

**Affirmed and Opinion filed May 20, 2025.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-24-00358-CV  
NO. 14-24-00409-CV**

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**MELISSA SMITH AND STACY SMITH, Appellants**

**V.**

**AL ROSS LUXURY HOMES LLC, Appellee**

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**On Appeal from the 190th District Court  
Harris County, Texas  
Trial Court Cause No. 2024-12350**

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**O P I N I O N**

In these interlocutory appeals, appellants Melissa and Stacy Smith challenge two trial court orders that, respectively, denied their motion to compel arbitration and temporarily enjoined them from proceeding with arbitration against appellee Al Ross Luxury Homes LLC. The Smiths and Al Ross signed a home remodeling contract, which contained an arbitration agreement. A dispute arose over the project, and the parties signed a mediated settlement agreement in which they jointly

declared null and void the contract containing the arbitration agreement and mutually released all claims arising under that contract. After a separate dispute arose over the settlement agreement, the Smiths sought to compel arbitration based on the original remodeling contract's arbitration clause.

The Smiths contend that the trial court abused its discretion in denying their motion to compel arbitration because: (1) in the remodeling contract, the parties delegated all decisions regarding the arbitrability of disputes to the arbitrator and the severability principle reserves to the arbitrator challenges to the continued validity of the parties' initial agreement; and (2) they established that this dispute falls within arbitration agreement's scope. For similar reasons, the Smiths urge in a third issue that the trial court abused its discretion in granting the temporary injunction.

Under Texas law, a court—as opposed to an arbitrator—must decide in the first instance whether an agreement to arbitrate exists. Applying that body of law here, we conclude that a court must decide the settlement agreement's effect on the prior arbitration agreement. Addressing that question, we further hold that, given the parties' settlement agreement to nullify the initial contract containing the arbitration clause, a presently enforceable arbitration agreement does not clearly and unmistakably exist. Accordingly, the trial court did not abuse its discretion in signing the challenged orders.

We overrule the Smiths' three issues and affirm.

### **Background**

The Smiths and Al Ross signed a contract to remodel the Smiths' home (the "Construction Contract"). The Construction Contract contained the following arbitration clause:

ALTERNATE DISPUTE RESOLUTION – It is the policy of the State of Texas to encourage the peaceable resolution of disputes through alternative dispute resolution procedures.

Mediation-Binding Arbitration: The parties agree that any dispute or claim arising under, or relating to, this Contract, any amendments thereto, the Property, Improvements, or any dealings between the Owner and Builder or their representatives shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) or, if applicable, by similar state statute, and not by or in a court of law. All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator. . . .

Owner and Builder agree that notwithstanding anything to the contrary, the rights and obligations set forth in this mediation-arbitration agreement shall survive . . . the termination of this Contract by either party . . . .

This Contract requires mandatory arbitration of disputes; if any party commences litigation in violation of this Contract, that party shall reimburse the other parties to the litigation for their costs and expenses including attorneys' fees incurred in seeking abatement of such litigation and enforcement of arbitration.

After a dispute arose regarding the Construction Contract, the parties attended mediation and signed a mediated settlement agreement (the "MSA"). The MSA provides that the Smiths and Al Ross "agree to a mutual walk away from the original construction agreement, *which is hereby made null and void.*" (Emphasis added). The MSA also states that, except for the MSA's "undertakings," the parties "agree to mutually release, discharge, and forever hold each other harmless from any and all claims, demands or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the above case, as of this date, arising from, or related to, the events and transactions which are the subject matter of this case." Under the MSA, Al Ross was to provide a draft "Final Settlement Release Agreement" to be delivered to the Smiths' counsel. Regarding any disputes

concerning the MSA, the parties would return to mediation. The MSA contains no other alternative dispute resolution provisions and instead refers to potential “litigation” between the parties.

A dispute arose regarding the language of the Final Settlement Release Agreement, and the parties returned to mediation. When the parties were unable to resolve their dispute, the Smiths filed a demand for arbitration with the American Arbitration Association pursuant to the Construction Contract’s arbitration clause. Al Ross then sued the Smiths in district court for breach of the MSA and for declaratory relief. Al Ross also asked the trial court to enjoin the arbitration proceedings. The trial court granted Al Ross’s application for a temporary restraining order and set a hearing on Al Ross’s request for a temporary injunction. Relying on the Construction Contract’s arbitration provision, the Smiths filed a motion to compel arbitration and abate the court proceedings.

