**Opinion issued October 12, 2021**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-20-00850-CV**

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**H-E-B, LP D/B/A JOE V'S SMART SHOP, Appellant**

**V.**

**MARIA SAENZ, Appellee**

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**On Appeal from the 269th District Court**
**Harris County, Texas**
**Trial Court Case No. 2019-63447**

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## MEMORANDUM OPINION

This is an interlocutory appeal from an order denying a motion to compel arbitration. TEX. CIV. PRAC. & REM. CODE § 51.016. Appellee Maria Saenz sued H.E.B., LP d/b/a Joe V's Smart Shop ("HEB"), a nonsubscriber to Texas's statutory workers' compensation system, claiming that HEB's negligence and the condition

of the premises caused her workplace injury. HEB moved to compel arbitration based on a clause in its benefits agreement. Saenz argued procedural unconscionability as a defense to the motion to compel arbitration. The trial court denied the motion to compel arbitration, and HEB appealed. We reverse.

## Background

While working as a baker for HEB, Saenz was struck by a forklift inside the store. Her injuries required back surgery. After Saenz filed suit, HEB moved to compel arbitration under the Work Injury Benefit Plan, which provided, among other things:

> Partners agree that any and all disputes, claims (whether tort, contract, statutory or otherwise) and/or controversies which relate, in any manner to this agreement, the Plan or the Trust, or to any on-the-job or occupational injury, death or disease of Partner shall be submitted to final and binding arbitration under the Federal Arbitration Act in accordance with the terms and conditions outlined below. The claims covered by this agreement to arbitrate include, but are not limited to, those claims which relate to the following: . . . claims for damages or monetary [sic] . . . ."

HEB relied on Saenz's electronic signature on the "Partner Acknowledgment, Indemnity Agreement and Accidental Death Beneficiary Designation Form," which provided:

> I have received, read, and understood the H-E-B Work Injury Benefit Summary Plan Description. I have had the opportunity to ask questions regarding this Plan. I understand my employment with H-E-B constitutes an acceptance of the terms of the Plan. My signature below confirms:
> . . . .

- **I understand my acceptance of employment with H-E-B constitutes an acceptance of the benefits under the Plan and my agreement to arbitrate disputes.**

In response to the motion to compel arbitration, Saenz asserted procedural unconscionability and provided an affidavit in which she averred that she does not read or write English and that she ordinarily relies on her children to translate for her. She argued that she was pressured to electronically sign the documents in English and did not have time to review the documents or have them translated. She said that she completed the documents at an HEB store, and when she asked questions, HEB supervisors and department managers told her to keep answering questions, that she was "doing it right," and not to worry because she was "answering correctly." Saenz averred that she did not understand the English-language documents, and nobody informed her that she was waiving her right to sue HEB if a conflict arose.

The trial court held an evidentiary hearing on the motion to compel arbitration. The court heard testimony from Saenz and from Gladys Makiya Suma-Kieta, who was a "team administrator assistant" at the grocery store where Saenz was employed.

Suma-Kieta explained the recruitment and hiring process. She said that all applications are initially received online because HEB does not have an in-person application process. The application is available online in both English and Spanish, and Spanish-speaking applicants are interviewed in Spanish. Suma-Kieta called

successful candidates to inform them that they would receive New Hire Paperwork that would be sent to the email address provided by the applicant in the application. Suma-Kieta instructed the successful candidates to verify their email addresses and to ask for clarification or not sign the documents if they did not understand them. Suma-Kieta testified that successful applicants are given a unique identification number and password, both of which must be entered into the electronic New Hire Paperwork forms provided through the email sent to the email address provided by the applicant. Suma-Kieta said that New Hire Paperwork could be accessed only through the email sent to the successful applicants. According to Suma-Kieta, this was the exclusive way to complete the New Hire Paperwork.

After the forms are electronically signed, HEB receives a notification that the documents have been completed, and it schedules new employees to attend a pre-employment orientation meeting at which they can ask questions about the documents they previously signed. New employees may choose to attend an orientation meeting conducted by Suma-Kieta in English or an orientation meeting conducted by store manager Tony Palomin in Spanish. Suma-Kieta attended the orientation meeting conducted in Spanish to provide support to Palomin as needed. A copy of the Work Injury Benefit Plan summary is provided to new employees at the orientation meeting.

