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Appeal Granted by Chilutti v. Uber Technologies, Inc., Pa., August 27, 2024

300 A.3d 430
Superior Court of Pennsylvania.

Shannon CHILUTTI and Keith Chilutti, H/W
Appellants
v.
UBER TECHNOLOGIES, INC., Gegen LLC, Raiser-PA, LLC, Raiser, LLC, Sarah's Car Care, Inc., Mohammed Basheir

No. 1023 EDA 2021
|
Argued May 3, 2023
|
Filed July 19, 2023

Synopsis
Background: Ride-share passenger and her husband filed suit against ride-share company, company's wholly owned subsidiaries, and ride-share driver, alleging that driver failed to provide passenger with seatbelt to secure her in her wheelchair upon her request, that driver's alleged conduct in making an aggressive left-hand turn caused passenger to fall out of her wheelchair and strike her head, and that passenger's husband was riding in the vehicle and observed passenger fall and strike her head. The Court of Common Pleas, Philadelphia County, Civil Division, No. 200900764, Arnold L. New, J., 2021 WL 10360843, granted motion to compel arbitration filed by company and its subsidiaries. Passenger and husband appealed.

Joseph L. Messa Jr., Philadelphia, for appellant.

Thomas N. Sweeney, Philadelphia, for appellant.

Michael L. Kichline, Philadelphia, for appellee.
BEFORE: BENDER, P.J.E., LAZARUS, J., OLSON, J., STABILE, J., DUBOW, J., NICHOLS, J., McLAUGHLIN, J., McCAFFERY, J., and SULLIVAN, J.

Opinion

OPINION BY McCAFFERY, J.:

***434** This appeal arises out of a motor vehicle accident that occurred on March 20, 2019. On that date, Shannon Chilutti, who is wheelchair bound, was injured while riding in a car provided by the transportation service company, Uber Technologies, Inc. (Uber), on the way home from a medical appointment in Langhorne, Pennsylvania.[1] 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.

[1] In scrutinizing this question, we emphasize at the outset that this Commonwealth guarantees its citizens a constitutional right to a jury trial: "**Trial by jury shall be as heretofore, and the right thereof remain inviolate**." PA CONST. art. 1, § 6 (emphasis added).[2] "Inviolate" is defined as "[f]ree from violation; not broken, infringed, or impaired." Black's Law Dictionary, "INVIOLATE" (11th ed. 2019). Since 1847, the Pennsylvania Supreme Court has safeguarded this constitutional protection by recognizing that a victim who has suffered personal injuries is guaranteed the right to a jury trial:

> The bill of rights, which is forever excluded from legislative invasion, declares that the trial by jury shall remain as heretofore, and the right thereof be inviolate; that all courts shall be open, and that every man shall have redress by the due course of law, and that no man can be deprived of his right, except by the judgment of his peers or the law of the land.

Brown v. Hummel, 6 Pa. 86, 90 (1847).

As will be discussed below, when Appellants filed the underlying negligence lawsuit, Uber, Gegen, LLC, Raiser-PA LLC, and Raiser, LLC[3] (collectively, Uber Appellees) moved to compel arbitration, asserting that the couple's conduct on the company's website and application — when they registered for the ridesharing service — signified that they agreed to be bound by the mandatory arbitration provision found in the hyperlinked terms and conditions, thereby relinquishing their right to a jury trial. The trial court granted the petition, determining the parties had not been forced out of court. In doing so, the court failed to consider this Commonwealth's ***435** important and protected constitutional right to a jury trial. Because we conclude that Appellants are legally entitled to relief, we reverse the trial court's order granting Uber Appellees' petition. We further opine that Appellants demonstrated there was a lack of a valid agreement to arbitrate; therefore, they are entitled to invoke their constitutional right to a jury trial. Accordingly, we reverse and remand for further proceedings.

