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Court of Appeals of Texas, Dallas.

AEROTEK, INC. and J.R. Butler, Inc., Appellants
v.
Lerone BOYD, Michael Marshall, Jimmy Allen, and Trojuan Cornett, Appellees

No. 05-18-00579-CV
|
Opinion Filed August 27, 2019

Synopsis

Background: Contractors brought action against staffing company alleging race discrimination, harassment, and retaliation pertaining to employment on construction project. Staffing company filed motion to compel arbitration. The 95th District Court, Dallas County, No. DC-18-00907, denied the motion to compel arbitration, and staffing company filed interlocutory appeal.

[Holding:] The Court of Appeals, Carlyle, J., held that staffing company did not present evidence establishing opposite of vital fact that contractors' denials of having ever agreed to mutual arbitration agreement.

Affirmed.

Bridges, J., dissented and filed opinion.

West Headnotes (18)

[1] **Alternative Dispute Resolution** Scope and standards of review

Appellate court reviews a trial court's order denying a motion to compel arbitration for abuse of discretion.

[2] **Alternative Dispute Resolution** Scope and standards of review

When reviewing a trial court's order denying a motion to compel arbitration, the appellate court defers to the trial court's factual determinations if they are supported by evidence, but reviews its legal determinations de novo.

[3] **Appeal and Error** Abuse of discretion

A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or acts without reference to any guiding rules or principles.

[4] **Appeal and Error** Conflicting or Disputed Evidence

There is no abuse of discretion when the trial court's decision is based on conflicting evidence, some of which reasonably supports the decision.

[5] **Alternative Dispute Resolution** Validity
Alternative Dispute Resolution Disputes and Matters Arbitrable Under Agreement

A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement.

[6] **Alternative Dispute Resolution** Trial or hearing

Motions to compel arbitration are ordinarily decided in summary proceedings on the basis of affidavits, pleadings, discovery, and stipulations.

[7] **Alternative Dispute Resolution** Trial or hearing

Where a party seeking to compel arbitration provides competent, prima facie evidence of an arbitration agreement, and the party seeking to resist arbitration contests the agreement's existence and raises genuine issues of material fact by presenting affidavits or other such evidence as would generally be admissible in a summary proceeding, the trial court must forego summary disposition and hold an evidentiary hearing.

[8] **Alternative Dispute Resolution** Scope and standards of review

Where the trial court conducts an evidentiary hearing on a motion to compel arbitration and thereafter makes a ruling, the appellate court reviews the trial court's findings for legal sufficiency.

[9] **Appeal and Error** Request for findings; failure to make request; waiver

In a nonjury proceeding where no findings of fact or conclusions of law are filed or requested, appellate court infers that the trial court made all the necessary findings to support its judgment.

[10] **Appeal and Error** Request for findings; failure to make request; waiver

Appeal and Error Verdict, Findings, Sufficiency of Evidence, and Judgment

Appellate court infers that the trial court made all the necessary findings to support its judgment in nonjury proceeding where no findings of fact or conclusions of law are filed or requested, and if the implied findings are supported by the evidence, appellate court must uphold the trial court's judgment on any theory of law applicable to the case.

[11] **Appeal and Error** Review for factual or legal sufficiency; "no evidence" review

When reviewing the evidence for legal sufficiency, appellate court considers the evidence in the light most favorable to the challenged finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not.

[12] **Appeal and Error** Legal sufficiency or "no evidence" in general

Evidence is legally insufficient if the record reveals: (a) the complete absence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence establishes conclusively the opposite of the vital fact.

[13] **Appeal and Error** Legal sufficiency or "no evidence" in general

Evidence is legally sufficient if it would enable fair-minded people to reach the verdict under review.

[14] **Appeal and Error** Legal sufficiency or "no evidence" in general

When conducting a review of the legal sufficiency of the evidence, appellate court is mindful that the factfinder was the sole judge of the credibility of the witnesses and weight to be given their testimony.

[15] **Evidence** Testimony of interested persons

Testimony by an interested witness may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and is clear, direct and positive, and there are no circumstances tending to discredit or impeach it.

[16] **Alternative Dispute Resolution** Judgment or order

Staffing company did not present evidence establishing opposite of vital fact that contractors' denials of having ever agreed to mutual arbitration agreement in employment contracts was physically impossible on staffing company's online onboarding system, and thus, trial court did not abuse its discretion by denying company's motion to compel arbitration, in action by employees alleging employment race discrimination, harassment, and retaliation, although only evidence to contrary was employees' affidavits stating that arbitration agreement was not included, where staffing company's witnesses were interested witnesses, were not information technology (IT) professionals, did not construct online onboarding system, and did not testify that system was infallible.

[17] **Compromise, Settlement, and Release** Contractual Nature and Requisites in General

A Rule 11 agreement between attorneys or parties touching any suit pending is a contract. Tex. R. Civ. P. 11.

[18] **Appeal and Error** Defects, objections, and amendments

Appellate court declined to address argument by counsel for staffing company regarding purported meaning of agreement between counsel of company and employees that employees' declarations would be considered same as live testimony, in action by employees' alleging race discrimination, harassment, and retaliation, where counsel did not raise argument in appellate brief, and parties' agreement was unambiguous on its face. Tex. R. Civ. P. 11.

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

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Before Justices Bridges, Partida-Kipness, and Carlyle

OPINION

Opinion by Justice Carlyle

***1** In this interlocutory appeal, appellants Aerotek, Inc. ("Aerotek") and J.R. Butler, Inc. challenge the trial court's order denying their motion to compel arbitration of employment-related claims asserted against them by appellees Lerone Boyd, Michael Marshall, Jimmy Allen, and Trojuan Cornett. Specifically, they focus on the legal sufficiency theory that their *Tipps*[1] hearing evidence conclusively established the opposite of appellees' claims they never saw and e-signed an arbitration agreement because this was physically impossible.[2] We affirm the trial court's order.

I. Background

Aerotek is a staffing company whose corporate clients include J.R. Butler, Inc. Appellees filed this lawsuit against appellants alleging race discrimination, harassment, and retaliation pertaining to appellees' 2017 employment on a J.R. Butler, Inc. construction project in Plano, Texas. Each appellant filed a separate general denial answer. Aerotek filed a motion to compel arbitration, asserting "there is no question" that all four appellees "entered into an agreement to arbitrate"

the claims alleged in the petition. J.R. Butler, Inc. joined. Appellees responded that they never saw or digitally signed the arbitration agreements and thus there was no valid agreement to arbitrate, requiring the trial court to deny the motion to compel arbitration. Appellees attached individual declarations to their response. As relevant, the declarations of Boyd, Marshall, and Cornett stated:[3]

> 5. At the time I was retained by Aerotek, I was required to review and agree to certain terms, conditions, policies and/or procedures of Aerotek.
>
> 6. I reviewed these terms, conditions, policies and/or policies online and signed these electronically.
>
> 7. After I filed this lawsuit, Aerotek produced an arbitration agreement that purports to bear my digital signature.
>
> 8. A copy of this document is attached to my declaration as Exhibit 1.
>
> 9. I had never seen this document before it was produced after this lawsuit was filed.
>
> 10. I did not sign any document, electronically or otherwise, providing my agreement to arbitrate claims against Aerotek or any of its customers.
>
> 11. I was not presented with any document, electronically or otherwise, providing my agreement to arbitrate claims against Aerotek or any of its customers.
>
> 12. I was never told, verbally or in writing, that I was consenting, would be consenting, would be required to consent, or had consented, to arbitrate any claims against Aerotek or any of its customers.
>
> 13. I was never presented with any document, electronic or otherwise, that stated I was consenting, would be consenting, would be required to consent, or had consented, to arbitrate any claims against Aerotek or any of its customers.
>
> ***2** 14. I was never told anything about arbitration, and no one from Aerotek or any other Defendant ever mentioned arbitration to me before this lawsuit was filed.
>
> 15. I was never presented with any document, electronically or otherwise, that mentioned arbitration.
>
> 16. None of the terms, conditions, policies and/or procedures of Aerotek that I reviewed and agreed to online mentioned arbitration.
>
> 17. Exhibit 1 was not one of the terms, conditions, policies and/or procedures of Aerotek that I reviewed and agreed to online.

