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SUPERIOR COURT OF PENNSYLVANIA

2879 EDA 2024

APRIL COBB
Appellee

v.

TESLA, INC.
Appellant

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, AND THE PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM IN SUPPORT OF APPELLANT

Appeal from the September 26, 2024 Order of the Court of Common Pleas of Philadelphia at December Term 2023, No. 02254

Robert L. Byer
Robert M. Palumbos
Leah A. Mintz
DUANE MORRIS LLP
30 S. 17th Street
Philadelphia, PA 19103

Of Counsel:
Jonathan D. Urick
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America, the Pennsylvania Chamber of Business and Industry, and the Pennsylvania Coalition for Civil Justice Reform

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The U.S. Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Pennsylvania Chamber of Business and Industry is the largest broad-based business association in Pennsylvania. It has close to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private workforce. Its members range from small companies to mid-size and large business enterprises across all industry sectors in the Commonwealth. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than the amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

The Pennsylvania Coalition for Civil Justice Reform is a statewide, nonpartisan alliance of organizations and individuals representing health care providers, professional and trade associations, businesses, nonprofit entities, taxpayers, and other perspectives. The Coalition is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

The members of the U.S. Chamber, the Pennsylvania Chamber, and the Coalition (collectively "Amici"), have structured millions of contractual relationships around arbitration agreements. The judicial standards for enforcing those agreements are thus of critical significance to the Amici's members.

ARGUMENT

I. *Chilutti* Does Not Apply Outside the Context of Web-Based Arbitration Provisions or Arbitration Provisions in Smartphone Applications.

The trial court refused to enforce the arbitration provision in the employment agreement between April Cobb and Tesla based solely on this Court's en banc decision in *Chilutti v. Uber Technologies, Inc.*, 300 A.3d 430 (Pa. Super. 2023) (en banc). But that decision—which is under review by the Supreme Court—involved an internet-based agreement where the smartphone application's users were presented with

hyperlinks to "terms and conditions" during the process of creating an account.[2] *Chilutti* does not and should not control the enforceability of an arbitration provision that is set forth in the main body of an employment agreement to which the plaintiff assented.

As the Court made abundantly clear in its decision, *Chilutti* was decided in the context of a consumer lawsuit where the arbitration provision was hyperlinked and, apparently, not even read. In the first paragraph of the *Chilutti* decision, the Court explained:

> Central to this case is whether a party should be deprived of their constitutional right to a jury trial when they purportedly enter into an arbitration agreement *via* a set of hyperlinked 'terms and conditions' on a website or smartphone application that they never clicked on, viewed, or read.

Chilutti, 300 A.3d at 434. Indeed, the Court's opinion is replete with specific reasons for why, in the Court's view, arbitration agreements in internet-based contracts should be subjected to greater scrutiny. *See id.* at 439-43.

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[2] Amici also maintain that *Chilutti* was also wrongly decided, as they argued in amicus briefs to the Supreme Court at the Petition for Allowance of Appeal and merits stages. *See* Brief of U.S. Chamber and Pennsylvania Chamber, 257 EAL 2023; Brief of Pennsylvania Coalition for Civil Justice Reform, *et al.*, 257 EAL 2023; Brief of U.S. Chamber and Pennsylvania Chamber, 58 EAP 2024; Brief of Pennsylvania Coalition for Civil Justice Reform, *et al.*, 58 EAP 2024. However, because *Chilutti* is binding on this Court until it is overruled by the Supreme Court, Amici advance these alternative arguments.

For example, the Court was hesitant to enforce any "waiver of a right to a jury trial in the context of an Internet arbitration agreement" because those arbitration provisions "(1) can be inconspicuous; (2) may be contained in a hyperlink that is separate from the binding action like a 'click' of an 'I agree to these terms' button; (3) may not require a party's signature to be in direct relation to the waiver; and (4) may not require that a party even review the agreement to be bound by it." *Id.* at 442. The Court was particularly concerned that, "[w]ith these internet contracts, it is now easier than ever for corporations to bind inexperienced, unaware, and unsuspecting consumers to arbitration agreements with the simple click or swipe of their finger—all from the convenience of [a] 3-inch by 6-inch smartphone screen." *Id.* at 443.

