REVERSE and REMAND; and Opinion Filed April 30, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00694-CV

WAL-MART STORES, INC., Appellant
V.
SHANNA CONSTANTINE & JONATHAN MORGAN, Appellees

On Appeal from the County Court at Law No. 1
Kaufman County, Texas
Trial Court Cause No. 96652-CC

MEMORANDUM OPINION

Before Justices Lang-Miers, Fillmore, and Stoddart
Opinion by Justice Lang-Miers

The trial court denied the motion of Wal-Mart Stores, Inc. to compel arbitration of claims asserted by Shanna Constantine and Jonathan Morgan. In this accelerated appeal, we reverse the trial court's order and remand with instructions to grant Wal-Mart's motion.

BACKGROUND

John Morgan was employed at a Wal-Mart store in Kaufman. He was at work at Wal-Mart on March 22, 2016, when Donald Coleman, who was not a Wal-Mart employee, shot and killed him. A week before the murder, Coleman threatened Morgan's life on Wal-Mart's premises, and a Kaufman police officer responded to a call reporting the incident. A Wal-Mart assistant manager was present when the police officer interviewed Morgan about the incident, and was aware that Coleman had threatened Morgan's life. Appellees Shanna Constantine and Jonathan Morgan,

Morgan's daughter and son,[1] brought this suit against Wal-Mart alleging that Wal-Mart had notice of the threat on Morgan's life but failed to take any action in response. They alleged causes of action for negligence, negligent training and supervision, negligent undertaking, respondeat superior/vicarious liability, gross negligence, and wrongful death.

Wal-Mart answered and filed a motion to compel arbitration, alleging that Morgan had agreed to arbitrate disputes with Wal-Mart, and appellees were bound by Morgan's agreement. Wal-Mart alleged that Morgan had completed the "Walmart[2] Associates, Inc. Texas Injury Care Benefit Plan Computer Based Learning Module" as part of his duties at Wal-Mart, through which he agreed to arbitrate negligence and wrongful death claims against Wal-Mart.

In support of its motion, Wal-Mart submitted the affidavits of Amanda Griffin and Tim Osmond. Griffin is Wal-Mart's custodian of records relating to the computer-based learning ("CBL") module for Wal-Mart's "Texas Injury Care Benefit Plan" (the "Plan"). She testified that:

- all Wal-Mart employees in Texas are required to complete CBL modules;
- the CBL modules are paperless, accessed through computers at Wal-Mart locations;
- to access the CBL modules, an employee must enter his or her confidential associate identification number and password;
- once a module is completed, an electronic training record is retained which identifies the date the module was completed, the completion status, and the score if the module requires a test;
- one of the required CBL modules for Wal-Mart's Texas employees is the "Texas Injury Care Benefit Plan CBL," which trains employees on subjects including reporting injuries, the benefits available under the Plan, and the process for receiving benefits;
- the CBL module for the Plan has a section titled "Arbitration" that "informs associates that the Plan has a mandatory arbitration process to resolve disputes other than benefit claims";

[1] For clarity, we refer to Shanna Constantine and Jonathan Morgan together as "appellees."

[2] The record reflects that appellant uses both hyphenated and non-hyphenated spellings of its corporate name.

- the "Arbitration Acknowledgement" in the Plan's CBL module provides:

  > Arbitration Acknowledgement
  >
  > I acknowledge that this Walmart and Sam's Club Texas Injury Care Benefit plan includes a mandatory policy requiring that claims or disputes relating to the cause of an on-the-job injury (that cannot otherwise be resolved between Walmart or Sam's Club and me) must be submitted to an arbitrator, rather than a judge and jury in court. I acknowledge that I have received this arbitration policy. I understand that the Company is also accepting and agreeing to comply with these arbitration requirements. All covered claims brought by my spouse, parents, children, beneficiaries, representatives, executors, administrators, guardians, heirs or assigns are also subject to the Company's arbitration policy, and any decision of an arbitrator will be final and binding on such persons and the Company.

