Dissenting Opinion Filed February 25, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00579-CV

AEROTEK, INC. AND JR BUTLER, INC., Appellants
V.
LERONE BOYD, MICHAEL MARSHALL, JIMMY ALLEN, AND TROJUAN CORNETT, Appellees

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-00907

OPINION DISSENTING FROM THE DENIAL OF MOTION FOR EN BANC RECONSIDERATION

Opinion by Justice Schenck

I respectfully dissent from the Court's denial of appellants' Motion for En Banc Reconsideration. This is one of a series of recent cases in this Court that have posed questions about enforcement of arbitration contracts and also, albeit less directly but perhaps more fundamentally, about the role of federal law in state court and of judges in ensuring that the results in these and other controversies adhere to that law. Appellants urge that the introduction of a contract containing an arbitration clause should have resolved any debate over the arbitrability question here despite the fact that the document was electronically executed and stored. I agree.

As detailed below, I do not believe the trial court's decision can be upheld without either acknowledging that in doing so we have crafted special rules for arbitration contracts, which would violate the governing federal law and the Constitution's Supremacy Clause, or holding every contract involving a computer open to costly nuisance-value litigation and abuse.

I.

Congress enacted the FAA in 1925 to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements on "the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA thus manifests an "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and requires that courts, state or federal, "rigorously enforce agreements to arbitrate," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Section 2 of the FAA is its "primary substantive provision." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This section "provides that written agreements to arbitrate controversies arising out of an existing contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Dean Witter Reynolds*, 470 U.S. at 218 (quoting 9 U.S.C. § 2)). It, together with the rest of the FAA, applies

to the full reach of the federal commerce power[1] and preempts and supplants any state law, whether labeled as a rule of substance or procedure,[2] that would conflict with the FAA's policy and goal of enforcing agreements to resolve controversies by arbitration rather than litigation. *ASW All State Painting v. Lexington Ins.*, 188 F.3d 307, 311 (5th Cir. 1999) (FAA "does not preempt state arbitration rules *as long as the state rules do not undermine the goals and policies of the FAA*.") (emphasis added).

A court interpreting an arbitration agreement is obliged to apply "ordinary contract principles" in determining the existence and reach of the agreement. Any other result is barred by federal law and, in turn, the Supremacy Clause. *Epic Sys. v. Lewis*, 138 S. Ct. 1612, 1622 (2019) ("Under our precedent, [rules] that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration' [are preempted]."); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017); *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 471 (2015) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (noting "the unmistakably clear congressional purpose that the arbitration procedure, when

[1] *See Citizens Bank v. Alafabco*, 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.").

[2] *Kindred Nursing Ctrs. v. Clark*, 137 S. Ct. 1421, 1426 (2017).

selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

If a party opposing an application to compel arbitration denies "the existence of the agreement," the Texas procedural rules, in keeping with the FAA, require a trial judge to "summarily determine [the] issue". TEX. CIV. PRAC. & REM. CODE ANN. § 171.021. "Because Texas courts favor arbitration as a means of settling disputes between parties, the party opposing arbitration bears the burden of proving that no valid arbitration agreement exists as to the dispute." *ASW*, 188 F.3d at 311 (citing *Fridl v. Cook*, 908 S.W.2d 507, 511 (Tex. App.—El Paso 1995, writ dism'd w.o.j.)). "If the material facts necessary to determine the issue are controverted by an opposing affidavit or otherwise admissible evidence, the trial court must conduct an evidentiary hearing to determine the disputed material facts." *Id.* (citing *Howell Crude Oil Co. v. Tana Oil & Gas Corp*., 860 S.W.2d 634, 639 (Tex. App.—Corpus Christi–Edinburgh 1993, no writ)).

