstrate "an absence of overreaching, coercive use  
10 of dominant bargaining power, or other anti-  
11 competitive misconduct."

12 And similarly in Columbia Ribbon by this co  
13 - - - this case, said, you know, that's equitable  
14 relief. And certainly, I would note that this  
15 argument was never raised to reargument, okay, and so  
16 arguably, it's not even before the court.

17 Secondly, I think the - - - the balancing -  
18 - - the case specific analysis is essentially  
19 discretionary. And as long as they considered the  
20 elements, there's - - - there's an issue about  
21 whether this court - - -

22 JUDGE PIGOTT: I looked at this - - - she's  
23 an actuary, right?

24 MR. ZARLOCK: Yes.

25 JUDGE PIGOTT: They're - - - they're gold.

1 I mean, they are - - - they are really special  
2 people, because it's a very difficult job and  
3 particularly in the insurance industry, so it's  
4 surprising to me that we're saying almost like she's  
5 a wounded fawn here, and - - - and they say, well,  
6 she failed to show she received a benefit for her  
7 signature, which I still don't understand - - - that  
8 she was presented with a contract on her first day of  
9 work. I - - - I don't know why anybody's saying  
10 that's a terrible thing. And then they say, well, it  
11 was seven years after BDO. Well, it's a Florida  
12 outfit. I mean, they're not bound by BDO.

13 MR. ZARLOCK: I'd like to respond to both  
14 of those, Judge. First of all, this court found in  
15 BDO, it expressly is a factor in overreaching. "If  
16 the employ" - - -

17 JUDGE PIGOTT: I know it is, but in BDO - -  
18 -

19 MR. ZARLOCK: Okay.

20 JUDGE PIGOTT: - - - it's a New York case  
21 and this - - -

22 MR. ZARLOCK: Sure.

23 JUDGE PIGOTT: - - - and this is a Florida,  
24 Florida issue.

25 MR. ZARLOCK: Well - - -

1 JUDGE PIGOTT: So to say you people down in  
2 Tallahassee aren't paying attention to what we're  
3 doing up here in Albany, just didn't seem to follow.

4 MR. ZARLOCK: Well, sure, let me - - - let  
5 me follow up on that issue. Well, first of all, this  
6 is New York insurance industry, New York Ms. - - -  
7 Ms. Johnson, New York BBNY, the parent, okay, who is  
8 attached - - - let's face it - - - solely for  
9 litigation purposes - - - it's a party by their own  
10 agreement - - -

11 JUDGE PIGOTT: Well, you're saying that - -  
12 - you're saying that - - -

13 MR. ZARLOCK: No, no, Judge - - -

14 JUDGE PIGOTT: - - - but that's not - - -

15 MR. ZARLOCK: - - - no, I'm not just saying  
16 that. If you look at the employment agreement, it  
17 says the company is BBNY, except for paragraphs 8, 9,  
18 and 10, which are the enforcement provision.

19 JUDGE ABDUS-SALAAM: Well, the Supreme  
20 Court found that, but the Appellate Division said  
21 otherwise.

22 MR. ZARLOCK: Yeah, the Appellate Division  
23 felt - - -

24 JUDGE ABDUS-SALAAM: It was a reasonable  
25 relationship and - - -

1 MR. ZARLOCK: Yeah, they felt that there  
2 was. But I think another thing which - - - I mean,  
3 it's undisputed in the record - - - that the parent  
4 didn't even sign the thing until 2010.

5 JUDGE PIGOTT: Well, these are all issues  
6 that - - - that - - - that - - - that your opponent  
7 in his argument whatever - - -

8 MR. ZARLOCK: Sure.

9 JUDGE PIGOTT: - - - but let me go to the  
10 fourth one they said.

11 MR. ZARLOCK: Absolutely.

12 JUDGE PIGOTT: They said partial  
13 enforcement implies bad faith. That the severability  
14 issue - - - and in fact, BDO says exactly the  
15 opposite, that BDO's the one that - - - that applied  
16 a severability issue on - - - on their contract.

17 MR. ZARLOCK: Well, I think - - - I think  
18 BDO looked at the second issue, whether it could be  
19 part - - - put down - - -

20 JUDGE PIGOTT: How could a severability  
21 clause be bad faith? I mean, I would think the  
22 fourth - - -

23 MR. ZARLOCK: No, the sev - - - the  
24 severability, Judge, there's plenty of undisputed  
25 evidence in the record to establish coercive conduct,

1 initial first day, the fact that it's overbroad. And  
2 I would lo - - - I want to answer one question Your  
3 Honor had before. In BDO, this court looked to its -  
4 - - not only its prior precedent, but decisions in  
5 other states. You know, assuming - - -

6 JUDGE PIGOTT: Yeah, but I haven't read  
7 Wyoming. I mean, if - - - if somebody says, you  
8 know, well, you should have known what was going on  
9 in Butte, Montana. Well, I didn't, you know, I'm  
10 sorry.

11 MR. ZARLOCK: Well, Judge, I think - - -  
12 we've noted that - - - again, in a New York context,  
13 it's certainly considered - - - it can be considered  
14 that it would be applying New York law. Secondly,  
15 Judge, we've also cited cases in our brief, BDO had -  
16 - - was cited in two cases involving Brown & Brown,  
17 Inc.

