

No. 05-0082

**IN THE
SUPREME COURT OF TEXAS**

IN RE THE FINISH LINE, INC.,

Relator

**Original Proceeding through the Second Court of Appeals
From the 352nd Judicial District Court of
Tarrant County, Texas**

RESPONSE FROM REAL PARTIES IN INTEREST

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STATEMENT OF THE CASE

Saling is dissatisfied with The Finish Line, Inc.’s (“Finish Line’s”) statement of the case to the extent the section captioned ‘Nature of underlying proceeding’ improperly discusses facts that are in dispute. *See* TEX. R. APP. P. 53.2(d). Specifically, Saling has disputed that her claims arise out of an employment relationship and disputes that her minor status is the sole reason that Finish Line’s arbitration agreement is not valid and is not enforceable. Saling therefore corrects the statement of the case set forth in the Petition with the following:

Nature of underlying proceeding:	Validity and enforceability of an arbitration clause by an employer against an employee in a case involving tort claims by the employee.
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STATEMENT OF JURISDICTION

Saling is dissatisfied with The Finish Line, Inc.’s (“Finish Line’s”) statement of jurisdiction to the extent it impermissibly argues that “the trial court improperly denied Finish Line’s Motion . . .,” that the trial court committed “an error,” and that this Court should “correct the trial court’s clear abuse of discretion.” TEX. R. APP. P. 53.2(e)(“The petition must state, without argument, the basis of the Court’s jurisdiction.”)(emphasis added. Saling offers the following Statement of Jurisdiction:

A trial court’s decision to grant or deny a motion to compel arbitration is subject to mandamus review. *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 88 (Tex. 1996); *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994).

ISSUES PRESENTED

Saling is dissatisfied with The Finish Line, Inc.'s ("Finish Line's") statement of Issues presented because it improperly suggests that the sole reason for the trial court's denial of its Motion to Compel Arbitration was Saling's minority status. Neither the trial court's order nor the Court of Appeal's opinion state the basis for their respective denials. (R. 81, 93). Saling therefore submits the following as the proper Issue Presented:

Whether the trial court clearly abused its discretion in denying Finish Line's Motion to Compel Arbitration.

STATEMENT OF FACTS

Saling is fundamentally satisfied with the Statement of Facts prepared by Finish Line. However, the Statement includes as fact two issues that are in dispute. Specifically, factual disputes exist as to whether Saling had an opportunity to review the Plan and whether her signature constitutes an agreement to be bound by the Plan. Saling therefore submits the following in replacement of both sentences found within Section 2, Paragraph 2 of the Petition's Statement of Facts.

Saling executed an Application for Employment that included a pre-printed statement that the Plan had been made available for her review. (R. 39)

SUMMARY OF THE ARGUMENT

The trial court did not clearly abuse its discretion in denying Finish Line's Motion to Compel Arbitration because i) the agreement to arbitrate is ambiguous and cannot form a true expression of the party's intent; ii) the agreement to arbitrate is supported only by an illusory promise and is therefore unenforceable; iii) the agreement to arbitrate is found within a contract of adhesion containing independently unconscionable provisions and is therefore unenforceable; iv) if otherwise valid and enforceable, Saling's minor status allows her to disaffirm the agreement to arbitrate; and v) her claims are outside the scope of the Plan

ARGUMENT

I. This Case Presents No Issues of Great Importance to the Jurisprudence of this State.

Finish Line attempts to narrow the issue such that its interpretation—that this case turns on the enforceability of an arbitration clause against a minor—would present a unique area of the law requiring clarification from this Court. As noted above in Saling's re-framing of the Issue Presented, the issue before the lower courts, and before this Court, is broader. Rule 56.1(a) of the Texas Rules of Appellate Procedure provides guidance on factors that this Court may evaluate in granting a Petition for Review. Saling suggests that the factors will also prove relevant in evaluating a Petition for Mandamus. *See* TEX. R. APP. P. 56.1(a); TEX. GOV'T CODE ANN. § 22.001 (Vernon 1988). As the contract

interpretation questions are fact-specific and the law is well-settled in this area, the only fertile ground for judicial review is the minor status of Lisa Saling, so she will focus on this status in her analysis under Rule 56.1(a).