Because of those concerns, *Chilutti* imposed specifically tailored new requirements for enforcing arbitration provisions contained in web-based or smartphone application-based agreements. It did so after concluding that "[d]ifferent Internet products lead to different expectations and applications of legal doctrine." *Id.* (alteration in original) (quoting Paul J. Morrow, *Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multidistrict Analysis Showing the Need for Oversight*, 11 U.P.H. J. Tech. L. Pol'y 7 (Spring 2011)).

For website- and application-based arbitration provisions to be binding, *Chilutti* requires that those provisions "explicitly stat[e] on the registration websites and application screens that a consumer is waiving a right to a jury trial when they agree to the company's 'terms and conditions,' and the registration process cannot be completed until the consumer is fully informed of that waiver." *Id.* at 450. In addition, "when the agreements are available for viewing after a user has clicked on the hyperlink, the waiver should not be hidden in the 'terms and conditions' provision but should appear at the top of the first page in bold, capitalized text." *Id.* In this context, *Chilutti* also appears (albeit in dicta) to require companies to define, or include a link to the definition of, arbitration in the agreement, and to explain the difference between binding and non-binding arbitration. *Id.*

None of these requirements—nor the rationale behind them—apply to this case or to employment agreements more generally. Unlike *Chilutti*, this case does not involve a consumer, does not involve a website or smartphone application, and does not involve a hyperlinked "terms and conditions" page that a user was not required to view before agreeing to its terms.

Instead, the arbitration provision in this case was spelled out in the main body of the plaintiff's employment agreement and was not hidden or deemphasized. (*See* R. 678-79a.) Rather than clicking or

swiping with a finger, Ms. Cobb directly applied her e-signature to the agreement. (R. 680a.) And like all employment agreements, it is expected and presumed that Ms. Cobb read and agreed to the terms of the agreement before signing it. *See In re Estate of Boardman*, 80 A.3d 820, 823 (Pa. Super. 2013) ("It is well established that, in the absence of fraud, the failure to read a contract before signing it is an unavailing excuse or defense and cannot justify an avoidance, modification or nullification of the contract; it is considered supine negligence." (quotation omitted)). The rationale behind *Chilutti* is therefore inapplicable to this case and to the interpretation of employment agreements more generally.

Rather than applying *Chilutti*'s special requirements for internet-based, hyperlinked arbitration provisions, this Court should use traditional contract principles to determine whether Ms. Cobb's and Tesla's arbitration agreement is binding. *See Chilutti*, 300 A.3d at 443 (recognizing that "the elements of an enforceable contract are an offer, acceptance, consideration, or mutual meeting of the minds" (quotation omitted)).

II. Policy Reasons Counsel Against Expanding *Chilutti* to Arbitration Provisions in Employment Agreements.

There are no policy reasons to create obstacles to arbitration in the employment setting. As this Court has previously recognized, "[i]t is

unquestioned that arbitration is a process favored today in this Commonwealth to resolve disputes. By now it has become well established that settlement of disputes by arbitration [is] no longer deemed contrary to public policy. In fact, our statutes encourage arbitration and with our dockets crowded and in some jurisdictions congested, arbitration is favored by the courts." *Gaffer Ins. Co., Ltd. v. Discovery Reins. Co.*, 936 A.2d 1109, 1113 (Pa. Super. 2007) (second alteration in original) (quotation omitted).

Empirical studies show that employment arbitration is both fair and efficient. One study reveals that employees are more likely to win in arbitrations compared to litigation in court. *See* Nam D. Pham, Ph.D. & Mary Donovan, "Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration," ndp analytics, at 12 (March 2022).[3] Employees win approximately 37.7% of cases decided on the merits in arbitration, as compared to 10.8% of cases brought in federal court. *Id.* And when employees win in arbitration, they win an average award of $444,134 and a median award of $142,332. *Id.* at 14. In

[3] https://instituteforlegalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf

litigation, however, employees win a lower average award of $407,678 and a lower median award of $68,956. *Id.*

Table 7.
On average, employee-claimants received $444,134 in arbitration and $407,678 in litigation during 2014-21

	Employment Arbitrations	Employment Litigations
Mean	$444,134	$407,678
Median	$142,332	$68,956
90th Percentile	$759,219	$727,312

Arbitration is also consistently a faster way for employees to resolve their disputes with employers. It took an average of 659 days for employees to prevail in arbitration, as opposed to 715 for employees to prevail in litigation in court. *Id.* at 15-16. And, significantly, the longest pending arbitrations were substantially shorter than the longest pending court cases. *Id.*

Employees also strongly favor arbitration for resolving employment disputes. A survey revealed that 61% of employees have a favorable view of using arbitration to decide disputes against their employers. *See* Bill McInturff & Jim Hobart, "Arbitration Survey," Public Opinion Strategies, at 13 (May 2019).[4] In fact, "[b]y more than two to one, employees prefer using arbitration to settle a dispute with their employer." *Id.* at 15.