At the evidentiary hearing on the motion to compel arbitration, Aerotek presented testimony of Phaedra Marsh, an Aerotek program manager, and Sybil Harper, an Aerotek administrative assistant. Marsh, a near-twenty-year Aerotek employee, testified in part (1) "the onboarding technology application that we utilize is something that I worked with our IS department to design and develop"; (2) "I also manage that technology currently, meaning that any time there are any updates or any enhancements that we make to the tool, any training that we provide our internal employees, I'm responsible for that"; and (3) she is "familiar with" and "capable of explaining" the "process that Aerotek utilizes for onboarding candidates for potential positions with Aerotek's clients."

Marsh described the online onboarding process and simultaneously demonstrated each step on a laptop computer connected to a monitor visible to the trial court.[4] During that demonstration, Marsh stated in part (1) in order to begin completing the electronic paperwork, the candidate must click on a hyperlink sent to him by Aerotek and create a "unique user ID," a password, and security questions; (2) the first "task" in the paperwork process is to "acknowledge and electronically sign" an "Electronic Disclosure Agreement," in which the candidate agrees "to use an electronic signature in lieu of a hand-written signature" throughout the process; (3) "[t]he paperwork has to be completed in the order that it's presented"; (4) when a particular section of the paperwork is "open," "the additional sections are all locked, and these sections will remain locked until the candidate completes this first section and each section going forward"; (5) the system "doesn't allow [candidates] to get out of order in completing their paperwork"; (6) "[w]hen they're electronically signing, it's ... time and date stamping the time in which they signed that particular document"; (7) in the "policies and procedures section," "the first five documents open up automatically and can be completed ... in any general order"; (8) one of those "first five documents" in that section is a "Mutual Arbitration Agreement"; (9) candidates cannot "get to th[e] last step in the process of finalizing and submitting the data without completing each and every single one of the steps"; and (10)

the process described by her "is the only online process" used by Aerotek for completing employment paperwork.

***3** Further, Marsh stated the system allows Aerotek to view data respecting whether a candidate "has completed this process." Marsh demonstrated that feature by accessing onboarding data pertaining to Boyd on the laptop computer described above. She testified the data pertaining to Boyd showed (1) "all the documents were signed in order of this process" and (2) the "time stamp" respecting the mutual arbitration agreement pertaining to Boyd "says 11/22 at 11:02 a.m."

During Marsh's testimony, Aerotek offered into evidence four individual "Electronic Disclosure Agreements" and four individual "Mutual Arbitration Agreements," each bearing a non-handwritten notation describing a date and time appellees purportedly "electronically signed" them. Those documents were admitted into evidence without objection. Additionally, Marsh testified,

> Q. Do you know of any other way that that name could appear on that disclosure document or any of the others that are in your hand if an individual didn't go online and go through the process that you've described for the Court?
>
> A. You know, not that I can think of. I mean, they receive the invitation themselves. They create an account. They sign and attest that this is who they are, so—
>
> ....
>
> Q. So if these individuals did what they said in their affidavit and they went online, they went through the process, they reviewed the terms and conditions, policies and procedures and they affixed electronic signatures as they said they did and they submitted the information to Aerotek, is there any possible way that you can imagine that they could have done that without executing the arbitration agreement?
>
> A. Not with this process. It's locked throughout the process, so they have to complete everything in that section before they can get to the finalize and submit section. So everything has to be signed and completed before they get there.

During cross-examination, Marsh admitted,

> I am not currently in IT. I work with our IT department to manage this process.
>
> Q. All right. I thought I heard you say earlier that you helped create this process.
>
> A. Yes, with our IT department.
>
> Q. So you're not the person who created the computer system itself?
>
> A. No.
>
> Q. Who is that person?
>
> A. This is an application that we purchased from a vendor called Smart ERP, and we utilized our IT department to attach it to our HRIS system. It's an add-on to our HRIS system, so I worked with the vendor as well as IT to build out all the forms that are in this process.
>
> Q. So let me see if I understand this. You helped create the forms that they then turned into a digital onboarding process?
>
> A. The forms were already in existence on paper per—previous to this, and so we took those forms that were on paper, and we built them out into this process. That's already established from the vendor.
>
> Q. So let me get this straight. None of the computer programming that goes into this onboard processing, you didn't do any of that?
>
> A. I did not do any of that.
>
> Q. And is—are any of those people here today?
>
> A. No.
>
> Q. All right. Well, do you consider yourself an IT expert?
>
> A. An IT expert, no. I don't do the development of this, but I have done all the testing on this system.
>
> ....
>
> Q. Have you ever seen a computer glitch?
>
> A. Yes.
>
> Q. Have you ever had your online system crash?
>
> A. It's gone offline, yes.
>
> Q. So you've seen glitches in that system before?

A. Yes.

....

THE COURT: Let's see. Do you have the—you or the company, anyone with the company, have—have the ability to alter forms that are submitted?

***4** ....

[MARSH]: No. We don't have the ability to alter them after they're submitted. If an update needs to be made, it's only added to the invitations launched going forward.

THE COURT: What, if any, glitches have you had with this system in the last four or five years?

[MARSH]: Um, there have been times where we've changed over—you know, we have four different servers that houses the data when we launch the invitation. And sometimes if one of those servers goes down, a candidate is not able to click on the link that takes them into the invitation. So they're unable to do their paperwork, but then once the serves [sic] comes back up, they can click on the link and do their paperwork.

Sybil Harper testified that in March 2017, she was an administrative assistant at Aerotek and her job duties included "helping people with their online paperwork." Harper stated she has no recollection of Allen or any dealings with him, but "very well could have met with him" during that time. Further, she testified (1) she has assisted Aerotek candidates with their online onboarding paperwork "[p]robably at least a hundred times"; (2) she has a "very strict" and "very structured" process for doing so; (3) she sits with the candidate in a computer lab in Aerotek's office lobby and "talks to them through this process"; (4) the candidate has the option of typing their information themselves or allowing her to input information provided by them; (5) "[i]t's a process that requires things to be unlocked" and she does not have the ability to "bypass any of the locks"; (6) she asks the candidate for his consent before proceeding to the next step; and (7) she has never "electronically attached someone's signature to any document, arbitration agreement or any other document in this process without ensuring that they agreed to having [her] do so." On cross-examination, Harper stated in part, "I actually don't know what arbitration is ..., but I just know that when we are trained on these things as far as the onboarding process, these are things that we need to make sure that we are making our candidates aware of."

Following that hearing, the trial court signed an order that stated in part (1) at the hearing, the parties "agreed that the declarations of Plaintiffs, attached to Plaintiffs' Response to Aerotek's Motion to Compel Arbitration, would be considered the same as live testimony as if provided in Court under oath, and that Defendant Aerotek waived any objections to the declarations on grounds that the testimony was not in proper format or was hearsay," and (2) "[t]he Court therefore accepts the declarations of Plaintiffs ... and any attachments thereto ... as if such testimony had been presented live in Court." The trial court also signed an order denying the motion to compel arbitration that stated in part "the Parties agreed that the declarations of Plaintiffs, ... and any attachments thereto, would be considered the same as live testimony as if provided in Court under oath, and that Defendant Aerotek waived any objections to the declarations on grounds that the testimony was not in proper format or was hearsay." This interlocutory appeal timely followed.