- (1) The two Texas Courts of Appeals that have ruled on this issue, under very similar facts, issued decisions without dissent. *See In re The Finish Line, Inc.*, No. 2-04-359-CV, WL 2830706 (Tex. App.—Fort Worth, Dec 09, 2004, mandamus filed)(not designated for publication); *In re Mexican Restaurants, Inc.*, No. 11-04-00154-CV, WL 2850151 (Tex. App.—Eastland, Dec. 2, 2004)(not designated for publication);
- (2) The two Texas Courts of Appeals that have ruled on this issue both found arbitration agreements unenforceable against a minor;
- (3) This case does not involve the interpretation of a statute;
- (4) This case does not involve constitutional issues;
- (5) The lower courts cannot be found to have committed errors of such importance to the state’s jurisprudence that they must be corrected because neither the trial court nor the Second Court of Appeals specified the reasons for their denial of Finish Line’s motion; and
- (6) The lower courts cannot be found to have decided an important question of state law that should be, but has not been, resolved by the Supreme Court because they did not specify the reasons for their decision and did not, therefore, clearly base their decisions on a question of law in contrast to making factual determinations.

II. Finish Line’s Plan is not enforceable under the FAA.

A. Standard of Review

A party seeking to compel arbitration by mandamus must establish the existence of an arbitration agreement subject to the Federal Arbitration Act (“FAA”) and that the claims at issue fall within the scope of the arbitration agreement. *See In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 549 (Tex. 2002). By its own terms, the FAA

applies only where the parties have agreed to arbitrate. *See* 9 U.S.C. § 2. It was designed to overrule the judiciary's longstanding refusal to enforce arbitration agreements and place them upon the same footing as other contracts. *See Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). The FAA simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *See Volt*, 489 U.S. at 478. It does not require parties to arbitrate when they have not agreed to do so. *See id.* Accordingly, to determine whether the FAA requires arbitration in this case, the Court must first determine, under Texas law, whether an arbitration agreement exists and then determine whether Saling has any defenses to its enforcement. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999).

B1. Finish Line's Plan is Ambiguous and Cannot be Ruled an Expression of the Parties' Intent

Finish Line does not suggest that Saling actually saw, read, inspected or understood the Plan. Finish Line merely suggests that the Plan was 'made available for her review.' (R. 29). Finish Line further offers Saling's employment application that included a preprinted agreement to "settle any and all previously unasserted claims . . . exclusively by final and binding arbitration before a neutral arbitrator." (R. 39). The application further states, "Complete detail of my agreement to submit these claims to arbitration are contained in [the Plan], which has been made available for my review prior to the execution of this application." (R. 39). The application is signed by Saling.

(R. 39). The referenced Plan is not. (R. 32-36). As noted in the Standard of Review, the first inquiry is whether or not an agreement exists. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d at 573. An ambiguous contract cannot be interpreted as a matter of law but requires factual inquiry. *See Coker v. Coker*, 650 S.W.2d 391, 393-94 (Tex. 1983).

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *See id.* Courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *See id.* No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *See id.*

A contract is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. *See id.* The trial court determines whether a contract is ambiguous by examining the contract as a whole in light of the circumstances present when the contract was executed. *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex.1995). A contract is not ambiguous if it can be given a definite or certain meaning as a matter of law. *See id.* However, if the contract is subject to two or more reasonable interpretations, the contract is ambiguous, and a fact issue exists on the parties' intent. *See id.*; *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). After a contract is deemed ambiguous, parol evidence may be admitted for the purpose of ascertaining the parties'

true intentions as expressed in the contract. *See Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 283 (Tex.1993). Although Saling has not pleaded ambiguity, a court may conclude that a contract is ambiguous, even in the absence of such a pleading by either party. *See Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex.1993).

Here, the arbitration agreement in question spans two separate writings, an application signed by Saling and the unsigned Plan. (R. 39, 32-36). An unsigned paper may be incorporated by reference in a contract signed by a party sought to be charged. *See Teal Constr. Co./Hillside Villas Ltd. v. Darren Casey Interests, Inc.*, 46 S.W.3d 417, 420 (Tex. App.—Austin 2001, pet. denied) (citing *Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex.1968)). The specific language used is not important so long as the application signed by Saling plainly refers to another writing. *See Teal Constr. Co.*, 46 S.W.3d at 420. When a document is incorporated into another by reference, both instruments must be read and construed together. *See Wolfe v. Speed Fab Crete Corp. Int'l*, 507 S.W.2d 276, 278 (Tex. Civ. App.—Fort Worth 1974, no writ). “An arbitration agreement is not invalid or unenforceable merely because it is contained in a document incorporated into the contract by reference.” *See Teal Constr. Co.*, 46 S.W.3d at 420.