Suma-Kieta testified an email was sent to the email address provided on Saenz's application, which belonged to Saenz's son.[1] The email included a link to complete the required forms in English or in Spanish and a summary of the Work Injury Benefit Plan to review before signing the acknowledgement. HEB introduced copies of the electronic New Hire Paperwork electronically signed by Saenz on August 21, 2015.

Suma-Kieta attended the orientation meeting that Saenz attended, which was led by Palomin in Spanish. Saenz did not ask any questions. Suma-Kieta also testified that Saenz was given a summary plan description of the HEB Work Injury Benefit Plan in English and in Spanish when she came to work for HEB.

Saenz testified in Spanish with an interpreter. She said that Spanish is her primary language and that she does not speak, write, or understand English. Saenz testified that her son completed the online application for her and with her consent, and an HEB employee helped her with the new hire paperwork. Saenz testified that she had no access to her son's email account.

Saenz testified that she never saw the email with the link to complete the new hire documentation in Spanish. She testified that she went to the HEB store, where she asked a supervisor, "Mr. Abel," for help completing the New Hire Paperwork,

[1] The email address was Saenz's son's name @ the email service provider.

and he directed another employee, "Mr. Jorge," to help her.[2] Saenz testified that she consented to Jorge's help with the computer. She said that Jorge completed the new hire paperwork for her, in English, asking her for personal information needed to complete the documentation. She said that Jorge did all the typing; she did not press a single key.

The trial court judge asked Saenz several questions, with consent of counsel.

Court: Did Joe V's [HEB] or any of their employees give you the opportunity to have a Spanish application?

Saenz: No, sir.

Court: Did you ever ask Joe V's [HEB] for a Spanish application?

Saenz: No. No.

Court: Did you ever complain to any of the folks conducting the application process that you did not understand the English application?

Saenz: Yes. I was making the comments to Mr. Abel Valdez that a lot of things I was not understanding; and he would just tell me, "Don't worry, Maria. You're already here."

Court: Did any of the Joe V's employees tell you anything else regarding the application?

Saenz: No.

[2] Saenz testified that she was at the store location where she later worked, but Suma-Kieta testified that the location where Saenz later worked was under construction at the time.

> Court: Did any of either . . . Mr. Palomin [the store manager]—or Jorge or Abel or anybody else try to explain any of the documents to you?
>
> Saenz: No, never. After they helped me out, filling out the applications, nobody made any other comment; and that's when I made the comment to Mr. Abel that I didn't understand a lot of the papers.

The trial court stated on the record that it "found Ms. Saenz to be very credible." The court denied the motion to compel arbitration, and HEB appealed.

## Analysis

On appeal, HEB argues in two issues that (1) it established that Saenz agreed to arbitrate disputes against HEB arising from on-the-job injuries and that her claims fall within the scope of that agreement, and (2) Saenz failed to establish that her agreement to arbitrate is unenforceable due to procedural unconscionability. Saenz argues that the circumstances under which she completed the electronic New Hire Paperwork forms when she was hired by HEB were unconscionable because she is illiterate in English, an HEB employee assisted her in completing the New Hire Paperwork in English but did not explain anything about arbitration to her, and she was not given an opportunity to review the relevant documents in Spanish.

### I. Standard of review

We have jurisdiction to review an interlocutory order denying a motion to compel arbitration. *See* TEX. CIV. PRAC. & REM. CODE § 51.016 (FAA). We review a trial court's order denying a motion to compel arbitration for abuse of discretion,

deferring to factual findings that are supported by evidence and determining legal questions de novo. *Parker v. Schlumberger Tech. Corp.*, 475 S.W.3d 914, 922 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Under the abuse of discretion standard, we will reverse the trial court's ruling only when "it acts in an arbitrary or unreasonable manner, without reference to any guiding rules or principles." *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (per curiam).

## II. Arbitration

A party seeking to compel arbitration must establish (1) the existence of a valid arbitration agreement and (2) that the claims asserted are within the scope of that agreement. *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014); *Parker*, 475 S.W.3d at 922. "Upon such proof, the burden shifts to the party opposing arbitration to raise an affirmative defense to the agreement's enforcement." *Venture Cotton Coop.*, 435 S.W.3d at 227. We apply ordinary contract principles to determine the existence of a valid agreement to arbitrate and any defenses. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 738 (Tex. 2005).

Ordinarily, we presume that an unambiguous contract reflects the intent of the contracting parties, and we enforce them as written. *Venture Cotton Coop.*, 435 S.W.3d at 228; *see Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 501 (Tex. 2015) (party to written agreement is presumed to have knowledge of and understand its contents); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex.