II. Denial of motion to compel arbitration

***5** **[1]** **[2]** **[3]** **[4]** We review a trial court's order denying a motion to compel arbitration for abuse of discretion. *See Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 184, 202 L.Ed.2d 40 (2018). We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo. *Id.*; *see also Sidley Austin Brown & Wood, L.L.P. v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.) (explaining that in reviewing denial of motion to compel arbitration, "we apply a no-evidence standard to the trial court's factual determinations and a de novo standard to legal determinations"). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). There is no abuse of discretion when the court's decision is based on conflicting evidence, some of which reasonably supports the decision. *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 709 (Tex. App.—Dallas 2010, no pet.).

[5] **[6]** **[7]** **[8]** A party seeking to compel arbitration must establish the existence of a valid arbitration agreement and that the claims at issue fall within the scope of that agreement. *Henry*, 551 S.W.3d at 115; *see also J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003) (although strong

presumption favors arbitration, "the presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists"). Motions to compel arbitration are ordinarily decided in summary proceedings "on the basis of affidavits, pleadings, discovery, and stipulations." *Kmart Stores of Tex., L.L.C. v. Ramirez*, 510 S.W.3d 559, 565 (Tex. App.—El Paso 2016, pet. denied after merits briefing) (quoting *Tipps*, 842 S.W.2d at 269). Where a party seeking to compel arbitration provides competent, prima facie evidence of an arbitration agreement, and the party seeking to resist arbitration contests the agreement's existence and raises genuine issues of material fact by presenting affidavits or other such evidence as would generally be admissible in a summary proceeding, the trial court must forego summary disposition and hold an evidentiary hearing. *Id.* Where the trial court conducts such a "*Tipps* hearing" and thereafter makes a ruling, we review the trial court's findings for legal sufficiency. *Id.*

[9] **[10]** In a nonjury proceeding where, as here, no findings of fact or conclusions of law are filed or requested, we infer that the trial court made all the necessary findings to support its judgment. *Id.*; *see also Holt Atherton Indus. Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). If the implied findings are supported by the evidence, we must uphold the trial court's judgment on any theory of law applicable to the case. *Kmart*, 510 S.W.3d at 565; *see also Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

[11] **[12]** **[13]** **[14]** When reviewing the evidence for legal sufficiency, we consider the evidence in the light most favorable to the challenged finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *City of Keller*, 168 S.W.3d at 807. Evidence is legally insufficient if the record reveals: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Id.* at 810. Evidence is legally sufficient if it would enable fair-minded people to reach the verdict under review. *Id.* at 827. When conducting a review of the legal sufficiency of the evidence, we are mindful that the factfinder was the sole judge of the credibility of the witnesses and weight to be given their testimony. *Id.* at 819.

***6** In its sole issue on appeal, Aerotek asserts,

> [T]he trial court abuse[d] its discretion by finding that Mutual Arbitration Agreements were missing from the online onboarding paperwork reviewed, electronically signed, and submitted by all four Contractors, where the evidence at the *Tipps* hearing was that a job candidate using Aerotek's online onboarding system cannot possibly submit any onboarding paperwork without electronically signing a Mutual Arbitration Agreement, and the only evidence to the contrary was the Contractors' own affidavits stating that the arbitration agreement was not included.

Our sister court's opinion in *Kmart* is instructive. *See* 510 S.W.3d at 559. The sole issue on appeal was whether the evidence conclusively established an employee assented to an arbitration agreement. *Id.* at 564. Norma Ramirez sued her former employer, Kmart, alleging disability discrimination. Kmart moved to arbitrate based on an agreement Ramirez purportedly acknowledged through Kmart's online employee portal and accepted by continuing to work for the company. *Id.* at 562. In support of that motion, Kmart provided affidavit testimony of its compliance programs manager, Roberta Kaselitz, and several electronic records. *Id.* Kmart's evidence described the steps an employee was required to take to access and acknowledge Kmart's arbitration policy, including entering a user ID and password information and following hyperlinks. *Id.* at 562–63. Also, Kaselitz testified Kmart's electronic records indicated that Ramirez's log-in information was used on a specific date to access and acknowledge an arbitration agreement with Kmart. *Id.* at 563, 568. In response, Ramirez stated in an affidavit that she did not log onto Kmart's network on the date in question "except to clock in for work" and had never electronically acknowledged or agreed to any arbitration agreement. *Id.* at 563. The trial court then held an evidentiary hearing. *Id.* At the hearing, Kmart presented no new evidence, but only moved to submit the evidence it had already submitted with its motion, including Kaselitz's affidavit. *Id.* at 564. Ramirez testified at the hearing that although she had viewed other Kmart policies electronically, 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.* The trial court denied Kmart's motion to compel arbitration and the court of appeals affirmed. *Id.* at 571.

The court of appeals did "not believe the mere existence of an electronic record can conclusively establish a person undertook an 'act,' particularly in light of a person's sworn

denial." *Id.* at 568 & n.6. Further, "Ramirez's denial was sufficient to raise a fact issue that the trial court could resolve" as to whether she assented to the arbitration provision. *Id.* at 569. Aerotek's counsel have ably catalogued the similarities and differences between the facts here and those in *Kmart.* We do not believe any merits disturbing the trial court's order.

***7** **[15]** We begin by addressing Aerotek's contentions that it presented "uncontested evidence regarding the physical impossibility of completing the onboarding paperwork without electronically signing the Mutual Arbitration Agreement" and showed "the physically impossible denials in [appellees'] declarations to be incompetent and, thus, 'no evidence.' " Marsh never testified that completing the onboarding paperwork without electronically signing the arbitration agreement was "physically impossible," nor did her testimony provide the basis for such a conclusion. "Testimony by an interested witness may establish a fact as a matter of law only if the testimony could be readily contradicted if untrue, and is clear, direct and positive, and there are no circumstances tending to discredit or impeach it." *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989); *Kmart*, 510 S.W.3d at 570; *see also Hunsucker v. Omega Indus.*, 659 S.W.2d 692, 697 (Tex. App.—Dallas 1983, no writ) (employee of party is "interested witness").

When asked, "Do you *know of* any other way that that name could appear on that disclosure document or any of the others that are in your hand if an individual didn't go online and go through the process that you've described for the Court?" she responded, "You know, not that I can think of." (emphasis added). Also, when asked, "So if these individuals did what they said in their affidavit ... is there any possible way that you can imagine that they could have done that without executing the arbitration agreement?" she responded, "Not with this process." Additionally, Marsh described and demonstrated how the system can be used to access records in a database showing the date and time documents were purportedly signed electronically. But Marsh admitted she "is not currently in IT," is "not an IT expert," did not do any of the computer programming respecting the onboard processing system, and does not "do the development of" the system. She stated she "work[s] with our IT department to manage this process." The trial court may have concluded Marsh had insufficient capacity to establish the system was failsafe.

Further, the trial court would have been well within its discretion to discredit Marsh's testimony. She was an interested witness—an Aerotek manager and near-twenty-year employee working at the company's corporate office. *See Hunsucker*, 659 S.W.2d at 697. And, she lacked expertise and involvement in the IT and programming aspects of the system. The trial court may have had demeanor-or credibility-based reasons supporting discrediting her testimony. *See Lofton*, 777 S.W.2d at 386. In line with this discussion, we conclude nothing in Harper's testimony would change our conclusion as to appellee Allen. Marsh's testimony applies to much of the analysis as to Allen, and Harper's total lack of specific memory as to her dealings with him provides no basis for a different conclusion as to him.