- the employee must click a button stating "I Understand" beneath the Arbitration Acknowledgement to proceed through the Plan CBL module;

- the Plan CBL module also contains an "Important Acknowledgement" section, informing the employee that Wal-Mart's "arbitration policy may be accessed by clicking the following button, that it is important for the associate to read the policy carefully so that the associate will be aware of his or her rights and obligations regarding arbitration, and to click the button and read this policy carefully before continuing";

- the employee may not continue through the Plan CBL module without first clicking the button that accesses the arbitration policy;

- Appendix A to the Plan, entitled "Arbitration of Certain Injury Related Disputes," informs employees that binding arbitration will be the sole and exclusive remedy for resolving work-related injury claims or disputes;

- the Plan CBL module also contains a section titled "Acknowledgement of Completion" which informs the employee that by clicking on the button below, the employee is completing the course and acknowledging that he or she has read and understood the arbitration acknowledgement and policy; and

- the Acknowledgement of Completion also informs the employee that his or her training record will be updated to show successful completion of the CBL module.

Osmond, Wal-Mart's Manager of Regional Risk Management, testified in his affidavit that:

- all Wal-Mart employees working in Texas must complete the Plan CBL module;

- he is custodian of the records relating to employees' completion of training modules;

- Morgan completed the Plan CBL module on November 20, 2015;
- To complete the Plan CBL module, Morgan would have accessed and had notice of the "Summary Plan Description," including Appendix A, "Arbitration of Certain Injury Related Disputes"; and
- Morgan was covered by the Plan, including Appendix A, on March 22, 2016, in the course and scope of his employment.

Griffin attached a copy of the CBL module slides to her affidavit as well as a copy of the Plan. Osmond attached a report generated on March 23, 2016, entitled "Total History for JOHN MORGAN," showing Morgan's associate identification number, and listing "Texas Injury Care Benefit Plan-English" and "Texas Injury Care Benefit Plan-English (1.2)" with a "Complete Date" of November 20, 2015.

Appendix A to the Plan, entitled "Arbitration of Certain Injury-Related Disputes," begins with an "Arbitration Policy Overview" explaining that "[t]he Employer hereby adopts a mandatory company policy requiring that certain claims or disputes must be submitted to final and binding arbitration under this arbitration requirement ("Policy"). This binding arbitration will be the sole and exclusive remedy for resolving any such claim or dispute."

Appellees responded to Wal-Mart's motion to compel arbitration. They argued that "Wal-Mart has no evidence John Morgan actually agreed to arbitrate these claims." They argued that "Wal-Mart is unable to present the alleged arbitration agreement showing John Morgan's signature or clearly identifying authentication of the agreement," and in any event, the alleged agreement was unconscionable because it "would have been obtained in a misleading fashion by being attached as an addendum to a Benefits Plan that expressly excludes coverage for the claims asserted in this case." And they contended that their tort claims were outside the scope of the alleged arbitration agreement.

Wal-Mart filed a reply to appellees' response, and each party filed an additional reply. After a hearing, the trial court signed an order denying Wal-Mart's motion. The trial court also

made three findings in its order: (1) "the purported arbitration agreement at issue is procedurally unconscionable"; (2) "the purported arbitration agreement at issue does not cover the claims asserted in this case"; and (3) "there is no conclusive evidence that an agreement to arbitrate exists in this case." The trial court signed an additional order denying Wal-Mart's objection to Shanna Constantine's "amended verification declaration." This appeal followed.

ISSUES

In seven issues, Wal-Mart contends the trial court abused its discretion by denying its motion to compel arbitration and by (1) finding that an agreement to arbitrate did not exist and that Morgan did not sign or have notice of an agreement to arbitrate; (2) finding that appellees' claims did not fit within the arbitration agreement's scope; (3) finding that no consideration supported the arbitration agreement; (4) finding that the arbitration agreement was procedurally unconscionable; (5) finding that appellees are not bound by the arbitration agreement; (6) opining that the "Dead Man's" evidentiary rule applied; and (7) failing to sustain Wal-Mart's objections to Constantine's amended verification declaration.

APPLICABLE LAW

Wal-Mart contends that this controversy is governed by the Federal Arbitration Act ("FAA"). Although appellees acknowledge that "the FAA is selected as the applicable law in the purported agreement," they argue that Wal-Mart has "failed to prove the existence of an agreement to arbitrate in this case," and consequently, Wal-Mart "has also failed to prove the FAA governs any such agreement."