After a hearing, the trial court granted a temporary injunction enjoining the Smiths from arbitrating their dispute over the MSA. In granting the injunction, the court stated, “The original contract was made null and void by the terms of the Settlement Agreement. . . .” The trial court also denied the Smiths’ motion to compel arbitration.

The Smiths timely appealed. *See* Tex. Civ. Prac. & Rem. Code §§ 51.014(a), 51.016.

### **Analysis**

The Smiths assert in their first two issues that the trial court abused its discretion in denying their motion to compel arbitration because: (1) the parties agreed in the Construction Contract to delegate all decisions regarding the arbitrability of disputes to the arbitrator and the severability principle reserves to the

arbitrator challenges to the continued validity of the Construction Contract; and (2) the Smiths established that this dispute falls within the Construction Contract's arbitration provision.

**A. Standard of Review and Governing Law**

We review interlocutory appeals of orders denying motions to compel arbitration for abuse of discretion, deferring to the trial court's factual determinations if they are supported by the evidence and reviewing questions of law de novo. See *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). Further, whether an arbitration agreement is enforceable is subject to de novo review. See *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). The arbitration agreement in the Construction Contract states that the Federal Arbitration Act ("FAA") governs any arbitration between the parties. See 9 U.S.C. §§ 1-402. A party seeking to compel arbitration under the FAA must establish that (1) there is a valid arbitration agreement and (2) the claims in dispute fall within that agreement's scope. See *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011); 9 U.S.C. §§ 2, 4. Parties cannot be compelled to arbitrate any controversy unless they have contractually agreed to do so. *TotalEnergies E&P USA, Inc. v. MP Gulf of Mexico, LLC*, 667 S.W.3d 694, 701 (Tex. 2023); see also *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148 (2024).

**B. Whether a presently enforceable arbitration agreement exists is a question for the court, not an arbitrator.**

The Smiths contend that an arbitrator must resolve the parties' dispute. According to Al Ross, however, the MSA superseded and nullified the Construction Contract, which means that the arbitration agreement contained in the Construction Contract no longer exists after the MSA. The Smiths do not dispute the MSA's language but urge nonetheless that an arbitrator must decide the threshold question

of this dispute's arbitrability because, pursuant to the Construction Contract, the parties delegated all decisions regarding arbitrability to the arbitrator.

The initial question, therefore, is whether, after the MSA, the parties' agreement to arbitrate in the Construction Contract still exists. On this question, we do not write on a blank slate. In *Valero Energy Corp. v. Teco Pipeline Co.*, this court addressed whether an arbitration clause had been revoked by a subsequent settlement agreement between the parties. 2 S.W.3d 576, 586 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We recognized that the issue was for the trial court to determine because “[w]ithout an agreement to arbitrate, arbitration cannot be compelled.” *Id.* (citing *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994)).

This court relied on *Valero* in *Texas La Fiesta Auto Sales, LLC v. Belk*, 349 S.W.3d 872 (Tex. App.—Houston [14th Dist.] 2011, no pet.). There, we again considered whether a court or an arbitrator must decide whether a later contract between the parties revoked an earlier arbitration agreement. *Id.* at 881-82. We stated, “[A]s this court has previously held, it is the trial court’s duty to determine whether a later agreement between the parties revokes an arbitration clause, because the court must determine the threshold issue of whether a valid arbitration agreement exists.” *Id.* at 881 (citing *In re Bath Junkie Franchise, Inc.*, 246 S.W.3d 356, 364 (Tex. App.—Beaumont 2008, orig. proceeding); *TransCore Holdings, Inc. v. Rayner*, 104 S.W.3d 317, 322-23 (Tex. App.—Dallas 2003, pet. denied)).

More recently, the Supreme Court of Texas has once again reaffirmed that courts, not arbitrators, must decide the fundamental question whether parties are bound by an arbitration agreement. See *Transcor Astra Grp. S.A. v. Petrobras Am., Inc.*, 650 S.W.3d 462, 480 (Tex. 2022). In *Transcor*, Petrobras and Astra entered into a stock-purchase agreement, which contained a binding arbitration provision. *Id.* at 468-69. The parties’ relationship deteriorated, but after engaging in extensive