[16] There is insufficient authority to support Aerotek's contention that Marsh's other testimony—that the onboarding process required passwords, user IDs, and security questions—required the conclusion that the electronic records described above constituted conclusive evidence of an arbitration agreement. Marsh never vouched for the records' integrity, nor could she adequately explain the security measures Aerotek took. *See Kmart*, 510 S.W.3d at 570 n.6. Marsh admitted Aerotek contracted with a vendor to create the onboarding system. Aerotek did not bring a witness from that vendor to provide technical explanation and vouch for system security.

In a similar situation, our sister court rejected Kmart's contention that its electronic records constituted conclusive evidence as a matter of law where, although Kmart's evidence showed users were required to enter user ID and password information and follow hyperlinks, Kmart's witness "never vouche[d] for the integrity of those records or explain[ed] any security measures Kmart uses to ensure its computer systems or software cannot be tampered with." *See id.* at 570 & n.6; *see also Alorica v. Tovar*, 569 S.W.3d 736, 742–43 (Tex. App.—El Paso 2018, no pet.) (rejecting employer's contention that employee must "explain how it was that her log-in credentials could have been used by someone else," and concluding that where employer did not demonstrate "how [employer's] I.T. security set-up differed at all from the one employed in *Kmart*," evidence was not "sufficient to defeat an employee's sworn lack-of-notice claim as a matter of law"). Aerotek's evidence was less compelling: people onboarding with Aerotek can, from anywhere, create their ID and password, and can also log in from anywhere. *Cf. Alorica*, 569 S.W.3d at 742 (describing requirement that users "pass through two log-in hurdles": log-in to "network generally" and additional log-in to "portal" using different ID/password combination). Absent other evidence on system security, the trial court was within its discretion in finding

Aerotek's evidence was not conclusive.[5] *See City of Keller*, 168 S.W.3d at 815–16 ("Evidence is conclusive only if reasonable people could not differ in their conclusions.... Undisputed evidence and conclusive evidence are not the same—undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed.").

***8** Part of Aerotek's argument addresses the Texas Business and Commerce Code's provision discussing the "attribution and effect of electronic record[s] and electronic signature[s]." Tex. Bus. & Com. Code § 322.009. Aerotek suggests its evidence sufficiently proved all the appellees signed the arbitration agreements electronically. The Texas Uniform Electronic Transactions Act permits electronic signatures and other means to transact business, but "does so against the backdrop" of the common law of contracts without "supplanting that framework." *See Alorica*, 569 S.W.3d at 743–44. We are left with appellees' sworn denials, Aerotek's evidence suggesting they electronically signed the arbitration agreements, and the trial court's finding in appellees' favor. We have no basis in the framework of appellate review to disturb the trial court's determination. *See Kmart*, 510 S.W.3d at 570 n.6; *Alorica*, 569 S.W.3d at 744.

Additionally, Aerotek argues that while the appellate court in *Kmart* "based its deference to the trial court's factual findings on the trial court's firsthand experience of the plaintiff/employee's live testimony," the appellees in this case "provided no such testimony" and "stood pat with the written declarations they had previously provided," "leaving this Court on equal footing with the trial court with respect to [appellees'] cold affidavit testimony." But Aerotek itself relies on the declarations as substantive evidence to support a finding essential to its position—that appellees "acknowledged receiving, reviewing online, and executing Aerotek's onboarding paperwork." That reliance weakens Aerotek's position. Moreover, in *Alorica*, our sister court specifically rejected an employer's attempt to distinguish *Kmart* based on a difference in "the quality of evidence" and stated (1) "the dispositive issue in *Kmart* did not necessarily hinge on live testimony-versus-affidavit" and (2) "[t]he distinction in the form with respect to how the evidence is presented is not material." *Alorica*, 569 S.W.3d at 742. Likewise, we reject Aerotek's argument that the distinction in form is material.

[17] **[18]** Aerotek's deference argument does not address or mention the parties' Rule 11 agreement, which Aerotek does not dispute is enforceable.[6] *See* Tex. R. Civ. P. 11. Based on the Rule 11 agreement—that the declarations "would be considered the same as live testimony as if provided in Court under oath"—and the trial court's acceptance of the declarations "as if such testimony had been presented live in Court," this case is distinguishable from the authority described in *Kmart* regarding the use of affidavits as evidence. In accordance with the parties' agreement, we consider the declarations "the same as live testimony." Thus, while the trial court may not have been able to assess appellees' physical demeanor on the witness stand, it certainly could assess their credibility relative to Aerotek's evidence and to that we must defer.

Finally, we are unconvinced by Aerotek's arguments claiming that affirmance here goes "beyond the corporate interests of Aerotek," "would jeopardize all electronically signed agreements," and "essentially means there are no enforceable agreements." Affirmance here does not go counter to preserving "the significance of contracts in the State of Texas." Nor does it, as the dissent contends, "amount[ ] to a state rule discriminating on its face against arbitration" or "treat agreements to arbitrate ... less favorably than other contracts." Instead, affirming here follows years of precedent: a party seeking to enforce a contract must first prove it exists, starting with mutual assent. *See* Restatement (Second) of Contracts § 17 (1981).

***9** Aerotek made the choice to forego in-person wet-ink signatures on paper contracts. This may be a good business decision that allows it to more efficiently process more business than otherwise possible. And in this case, Aerotek made the choice to bring only one person, an employee without apparent IT experience specific to the type of computer system whose technical reliability and security she sought to vouch for. Aerotek did this in the face of admitting it had contracted out creation and implementation of this system to another entity altogether and brought no witness from that entity. *Cf. Alorica*, 569 S.W.3d at 743.

We conclude Aerotek did not present evidence establishing the opposite of a vital fact, here that appellees' denials of ever seeing the arbitration contracts were physically impossible given Aerotek's computer system. *See City of Keller*, 168 S.W.3d at 827. The trial court may have given Aerotek's witness testimony minimal weight because neither witness had sufficient technical understanding of Aerotek's system, the infallibility of which was the entire basis for this appeal; it could have discredited Aerotek's employee-witnesses as interested. Appellees presented detailed affidavits that

Aerotek agreed to have the trial court accept as "live testimony," and the court could have credited these affidavits. In the light most favorable to the ruling, the trial court did not venture outside the broad zone of its discretion to deny Aerotek's motion to compel arbitration.[7]

III. Conclusion

We decide against Aerotek on its sole issue and affirm the trial court's order.[8]

Bridges, J., dissenting

DISSENTING OPINION

Opinion by Justice Bridges

I respectfully dissent from the majority's opinion and judgment because I would conclude the trial court abused its discretion in denying the motion to compel arbitration filed by Aerotek and joined in by HCBeck Ltd. and J.R. Butler, Inc.

Arbitration has been defined as:

> a contractual proceeding by which the parties to a controversy or dispute, in order to obtain a speedy and inexpensive final disposition of matters involved voluntarily select arbitrators or judges of their own choice, and by consent submit the controversy to such tribunal for determination in substitution for the tribunals provided by the ordinary processes of the law.

***10** *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992) (quoting *Alderman v. Alderman*, 296 S.W.2d 312, 315 (Tex. Civ. App.—San Antonio 1956, writ ref'd)).