The FAA does not require parties to arbitrate when they have not agreed to do so. *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 (Tex. 2007) (orig. proceeding). A party seeking to compel arbitration has the initial burden to establish the arbitration agreement's existence. *In re Sthran*, 327 S.W.3d 839, 843 (Tex. App.—Dallas 2010, orig. proceeding). This determination is

made under ordinary state law principles that govern the formation of contracts. *Id.* at 227–28. *See In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 676 (Tex. 2006) (orig. proceeding) ("In determining validity of agreements to arbitrate which are subject to the FAA, we generally apply state-law principles governing the formation of contracts."). In addition, the supreme court has applied state substantive law to the question whether nonsignatories are bound by an arbitration agreement. *See In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). A strong presumption in favor of arbitration arises, but not until the party seeking to compel arbitration proves that a valid arbitration agreement exists. *Pilot Travel Ctrs., LLC v. McCray*, 416 S.W.3d 168, 177 (Tex. App.—Dallas 2013, no pet.).

STANDARD OF REVIEW

The civil practice and remedies code permits interlocutory appeal of an order denying arbitration. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.016 (West 2015) (appeal arising under FAA). We apply an abuse of discretion standard of review to the trial court's order. *Big Bass Towing Co. v. Akin*, 409 S.W.3d 835, 838 (Tex. App.—Dallas 2013, no pet.). Under this standard, we defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations de novo. *Id.* Whether an arbitration agreement is enforceable is a legal question subject to de novo review. *Labatt Food Serv.*, 279 S.W.3d at 643.

DISCUSSION

1. Non-signatories (Issue 5)

We begin by considering Wal-Mart's fifth issue regarding whether appellees, as non-signatories, are bound by a valid agreement to arbitrate between Morgan and Wal-Mart. If appellees would not be bound by Morgan's agreement to arbitrate in any event, then we need not reach any other issue. In their operative petition, appellees pleaded that Wal-Mart's wrongful conduct caused Morgan's death, and sought damages including loss of Morgan's "love, service,

society, comfort, affection, moral support, companionship, and support." *See Ordonez v. Abraham*, No. 08-14-00157-CV, 2017 WL 105133, at *5 (Tex. App.—El Paso Jan. 11, 2017, no pet.) (wrongful death cause of action compensates spouse, children, and parents for loss sustained from death of decedent); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001–.0112 (West 2008 & Supp. 2017) (liability for wrongful death). The supreme court has decided that "wrongful death beneficiaries, as derivative claimants, are bound by the decedent's agreement to arbitrate." *In re Golden Peanut Co., LLC*, 298 S.W.3d 629, 630 (Tex. 2009) (orig. proceeding) (citing *Labatt Food Serv.*, 279 S.W.3d 640); *see also Pilot Travel Centers*, 416 S.W.3d at 179 (where decedent would have been compelled to arbitrate claims for his own injuries prior to his death, his wrongful death beneficiaries were also bound to arbitrate).

Although appellees do not address *Golden Peanut* or *Labatt Food Service* in her brief, they do argue that because Wal-Mart "failed to prove the existence of an arbitration agreement to which the Decedent would be bound were he alive," Wal-Mart "likewise failed to prove the existence of an arbitration agreement to which the Decedent's wrongful death beneficiaries would be bound." Consequently, if Wal-Mart met its burden to establish an agreement to arbitrate with Morgan, then appellees are bound by Morgan's agreement. *See Golden Peanut*, 298 S.W.3d at 630; *Labatt Food Serv.*, 279 S.W.3d at 643–47. We sustain Wal-Mart's fifth issue, and turn to the question whether Wal-Mart and Morgan agreed to arbitrate.

2. Agreement to arbitrate (Issues 1, 3, 6, and 7)

In its first issue, Wal-Mart contends that because there was a valid agreement to arbitrate, the trial court erred by denying the motion to compel arbitration. And, in its third issue, Wal-Mart argues there was consideration to support an agreement to arbitrate.

As we have explained, we apply state contract law principles governing the formation of contracts to determine if an agreement to arbitrate exists. The elements necessary for formation of

a valid contract are (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Thornton v. AT& T Advert., L.P.*, 390 S.W.3d 702, 705 (Tex. App.—Dallas 2012, no pet.). For a contract to be enforceable, it must be supported by consideration. *In re OSG Ship Mgmt., Inc.*, 514 S.W.3d 331, 338 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (orig. proceeding). Generally, parties must sign arbitration agreements before being bound by them. *In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011) (orig. proceeding).