The trial court recited the relevant facts and procedural history as follows:

> [Appellant] Shannon Chilutti, who uses a wheelchair for mobility assistance, used the Uber software application to obtain a ride home from a medical appointment. The driver of the vehicle that responded to her Uber request, Mohammed Basheir, secured Mrs. Chilutti's wheelchair using pre-positioned retractable hooks but failed to provide a seatbelt for Mrs. Chilutti, despite her request for one. While driving, Basheir allegedly made an aggressive left-hand turn, causing Mrs. Chilutti to fall out of her wheelchair and strike her head, rendering her unconscious. [Appellant] Keith Chilutti was riding in the vehicle and observed his wife fall and strike her head.
>
> On September 17, 2020, [Appellants] filed a complaint seeking to recover for injuries sustained as a result of the March 20, 2019 incident. [Uber Appellees] filed a petition to compel arbitration in which they argued the terms and conditions of the Uber application required [Appellants] to arbitrate their claims. Following extensive briefing by the parties, th[e trial] court granted the petition to compel arbitration and stayed this matter as to [Uber Appellees on April 26, 2021].

Appellants raise one issue on appeal:

> ***436** Did the trial court err in granting [Appellees'] Petition to Compel Arbitration where the evidence before the trial court demonstrated that no valid agreement to arbitrate existed between the parties because [Appellees] failed to establish that Uber's registration process and/or subsequent emails properly communicated an offer to arbitrate to [Appellants] under Pennsylvania law?

Appellants' Brief at 4.

II. Arbitration Provisions, Browsewrap Agreements, and the Right to a Jury Trial

Appellants next argue that the trial court erred in compelling them to arbitrate their claims against Uber Appellees because no valid agreement to arbitrate exists between the parties. ***See*** Appellants' Brief at 30-45. They state that Uber Appellees "failed to demonstrate that they properly communicated an offer to arbitrate to [Appellants] under Pennsylvania law." ***Id.*** at 32. Appellants point to the assertion that there "was no meeting of the minds ... regarding an agreement to arbitrate[,] and "[a]t best, when [they] registered to use Uber's services, they agreed to exchange money for either transportation or food delivery services from Uber." ***Id.*** at 34-35.

Appellants' argument focuses on the registration process. They contend that "Uber's registration process failed to adequately communicate an offer to arbitrate in a definite manner, so as to create a meeting of the minds on a material and necessary detail of the bargained for exchange." ***440** Appellants' Brief at 35. They state:

> When Mrs. Chilutti registered for an Uber account in 2016, there was nothing on Uber's website which conveyed an offer to arbitrate or notified her that Uber's Terms of Use contained an arbitration provision which would require her to waive her right to a jury trial. Nor was it by any means obvious to an individual, like Mr. Chilutti, who signed up to use Uber's rideshare services in September 2018 that doing so would be accompanied by extensive terms and conditions, which included a mandatory, binding arbitration provision.

Id. Appellants also assert Uber Appellees failed to properly communicate amendments and revisions to the arbitration provisions in their subsequent communications. ***Id.*** at 39-45.

Uber Appellees respond to Appellants' arguments by insisting they "received reasonably conspicuous notice of Uber's terms and took actions demonstrating their assent to those terms." Uber Appellees' Substituted Brief at 39. Specifically, they state:

> Appellants created Uber accounts on three occasions, twice for [Shannon] Chilutti and once for [Keith] Chilutti. Each time, Appellants received notice that, by creating an Uber account, they were agreeing to Uber's terms. Each time, references to Uber's terms were a different color font, which both called attention

> to the existence of the terms and indicated that they were hyperlinks. And each time, Appellants clicked on the buttons to create their accounts. By doing so, they agreed to and became bound by Uber's terms.

Id. at 47.