Read together, the arbitration provision in the employment application and that set forth in the Plan have a material ambiguity as to the scope of claims covered. Specifically, the employment application states that the arbitration provision covers “any

and all previously unasserted claims . . . exclusively by final and binding arbitration before a neutral arbitrator.” (R. 39). In contrast, the Plan excludes several specific categories of claims from the arbitration requirements. (R. 33).

While courts should avoid, if possible, holding a contract void on the ground of uncertainty, they have no authority to eliminate terms of material legal consequence in order to uphold it. *See Luckel v. White*, 819 S.W.2d 459, 463 (Tex. 1991). Here, the contract has two conflicting provisions concerning the scope of an agreement to arbitrate, and Finish Line cannot show that the parties had a meeting of the minds on this point. Indeed, if a contract is doubtful or ambiguous in its meaning, the acts of the parties themselves, in the course of the performance of the contract, are entitled to great weight to aid the court in its interpretation. *See Lone Star Gas Co. v. X-Ray Gas Co.*, 164 S.W.2d 504 (Tex. 1942). Here, Saling denied, at every turn, that the arbitration agreement applied to her claims, she filed her suit in district court, and has vigorously contested the applicability of the arbitration agreement to this case. (R. 5, 43). Therefore, the parties cannot have formed an agreement as to the scope of claims covered, as required by the FAA, *see* 9 U.S.C. § 2, and the arbitration provision is unenforceable. Because Finish Line and Saling did form an agreement on the scope of claims covered, Finish Line has not proved an enforceable agreement and the trial court did not clearly abuse its discretion in denying Finish Line’s motion to compel arbitration.

B2. Finish Line’s Plan is Not Enforceable Because It is only Supported by an Illusory Promise.

As noted above, any arbitration provision found in this case spans two documents, the employment application and the Plan. The Plan contains the following provision at Paragraph 14:

This Plan may be amended by the Company at any time. However, no amendment shall apply to a dispute of which the Company had actual knowledge on the date of amendment.

“If an employer retains the unilateral right to modify an arbitration plan, the consideration for the arbitration agreement is illusory.” *In re Dillard Dept. Stores, Inc.*, __ S.W.3d __, No. 08-04-00259-CV, WL 552422, *3 (Tex. App.—El Paso Mar. 3, 2005, no pet. hist.).

Finish Line retained a unilateral right to modify the plan. The Plan contains no requirement that Saling be notified of changes, but this concept was not foreign to Finish Line as it agreed to provide notice upon the Plan’s termination. (R. 35). *See In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002) (Validating the employer’s right to unilateral change upon proof of notice to the employee and acceptance by the employee).

A contract must be based upon a valid consideration or mutuality of obligation. *See Texas Gas Utils. Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970). Consideration may consist of either benefits or detriments to the contracting parties. *See In re Turner Bros. Trucking Co., Inc.*, 8 S.W.3d 370, 373 (Tex. App.—Texarkana 1999, orig. proceeding). When illusory promises are all that support a purported bilateral contract, there is no mutuality of obligation and, thus, there is no contract. *See Light v. Centel*

Cellular Co. of Tex., 883 S.W.2d 642, 645 (Tex. 1994). A promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance. *See id.*; *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 370 (Tex.App.—Houston [14th Dist.] 2000, orig. proceeding).

Here, Finish Line has reserved the right to unilaterally amend its arbitration agreement, including the types of claims covered by that agreement. Therefore, the arbitration agreement is supported only by an illusory promise and is unenforceable. Because Finish Line has failed to establish the existence of a valid arbitration agreement, the trial court did not clearly abuse its discretion in refusing to compel the parties to arbitration.