"An employer may enforce an arbitration agreement entered into during an at-will employment relationship if the employee received notice of the employer's arbitration policy and accepted it." *In re Dallas Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161, 162 (Tex. 2006) (per curiam) (orig. proceeding). "An at-will employee who receives notice of an employer's arbitration policy and continues working with knowledge of the policy accepts the terms as a matter of law." *Id.* at 163.

Appellees contend, however, that Wal-Mart's evidence relating to the Plan CBL module and to Morgan's completion of the module is insufficient to establish that Morgan agreed to arbitrate his disputes with Wal-Mart. They argue that "[a]lthough Wal-Mart has produced a form arbitration agreement, it has failed to prove that such was ever agreed to by John Morgan, or his spouse and children." They contend that Morgan's signature does not appear on any document "agreeing to or acknowledging the purported arbitration agreement." Further, they argue that there is no electronic signature or acknowledgement witnessed by a notary, no computer/webcam photo of Morgan reviewing or acknowledging the Plan materials, no signature acknowledging receipt or notice of the arbitration agreement, and "no identifying authentication by John Morgan of any kind in relation to the arbitration agreement." They conclude, "[t]here simply is no evidence John

Morgan actually agreed to arbitrate any claim in this case, or that he even had notice of the alleged agreement."

As we have noted above, however, and according to Griffin's affidavit testimony, all Wal-Mart employees must complete CBL modules, including the Plan CBL module. Griffin also testified that to complete the Plan CBL module, the employee must first log in by entering his or her confidential associate identification number and password. The employee must click a button accessing Wal-Mart's arbitration policy, accompanied by instructions "to read the policy carefully," in order to continue through the CBL module. In addition, the employee must click a button stating "I Understand" beneath the "Arbitration Acknowledgement," which informs the employee that "claims and disputes relating to the cause of an on-the-job injury . . . must be submitted to an arbitrator, rather than a judge and jury in court." Finally, the Plan CBL module contains an "acknowledgement of completion" informing the employee that by clicking on the button below, he is completing the course and acknowledging that he has read and understood the arbitration acknowledgement and policy.

This Court has relied on similar evidence to conclude that a party seeking to enforce an agreement to arbitrate met its burden. In *Momentis U.S. Corp. v. Weisfeld*, the plaintiffs completed online applications to become independent representatives, or "IRs," for Momentis. No. 05-13-01250-CV, 2014 WL 3700697, at *1 (Tex. App.—Dallas Jul. 22, 2014, no pet.). Momentis offered evidence, through the affidavit of its director of research and compliance, that every person who wished to become an IR was required to complete a ten-step online application process. *Id.* at *3. Step nine of the process was to select the "I agree" option, which followed a statement that the applicant had read and agreed to the "Momentis Terms of Agreement, Policies & Procedures and Compensation Plan." *Id.* Links were provided to PDF versions of these documents, which included an arbitration provision. *Id.* The "I agree" option in step nine also included a statement that "[b]y

submitting this form you are electronically signing a legal agreement between you and Momentis." *Id.* If the applicant did not agree, he could neither continue with the application process nor submit the application. *Id.* We concluded that Momentis established that the plaintiffs each agreed to the terms and conditions set forth in the IR agreement, including the arbitration provision. *Id.* at *4. We reached the same conclusion in *Momentis U.S. Corp. v. Perissos Holdings, Inc.*, No. 05-13-01085-CV, 2014 WL 3756671, at *3 (Tex. App.—Dallas Jul. 30, 2014, pet. denied).

Additionally, in *Weisfeld*, as here, the plaintiffs relied on section 322.005(b) of the business and commerce code to argue that completing the electronic application process did not require them to arbitrate because they had not agreed to conduct transactions electronically. *See Weisfeld*, 2014 WL 3700697, at *5; TEX. BUS. & COM. CODE ANN. §§322.001–322.021 (West 2015) (Uniform Electronic Transactions Act); *Id.* § 322.005(b) (parties may agree to conduct transactions by electronic means). Subsection (b) of section 322.005 provides that "[t]his chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means." But subsection (b) also provides that the parties' agreement is determined from the context and surrounding circumstances, including the parties' conduct. TEX. BUS. & COM. CODE ANN. § 322.005(b). In *Weisfeld*, we concluded that where the plaintiffs accessed online applications, and after agreeing to the terms, completed and submitted the applications by clicking a "Sign & Submit" button, there was sufficient evidence of the plaintiffs' agreement to conduct the transaction by electronic means. *Weisfeld*, 2014 WL 3700697, at *5.