[11] [12] [13] To determine whether arbitration should be compelled, we employ a two-part test: "The first determination is whether a valid agreement to arbitrate exists. The second determination is whether the dispute is within the scope of the agreement." ***Smay v. E.R. Stuebner, Inc.***, 864 A.2d 1266, 1270 (Pa. Super. 2004) (citations omitted). "Whether an agreement to arbitrate disputes exists is a question of law." ***Neuhard v. Travelers Ins. Co.***, 831 A.2d 602, 604 (Pa. Super. 2003). "When we review questions of law, our standard of review is limited to determining whether the trial court committed an error of law." ***Id.***

[14] [15] [16] To thoroughly analyze this argument, we begin with the interplay of arbitration agreements and the constitutional right to a jury trial (a right that has not been amended or modified for hundreds of years). We recognize the following:

> Pennsylvania has a well-established public policy that favors arbitration, and this policy aligns with the federal approach expressed in the Federal Arbitration Act [("FAA")]. [T]he fundamental purpose of the [FAA] is to relieve the parties from expensive litigation and to help ease the current congestion of court calendars. Its passage was a congressional declaration of a liberal federal policy favoring arbitration agreements.
>
> This policy, however, was not intended to render arbitration agreements more enforceable than other contracts, and the FAA had not been designed to preempt all state law related to arbitration. Rather, when addressing the specific issue of whether there is a valid agreement to arbitrate, courts generally should apply ordinary state-law principles that govern the formation of contracts, but in doing so, must give due regard to the federal policy favoring arbitration.[7]

441** ***Pisano, 77 A.3d at 660-61 (citations, quotation marks, & some footnotes omitted).[17] ***See also Marmet Health Care Center, Inc. v. Brown***, 565 U.S. 530, 531-33, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012).

Nevertheless, it must be noted that the evolution and effect of arbitration provisions has substantially weakened the constitutional right to a jury trial in civil proceedings. The Pennsylvania Supreme Court recognized this development in ***Taylor, supra***, opining:

> One of the striking consequences of the shift away from the civil justice system and toward private adjudication is that corporations are routinely stripping individuals of their constitutional right to a jury trial. ***See*** U.S. Const. amend. VII (preserving the right to a trial by jury); Pa. Const. art. 1, § 6 (same). While one's right to a jury trial may be waived, it is not at all apparent that signatories to arbitration agreements are aware that they waive their right to a jury trial upon the execution of an arbitration agreement.

Taylor, 147 A.3d at 508 (footnote omitted).

A court will only enforce a confession of judgment provision when the court is satisfied that the party agreeing to it is aware that they waived their right to a jury trial. Generally, courts make the "enforcement" determination when the agreement clearly and plainly states that the party is waiving, *inter alia*, their right to a jury trial. Similarly, a court should not enforce an arbitration provision in an Internet purchase agreement unless the court finds that the party agreeing to an arbitration provision was aware that they were waiving the right. It is reasonable to assume that if the arbitration provision is buried deep in webpages in tiny print, the person was not aware of the provision and it is unenforceable.

However, Internet arbitration agreements are reviewed with considerably less stringent requirements. As will be discussed below, a waiver of a right to a jury trial in the context of an Internet arbitration agreement: (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.

[20] At this juncture, we point out that courts have not addressed the importance ***443** of ensuring that a party is aware of the consequences of waiving a civil jury trial as they have in criminal proceedings. Notably, in criminal

matters, a defendant's waiver to a jury trial must be explicit. A defendant "may waive a jury trial with approval by a judge of the court in which the case is pending." ***Commonwealth v. Houck***, 596 Pa. 683, 948 A.2d 780, 787 (2008) (citation omitted). Moreover, the Rules of Criminal Procedure mandate "[t]he judge shall ascertain from the defendant whether this is a knowing and intelligent waiver, and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record, and signed by the defendant, the attorney for the Commonwealth, the judge, and the defendant's attorney as a witness." Pa.R.Crim.P. 620. We advocate that in both contexts — criminal and civil matters — it is critical that a party be fully informed of their right to a jury trial and the effect of waiving that right. We are not suggesting that an on-the-record colloquy is necessary in civil litigation like in criminal proceedings — just that, again, a waiver must be clearly described and understood to be giving up a constitutional right to a jury trial.