[4] https://instituteforlegalreform.com/wp-content/uploads/media/ILR_Arbitration_Online_Survey_-_Presentation.pdf

Based on the success and positive perception of employee-employer arbitration, many businesses around the country and in the Commonwealth have structured their employment agreements around arbitration provisions. Expanding *Chilutti* to the employment context, when even the *Chilutti* opinion does not contemplate such an expansion, will disrupt the traditional expectations of businesses and employees based in Pennsylvania. That disruption would be detrimental to Pennsylvania's business community and, ultimately, those businesses' employees and consumers.

Uncertainty over the enforceability of arbitration clauses will pervade the business community operating in Pennsylvania. Numerous, piece-meal challenges may be brought regarding the font sizes, locations, and format of arbitration provisions in all sorts of employment agreements, clogging up the courts.[5] Such litigation

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[5] Indeed, this type of litigation has already begun in the consumer context. *See, e.g.*, *W.W. v. Allegheny Health Network*, 23-cv-1163, 2025 WL 634390, at *6 (W.D. Pa. Feb. 27, 2025) (holding that arbitration provision was not conspicuous enough because, among other reasons, the user has to scroll through other sections to get to the footer containing the hyperlink, and "while the white font of the link against the dark blue footer helps the link stand out, it is still one of over forty links in the footer"); *Pierce v. Floatme Corp.*, GD 24-2169, 2024 WL 5364269, at *1 (C.P. Allegheny Dec. 19, 2024) (holding that arbitration provision was not enforceable because the "'Terms of Service,' while pink in color, is not underlined or in all capital letters and its font is smaller than the other words on the screen"); *Shainline v. Tri Cnty. Area Fed. Credit Union*, No. 2022-16043, 2023 WL 11662407, at *1 (C.P.

threatens to undo the central reason that many businesses seek arbitration in the first place—to reach a just and speedy resolution of claims.

By extending the *Chilutti* rule into employment contracts, this Court would, at a minimum, call into question the enforceability of thousands of arbitration agreements already in existence in employment contracts around the Commonwealth, upsetting a system that employers and employees alike have relied on and which continues to benefit all involved. Casting doubt on the validity of arbitration agreements would also force more cases into court, further burdening the judicial system. To avoid this undesirable result, this Court should decline to extend the decision in *Chilutti* to arbitration provisions in employment agreements.

III. The Federal Arbitration Act preempts any heightened requirements for arbitration agreements.

This Court should also decline to expand the holding in *Chilutti* because that opinion barely addressed—let alone grappled with—the substantial and dispositive federal preemption issue under the Federal Arbitration Act (the "FAA"), which prevents state law from imposing

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Montgomery Oct. 16, 2023) (holding that arbitration provision was unenforceable because, among other reasons, the heading for the provision—which was in all capital letters and bolded—had the same formatting as other headings around it).

higher burdens on the enforceability of arbitration provisions than would apply to any other contract.

In *Chilutti*, this Court expressly stated that, "because the constitutional right to a jury trial should be afforded the greatest protection under the courts of this Commonwealth," for online arbitration agreements, "a stricter burden of proof is necessary to demonstrate a party's unambiguous manifestation of assent to arbitration." *Chilutti*, 300 A.3d at 449-50. Moreover, according to the majority in *Chilutti*, the enforceability of an online arbitration agreement will not turn on overall objective evidence of notice and assent, but on judges' subjective perspectives on web-page layout, font size, and font color. *Id.* at 449. On top of that vague standard, *Chilutti* layers a mandate for uniquely specific language:

> (1) explicitly stating on the registration websites and application screens that a consumer is waiving a right to a jury trial when they agree to the company's "terms and conditions," and the registration process cannot be completed until the consumer is fully informed of that waiver; and (2) when the agreements are available for viewing after a user has clicked on the hyperlink, the waiver should not be hidden in the "terms and conditions" provision but should appear at the top of the first page in bold, capitalized text.