The Texas Supreme Court, recognizing that the essential point of arbitration is to avoid the tortuous and costly process associated with plenary trial and motion practice, has made clear that the issue should be decided "summarily" and that the party seeking enforcement should have access to immediate review by extraordinary writ, though it is now also available by statutory amendment via the interlocutory appeal at issue here. *See* PRAC. & REM. § 51.016; *In re Nexium Health at Humble, Inc.*, 173 S.W.3d 67, 68 (Tex. 2005) (orig. proceeding); *Jack B. Anglin Co. v. Tipps*,

842 S.W.2d 266, 272 n.10 (Tex. 1992) (orig. proceeding).

II.

In this case, appellants urged that each of the appellees had entered into a contract, which is itself the source of the claim they have filed. That contract was both executed and preserved electronically, as countless modern documents and agreements are. The copies of the agreements filed by appellants as part of their motion to compel arbitration included a clause directing the claims to arbitration. Appellees responded in opposition, urging not that they did not recall whether the electronic version they executed contained an arbitration clause, but that each was able to recall the entire electronic offering in full and that it did not contain the arbitration clause now shown in the electronically stored and printed copies. Following the Texas state procedural path laid out in *Tipps*, the trial court found this conflict to warrant a hearing.

In *Tipps*, the Texas Supreme Court construed what is now section 171.021 of the Texas Civil Practice & Remedies Code:

> PROCEEDING TO COMPEL ARBITRATION.
> (a) A court shall order the parties to arbitrate on application of a party showing:
> (1) an agreement to arbitrate; and
> (2) the opposing party's refusal to arbitrate.
> (b) If a party opposing an application made under Subsection (a) denies the existence of the agreement, the court shall summarily determine that issue. The court shall order the arbitration if it finds for the party that made the application. If the court does not find for that party, the court shall deny the application.
> (c) An order compelling arbitration must include a stay of any

proceeding subject to Section 171.025.

Analogizing to summary-judgment rules and drawing on the need to align the statute with the purpose of arbitration—namely, to avoid litigating in court in the first instance—the supreme court held that a full evidentiary hearing was not likely envisaged by the directive that "the court shall decide the issue summarily." *Tipps*, 842 S.W.2d at 269. A full evidentiary hearing would be proper only where the "*material* facts necessary to determine the issue are controverted." *Id.* (emphasis added). As this case comes to us after the trial court proceeded to such a hearing, we look to the record of that hearing. As detailed below, I do not believe *Tipps*'s language or its resort to summary-judgment norms would support the conclusion that *any* affidavit purporting to contest the existence of the arbitration clause would permit such a hearing. Absent some relevant and lawful indication that a reasonable and fair-minded fact finder might decide the dispute either way, there seems little purpose to delaying the arbitration—and adding to the costs—by proceeding to an evidentiary hearing. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 87–88 (Tex. 2018) (elucidating meaning of "genuine" in summary-judgment parlance).

III.

At the hearing on the motion in this case, appellants produced and secured admission of the printed copies of the electronic agreements, including the disputed arbitration language, and offered live testimony detailing the operation of the software that yielded it, including unchallenged testimony that the software would

not permit the signatory to advance to the final signature page without assenting to each of the preceding pages, including the page containing the arbitration clause. Appellees merely reintroduced their affidavits by agreement of the parties. The trial court evidently regarded this impasse, such as it is, as one susceptible to a credibility determination and held for appellees. I disagree.

There are only two possibilities here. Either the trial court was aware of—and heeded—its Supremacy Clause obligations and applied the same proof standard to the arbitration agreement as it would any other contract, *e.g., Kindred Nursing Ctr.*, 137 S. Ct. at 1428 (courts bound by FAA must apply same contract norms to arbitration clause as any other contract), or the trial court's decision turned on a special rule of contract applicable only to arbitration contracts, in which case it is barred by the Supremacy Clause. *Epic Sys.*, 138 S. Ct. at 1622.