With this in mind, we highlight that we live in an age where Internet users are asked to form contracts with companies on a daily basis using web-based or mobile application technology. These agreements run the gamut from a mortgage loan to a clothing sales transaction to registration for a transportation or ride-hailing service. Notably, "[d]ifferent Internet products lead to different expectations and applications of legal doctrine." Paul J. Morrow, Esq., *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). With 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 3-inch by 6-inch smartphone screen.

[21] [22] [23] Under Pennsylvania law, the elements of an enforceable contract are an "offer, acceptance, consideration, or mutual meeting of the minds." ***Schreiber v. Olan Mills***, 426 Pa.Super. 537, 627 A.2d 806, 808 (1993) (citation and quotation marks omitted). "[T]here must be a meeting of the minds; the very essence of an agreement is that the parties mutually assent to the same thing." ***Id.*** (some punctuation omitted). "Whether particular conduct expresses an offer and acceptance must be determined on the basis of what a reasonable person in the position of the parties would be led to understand by such conduct under all of the surrounding circumstances." ***Mountain Properties, Inc. v. Tyler Hill Realty Corp.***, 767 A.2d 1096, 1101 (Pa. Super. 2001), *quoting* ***Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.***, 764 A.2d 587 (Pa. Super. 2000).

The United States Court of Appeals for the Ninth Circuit has recently described the two primary kinds of Internet contracts as follows:

> The[ ] elemental principles of contract formation apply with equal force to contracts formed online. Thus, if a website offers contractual terms to those who use the site, and a user engages in conduct that manifests her acceptance of those terms, an enforceable agreement can be formed.
>
> The most straightforward application of these principles in the online world involves so-called "clickwrap" agreements, in which a website presents users ***444** with specified contractual terms on a pop-up screen and users must check a box explicitly stating "I agree" in order to proceed. In that scenario, the consumer has received notice of the terms being offered and, in the words of the Restatement, "knows or has reason to know that the other party may infer from his conduct that he assents" to those terms. Restatement (Second) of Contracts § 19(2). As a result, courts have routinely found clickwrap agreements enforceable.
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> At the other end of the spectrum are so-called "browsewrap" agreements, in which a website offers terms that are disclosed only through a hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website. Courts are more reluctant to enforce browsewrap agreements because consumers are frequently left unaware that contractual terms were even offered, much less that continued use of the website will be deemed to manifest acceptance of those terms.
>
> To avoid the unfairness of enforcing contractual terms that consumers never intended to accept, courts confronted with online agreements such as those at issue here have devised rules to determine whether meaningful assent has been given. Unless the website operator can show that a consumer has actual knowledge of the agreement, an enforceable contract will be found based on an inquiry notice theory only if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action,

such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms.

(a) Shannon Chilutti's 2016 Uber Account

Shannon Chilutti registered for an Uber rider account in February 2016 *via* the company's website. R.R. 113a, 118a. The registration page requires the user to input certain personal information and click on a blue "Create Account" button at the bottom of the webpage. R.R. 113a-14a, 120a. Below the "Create Account" button, a putative user would have seen the following: "By clicking 'Create Account', you agree to Uber's Terms and Conditions and Privacy Policy." R.R. 120a. The words, "Terms and Conditions" and "Privacy Policy" were hyperlinks, which, **if clicked on**, would have redirected the user to another website that would then display a 12-page document. R.R. 114a. The hyperlinks are smaller than the other wording on the webpage and in a blue-colored font that was not underlined. R.R. 114a, 207a-08a. Starting on the ninth page, the "Terms and Conditions" contain a "Dispute Resolution" Section, which included the following provision:

> Arbitration
>
> You agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof or the use of the Services (collectively, ***445** "*Disputes*") will be settled by binding arbitration between you and Uber, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. You acknowledge and agree that you and Uber are each waiving the right to a trial by jury or to participate as a plaintiff or class in any purported class action or representative proceeding. Further, unless both you and Uber otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of these Terms.
>
> Arbitration Rules and Governing Law
>
> The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rule and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this "Dispute Resolution" section. ... The Federal Arbitration Act will govern the interpretation and enforcement of this Section.