III. Finish Line’s Plan is not Enforceable Against Saling

A. If Found to be Valid, Saling may nonetheless Disaffirm the Agreement due to Her Status as a Minor.

The parties are in agreement that Saling was younger than 18 years of age at the time she was hired by Finish Line and at the time of her rape. A ‘child’ or ‘minor’ is defined as a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed. *See* TEX. FAM. CODE ANN. § 101.003(a) (Vernon 2002). It is well-settled in Texas that the contract of a minor is voidable at the minor’s instance. *See Brown v. Farmers’ & Merchants’ Nat. Bank of Cleburne*, 31 S.W. 285 (Tex. 1895). Texas courts have consistently held that a contract entered into by a minor is voidable at her option. *See generally Swain v. Wiley College*, 74 S.W.3d 143

(Tex. App.—Texarkana 2002); *Dairyland County Mut. Ins. Co. of Texas v. Roman*, 498 S.W.2d 154 (Tex. 1973).

A minor need not take affirmative action to rescind the contract; rather, it would be sufficient if she merely resisted enforcement of the contract by the other party. *See Walker v. Stokes Bros. & Co.*, 262 S.W. 158 (Tex. Civ. App.—Austin 1924, no writ). In the arbitration context, the Eastland Court of Appeals recently held that 15 and 17 year-old children, who had both signed arbitration agreements as part of an employment application, lawfully disaffirmed the agreement when they filed suit in district court. *See In re Mexican Restaurants, Inc.*, No. 11-04-00154-CV, WL 2850151 (Tex. App.—Eastland, Dec. 2, 2004)(not designated for publication). The Eastland Court held

The contracts of a minor are voidable; and the minor may, within a reasonable time after reaching his majority, set aside such contracts. [The minors] disaffirmed their respective employment contracts with the Restaurant by ending their employment and filing suit against the Restaurant. [The minors] further disaffirmed their arbitration agreements by seeking to avoid arbitration and proceed to a trial of the cause. The Restaurant has not shown that the trial court clearly abused its discretion in denying its motions to reconsider compelling arbitration.

In re Mexican Restaurants, Inc., 2004 WL 2850151 at *2.

Other jurisdictions have also held that a minor may rescind an arbitration contract. In *H & S Homes, L.L.C. v. McDonald*, the Alabama Supreme Court held that arbitration agreements entered into by minors may be avoided or ratified at the option of the minor. 823 So.2d 627 (Ala. 2001). TIn addition, a federal court in North Carolina held in *Wilkie by Wilkie v. Hoke* that “[u]nder common law, plaintiff, as a minor, can elect to void the

agreement to arbitrate controversies.” 609 F.Supp. 241 (W.D.N.C. 1985). Finish Line points to an Illinois case requiring a minor to be bound to an arbitration agreement, but such case is distinguishable in that the Illinois dispute rose under Title VII and is clearly linked to the employment context. In that case, the allegation was sexual harassment, a concept unique to employment law. Saling’s rape is distinguishable.

Applying *Walker* to the present case, the purported arbitration agreement entered into by Lisa is voidable at her option, and she can rescind it either expressly, by implication, or by subsequent conduct. *See Youngblood v. State*, 658 S.W.2d 598 (Tex. Crim. App. 1983).

In this case, Saling has not relied upon the alleged contract, nor has she made any claims thereunder. Finish Line suggests that Saling seeks to enjoy the benefits of the agreement but escape its burdens, but she has not availed herself of the arbitration agreement. Rather, she has chosen to oppose the Defendant’s Motion to Compel Arbitration. (R. 5, 43). By resisting enforcement of the agreement and by her conduct, she has clearly disaffirmed any alleged arbitration agreement.

Finish Line argues that Saling is seeking the benefit of her bargain but wants to escape its burden. As noted, she has never invoked the arbitration provisions. As to the employment relationship, at its core, Saling exchanged labor for wages. She worked; Finish Line paid. That is the bargain between the parties, and any other factors are merely collateral.

Based upon her defense to enforcement of the arbitration agreement, the trial court did not clearly abuse its discretion in refusing to enforce that agreement.

B. Finish Line’s Plan is not Enforceable Against Saling because It is Unconscionable.

Texas law defines an adhesion contract as a contract in which “one party has absolutely no bargaining power or ability to change the contract terms.” *See In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 370-71 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Here, the two-part arbitration agreement consist of the employment application with its pre-printed text and the Plan itself, and Finish Line does not assert that Saling even saw the Plan, only that she had the *opportunity* to see it. Saling does not argue that an adhesion contract, standing alone, is per se unconscionable. Indeed, under Texas law, the party opposing arbitration must also present some other evidence of unconscionability. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex.1999); *H.E. Butt*, 17 S.W.3d at 371.