1996) (same); *see also In re U.S. Home Corp.*, 236 S.W.3d 761, 764 (Tex. 2007) ("Like any other contract clause, a party cannot avoid an arbitration clause by simply failing to read it."). An arbitration agreement need not be signed so long as it is in writing and agreed to by the parties. *See In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005) (enforcing arbitration provision referenced and agreed to in numerous enrollment forms).

## II. Unconscionability

A contract or arbitration provision may be avoided, however, if the party opposing enforcement proves a defense, such as unconscionability. *See In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006). When a party asserts unconscionability as a defense to a motion to compel arbitration, the party must demonstrate that the unconscionability relates to the arbitration provision, not the contract as a whole. *Royston, Rayzor, Vickery, & Williams, LLP*, 467 S.W.3d at 501 ("[C]hallenges relating to an entire contract will not invalidate an arbitration provision in the contract; rather challenges to an arbitration provision in a contract must be directed specifically to that provision."); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) (same).

"Unconscionability principles are applied to prevent unfair surprise or oppression." *Palm Harbor Homes*, 195 S.W.3d at 679. "Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas

procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." *Id.* at 677.

"The principle [of procedural unconscionability] is one of preventing oppression and unfair surprise and not of disturbing allocation of risks because of superior bargaining power." *FirstMerit Bank*, 52 S.W.3d at 757. "[T]he circumstances surrounding the negotiations must be shocking" to warrant a finding of procedural unconscionability. *LeBlanc v. Lange*, 365 S.W.3d 70, 88 (Tex. App.—Houston [1st Dist.] 2011, no pet.). "Absent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract he signed, regardless of whether he read it or thought it had different terms." *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005).

Gross disparity in bargaining position is not evidence of procedural unconscionability, nor is an employer's "take it or leave it" offer to at-will employees procedurally unconscionable. *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002) ("Because an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, merely to premise continued employment on acceptance of new or additional employment terms."); *see Palm Harbor Homes*, 195 S.W.3d at 678 ("[A]dhesion contracts are not *per se* unconscionable or void."). A party's testimony that he did not understand the significance of his signature on a contract is not evidence of procedural

unconscionability. *See McKinney*, 167 S.W.3d at 835. Likewise, testimony that a party is unsophisticated, or that she would not have signed the arbitration agreement if the concept of arbitration had been explained to her does not establish procedural unconscionability. *Palm Harbor Homes*, 195 S.W.3d at 679.

Illiteracy in English is also insufficient to prove procedural unconscionability when the agreement is either explained to the party or translated into a language in which the party is literate. *See Superbag Operating Co., Inc. v. Sanchez*, No. 01-12-00342-CV, 2013 WL 396247, at *6 (Tex. App.—Houston [1st Dist.] Jan. 31, 2013, no pet.) (mem. op.). *Compare Delfingen US-Tex., L.P. v. Valenzuela*, 407 S.W.3d 791, 802 (Tex. App.—El Paso 2013, no pet.) (finding procedural unconscionability where employee was illiterate in English, no Spanish language version of arbitration agreement was available, and employee was misled to believe that arbitration agreement was an attendance policy), *with ReadyOne Indus., Inc. v. Casillas*, 487 S.W.3d 254, 262 (Tex. App.—El Paso 2015, no pet.) (Spanish language version available and no evidence of misrepresentation of any terms), *and Superbag Operating Co.*, 2013 WL 396247, at *6 (company supplied Spanish version of policies to employee, employee signed Spanish version of agreements, and no evidence showed that company rebuffed employee's attempt to obtain more information).

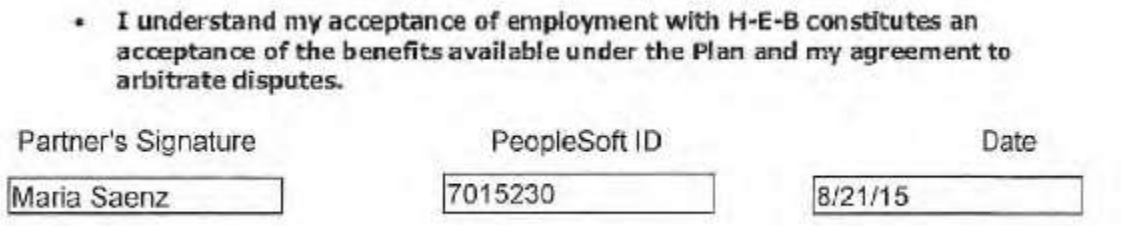
## III. A valid agreement to arbitrate exists, and Saenz's claims are within its scope.