18 JUDGE ABDUS-SALAAM: We only apply New York  
19 law, counsel, if the cho - - - if there is a  
20 conflict, because there is a choice of law in the  
21 agreement. It's Florida law, correct?

22 MR. ZARLOCK: Yeah, there is - - - the  
23 agreement that was signed the first day of work does  
24 provide for Florida law, correct.

25 JUDGE ABDUS-SALAAM: So we would only be

1 applying New York law if there's a conflict of laws.

2 MR. ZARLOCK: And there is. Clearly, if  
3 you look at the - - - and I want to - - - the Florida  
4 law, it's not just - - - I think the most egregious  
5 part probably is the not considering hardship, but it  
6 also is in there, it says that first of all, the  
7 court "shall modify". It's not the discretionary  
8 analysis this court provides in BDO to sever, but  
9 shall - - - "and shall do so to the greatest extent  
10 possible". And that the burden isn't - - - is on - -  
11 - demonstrating it's overbroad is on the employee,  
12 and that even where violative of public policy,  
13 that's not enough to violate it.

14 I mean, the whole - - - it's a unified  
15 statute, and to address one thing the court asked  
16 counsel, there is no precedent on a contractual  
17 choice of law for picking and choosing a hybrid  
18 choice of law. I mean, I think - - -

19 JUDGE PIGOTT: Well, BDO did. In other - -  
20 - in BDO, they said you can't - - - you can't  
21 surcharge the employee that's - - - that's no longer  
22 with you if they take your - - - your customer,  
23 because what they said was if you - - - if you - - -  
24 if you take our customer, you've got to pay us 150  
25 percent of what - - - of what you get or something.

1 MR. ZARLOCK: Sure, essentially.

2 JUDGE PIGOTT: So they said, that can't  
3 apply, but the rest of it was fine. So they did a  
4 severability in that case. And when I looked at this  
5 one, which says "the limitations to any insurance or  
6 bond business of any kind or character from any  
7 person, firm, or corporation, or other entity that is  
8 a customer or account of the New York offices of the  
9 company during the term of this agreement or from any  
10 prospective customer or account to whom the company  
11 made proposals about which an employee had particular  
12 knowledge, or in which the employee participated  
13 during the last six months of the employee's  
14 employment," which seems to me has the time and place  
15 and everything else to be pretty boxed.

16 MR. ZARLOCK: Well, actually, not, because  
17 BDO, any customer. It's not limited strictly to the  
18 one she worked with. BDO expressly said that that's  
19 overbroad. Now if the court is going to change the  
20 holding of BDO, I guess, you know, that's a different  
21 issue. But under BDO, that's overbroad. It's not  
22 simply the customers that she dealt with.

23 And on the other issue the court said about  
24 do they know of BDO down in Florida? BDO is probably  
25 the seminal case on restrictive covenants in the

1 United States. It's been cited in two - - -

2 JUDGE PIGOTT: Well, I get that. I - - - I  
3 just didn't think that the Appellate Division should  
4 say to a Florida company you - - - you're not  
5 following New York law, and you should have known it  
6 by now.

7 MR. ZARLOCK: You know - - - you know, I do  
8 think, Judge, you know, in - - - in - - - certainly  
9 in Scott v. Skavina, they - - - the Third Department  
10 case - - - essentially said the same thing. You  
11 know, there are some aspects of the Fourth  
12 Department's language. You know, you don't need an  
13 expressed finding of bad faith, but the circumstances  
14 which are undisputed, you know, which essentially - -  
15 - first day of employment, under BDO, that's a  
16 factor. She wasn't made a partner, you know, like  
17 the BDO person, where you start getting into the  
18 issues which establish that - - - establish some type  
19 of basis for the covenant - - -

20 JUDGE ABDUS-SALAAM: Is that the only - - -  
21 in BDO, because you get a promotion, is that the only  
22 way that you can avoid bad faith, giving someone  
23 someone sort of benefit, like a promotion?

24 MR. ZARLOCK: Well - - -

25 JUDGE ABDUS-SALAAM: What about getting a

1 better job? Is that - - -

2 MR. ZARLOCK: Yeah, I mean, it's still an  
3 initial con - - - you can argue for any new job that  
4 it's an initial contract of employment. I mean, if  
5 it's a better job at the same company you've been,  
6 then it might suffice. But, you know, she left her  
7 other place. And this is something which I think is  
8 - - - I forgot - - - I forgot who - - - who focused  
9 on this particular aspect - - - but it was presented  
10 to her after she left her former employee. If you  
11 had - - -

12 JUDGE PIGOTT: Yeah, but she didn't at any  
13 point - - - that's why I asked you how long she'd  
14 worked there - - - she didn't at any point say, boy,  
15 did I get screwed; now I - - - now I can't go back to  
16 Blue - - -

17 MR. ZARLOCK: She didn't - - - she didn't  
18 know about it until she gets a letter - - -

19 JUDGE PIGOTT: I can't go back to Blue  
20 Cross, and here I've signed this document and I'm - -  
21 - and I'm stuck. I mean, she got fired, right?