Both parties agree the FAA governs this arbitration dispute. In such a case, the FAA applies to the substantive rules of decision, but Texas law, and specifically the Texas General Arbitration Act (TAA),[1] governs the procedural matters. *In re Chestnut Energy Partners*, 300 S.W.3d 386, 395–96 (Tex. App.—Dallas 2009, pet. denied) (citing *Tipps*, 842 S.W.2d at 272); *Craig v. S.W. Sec., Inc.*, No. 05-16-01378-CV, 2017 WL 6503213, at *2 (Tex. App.—Dallas Dec. 18, 2017, no pet.) (mem. op.). The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, —— U.S. ——, 137 S. Ct. 1421, 1426, 197 L.Ed.2d 806 (2017) (quoting 9 U.S.C. § 2). That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (quoting *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)). The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a "law prohibit[ing] outright the arbitration of a particular type of claim." *Id.* (quoting *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740). The FAA only preempts contrary state law, not consonant state law. *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 779 (Tex. 2006). The FAA applies to all suits in state and federal court when the dispute concerns a "contract evidencing a transaction involving commerce." *Tipps*, 842 S.W.2d at 269–70 (quoting *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)).

In general, a party seeking to compel arbitration under the FAA must establish that: (1) there is a valid arbitration agreement, and (2) the claims raised fall within that agreement's scope. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005). When the parties dispute whether a valid arbitration agreement exists, the party seeking to compel arbitration must show by "a preponderance of the evidence that the [opposing party] has entered into a valid arbitration agreement." *In re JP Morgan Chase & Co.*, 916 F.3d 494, 503 (5th Cir. 2019).

The record shows J.R. Butler is a commercial subcontractor specializing in engineering, design assist, and installation of glass, polycarbonate, and photovoltaic skylight systems and curtain wall, storefront, and ribbon window wall systems. Beginning in November 2016, Butler began work on the JP Morgan Chase Project construction project in Plano, Texas, where it acted as the glass installation contractor (the "Texas Project"). In order to staff the Texas Project, Butler entered a services agreement with Aerotek to provide supplemental staffing services in the form of temporary contract employees. The services agreement expressly stated that Butler was a client of Aerotek. As contemplated in the services agreement, Aerotek provided contract personnel to Butler to assist it with its staffing needs on the Texas Project, which was managed by HCBeck as the general contractor. Just prior to beginning work for Butler on the Texas Project, appellees each executed Aerotek's mutual arbitration agreement.

***11** Appellees filed an original petition in January 2018 asserting claims against appellants arising out of appellees' employment with Aerotek. Aerotek filed a motion to compel arbitration asserting all four appellees entered into an agreement to arbitrate. Specifically, Aerotek alleged appellees were employed by Aerotek to work for J.R. Butler at the JP Morgan Chase construction project managed by HCBeck in Plano, Texas. Before beginning work, each appellee completed Aerotek's pre-employment paperwork, which included a Mutual Arbitration Agreement ("Agreement"). Aerotek alleged Lerone Boyd signed his Agreement on November 22, 2016; Michael Marshall signed his agreement on November 17, 2016; Jimmy Allen signed his Agreement on March 14, 2017; and Trojuan Cornett signed his Agreement on November 15, 2016. Under the Agreements, Aerotek alleged, appellees were required to arbitrate their claims against Aerotek. Appellees responded that, among other things, they "expressly and affirmatively den[ied] having ever seen an agreement to arbitrate claims (before this lawsuit was filed), let alone actually agreed to arbitrate claims against any Defendant." As the majority sets out, attached to the response were individual declarations stating, among other things, appellees "had never seen" the Agreement before it was produced in the underlying lawsuit; "did not sign any document, electronically or otherwise, providing my agreement to arbitrate claims against Aerotek or any of its customers"; and were never presented with any document, electronic or otherwise, that "mentioned arbitration," "stated I was consenting, would be consenting, would be required to consent, or had consented, to arbitrate" claims against Aerotek. On these and other similar denials, appellees based their argument that they should not be compelled to arbitrate their claims against appellants.

At the *Tipps*[2] hearing, Phaedra Marsh testified she is a program manager with Aerotek's technologies department and has worked for Aerotek for almost twenty years. Marsh testified she worked with Aerotek's IS department to design and develop its on-boarding technology application. Marsh testified she "created the process" for "on-boarding candidates for potential positions with Aerotek's clients," and she was "capable of explaining to the Judge and with some degree of detail how that process works today." Aerotek's counsel asked Marsh to describe how the process works after a particular candidate receives a conditional offer of employment. Marsh testified that, after the candidate accepts the conditional offer, Aerotek creates an invitation based on the candidate's requirements and emails it to the candidate's personal email address provided by the candidate during their application process. At that stage of the process, administrative assistants also provide a "welcome call" to explain the process to the candidate, review some frequently asked questions about how to log in, and "prepare them for the process." The invitation email itself gives the candidate instructions on how to log in to the on-boarding system, information on how long the process will take, and a description of information they might need once they log in. The invitation also contains links the candidate can click on to register for an account for their registration process. Marsh testified the links are "very specific to each candidate." Aerotek's counsel asked Marsh at trial in April 2018 how the process was different from the way it was in November 2016 and March 2017 when appellees went through the process. Marsh answered, "The process hasn't changed."

Marsh testified that Aerotek launched "over 465,000 invitations [in] 2017." Marsh testified the online system was launched in February 2015, and "this arbitration agreement [had] been in" since Aerotek developed the system in 2015. Aerotek's standard operating procedure was for candidates to complete their paperwork from home because it was not feasible to have all of the candidates come to Aerotek's offices to complete the process. However, if a candidate needed help with the process, the candidate could come to Aerotek's office for assistance. The record shows that, at this point in her testimony, Marsh presented a demonstration of the on-boarding process on her laptop. Marsh's accompanying testimony shows the demonstration began with the launch of an invitation Marsh had sent to her personal email account. The invitation contained basic information and links allowing a candidate to register for an account. Marsh clicked on the first link in order to create a user ID and password, and she explained that this requirement was for security purposes because the information and personal data provided is sensitive. Also for security purposes, candidates were asked to create security questions, and they had to answer the questions every time they logged in to the system. The system allows a candidate to stop the process and come back later to finish their paperwork, but every time they log in, they have to answer the security questions.

***12** After logging in, the first thing the candidate sees is the "electronic disclosure" which "explains that they agreed to use an electronic signature in lieu of a handwritten signature throughout the process." Once the candidate clicks an acknowledgement and electronically signs, "an identifier pops up again to verify their identity to make sure they are the

person that created that account." Marsh testified, "once that is signed, the rest of the paperwork is now ready to begin." Marsh described the layout of the screen as follows:

> You'll notice on the left-hand side of here that only one document is accessed. It's got a clock on it. It shows it's open. The rest of these are locked. The paperwork has to be completed in the order that it's presented. And you'll notice across the top the additional sections are all locked, and these sections will remain locked until the candidate completes this first section and each section going forward. So it doesn't allow them to get out of order in completing their paperwork.

Marsh then proceeded to describe the steps in the process, beginning with the entry of personal information that "is going to be populated on any of the forms going forward." "[O]nce they've entered in their biographic information, they're going to save the data, and this form doesn't automatically move forward because we want them to review their data just to make sure it's correct." Once the candidate validates the information is correct and clicks continue, the program automatically moves to the next document in the process: the employment agreement. Marsh testified that these initial categories were "all a subpart of the employee information box at the top." Marsh testified the next section, "prescreen," was locked and would not unlock until all categories in the employee information section were complete. In the prescreen section, candidates could download and review "policy documents," but each step in the prescreening process had to be completed in successive order to get to the next. As Marsh went through each step, she clicked on an electronic signature that caused the system to affix the candidate's signature electronically to the document. Marsh testified the system was "also time and date stamping the time in which [the candidate] signed that particular document."