Viewed through the only constitutional lens open to defend it, the need for further, prompt review and reversal of the trial court's judgment becomes obvious. Under generally applicable contract law, a document in original or duplicate may be challenged for its admissibility as a forgery or alteration, but barring some legal basis for its exclusion,[3] it must be admitted. *Vince Poscente Int'l v. Compass Bank*, 460 S.W.3d 211, 216 (Tex. App.—Dallas 2015, no pet.). And, once admitted, any other

[3] If there is a "genuine dispute as to fraud or alteration" of a document or an original, that dispute must first be resolved in the trial court as a condition of admission. *E.g., State v. Robinson*, 363 P.3d 875, 1020 (Kan. 2007). Treating parol testimony of a different recollection of the contents of the writing as such a dispute conflates the parol and best evidence rules with the result of eliminating both.

evidence relating "to the contents" of the document is legally no evidence at all.

Despite its name, the parol evidence rule is "not a rule of evidence . . . but a rule of substantive law." *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 31 (Tex. 1958). Testimony as to one's memory of the contents of a document cannot be used to contradict its written terms. *E.g.*, *Self v. King*, 28 Tex. 552 (1866)[4]; *Universal Life & Acc. Ins. Co. v. Reed*, 115 S.W.2d 728 (Tex. App.—Dallas 1938, no writ) (reversing jury verdict affording additional recovery under insurance policy based on beneficiary's testimony recalling double indemnity provision in policy where writing provided otherwise).[5] Parol evidence of a different meaning than the written words is not only excludable at trial, but is legally no evidence at all. *Brannon v. Gulf States Energy Corp.*, 562 S.W.2d 219, 222 (Tex. 1977). Thus, even where it is admitted without objection, it is of no legal effect below or on appeal. *Aetna Ins. Co. v. Klein*, 325 S.W.2d 376, 379 (Tex. 1959); *Wells v. Wells*, No. 05-06-00773-CV, 2007 WL 2165354, at *3 n.1 (Tex. App.—Dallas July 30, 2007, no pet.) (mem. op.). Any other result invites chaos and mischief. Testimony to the effect that "I remember the words differently" or "maybe the paper, the photocopier, or the computer, were manipulated" cannot be a basis for a different result than the one directed by the written contents. MCCORMICK ON EVIDENCE § 231–32 (3d ed. 1984);

[4] This rule has been in force in Texas since it became a state. *Heatherly v. Record*, 12 Tex. 49 (1854).

[5] While the best evidence rule originated in common law, it survives under the modern state and federal rules. TEX. R. EVID. 1002; *see also Medina v. Multatler*, No. CV 06-00107 MMM (AJWx), 2007 WL 5124009, at *1 (C.D. Cal. 2001) and cases cited therein.

Reed, 115 S.W.2d at 728.

I would think it should also be clear that the document is entitled to the same force and effect regardless of whether it was made or stored on paper or electronically.[6] TEX. BUS. & COM. CODE § 322.001. There is no requirement that the proponent of the admission of a document affirmatively anticipate and disprove the possibility of alteration of a writing, by photocopier or otherwise, as a condition of the document's being entitled to the natural parol evidence implications of its admission. TEX. R. EVID. 1001(d).

As the National Conference of Commissioners on Uniform State Laws recognized in drafting and proposing the Uniform Electronic Transaction Act ("UETA"), modern commerce depends on electronic communication and confidence in the resulting stored data. The Texas Legislature evidently appreciated this by adopting the UETA in 2007. TEX. BUS. & COM. CODE ANN. § 322.001.

Notwithstanding the UETA, our decision in this case will be treated as binding over the millions of people and countless businesses within our reach and risks calling all of that business conducted electronically into doubt. Because our decision in this case must apply to all contracts and cannot constitutionally target only

[6] Texas and federal courts have adopted functionally identical rules governing the admission of electronic records that have rejected the notion that the proponent is under special foundation requirements for admission. *United States v. Vela*, 673 F.2d 86, 90 (5th Cir. 1982); *Wenk v. City Nat'l Bank*, 613 S.W.2d 345, 350 (Tex. App.—Tyler 1981, no writ). Instead, the burden of suggesting some basis for exclusion on account of alteration of the original is on the opponent. I thus disagree with the panel majority that a failure to call a Xerox representative or software designer to testify to the lack of a possible alteration gives rise to a fact question as to a document's status as an original, or duplicate entitled to the same consideration as an original, regardless of whether it was stored electronically. *See* TEX. R. EVID. 1001(d), 1003.