In this case, Saenz does not argue that no valid agreement to arbitrate exists or that her claims are not within the scope of the agreement. In response to the motion to compel arbitration, she provided an affidavit in which she averred that she completed the new hire paperwork at an HEB store, but the forms were in English, and her requests for help or translation were rebuffed by HEB employees. At the hearing on the motion to compel arbitration, she testified that she completed the paperwork at an HEB store, and when she asked for help, Abel Valdez, a supervisor, asked another employee named Jorge to assist her. According to Saenz, Jorge input all the information, and she did not press a single key. She said that Jorge asked her for personal information, which she provided. She said that she told him she did not understand the forms, and she testified that he told her they concerned an attendance policy.

HEB relies on Saenz's electronic signature of August 21, 2015, on the New Hire Paperwork.[3] The file included many acknowledgements of distinct HEB policies, including an acknowledgment of HEB's Work Injury Benefit Plan. At the

[3] The New Hire Paperwork included an electronic signature agreement by which the newly hired employee agreed that typing in a unique "H-E-B Careers password" would have "the same force and effect" as a handwritten signature. The electronic signature agreement itself required the new employee to input a password, which appears as a series of asterisks in the printed copy of the New Hire Paperwork Digital File that was admitted into evidence at the hearing.

bottom of the acknowledgment of HEB's work injury benefit plan, the following statement and fill-in spaces appeared:



- I understand my acceptance of employment with H-E-B constitutes an acceptance of the benefits available under the Plan and my agreement to arbitrate disputes.

| Partner's Signature | PeopleSoft ID | Date |
|---|---|---|
| Maria Saenz | 7015230 | 8/21/15 |

The Work Injury Benefit Plan was an alternative to HEB's participation in the worker's compensation program under the Texas Worker's Compensation Act ("TWCA"). The Plan included an arbitration provision, which provides:

> Partners agree that any and all disputes, claims (whether tort, contract, statutory or otherwise) and/or controversies which relate, in any manner to this agreement, the Plan or the Trust, or to any on-the-job or occupational injury, death or disease of Partner shall be submitted to final and binding arbitration under the Federal Arbitration Act in accordance with the terms and conditions outlined below.

The arbitration provision also provided: "Adequate consideration for this arbitration requirement is represented by, among other things, your eligibility for benefits under this Plan and the fact that it is mutually binding on both the Company and you."

### A. Electronic signature

In *Aerotek, Inc. v. Boyd*, the Texas Supreme Court discussed the type of evidence needed to prove the authenticity of an electronic signature under the Texas Uniform Electronic Transactions Act. 624 S.W.3d 199, 201 (Tex. 2021). The Texas

Uniform Electronic Transactions Act provides that "[a]n electronic record or electronic signature is attributable to a person if it was the act of the person." TEX. BUS. & COM. CODE § 322.009(a). "The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." *Id.* The Act defines "security procedure" as "a procedure employed for the purpose of verifying that an electronic signature . . . is that of a specific person or for detecting changes or errors in the information in an electronic record." *Id.* § 322.002(13). Security procedures may include "the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures." *Id.* For example, security procedures may include:

> requiring personal identifying information—such as a social security number or an address—to register for an account; assigning a unique identifier to a user and then tying that identifier to the user's actions; maintaining a single, secure system for tracking user activities that prevents unauthorized access to electronic records; business rules that require users to complete all steps in a program before moving on or completing it; and timestamps showing when users completed certain actions.

*Aerotek*, 624 S.W.3d at 205–06. It is the "efficacy of the security procedure" that connects the electronic record to "the person to whom the record is attributed." *Id.* at 206. "A record that cannot be created or changed without unique, secret credentials can be attributed to the one person who holds those credentials." *Id.*

Suma-Kieta testified about the security procedures used by HEB. First, she said that the initial job application is available only online, not in paper form. She said that after interviews, she calls successful candidates to inform them that New Hire Paperwork will be sent to the email address provided by the applicant in the initial application. New employees are assigned a unique identification number and password, both of which must be entered into the New Hire Paperwork forms, which can only be accessed by a link in the email sent to the email address provided by the applicant in the initial application. She testified that this is the only way a new employee can complete the New Hire Paperwork. In addition, HEB offered printed copies of Saenz's New Hire Paperwork, which showed her unique identification number.