Marsh testified that, after completing a pay preferences section, the candidate came to the policies and procedures section. In this section, the first five documents opened up automatically and could be completed in any order; however, the candidate could not "move forward without completing all five of these documents." The mutual arbitration agreement appeared in this section. Once the policies and procedures section was completed, the candidate moved on to the worker's compensation, employee handbook, safety handbook, benefits, and "finalize and submit" sections. Marsh testified a candidate could not get to the last step of finalizing and submitting the data without completing each and every step she walked through.

Marsh testified Aerotek could view the invitations in progress and determine the extent to which a particular candidate had completed the on-boarding process. Once the process was completed, Aerotek had "the ability to act on them because we utilize that data to download into our HRIS system. At the urging of Aerotek's counsel, Marsh logged on to the system and viewed Chris Boyd's invitation and completed paperwork. The system showed Boyd signed the documents in the policies and procedures section, including the mutual arbitration agreement, which Boyd signed at 11:02 a.m. on November 22, 2016. When asked if there was a way to know whether Boyd completed the process, Marsh testified the next section of the process opened up for Aerotek's administrative staff to complete once the paperwork was completed. The administrative staff then sent the information to Aerotek's HRIS system so that payroll could be set up, "and these steps won't open until all of these in front of them are done." Marsh testified that Boyd's electronic signature on the electronic disclosure acknowledgment meant that Boyd "logged in and created an account and then electronically signed this document."

***13** Aerotek's counsel introduced hard copies of each appellee's mutual arbitration agreement. Marsh testified that the signatures on the agreements "indicate[d] that the person that logged in, whoever it was that signed this document, is the one that signed that document." Aerotek's counsel pointed out that Boyd, Marshall, and Cornett all submitted affidavits stating they reviewed the terms, conditions, policies and/or procedures online and signed the documents electronically. Aerotek's counsel then asked Marsh if there was more than one online process, and Marsh answered that "this is the only online process." Aerotek's counsel asked Marsh the following:

> So if these individuals did what they said in their affidavit and they went online, they went through the process, they reviewed the terms and conditions, policies and procedures and they affixed electronic signatures as they said they did and they submitted the information to Aerotek, is there any possible way that you can imagine that they could have done that without executing the arbitration agreement?

Marsh answered, "Not with this process. It's locked throughout the process, so they have to complete everything in that section before they can get to the finalize and submit section. So everything has to be signed and completed before they get there."

As the majority correctly points out, on cross-examination Marsh testified she has worked for Aerotek for twenty years, she works with Aerotek's IT department to "manage this process," she helped Aerotek's IT department "create this process," she was "not the person who created the computer system itself," Aerotek purchased the application from a vendor and used Aerotek's IT department to "attach it to our HRIS system," and she "worked with the vendor as well as IT to build out all the forms that are in this process." Marsh testified she "did not do any" of the "computer programming that goes into this on-board processing" and she is not an "IT expert," but she did "all the testing on this system." Marsh testified she had had a computer "lock up" for "no reason," seen a "computer glitch," and had the system go offline. In response to questioning from the trial court, Marsh testified that Aerotek has four different servers that "houses the data when we launch the invitation," and if one of the servers went down a candidate would "not be able to click on the link that takes them into the invitation." However, once the server came back up, "they can click on the link and do their paperwork." Other than questions during cross examination about computers going down, there was absolutely no evidence from any of the appellees that anything out of the ordinary happened to cause a dropped or failed connection. Appellees in their brief argue as follows:

> The best example that everyone has experienced is a failed or dropped cellular telephone call. The "normal" procedure for starting a cellular telephone call is to press the numbers on the phone that one desires to call, and then press a telephone icon to initiate the call. The "normal" procedure results in "ringing" the phone number called. However, this "normal" procedure routinely fails. Many times, when the "normal" procedure is followed, nothing happens. This requires the caller to "end" the non-call and re-initiate it. This is certainly not the intended result of the "normal" procedure, but it is a technological "glitch" that happens thousands of times a day throughout the United States.

Nevertheless, there is no evidence in the record that there was ever a glitch or that a glitch would fill in the paperwork requiring arbitration for any candidate, much less appellees.

***14** On this record, however, the majority concludes that the trial court may have concluded Marsh had insufficient capacity to establish the on-boarding system was failsafe. In reaching this conclusion, the majority appears to rely on Marsh's testimony that she could not "think of" another way a candidate's name could appear on an on-boarding document if the candidate did not go through the on-boarding process Marsh described. Relying on *Kmart Stores of Texas, L.L.C. v. Ramirez*, 510 S.W.3d 559 (Tex. App.—El Paso 2016, pet. denied), the majority concludes that Marsh's failure to vouch for the electronic records' integrity and failure to adequately explain the security measures Aerotek took left it within the trial court's discretion to determine that Aerotek's evidence was not conclusive.

In *Kmart*, Norma Ramirez began working for Kmart on May 23, 2010. *Kmart*, 510 S.W.3d at 562. In April 2012, Kmart introduced an arbitration policy requiring submission of all disputes between employees and the company to arbitration. *Id.* Kmart maintained that, by September 14, 2012, its employees, including Ramirez, were required to complete a series of policy acknowledgments on Kmart's online portal. *Id.* Among the policies was an arbitration agreement. *Id.* When Ramirez later sued Kmart, Kmart moved to compel arbitration, submitting as evidence the affidavit of Roberta Kaselitz, Kmart's compliance programs manager, and exhibits setting out the arbitration agreement and demonstrative screenshots from Kmart's online portal. *Id.* at 563. Kaselitz' affidavit described the process an employee had to undertake in order to access and acknowledge the arbitration agreement. *Id.* at 562. The process included entering the employee's user ID and password, following a link "policy acknowlegments," and following hyperlinks to the arbitration agreement itself. *Id.* at 563. Kaselitz' affidavit stated Ramirez received copies of the arbitration agreement when an "Arbitration Policy/ Agreement 'Course' " was created in Kmart's computer system in February 2012, and the system reflected Ramirez' acknowledged receipt of the arbitration agreement on April 23, 2012. *Id.* In response, Ramirez filed an affidavit in which she stated that she had never electronically acknowledged or agreed to any arbitration agreement.

At a subsequent *Tipps* hearing, Ramirez testified she did not log on to Kmart's online portal on April 23, 2012 to view an arbitration agreement; she did not click on a screen saying that she acknowledged receipt of the arbitration policy or agreement link; and she was not ever presented with an arbitration agreement at any time during her employment. *Id.* at 564. Ramirez admitted using Kmart's online portal before and reviewing some policies electronically at the beginning of her employment, but she denied logging on to Kmart's network on April 23, 2012, except to clock in for work. *Id.* In deferring to the trial court's determination that Kmart's motion to compel arbitration should be denied, the court in *Kmart* noted Kmart had "failed to cite any authority requiring the courts to give presumptive credence to an employer's

electronic records over an employee's testimony in arbitration determinations." *Id.* at 571. In reaching this disposition, the court stated in a footnote that, in her affidavit, Kaselitz "never vouches for the integrity of [Kmart's electronic] records or explains any security measures Kmart uses to ensure its computer systems or software cannot be tampered with." *Id.* at 570 n.6. "Absent even that bare showing," the court continued, "we will not craft a rule that automatically credits an employer's records over an employee's testimony as a matter of law." *Id.* Thus, the *Kmart* court perversely reasoned that Kmart's failure to offer evidence of the integrity of its records or efficacy of its security measures established the opposite: that its security measures were ineffective and its records were susceptible to tampering by an unknown actor who acknowledged Kmart's arbitration policy without Ramirez' knowledge or consent.