R.R. 130a-31a. Uber's legal program manager, Ryan R. Buoscio, admitted, during his deposition, that a purported user could create an account with Uber on its 2016 website without viewing the "Terms and Conditions" document. R.R. 208a ("Depending on the device you're using ... if you did not complete scrolling to the bottom of this page, it's possible you may have not seen a component of the page."). Buoscio also acknowledged the website made no reference to the fact that the "Terms and Conditions" document contained an arbitration provision. ***Id.*** Lastly, he admitted that the terms, "arbitration," "waiver of jury trial," and "waiver of constitutional rights" do not appear anywhere on the general website. ***Id.***

Shannon Chilutti averred in an affidavit that she did "not see any hyperlinks[,]" "click on any hyperlinks[,]" or "review" the "Terms and Conditions" or "Privacy Policy" during the registration process and she was not required to review them to complete the registration process. R.R. 222a.[20] During her deposition, Shannon Chilutti testified that she did not see any hyperlinks; rather, she only recalled clicking on the blue box to create the account. R.R. 231a-32a.

(b) Keith Chilutti's 2018 Uber Account

Keith Chilutti registered for an Uber rider account in September 2018 with the Uber Rider App on his IPhone. R.R. 167a, 169a. When registering, he provided personal information. R.R. 185a-86a, 189a-98a. Prior to his account being created, Keith viewed a screen, which stated, "By tapping the arrow below, you agree to Uber's Term of Use and acknowledge that you have read the Privacy Policy." R.R. 200a. Below, in smaller font, it stated: "To learn more, see our Terms of Use and Privacy Policy." ***Id.*** "Terms of Use" and "Privacy Policy" were blue-colored hyperlinks that ***446** were not underlined. R.R. 200a, 256a. To proceed with the process of registering, a user would not have to click on the links to proceed to the next screen. R.R. 258. The "Terms of Use" was a ten-page document that contained an

"Arbitration Agreement" on the second page. The provision stated, in pertinent part:

> **By agreeing to the Terms, you agree that you are required to resolve any claim that you may have against Uber on an individual basis in arbitration, as set forth in this Arbitration Agreement. This will preclude you from bringing any class, collective, or representative action against Uber, and also preclude you from participating in or recovering relief under any current or future class, collective, consolidated, or representative action brought against Uber by someone else.**
>
> Agreement to Binding Arbitration Between You and Uber.
>
> You and Uber agree that any dispute, claim or controversy arising out of or relating to (a) these Terms or the existence, breach, termination, enforcement, interpretation or validity thereof, or (b) your access to or use of the Services at any time, whether before or after the date you agreed to the Terms, will be settled by binding arbitration between you and Uber, and not in a court of law.
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> You acknowledge and agree that you and Uber are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding. Unless both you and Uber otherwise agree in writing, any arbitration will be conducted only on an individual basis and not in a class, collective, consolidated, or representative proceeding. However, you and Uber each retain the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights.
>
> Rules and Governing Law.
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> The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the AAA's Consumer Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Arbitration Agreement. The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879....

R.R. 172a-73a (emphasis in original).

At his deposition, Keith Chilutti testified that he did not click on either hyperlink during the registration process, so he never reviewed the documents. R.R. 266a-67a.