Similarly here, Morgan as a Wal-Mart employee was required to complete the Plan CBL module and other CBL modules online. To complete the Plan CBL module, Morgan was required to log in by entering his confidential associate identification number and password. He accessed the module, clicking through it where required, and acknowledged his completion by clicking an acknowledgement button. As in *Weisfeld*, we conclude the requirements of section 322.005(b)

were met by Wal-Mart's evidence of "the context and surrounding circumstances, including the parties' conduct." *See Weisfeld*, 2014 WL 3700697, at *5.

Appellees rely on *Kmart Stores of Texas, L.L.C. v. Ramirez*, 510 S.W.3d 559, 568–71 (Tex. App.—El Paso 2016, pet. denied), to support their argument that Wal-Mart's electronic records are insufficient to establish Morgan's agreement to arbitrate. In that case, Ramirez sued her former employer Kmart for disability discrimination. *Id.* at 563. Kmart moved to compel arbitration, offering the affidavit testimony of its compliance programs manager Roberta Kaselitz. Kaselitz described the steps an employee was required to take to access and acknowledge Kmart's arbitration policy. *Id.* at 562–63. She testified that Ramirez's login information was used on April 23, 2012, to access and view an arbitration agreement with Kmart. *Id.* at 563, 568. Ramirez, however, stated in an affidavit that she had never electronically acknowledged or agreed to any arbitration agreement. *Id.* at 563. The trial court then held an evidentiary hearing. *Id.* Ramirez testified unequivocally that she did not log in through Kmart's online portal to view an arbitration agreement, did not click on a screen acknowledging receipt of the policy, and had never been presented with an arbitration agreement at any time during her employment. *Id.* at 564. Although on cross-examination she admitted viewing other policies electronically, and she denied ever giving her user ID or password to anyone else, Ramirez consistently testified that she had never seen Kmart's arbitration policy and was not aware that any other Kmart employees were subject to arbitration agreements. *Id.* Although the court concluded that Kaselitz's affidavit was sufficient to meet Kmart's prima facie burden, the court also concluded that "Ramirez's denial was sufficient to raise a fact issue" whether she had notice of the arbitration provision. *Id.* at 569–70.

Wal-Mart responds that in this case, there is no such denial from Morgan himself. But appellees counter that Morgan's death prevented his denial, especially because Wal-Mart's records showing Morgan's completion of the CBL modules were not generated until after Morgan died.

Appellees also argue that the "Dead Man's Rule" prohibits the admission of Wal-Mart's evidence purporting to show Morgan's agreement to the arbitration policy. *See* TEX. R. EVID. 601(b) ("Dead Man's Rule"). But Wal-Mart contends in its sixth issue that the Dead Man's Rule does not apply, because (1) the rule does not apply to wrongful death claims; and (2) the rule does not apply to written statements by the decedent.

Appellees acknowledge that rule 601(b) bars admission of an "oral statement" by a decedent, but contend that "the alleged clicking of the acknowledgement button" in the Plan CBL module is "equivalent to an oral statement about which Wal-Mart is prohibited from testifying as an interested party." They argue that the Dead Man's Rule exists "to prevent an unscrupulous party from relying on a purported assertion that cannot be contradicted because the party allegedly making the assertion is deceased." And they contend that a "self-created, self-serving entry in human resources records as the sole evidence of an agreement" is insufficient "where one of the alleged parties to the agreement is deceased and cannot rebut the purported evidence of agreement." We disagree.

The Dead Man's Rule is strictly construed. *Coleman v. Coleman*, 170 S.W.3d 231, 238 (Tex. App.—Dallas 2005, pet. denied). By its express terms, it applies only to an "oral statement by the decedent." TEX. R. EVID. 601(b)(2).[3] The "statement" at issue here was made electronically, by clicking on an "I Understand" button under an "arbitration acknowledgement." An electronic record satisfies the legal requirement of a writing. TEX. BUS. & COM. CODE ANN. § 322.007(a) (record may not be denied legal effect or enforceability solely because it is in electronic form);