Here, the New Hire Paperwork could not be created without unique, secret credentials, and therefore Saenz's New Hire Paperwork, completed electronically, can be attributed to her. Therefore, the completion of the forms is considered her act, even if Jorge helped her physically input the information into the computer and without regard to whether she personally saw or read the electronic forms. *See* TEX. BUS. & COM. CODE § 322.009(a); *Aerotek*, 624 S.W.3d at 205–06. By enacting the Uniform Electronic Transactions Act, effective with safeguards, the Legislature announced the public policy of the state and provided the statutory framework for its implementation. *See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246

S.W.3d 653, 665 (Tex. 2008) ("The Legislature determines public policy through the statutes it passes."). Thus, we must conclude that Saenz electronically signed the documentation, including the acknowledgment of the Work Injury Benefit Plan, which includes the arbitration requirement. *See Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 543 (Tex. 2021) (quoting *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015)) ("A court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written.").

**B. Acceptance by performance**

In addition, Suma-Kieta testified that a Spanish language copy of the Work Injury Benefit Plan Summary Plan Description was provided to Saenz when she began work and that this document was typically provided to new employees at the in-person orientation session. Saenz subsequently began working for HEB, which under the Plan constitutes an acceptance of benefits. This is the kind of adhesory, take-it-or-leave-it offer that the Supreme Court has endorsed as effective to bind an employee to an arbitration agreement when the employer has provided notice of the benefit plan and informed the employee that continuing employment constitutes an acceptance of the agreement. *See Halliburton*, 80 S.W.3d at 572. Thus, under Texas Supreme Court precedent, we must conclude that by undertaking employment at HEB, Saenz accepted the arbitration agreement in the Work Injury Benefit Plan. *See*

*id.*; *see also Benson v. Chalk*, 536 S.W.3d 886, 902 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (court of appeals bound to follow precedent of Texas Supreme Court).

### C. On-the-job injury

Saenz's claims in this case arise from an on-the-job injury. It is not disputed that these claims fall within the scope of the arbitration provision.

* * *

We conclude that the parties had a valid agreement to arbitrate and that Saenz's claims are within the scope of that agreement.

## IV. Saenz did not prove procedural unconscionability.

In the trial court and in this court, Saenz has argued that the arbitration agreement should not be enforced because the circumstances by which she completed the New Hire Paperwork were unconscionable. She argues that she is illiterate in English, that the New Hire Paperwork was not made available to her in Spanish, and that her questions about the substance of the New Hire Paperwork were rebuffed. The trial court stated on the record that it found Saenz to be credible. However, Texas Supreme Court precedent compels us to conclude that Saenz has not established procedural unconscionability in this case.

First, a party to a written agreement is presumed to have read and understood its contents. *See Royston, Rayzor, Vickery, & Williams*, 467 S.W.3d at 501. This is

true whether she understood the consequence of her signature on the contract or not. *See McKinney*, 167 S.W.3d at 835. Second, illiteracy in English is insufficient to establish procedural unconscionability when a translation has been provided. *See Superbag*, 2013 WL 396247, at *6. Suma-Kieta testified—and the printed documents showed—that an option to complete the New Hire Paperwork in Spanish was provided in the email that was sent to Saenz's son's email address. In addition, a Spanish language version of the Work Injury Benefit Plan was provided to Saenz at the orientation meeting before she began work, and her undertaking of employment at HEB was considered acceptance of the agreement. *See Halliburton*, 80 S.W.3d at 572. Third, while there is some evidence that Saenz's questions were rebuffed by Jorge and Abel, there is also undisputed evidence that Saenz asked no questions at the Spanish-language orientation session led by store-manager Palomin. As we have explained, under Texas Supreme Court precedent, the provision of a Spanish-language version of the Work Injury Benefit Plan is an independent basis upon which we must conclude that Saenz agreed to the arbitration requirement by undertaking employment with HEB. *See id.*

HEB's procedures are not a model of transparency and disclosure, and they can lead a new employee to unwittingly waive the right to a jury trial. Nonetheless, we are not presented with shocking evidence of fraud, misrepresentation, or deceit, and we are bound by the policy determinations made by the Texas Supreme Court

and the Texas Legislature. We hold that Saenz did not demonstrate procedural unconscionability.

## Conclusion

We reverse the order of the trial court and render judgment compelling the parties to arbitrate Saenz's claims.

Peter Kelly
Justice

Panel consists of Justices Kelly, Landau, and Hightower.