***15** Following its opinion in *Kmart*, the El Paso court of appeals issued *Alorica v. Tovar*, 569 S.W.3d 736, 742-44 (Tex. App.—El Paso 2018, no pet.), a case cited favorably by the majority. In *Alorica*, in response to her employer's motion to compel arbitration, an employee submitted an affidavit stating she had never seen or heard of the arbitration agreement at issue in the case until after she filed suit. The court described *Kmart* as a case in which the court "found that the conflict between the employer's records and the employee's sworn denial created a fact issue in contract formation, meaning that the trial court could find in either the employer or the employee's favor." *Id.* at 741. The court determined that the employee's sworn denials were sufficient to create a fact issue that the trial court could resolve in the employee's favor after a *Tipps* hearing. *Id.* at 744. Declining to undertake a factual sufficiency review, the court concluded, "We are only explicitly permitted to use the legal sufficiency standard in measuring fact questions related to arbitration." *Id.* at 744 (citing *Kmart*, 510 S.W.3d at 570). Under that standard, the court stated it "must uphold the trial court's decision if there is some evidence more than a scintilla to support it *unless* [the employer] establishes notice [of the arbitration provision] *as a matter of law.*" *Id.* The court acknowledged "a handful of federal district court cases in which judges faced with the same factual dilemma presented here decided in favor of the employer, not the employee," but dismissed these cases as only demonstrative of "how various trial judges resolved evidentiary discrepancies in the record." *Id.*

Tipps holds that, if the material facts necessary to determine the issue of whether to compel arbitration are controverted, the trial court must conduct an evidentiary hearing to determine the disputed material facts. *Tipps*, 842 S.W.2d at 269. However, *Tipps* is silent on the parties' evidentiary burdens at the *Tipps* hearing and on the standard of review this Court should apply when reviewing the trial court's determinations at the hearing. The El Paso court of appeals says that the fact issue that entitles a party to a *Tipps* hearing is sufficient, apparently without further evidence, to support the trial court's resolution of the matter on the fact issue alone and render a decision in favor of the party who raised the fact issue. *See Alorica*, 569 S.W.3d at 741-44.

Under the rationale of *Kmart* and *Alorica*, as exemplified by the majority opinion, a *Tipps* hearing becomes an opportunity for the trial court to determine whether or not to compel arbitration, regardless of the strength of the evidence supporting the motion to compel arbitration or the bad faith of the affidavits that created a "fact issue" necessitating the Tipps hearing in the first place. In an analogous situation, the Texas Supreme Court, in a summary judgment case, refused to limit a party's remedies to sanctions and contempt when a party filed a bad faith affidavit in an attempt to avoid summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 88-89 (Tex. 2018). The court noted that the federal rules regarding bad faith affidavits include a residual clause allowing the trial court to order "other appropriate sanctions" which can include striking the affidavit. *Id.* at 88. Without allowing bad faith affidavits to be stricken, the court reasoned, "the result would be that even the most flagrantly bad-faith affidavits could be used to survive summary judgment." *Id.* at 89. As the record developed at the *Tipps* hearing, I would conclude the affidavits in this case were filed in bad faith and therefore constituted no evidence.

The record is clear that appellees contacted Aerotek about obtaining employment as temporary construction workers. Appellees provided their email addresses to Aerotek, and Aerotek sent appellees invitations to log on to the on-boarding system with their individually created passwords. In addition to Marsh's detailed testimony concerning the on-boarding process, the record contains time-stamped computer records showing each appellee's completion of each step in the process. Boyd's record, for example, shows that on "11/22/16" he completed the electronic disclosure section at 10:32 a.m.; completed the biographical information section at 10:37 a.m.; completed the employment agreement section at 10:41 a.m.; and continued to complete the sections in order, including the mutual arbitration agreement section at 11:02 a.m., before submitting his paperwork for review at 11:07 a.m. The record contains time-stamped records showing each

of the appellees completed the on-boarding process in the same sequence. Having completed the on-boarding process, appellees went to work for Aerotek. Appellees' own affidavits stated they went online, completed the process, and submitted the information to Aerotek.

***16** The majority concludes the trial court would have been well within its discretion to discredit Marsh's testimony because Marsh was an "interested witness" with twenty years' experience with Aerotek, and she lacked expertise and involvement in the IT and programming aspects of the system. Oddly, the majority finds no fault in treating the affidavits submitted by appellees as sufficient to create a fact issue warranting the hearing despite their own more direct interest in pursuing their own claims for money damages or avoiding arbitration. I find no evidence that Marsh's employment with Aerotek, alone, makes her an interested witness on the issue of whether appellee's claims should be submitted to arbitration, especially in light of the fact that Marsh knows appellees all had to sign an agreement to arbitrate before being accepted as Aerotek employees. Neither the record nor the parties' briefs make this "interested witness" argument. In addressing this issue, the majority appears to be addressing an issue raised in the *Kmart* case. *See Kmart*, 510 S.W.3d at 570. Further, when considering testimony about such "clickwrap" online agreements, this Court has not required that the affiant demonstrate specialized or technical knowledge of the software design of the online portal used by the company. *Kyäni, Inc. v. HD Walz II Enters., Inc.*, No. 05-17-00486-CV, 2018 WL 3545072, at *4 (Tex. App.—Dallas July 24, 2018, no pet.) (mem. op.).

In addition, the majority finds section 322.009 of the Texas Business and Commerce Code provides no basis to disturb the trial court's determination. Section 322.009, entitled "Attribution and Effect of Electronic Record and Electronic Signature," provides the following:

> (a) An electronic record or electronic signature is attributable to a person if it was the act of the person. 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.
>
> (b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Tex. Bus. & Com. Code Ann. § 322.009 (2015). The court in *Kmart* acknowledged "the code allows courts to infer an electronic record upon 'a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable' " but concluded no such showing had been made. *Kmart*, 510 S.W.3d at 570 n.6. The court stated that Kmart's expert, in her affidavit, "explains that she has knowledge of the company's computer system and electronic HR records, but she never vouches for the integrity of those records or explains any security measures Kmart uses to ensure its computer systems or software cannot be tampered with." *Id.* "Absent that bare showing," the court declined to "craft a rule that automatically credits an employer's records over an employee's testimony as a matter of law." *Id.* What was missing there and here, apparently, was the in-person testimony of the software writer–a standard that would make electronic contract formation practically impossible and write section 322.009 out of the law. The majority effectively dismisses Marsh's testimony as "evidence suggesting [appellees] electronically signed the arbitration agreements" and concludes the trial court was within its discretion in finding Aerotek's evidence was not conclusive "[a]bsent other evidence on system security." Both the court in *Kmart* and the majority disregard the plain language of section 322.009(a) providing "[t]he act of the person may be shown in *any manner*." Tex. Bus. & Com. Code Ann. § 322.009(a) (2015) (emphasis added). "[A] showing of the efficacy of any security procedure" is only one way of showing the act of the person, not the only way. *Id.* I would conclude that Marsh's detailed testimony constituted one way in which appellees acts of electronically signing the arbitration agreements at issue could be shown. *See id.*

Finally, I would agree with Aerotek's argument that affirmance here "jeopardize[s] all electronically signed agreements" and "essentially means there are no enforceable agreements." This would allow any party to a contract signed electronically to deny the existence of the contract even in the face of overwhelming evidence that the contract was signed. Further, this holding amounts to a state rule discriminating on its face against arbitration, which is expressly prohibited. *Clark*, 137 S.Ct. at 1426. In any other contractual context, a bad faith affidavit denying the existence of a contractual provision, without more, could not withstand summary judgment or form the basis for a judgment in favor of the party proffering the affidavit.