[24] Based on the nature of the Uber's two interfaces, it is clear the contracts qualify as "browsewrap agreements" because both Appellants were "left unaware that contractual terms were even offered, much less that continued use of the website [would] be deemed to manifest acceptance of those terms." ***Berman***, 30 F.4th at 856. Thus, we are faced with the question of whether: "(1) the website provide[d] reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer [took] some action, such as clicking a button or checking a box, that unambiguously manifest[ed] his or her assent to those terms." ***Id.***

Turning to the present matter, we conclude that Uber's website and application did not provide reasonably conspicuous notice of the terms to which Appellants were bound. For example, in Shannon Chilutti's case, the "terms and conditions" agreement was encapsulated in tiny, blue font at the very bottom of a cluttered webpage. The relevant text was not underlined or capitalized. With respect to Keith Chilutti, he was on the fifth screen of the registration process, after he had already provided substantive personal information, when the "Terms and Conditions" page could be reviewed in small font that, again, was not underlined or capitalized. Like in ***Berman***, "[t]he comparatively larger font used in all of the surrounding text naturally directs the user's attention everywhere else. And the textual notice is further deemphasized by the overall design of the webpage, in which other visual elements draw the user's attention away from the barely readable critical text." ***Berman***, 30 F.4th at 857.

[25] Thus, the matter now turns on whether Appellants took any action that unambiguously manifested their assent to be bound by the terms and conditions. We acknowledge that the two agreements at issue herein would arguably meet the standard recited by the ***Berman*** Court, which stated: "This notice defect could easily have been remedied by including language such as, 'By clicking the Continue >> button, you agree to the Terms & Conditions.' " ***Berman***, 30 F.4th at 858 (citation omitted).[22] Here, the text did include language like "By clicking 'Create Account,' you agree to Uber's Terms and Conditions" and "By tapping the arrow below, you agree to Uber's Term of Use[.]" R.R. 120a, 200a.

[26] However, as indicated above, because the constitutional right to a jury trial should be afforded the greatest protection under the courts of this Commonwealth, we conclude that the ***Berman*** standard is insufficient under Pennsylvania law, and a stricter burden of proof is necessary to ***450** demonstrate a party's unambiguous manifestation of assent to arbitration.[23] This is accomplished by the following: (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.

Indeed, as indicated in the record before us, Appellants did not click on or access the terms and conditions before their registration process was completed. These facts were admitted by the Uber representatives. Rather, the evidence merely shows that they created a user account for the ridesharing service.[24] Furthermore, we point out that the definition of arbitration is not contained in the agreement and there is no link to the definition. ***See*** R.R 130a-31a; R.R. 171a-72a. Likewise, there is no explanation as to the difference between binding and non-binding arbitration in the agreement. ***See id.*** Notably, if a party wants to review the AAA Rules that govern the process, they are required to click on a second hyperlink to access that document. ***See*** R.R. 131a, R.R. 172a. Further, we believe that the term, "arbitration," is ambiguous in that there is nothing to explain its meaning and any non-lawyer subscriber could easily believe that arbitration is simply another step in the litigation process that does not involve relinquishing the constitutional right to a jury trial in its entirety. As such, Appellants were not informed in an explicit and upfront manner that they were giving up a constitutional right to seek damages through a jury trial proceeding.[25,26]

***451** Finally, we note that if the issue before us on appeal was a confession of money judgment, this Court would have no qualms in finding the circumstances require an opening or striking of said judgment based on the inconspicuous use of the provision in question. The same would apply to a criminal conviction where no colloquy was provided, or the defendant was not advised of his right to a jury trial. We see no reason why similar analysis should not be afforded herein where the constitutional right to a jury trial in a civil action is "clicked away" without the benefit of any protections the law provides.

Accordingly, we hold that the trial court erred in granting Appellees' petition to compel arbitration, and Appellants demonstrated there was a lack of a valid agreement to arbitrate, and therefore, they are entitled to invoke their constitutional right to a jury trial.

Order reversed. Case remanded for further proceedings. Application for leave to file supplemental authority granted. Jurisdiction relinquished.