“The 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 FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001). While a single provision may not be unconscionable, taken with other provisions, the entire agreement may be unconscionable. *See Pony Exp. Courier Corp. v. Morris*, 921 S.W.2d 817 (Tex. App.—San Antonio 1996, no writ); see also *In re Luna*,

___ S.W.3d. ___, NO. 01-03-01055-CV, WL 2005935 (Tex. App.—Hous. [1 Dist.] Sept. 9, 2004, mandamus filed (“*Pony Express* clearly indicates that it is appropriate to determine whether an arbitration agreement is unconscionable as a whole, even if the individual provisions considered in isolation are not substantively unconscionable.”))

The Finish Line Plan subjects Lisa Saling, a minor with income from her hourly job in a shoe store, to up to \$10,000 in costs for the arbitration and requires that ‘each party shall deposit funds or post other appropriate security for its share of the Arbitrator’s fee, in an amount to be determined by the Arbitrator, ten days before the first day of the hearing.’ (R. 35). The U.S. Supreme Court has noted that, “It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her . . . rights in the arbitral forum.” *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). Here, the requirement that an hourly employee pre-pay up to \$10,000 in costs, when coupled with the low likelihood of her finding an attorney to represent her in an arbitration on a contingency basis and the resulting need to advance legal fees, deters her access to the resolution system and is evidence of unconscionability. *See In re Luna*, ___ S.W.3d. ___, WL 2005935 (holding that a similar provision in an arbitration agreement was evidence of substantive unconscionability.)

Further, Finish Line’s Plan requires Saling to conduct her arbitration in Indianapolis, Indiana. In support of its position that this is not unconscionable, Finish Line points to *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir.

2004). But *Countrywide Credit* concerned a provision that merely states disputes would be arbitrated in the federal judicial district where the employee was last employed. That is not unreasonable. But here, Saling submits that Finish Line's provision forcing a minor across several state lines to resolve her dispute in a foreign forum—a forum would nonetheless be compelled to apply Texas law—exists solely to frustrate her access to relief.

Taken together, the high costs of arbitration requiring up-front payment and the burdensome requirement that the minor Saling travel to Indiana to arbitrate her claim, may fairly be viewed as contractual devices designed solely to limit Saling's access to the dispute resolution system. As such, the agreement is unconscionable, and the trial court did not clearly abuse its discretion in denying Finish Line's Motion to compel arbitration.

C. Saling's Claims are Outside the Scope of the Plan

Saling has alleged a rape perpetrated by another employee of Finish Line. Their status as co-employees is the sole nexus between the Saling's claims and her status as a Finish Line employee. In contrast to the Illinois case relied upon by Finish Line, Saling's claims against Finish Line would be no different if she were a store customer, lured into the store and assaulted by its manager.

The Plan seeks to stretch its scope to claims 'whether or not arising out of the employment relationship,' yet Finish Line offers no indication of why or how it provide consideration for this provision. (R. 33). Indeed, the Plan, as written, would compel an

employee to arbitrate, for example, a products liability or warranty claim arising from the arms-length purchase of goods from the store. That is an absurd interpretation.

Assuming that the employment relationship between Saling and Finish Line involves interstate commerce, then the Federal Arbitration Act applies. *See* 9 U.S.C. § 2 (1999); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). But Finish Line seeks to stretch the Plan into areas outside the employment relationship. Saling submits that once the Plan steps away from the employment context, it steps away from interstate commerce; thus, and the Plan is now longer valid under the FAA. For this reason, the trial court did not clearly abuse its discretion when it denied Finish Line's Motion to Compel Arbitration.

PRAYER

Finish Line has failed to carry its burden of showing that the trial court's denial of its Motion to Compel Arbitration constituted a clear abuse of discretion. Ambiguities in the arbitration agreement and a failure of consideration due to illusory promises refute Finish Line's assertion that it has a valid agreement. But if such agreement were valid, the trial court could find that its unconscionability rendered in unenforceable against Saling, that her minority allowed her to disaffirm the agreement, or that her claims were outside the scope of the agreement. Saling therefore requests that Finish Line's Petition be denied and that this Court grant her whatever further relief to which she may show herself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the **16th** Day of **March, 2005** a true and correct copy of the foregoing has been served on all counsel of record as follows:

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