22 MR. ZARLOCK: She did. She got fired, and  
23 that's, you know, another reason which I think has to  
24 do with overreaching in these types of circumstances,  
25 by the employer, where you have an agreement which -

1 - - which would purport to restrict her in two years  
2 - - - for two years - - - throughout New York State,  
3 and for no severance of any kind.

4 You know, I know that the Fourth  
5 Department, you know, said, look at the involuntary  
6 termination issue is only relative for injunctive  
7 relief. Now I think, while I agree with the Fourth  
8 Department on - - - on Post and what it dealt with on  
9 the facts, I do think that involuntary termination is  
10 - - - is a factor that should be relevant in  
11 overreaching as well, okay, but, you know, that's  
12 another basis for affirmance on different grounds  
13 than the court below.

14 JUDGE ABDUS-SALAAM: But generally New York  
15 is an employee - - -

16 CHIEF JUDGE LIPPMAN: Go ahead, Judge.

17 JUDGE ABDUS-SALAAM: - - - is an employee  
18 at will state - - -

19 MR. ZARLOCK: That's correct.

20 JUDGE ABDUS-SALAAM: - - - so there isn't -  
21 - - I mean, she could be fired for no reason or - - -

22 MR. ZARLOCK: That's absolutely true, but  
23 you know, the - - - the court, I mean - - - and  
24 again, I understand, you know, the emp - - - the  
25 employee choice doctrine of this court as expressed

1 in Post and in Morris, I believe. But the, you know,  
2 there is a certain mutuality of obligation that's  
3 discussed in - - - in Post, which talks about that  
4 mutuality being relevant not strictly to the  
5 severance benefit lost, but also to the covenant  
6 itself. And again, that's just something which I  
7 think is relevant not just on an injunctive context,  
8 but also on a summary judgment context for damages.

9 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
10 hear from your adversary.

11 MR. ZARLOCK: Thank you, Your Honor.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 Rebuttal, counselor.

14 MR. GRIFFITHS: Well, Your Honors, the - -  
15 - the - - - the - - - the mandate of BDO Seidman  
16 under New York law is clear. The - - - the - - - the  
17 - - - the evaluation of whether there's been  
18 impermissible coercion or bad faith on the part of  
19 the employer is based on a fact-intensive, case-by-  
20 case, specific analysis. And what the Fourth  
21 Department did here, we would submit, is - - - is  
22 directly contrary to that because they, in effect,  
23 tried to create a per se rule, a per se rule that  
24 because Ms. Johnson signed the - - - the - - - the  
25 employment agreement on her first - - - first - - -

1 first day of employment - - -

2 JUDGE PIGOTT: What do you think they  
3 should have said? What do - - - what do you - - - if  
4 you - - - if you could write for the Fourth  
5 Department, what would you be saying?

6 MR. GRIFFITHS: What - - - what we would be  
7 saying for the Fourth Department is this should be  
8 referred back to the trial court to - - - for  
9 development of a full record, because that  
10 determination cannot be made absent full discovery.

11 JUDGE PIGOTT: What's - - - what's missing?

12 MR. GRIFFITHS: Well, what's missing is,  
13 number one, a full understanding of - - - of - - - of  
14 what Ms. Johnson was thinking, and - - - and - - -  
15 throughout the negotiation process, from the time she  
16 was at Blue Cross up until the day she - - - she came  
17 to - - - to - - - to - - - to - -

18 JUDGE ABDUS-SALAAM: So why did you wait  
19 until she moved for - - - or the defendants moved for  
20 summary judgment before you asked for discovery?

21 MR. GRIFFITHS: Well, Your Honor, and again  
22 - - - I - - - that is - - - I'm glad you brought that  
23 up. This - - - this summary judgment motion was made  
24 - - - I believe it was - - - and it's in the record -  
25 - - thirty days after issue was joined. This is not

1 something which had been out there for months and  
2 months. We - - - there was a - - - they made a - - -  
3 they - - - we sought to amend the complaint. There  
4 was - - - there was some motion practice which was  
5 withdrawn. We put in an answer. Thirty days later,  
6 this motion was made.

7 There hadn't even been significant document  
8 discovery, much less a deposition. So to suggest  
9 that discovery is a red herring when - - - when - - -  
10 when there - - - where there hadn't really been any  
11 meaningful opportunity to - - - to have discovery,  
12 and that's very clear from the record, I - - - I  
13 think is - - - is - - - is - - is really a misnomer.

14 JUDGE STEIN: Why didn't you argue that in  
15 the trial court?

16 MR. GRIFFITHS: Well - - - well, Your  
17 Honor, we - - - we did say in the trial court - - -  
18 it's - - - it's in the brief and it is in one of the  
19 affidavits - - - we - - - we made the point that - -  
20 - that the record was insufficiently thin, and that  
21 this motion was being made at a - - - at a very, very  
22 premature stage.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 MR. GRIFFITHS: Thank you, Your Honors.

25 CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals Brown & Brown, Inc. v. Johnson, No. 92, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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