[3] Appellees argue that the Dead Man's Rule has been applied to bar admission of "non-oral assertions," such as evidence of a party's silence, citing *Fraga v. Drake*, 276 S.W.3d 55, 60 (Tex. App.—El Paso 2008, no pet.). In *Fraga*, the trial court sustained an objection under the Dead Man's Rule to a statement in the plaintiff's affidavit that the deceased defendant had failed to disclose structural problems in a home plaintiff purchased from him. *Id.* But this alleged failure to disclose was grouped with a series of other alleged affirmative misrepresentations, and neither the trial court nor the court of appeals addressed the question whether a failure to disclose is a "statement" for purposes of the Dead Man's Rule. *See id.* And neither court addressed the question whether the Dead Man's Rule applies to a statement made electronically under Chapter 322 of the business and commerce code. *Fraga* does not support appellees' argument that the Dead Man's Rule precludes admission of Morgan's electronic acknowledgement of Wal-Mart's arbitration policy.

§ 322.007(c) (if law requires record to be in writing, electronic record satisfies the law). And in any event, nothing in the record indicates that the trial court's denial of Wal-Mart's motion to compel arbitration was made on the basis of appellees' objection under the Dead Man's Rule. We conclude that the Dead Man's Rule does not preclude admission of Wal-Mart's evidence supporting its motion to compel arbitration.

As appellees have argued, they cannot raise a fact issue as Ramirez did, with direct testimony denying Morgan's notice of or agreement to the arbitration provision. *See Ramirez*, 510 S.W.3d at 569–70. They also contend, however, that Wal-Mart's motion was properly denied because Griffin's and Osmond's affidavit testimony was not "susceptible of being readily controverted" and was therefore not competent summary judgment evidence, citing rule 166a(c) and *Milteer v. University of Texas at Dallas*, No. 05-13-01076-CV, 2014 WL 5581315, at *3 (Tex. App.—Dallas Nov. 4, 2014, no pet.). But in *Milteer*, there was evidence contradicting Milteer's conclusory affidavit testimony, and no underlying facts to support his conclusions. *See id.* Here, both Griffin and Osmond offered detailed testimony and documentary evidence to support their conclusion that Morgan agreed to Wal-Mart's arbitration policy. Their affidavits were competent summary judgment evidence to support Wal-Mart's motion. *See* TEX. R. CIV. P. 166a(c).[4]

In its seventh issue, Wal-Mart challenges the trial court's order overruling its objections to Shanna Constantine's affidavit. Appellees filed an "Amended Declaration Verifying Response to Motion to Compel," in which Constantine stated, "I have reason to believe and do believe that the arbitration agreement at issue in this case was not executed by John Morgan or by his authority. No signature or similar acknowledgment of agreement appears anywhere of which I am aware in

[4] We also note the supreme court's instruction that "'[c]ould have been readily controverted' does not mean that the summary judgment evidence could have been easily and conveniently rebutted, but rather indicates that the testimony could have been effectively countered by opposing evidence." *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997). The court explained that where the opposing party made no attempt to controvert the summary judgment affidavit through deposition testimony, interrogatories, or other discovery, the affidavit was competent summary judgment evidence even though it was self-serving. *See id.*

relation to an arbitration agreement." Wal-Mart objected to the admission of this declaration on numerous grounds. Although the declaration includes the statement required for denial of the execution of a document by a deceased person under rule 93(7), Texas Rules of Civil Procedure,[5] and Wal-Mart's objection to its form as lacking notarization is not well-taken,[6] the affidavit does not reveal any basis for Constantine's personal knowledge of the facts she recites. Consequently, Wal-Mart's objections that the affidavit was inadmissible because it contained factual and legal conclusions, did not constitute relevant evidence, and was speculative should have been sustained. *See Vince Poscente Int'l, Inc. v. Compass Bank*, No. 05-11-01645-CV, 2013 WL 1320511, at *4–5 (Tex. App.—Dallas Mar. 28, 2013, no pet.) (mem. op.) (affidavit that did not affirmatively show basis for affiant's personal knowledge was legally insufficient); *see also Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 884 (Tex. App.—Dallas 2007, no pet.) (affidavit that is conclusory is substantively defective; conclusory affidavits do not raise fact issues).

We conclude that Wal-Mart established a valid and enforceable agreement to arbitrate between it and Morgan. We sustain Wal-Mart's first, third, sixth, and seventh issues.