***17** I believe that *Kmart* and *Alorica* were wrongly decided. We are faced with the dilemma of how we will review

electronically-signed contracts. This Court's resolution of this issue implicates much more than arbitration. A court is supposed to favor arbitration and treat agreements to arbitrate no less favorably than other contracts. Arbitration streamlines court cases but takes away a trial before a jury.

Every day, millions of agreements are made online without the benefit of a "wet ink" signature. Those agreements are upheld. In this case, four men in Dallas seeking a job through a national staffing company logged in with their email, established passwords, and gave all their personal information. This allowed them to be paid. The men agreed to all the documents in the on-boarding process including, among others, a pay preferences section. In the middle of the process, the form included a mutual arbitration agreement. The men accepted the jobs and the benefits until they were fired. Now the men want to try their discrimination case before a jury.

Before the trial court was an affidavit from each man saying not that he did not see this agreement but that, in these four cases, the agreement was not there. They raise the specter of computer error without any evidence to show computer error. Their argument to the trial court was in the form of questions to Marsh on cross-examination concerning whether there could have been a "glitch" or whether the power could have gone off. Somehow, this line of questioning translated to a theory under which the computer filled in the arbitration agreement for these four which they electronically signed at the end. The testimony from Aerotek was clear that the computer does not fill in answers for candidates. Unlike the majority, I would conclude this testimony constituted uncontested evidence that completing the on-boarding paperwork without electronically signing the arbitration agreement was "physically impossible."

The only issues in this case are whether the arbitration agreement was part of the online process and whether Aerotek presented evidence that a reasonable factfinder could not disregard establishing appellees electronically signed the arbitration agreements at issue despite appellees' statements that they had not agreed to arbitrate. *See City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005).[3] On this record, despite appellees' affidavits denying they agreed to arbitrate, I would conclude that a reasonable factfinder could not disregard the evidence establishing appellees electronically signed the arbitration agreements at issue. *See id.* I would further conclude the trial court abused its discretion in denying Aerotek's motion to compel arbitration and remand for entry of an order compelling the underlying case to arbitration.

All Citations

--- S.W.3d ----, 2019 WL 4025040

Footnotes

1 *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992) (orig. proceeding).

2 *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005) (" 'No evidence' points must ... be sustained when the record discloses ... the evidence establishes conclusively the opposite of the vital fact." (quoting Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 362–63 (1960))).

3 Allen's declaration stated in part:

> 5. At the time I was retained by Aerotek, I told Sybil Harper I was not computer savvy.
> 6. Ms. Harper then went through and signed all my paperwork electronically while I sat with her.
> ....
> 8. After I filed this lawsuit, Aerotek produced an arbitration agreement that purports to bear my digital signature.
> 9. A copy of this document is attached to my declaration as Exhibit 1.
> 10. I had never seen this document before it was produced after this lawsuit was filed.
> 11. I did not sign any document, electronically or otherwise, providing my agreement to arbitrate claims against Aerotek or any of its customers.
> 12. I was not presented with any document, electronically or otherwise, providing my agreement to arbitrate claims against Aerotek or any of its customers.
> 13. I was never told, verbally or in writing, that I was consenting, would be consenting, would be required to consent, or had consented, to arbitrate any claims against Aerotek or any of its customers.
> 14. I was never presented with any document, electronic or otherwise, that stated I was consenting, would be consenting, would be required to consent, or had consented, to arbitrate any claims against Aerotek or any of its customers.

15. I was never told anything about arbitration, and no one from Aerotek or any other Defendant ever mentioned arbitration to me before this lawsuit was filed.
16. I was never presented with any document, electronically or otherwise, that mentioned arbitration.
17. None of the terms, conditions, policies and/or procedures of Aerotek that I reviewed and agreed to online mentioned arbitration.
18. Exhibit 1 was not one of the terms, conditions, policies and/or procedures of Aerotek that I reviewed.

4 Our record does not contain a visual reproduction of this demonstration. Even had Aerotek presented us video evidence of the in-court demonstration, this would only show what happened in the system that day in court. It would likely not prove, absent other evidence not present here, the physical impossibility of appellees' sworn denials.

5 The dissent cites *Kyäni, Inc. v. HD Walz II Enterprises, Inc.*, No. 05-17-00486-CV, 2018 WL 3545072, at *4 (Tex. App.—Dallas July 24, 2018, no pet.) (mem. op.), in support of its assertion that "when considering testimony about such 'clickwrap' online agreements, this court has not required that the affiant demonstrate specialized or technical knowledge of the software design of the online portal used by the company." In *Kyäni*, this court reversed a trial court's denial of a motion to compel arbitration that was based on an electronic agreement. But *Kyäni*'s facts are distinguishable. Although the party moving to compel arbitration in *Kyäni* relied solely on an affidavit of its general counsel who demonstrated no technical software design knowledge, no evidence was submitted by the party seeking to avoid arbitration. *See id.* at *7.

6 During oral submission, Aerotek's counsel attempted to explain why the parties came to their Rule 11 agreement and also suggested what the terms of the agreement did and did not mean. A Rule 11 agreement is a contract. *See Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't of Health & Human Servs.*, 540 S.W.3d 553, 560 (Tex. 2018). We construe an unambiguous contract on its face. *See id.* at 561. In addition to the fact that counsel never made these arguments in briefing, meaning we need not address them, we refuse to address them because the Rule 11 agreement is unambiguous on its face. *See id.*; *Backes v. Misko*, 486 S.W.3d 7, 21 n.3 (Tex. App.—Dallas 2015, pet. denied) (refusing to address argument raised for first time during oral submission).

7 We have credited evidence favorable to appellees in this case, as we are required to do, because a reasonable factfinder could do so here. *See City of Keller*, 168 S.W.3d at 807. And we have disregarded contrary evidence, similarly concluding that a reasonable factfinder would *not* be in a position where it could *not* have disregarded contrary evidence. *See id.* Here, Aerotek points to the unlikeliness of four contractors on the same job with similar claims against appellants being represented by the same lawyer and having the same problem with its onboarding process. As we conclude, Aerotek's evidence did not establish the impossibility of this confluence, though we may have been similarly hesitant to reverse an order granting the motion to compel arbitration. As we note, Aerotek could have proven the impossibility, and may still convince a jury of appellees' claims' weaknesses. But under the ruling-deferential standard we must follow, we do not believe a factfinder would be unable to disregard contrary evidence, to the extent it exists here. *See id.* Though the dissent "would conclude the affidavits in this case were filed in bad faith and therefore constituted no evidence," that conclusion disregards the standard of review to which we are bound.

8 Additionally, on May 30, 2018, this court stayed discovery in this case pending this appeal's resolution. We order that stay lifted.

1 Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-171.098.

2 As the majority correctly sets out, where a party seeking to compel arbitration provides competent, prima facie evidence of an arbitration agreement, and the party seeking to resist arbitration contests the agreement's existence and raises genuine issues of material fact by presenting affidavits or other such evidence as would generally be admissible in a summary proceeding, the trial court must forego summary disposition and hold an evidentiary hearing. *Kmart Stores of Tex., L.L.C. v. Ramirez*, 510 S.W.3d 559, 565 (Tex. App.—El Paso 2016, pet. denied) (quoting *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992) (orig. proceeding)). Where the trial court conducts such a "*Tipps* hearing," and thereafter makes a ruling, we review the trial court's findings for legal sufficiency. *Id.*

3 Although *City of Keller* was a case arising from a jury trial, a trial court's findings are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing evidence supporting a jury's answer. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).