arbitration clauses, our decision to recognize the electronic signature but none of the words that precede it as presumptively valid invites absurd and costly abuse. Many, if not most, Texans have some form of computer-driven commercial relationships that may be central to their affairs, including online banking, mortgage servicing, brokerage accounts, and bill payment programs. Likewise, many, if not most, have agreed to make use of software or updates to software that are made available only because the provider can rely on the enforcement of an electronic signature. If the banking customer is able to create a genuine fact dispute—much less a potential victory at trial—by simply asserting a memory of an account balance with several more zeros than the computer now alleges, that industry and the people it employs will flee or revert to the passbook savings account. The costs associated with the resulting debates over mortgage balances, loan rates, and stock and mutual fund purchases and sales will be greater than the underlying accounts. The electronic agreements that allowed these Texans to participate in this modern, electronic form of commerce will be worthless.

IV.

The bizarre result in this case is said to find support from the El Paso Court of Appeals decisions culminating in *Kmart v. Ramirez*, 510 S.W.3d 559 (Tex. App.—El Paso 2016, pet. denied).[7] *Ramirez* involved a Kmart employee who denied

[7] *See also Alorica v. Tovar*, 569 S.W.3d 736, 741–42 (Tex. App.—El Paso 2018, no pet.).

logging in to the company's website to approve the document containing an arbitration clause, despite electronic records so showing. After rejecting the employee's authentication and hearsay objections to Kmart's records, the court arrived at the fundamental question: whether the employee's testimony contradicting the electronic records amounted to a "scintilla" of evidence—that is to say evidence of such weight and quality that a reasonable, fair-minded person could, by crediting it, rule in its proponent's favor. *Id.* at 568–69.

Putting aside the question whether *Ramirez* properly applied the concept of a "scintilla" in contemporary sufficiency analysis following *City of Keller*, it did acknowledge, but as quickly rejected, a series of federal cases applying the FAA and confronting the same arbitration clause and software that had rejected an employee's denial. *Id.* at 569. The *Ramirez* court dismissed most of those cases as reflecting the factual rejection of the respective trial judges. One, however, *Grynko v. Sears Roebuck & Co.*, No. 1:13 CV 2482, 2014 WL 66495, at *4 (N.D. Ohio Jan. 6, 2014), answered the same question posed in the *Ramirez* appeal: whether the employee's memory of not clicking the "accept" button could create a genuine issue of fact to allow the court to ignore the electronic records and associated signature and found none. *Grynko* said "no," unsurprisingly. It dismissed the issue summarily, noting "the Plaintiff does not account for this document or offer any explanation as to why it would indicate that she had acknowledged receiving the Agreement if she in fact had not acknowledged receiving the Agreement." The El Paso court dismissed

Grynko as determining whether the computer records and denial of "clicking" raised a fact issue under *Ohio* law and offered no answer to "whether Ramirez's denial of notice constitutes *more than a scintilla of evidence in Texas.*" *Ramirez*, 510 S.W.3d at 569 (emphasis added).

To its credit, the panel majority in this case does not take up the debate over whether the act of clicking a mouse in Texas is somehow unique to our contract law or whether our scintillas are smaller than Ohio's, which I doubt.[8] It adds that Aerotek, Inc. could have called the developer of the software to vouch for the absence of security issues that might have resulted in the software's concealing the arbitration clause from these claimants and introducing it into the stored version after they signed the rest of the agreement.

Of course, as in *Grynko*, there is no evidence in this case to support any inference that the electronic records have been altered or that the software altered itself and inserted an arbitration clause after the fact.[9] That latter notion cannot be a constant, lingering fact issue requiring preemptive refutation without grinding judicial (and all other) business to a halt. In the era of determinate computing,

[8] On the contrary, our scintillas are as stout as anyone's and fortified by the requirement that we look at all of the evidence bearing on an issue—not merely the ostensibly supporting scintilla—to determine whether a *reasonable* factfinder could arrive at the answer the proponent requires. *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005).