3. Scope of agreement (Issue 2)

In order to compel arbitration, Wal-Mart must also show that the claims raised fall within the scope of the agreement. *In re Dallas Peterbilt, Ltd., L.L.P.*, 196 S.W.3d 161, 163 (Tex. 2006) (per curiam) (orig. proceeding). As we have noted, the trial court expressly found that appellees' claims were not covered by Wal-Mart's arbitration policy. This is a question of arbitrability; that

[5] Rule 93(7) requires that a pleading denying execution of an instrument in writing must be verified. TEX. R. CIV. P. 93(7) ("Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority.")

[6] Constantine's declaration meets the requirements of TEX. CIV. PRAC. & REM. CODE ANN. § 132.001 (West Supp. 2017), which provides that "an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by . . . a rule," if the declaration is in writing, subscribed by the person making the declaration as true under penalty of perjury, and includes a jurat with the person's name, date of birth, address, and declaration "under penalty of perjury that the foregoing is true and correct."

is, whether the parties agreed to arbitrate the merits of their dispute. *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 229 (Tex. App.—Dallas 2010, pet. denied). Wal-Mart also argues that the question of arbitrability should be decided by an arbitrator, not the trial court. Questions of arbitrability, however, are for the court unless the parties "'clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)); *see also Saxa Inc.*, 312 S.W.3d at 229 (although question of substantive arbitrability is generally gateway issue to be decided by court, parties may agree to submit that question to arbitration).

The "Arbitration Policy Overview" on the first page of Appendix A to the Plan provides that "certain claims or disputes must be submitted to final and binding arbitration under this arbitration requirement ("Policy")." Subsection (a)(1) provides that a "covered claim" includes "any legal or equitable claim or dispute relating to enforcement or interpretation of the arbitration provisions in . . . this Policy." Subsection (a)(3) lists "[t]he determination of whether a claim is covered by this Policy" as a "covered claim." Subsection (c), "Covered Parties," provides that the Policy applies "to any claims that may be brought by an associate's spouse, children, parents, beneficiaries, Representatives, executors, administrators, guardians, heirs or assigns (including, but not limited to, any survival or wrongful-death claims)." We conclude that this language "clearly and unmistakably provide[s]" that the arbitrator will decide questions of arbitrability. *Howsam*, 537 U.S. at 83.

Appellees also argue that because Wal-Mart asked the trial court to determine the scope of the arbitration agreement, it cannot now argue that the question of arbitrability should be determined by the arbitrators. *See Affiliated Pathologists, P.A. v. McKee*, 261 S.W.3d 874, 878 (Tex. App.—Dallas 2008, no pet.) (under "invited error" doctrine, party who requested that trial court vacate arbitration award could not argue on appeal that trial court should have confirmed

award). Wal-Mart did argue in the trial court that "[t]o determine whether the claim is within the scope of the Arbitration Agreement, **the court** examines the terms of the Arbitration Agreement and the factual allegations of the plaintiff's claim," and also argued that appellees' claims fell within the scope of the agreement. (Emphasis added.) But the same section of Wal-Mart's trial court briefing concludes with the statement, "[t]herefore, the Arbitrator, not this Trial Court, should determine if Plaintiffs' claims fall within the scope of the Arbitration Agreement." We conclude that Wal-Mart is not precluded from arguing on appeal that the scope of the arbitration agreement should be determined by the arbitrator, not the court. We sustain Wal-Mart's second issue. In doing so, we express no opinion on the scope of the agreement.

4. Procedural unconscionability (Issue 4)

Wal-Mart's fourth issue challenges the trial court's finding that the arbitration agreement is procedurally unconscionable. "Texas law renders unconscionable contracts unenforceable." *In re Olshan Foundation Repair Co., LLC*, 328 S.W.3d 883, 892 (Tex. 2010) (orig. proceeding). "Courts may consider both procedural and substantive unconscionability of an arbitration clause in evaluating the validity of an arbitration provision." *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002) (orig. proceeding). Procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration provision. *Id.* at 571. Substantive unconscionability refers to the unfairness of the arbitration provision itself. *Id.*

"[T]he basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (orig. proceeding). "The principle is one of preventing oppression and unfair surprise and not of disturbing allocation of

risks because of superior bargaining power." *Id.* The burden of proving the defense of unconscionability is on the party opposing arbitration. *Id.* at 756.