Id. at 450. The opinion also appears to require businesses to define the term "arbitration" (or at least to supply a link to a definition of that

term), provide an explanation of the differences between binding and non-binding arbitration, and specifically state "in an explicit and upfront manner that [users] were giving up a constitutional right to seek damages through a jury trial proceeding." *Id.*

The heightened standards imposed by this Court for proving assent to arbitration are preempted by the FAA—a law that that clearly applies to employment agreements in the Commonwealth. Indeed, the U.S. Supreme Court has not been shy about issuing unanimous *per curiam* decisions summarily reversing state court decisions that adopt rules hostile to arbitration. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012).

The FAA "was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and place such agreements upon the same footing as other contracts." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). It "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." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017).

"The FAA thus preempts any state rule discriminating on its face against arbitration" and "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* The FAA's preemptive force similarly applies to judicial rules that "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding" not to enforce the agreement. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). For purposes of this equal-treatment rule, there is no "distinction between contract formation and contract enforcement." *Kindred Nursing*, 581 U.S. at 254. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 254-55.

The *Chilutti* decision "flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts." *Id.* at 255-56. Although the Court recognized that the plaintiffs agreed to Uber's terms and conditions when they created online accounts, it held that "a stricter burden of proof is necessary to demonstrate a party's unambiguous manifestation of assent to arbitration." *Chilutti*, 300 A.3d at 449-50. The Court thus expressly adopted a higher standard for the formation of an agreement to arbitrate than would apply to the formation of any other online agreement. "Because that

rule singles out arbitration agreements for disfavored treatment, . . . it violates the FAA." *Kindred Nursing*, 581 U.S. at 248.

It likewise makes no difference whether plaintiffs challenging arbitration agreements have invoked their right to a jury trial made "inviolate" by Article I, section 6 of the Pennsylvania Constitution. In *Kindred Nursing Centers*, the Kentucky Supreme Court relied on a similar state constitutional provision when it decided that "an agent could deprive her principal of an adjudication by judge or jury [through an arbitration agreement] only if the power of attorney expressly so provide[d]." 581 U.S. at 250 (second alteration in original) (quotations omitted). The U.S. Supreme Court reversed, holding that the Kentucky Supreme Court had violated the FAA by "adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 252.

The Pennsylvania Supreme Court has similarly acknowledged that the U.S. Supreme Court is "unsympathetic to [a] state court's concern for the right to a jury trial" when addressing arbitration provisions. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 509 (Pa. 2016). The Court explained that it was obligated to "consider questions of arbitrability with a 'healthy regard for the federal policy favoring arbitration,'" and that it was bound to compel arbitration of

claims subject to an arbitration agreement. *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)).

By adopting a stricter burden of proof for online agreements to arbitrate than other online agreements, this Court in *Chilutti* made the same mistake as the Kentucky Supreme Court in *Kindred Nursing Centers*. Yet, this Court did not address the FAA, *Kindred Nursing*, or the Supreme Court's decision in *Taylor* in any meaningful way. Instead, it simply declared that "the FAA is not pertinent because the parties never agreed to arbitrate at the outset." *Chilutti*, 300 A.3d at 450 n.26. But the Court only found that there was no agreement to arbitrate *after* applying its new, heightened standard for assent to arbitration in violation of the FAA. By expressly announcing "a stricter burden of proof" for online agreements, the Court ignored the U.S. Supreme Court's pronouncement that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Taylor*, 147 A.3d at 504 (explaining "that courts are obligated to enforce arbitration agreements as they would enforce any other contract, in accordance with their terms, and may not single out arbitration agreements for disparate treatment").

Because of these problems with the Court's opinion in *Chilutti*, this Court should decline to extend the rationale of *Chilutti* to arbitration provisions in employment agreements.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's order denying the motion to compel arbitration and direct the trial court to stay all proceedings pending the result of that arbitration.

Respectfully submitted,

April 9, 2025

/s/ Leah A. Mintz
Robert L. Byer
Robert M. Palumbos
Leah A. Mintz
DUANE MORRIS LLP
30 S. 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for the Chamber of Commerce of the United States of America, the Pennsylvania Chamber of Business and Industry, and the Pennsylvania Coalition for Civil Justice Reform

Of Counsel:
Jonathan D. Urick
Kevin R. Palmer
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

CERTIFICATES OF COMPLIANCE

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/s/ Leah A. Mintz
Leah A. Mintz
Pa. I.D. 320732
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000
LMintz@duanemorris.com

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