[9] The panel dissent would, like *Grynko,* find the evidence manifestly insufficient to support the trial court's finding. I would agree with that conclusion, if parol recollections were relevant to the issue, as there is no basis in the record or contemporary human experience for inferring that this software became self-aware and rewrote the agreements. While machine learning and artificial intelligence may one day force us to confront those issues, on this record that notion remains fanciful. Because I conclude that the evidence was of no legal relevance, I find further debate unnecessary.

computers are used because their software produces a constant result. Until there is some affirmative evidence in the record to question what is shown on an electronic record, such that it should be excluded from evidence in the first place, that record must be treated as valid in the same way a paper copy is presumed to be for every other legal purpose. *E.g.*, *Poscente Int'l*, 460 S.W.3d at 216 ("A photocopy of a promissory note, attached to an affidavit in which the affiant swears that the photocopy is a true and correct copy of the original note . . . establishes the existence of the note.").

V.

The only admitted document reflecting the agreement the plaintiffs sued under included an arbitration provision. That the plaintiffs filed affidavits presenting a contrary recollection of the contents of that written agreement does not, in my view, amount to "controverting" the tendered written agreement under *Tipps* or, more importantly, create a fact issue that could be resolved in conflict with the written document. To suggest that the agreement is entitled to less recognition than any other because it was made electronically is contrary to controlling statutory law and invites a general degradation of all modern commerce, unless this rule is limited to arbitration contracts, in which case it is also preempted by the FAA and the Supremacy Clause.

I pause to add that the law we apply in arbitration cases is largely not of our own making or, necessarily, to our pleasing. Federal law, operating at the full and

essentially unfettered reach of the "New Deal" era Supreme Court, constitutionally compels our thinking, and like diversity jurisdiction, removal jurisdiction, and various other federal enactments[10] may signal of a lack of confidence in the modern state judiciary. Whatever the cause for that lack of confidence, forcing reluctant customers into our courts by barring the exits with what might be described as imaginative contract enforcement rules will do little to stem the tide.

To the extent one wishes to question whether arbitration policy is sound or whether the reality has lived up to the aspirational promise of arbitration—a quick, efficient and predictable alternative to litigation—that complaint can be directed only to the United States Congress and the Supreme Court that empowered it.[11] The more immediate question might be why, if arbitration is not in fact, quick, inexpensive, and predictable, so many sophisticated parties still demand it as an

[10] In 2005, Congress enacted the Class Action Fairness Act of 2005 (CAFA), significantly expanding federal diversity jurisdiction over most mass and class actions (28 U.S. § 1332(d)). In particular, CAFA:

- Increased the amount in controversy requirement from $75,000 to $5 million, but relaxed the threshold standard by requiring the $5 million to represent the aggregate of all individual claims (28 U.S.C. § 1332(d)(2), (6)); and
- Relaxed the requirement that all plaintiffs be diverse from all defendants to allow jurisdiction where at least one plaintiff is diverse from at least one defendant (28 U.S.C. § 1332(d)(2)).

CAFA also enacted new rules and procedures related to removal of class actions (28 U.S.C. § 1453) and to settling class actions (28 U.S.C. §§ 1711–1715).

[11] If Congress has the power to dictate policy over an intra-state contract between a day-laborer and his employer under the terms of the Interstate Commerce Clause, one might wonder why the framers also went to the trouble of writing or securing passage of the balance of that section of Article 1 and its seemingly unnecessary expressions of this roaming commercial authority to, among other things, establish a currency, uniform rules of bankruptcy, or a post office. Of course, while I might question the Supreme Court's holding in *Wickard v. Filburn*, 317 U.S. 111 (1942), and its progeny, any attempt on my part as a judge serving on an inferior court to ignore or evade its holding could serve only to undermine confidence in the system.

alternative to our free, state funded alternative?

In all events, I dissent from our denial of the request for en banc reconsideration and urge prompt review by the Texas Supreme Court.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

Bridges, J., Myers, J., and Evans, J., join this dissenting opinion

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