In their response to Wal-Mart's motion to compel arbitration, appellees argued that the agreement was misleading. They contended that Wal-Mart presented the arbitration agreement as part of a health benefits plan, but actually required employees to waive their constitutional right to a jury trial on all claims related to employment. And they argued that the terms of the arbitration agreement conflicted with the terms of the health benefits plan. Further, appellees argued that the disparity in bargaining power between Wal-Mart and Morgan and the "atmosphere in which the agreement is alleged to have been made" contributed to the agreement's procedural unconscionability. Appellees concluded that "[b]ecause the circumstances of the alleged formation of the arbitration agreement were misleading, applying the arbitration provisions to claims not covered by the Plan would be unconscionable."[7]

The Supreme Court of Texas, however, has held that gross disparity in bargaining power between employer and employee, without more, does not establish procedural unconscionability. *In re Halliburton Co.*, 80 S.W.3d at 572; *see also Pilot Travel Centers*, 416 S.W.3d at 180 (arbitration agreement requiring employee's acceptance in order to be employed was not procedurally unconscionable; employer "may make precisely such a 'take it or leave it' offer to its at will employees"). Consequently, neither the one-sided character of the agreement nor Wal-Mart's greater bargaining power establishes procedural unconscionability. *See Pilot Travel Centers*, 416 S.W.3d at 180.

Additionally, courts have concluded that procedural unconscionability may result from situations "in which one of the parties was incapable of understanding the agreement without assistance, and the other party did not provide that assistance, such as where one of the parties was

[7] Appellees do not cite authority to support this argument.

functionally illiterate or where one of the parties did not speak English." *BBVA Compass Investment Solutions, Inc. v. Brooks*, 456 S.W.3d 711, 724 (Tex. App.—Fort Worth 2015, no pet.) (collecting cases). But the supreme court rejected the argument that an arbitration agreement was procedurally unconscionable where plaintiffs submitted affidavit testimony that they did not voluntarily waive their right to a jury trial "and they are unsophisticated persons who, if the concept of arbitration had been explained to them, would not have signed the arbitration agreements." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d at 679; *see also Micocina, Ltd. v. Balderas-Villanueva*, No. 05-16-01507-CV, 2017 WL 4857017, at *5–8 (Tex. App.—Dallas Oct. 27, 2017, no pet.) (agreement to arbitrate was not procedurally unconscionable, absent evidence of fraudulent misrepresentation or trickery, where employee who was illiterate in English signed an acknowledgment written in English without requesting assistance in reading it).

In *Micocina*, we explained that "[t]he supreme court has upheld arbitration agreements even where there was conflicting evidence about whether the objecting party read the provision or knew it was there." *Micocina*, 2017 WL 4857017, at *7 (collecting cases); *see also In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005) (orig. proceeding) (per curiam) (party's contention that he did not understand the significance of his signature on a contract containing an arbitration provision "does not negate his acceptance of the contract's terms"). And we noted that "[b]ecause parties generally are bound by the terms of contracts they sign even if they did not read or were unaware of those terms, parties are likewise bound by arbitration terms in contracts they sign." *Micocina*, 2017 WL 4857017, at *8. We concluded that the plaintiff failed to prove procedural unconscionability in light of his obligation to read the document before signing it and the lack of evidence of a fraudulent misrepresentation or trickery. *Id.* Under these cases, appellees' arguments of disparity in bargaining power and "misleading circumstances" in the formation of the agreement are insufficient to establish procedural unconscionability. We conclude that the trial court erred by

ruling that the arbitration agreement was procedurally unconscionable, and sustain Wal-Mart's fourth issue.

CONCLUSION

We reverse the trial court's order denying Wal-Mart's motion to compel arbitration, and remand to the trial court with instructions to grant the motion.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WAL-MART STORES, INC., Appellant	On Appeal from the County Court At Law No. 1, Kaufman County, Texas
No. 05-17-00694-CV V.	Trial Court Cause No. 96652-CC.
SHANNA CONSTANTINE & JONATHAN MORGAN, Appellees	Opinion delivered by Justice Lang-Miers; Justices Fillmore and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court with instructions to grant the motion of Wal-Mart Stores, Inc. to compel arbitration.

It is **ORDERED** that appellant Wal-Mart Stores, Inc. recover its costs of this appeal from appellees Shanna Constantine and Jonathan Morgan.

Judgment entered this 30th day of April, 2018.