negotiations, they reached a comprehensive settlement agreement resolving all their disputes and releasing any claims against each other. *Id.* at 468. Later, Petrobras alleged that the stock-purchase agreement—as well as the settlement agreement—were induced based on Astra’s “substantial corruption.” *Id.* Petrobras sued Astra for various torts and sought to set aside the settlement agreement. Petrobras also initiated arbitration proceedings to invalidate the stock-purchase agreement. *Id.* at 469. Astra filed several summary-judgment motions, and the trial court ultimately signed a final judgment ordering that Petrobras take nothing on its claims and declaring that the settlement agreement was valid and enforceable and barred Petrobras’s claims, including the claims asserted in arbitration. *Id.* Petrobras appealed, and this court reversed and remanded, holding that some of Petrobras’s claims remained viable. *Id.* at 469-70 (citing *Petrobras Am., Inc. v. Astra Oil Trading NV*, 633 S.W.3d 606 (Tex. App.—Houston [14th Dist.] 2020)).

The supreme court disagreed in part and rendered judgment reinstating the trial court’s final take-nothing judgment. *Id.* at 468. After first determining that the settlement agreement was enforceable, the supreme court held that, although the initial stock-purchase agreement “indisputably includes a clear and unmistakable agreement that the arbitrator will decide any questions regarding the ‘validity’ of the parties’ arbitration agreement,” the later settlement agreement “just as clearly confirms that the parties later agreed to resolve all claims and to supersede the stock-purchase agreement.” *Id.* at 481. The arbitration issue in *Transcor*, like here, was whether, after the settlement agreement, the parties’ prior arbitration agreement still existed. This question, the court held, must be decided by the court because courts must decide “‘whether the parties made a valid *and presently enforceable* agreement to arbitrate.’” *Id.* at 480 (quoting *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 522 (Tex. 2015) (emphasis in original)). The court explained that

“[b]ecause the parties here dispute whether their arbitration agreement continued to exist after the 2012 settlement agreement, we agree with the trial court and court of appeals that courts must decide that issue.” *Id.* at 480. Thus, when the parties dispute whether an arbitration agreement continues to exist following the execution of a second agreement, courts must decide that issue even if the first agreement delegated arbitrability questions to the arbitrator. *See id.*

As recently as last year, the United States Supreme Court spoke again on the issue. *Coinbase*, 602 U.S. at 152. Addressing whether a court or an arbitrator must decide which of two conflicting contracts governed the arbitrability question, the court held that “a court, not an arbitrator, must decide whether the parties’ first agreement was superseded by their second.” *Id.* This is so because the substance of such a dispute is whether an arbitration agreement exists at all. *Id.* at 150.

Citing *Baby Dolls Topless Saloons, Inc. v. Sotero*, 642 S.W.3d 583, 587-88 (Tex. 2022), and *RSL Funding*, the Smiths contend that “the separability doctrine reserves to the arbitrator challenges to the continued validity of the parties’ initial agreement.” In those cases, the court considered whether arbitration should be compelled when an arbitration agreement expired (*Baby Dolls*) or was alleged to be void on public policy grounds (*RSL Funding*). In *RSL Funding*, for example, the supreme court held that whether an agreement which contained an arbitration clause is void is a decision delegated to the arbitrator. *RSL Funding*, 569 S.W.3d at 125 (“Because voidness on public policy grounds, like illegality, is a defense to the contract’s enforcement, it falls into the category that the *Prima Paint* line of cases delegates to the arbitrator.”). *RSL Funding* involved a legal defense to a contract’s enforcement, not a question of contract existence.

Here, however, the Construction Contract did not “expire” nor is it alleged to be void on public policy grounds. In the MSA, the parties agreed that the

Construction Contract was “made null and void.” The Smiths’ reliance on *Baby Dolls* and *RSL Funding* loses sight of the core question: whether the parties agreed to send a given dispute to arbitration. See *Coinbase*, 602 U.S. at 150; *Transcor*, 650 S.W.3d at 480; *Belk*, 349 S.W.3d at 882. As discussed, controlling precedent consistently places that decision in the hands of judges, not arbitrators. Accepting the Smiths’ contrary position could result untenably in an arbitrator ultimately deciding that the Construction Contract (and its arbitration agreement) is in fact null and void, which is tantamount to concluding that “the arbitrator never had any authority to decide the issue.” *In re Morgan Stanley Co.*, 293 S.W.3d 182, 189 (Tex. 2009).

Moreover, as the court explained in *Coinbase*, the severability principle is satisfied when, as here, “a challenge applies ‘equally’ to the whole contract and to an arbitration or delegation provision. . . .” *Coinbase*, 602 U.S. at 150-51. Because Al Ross asserts that the entire Construction Contract was made “null and void” by the MSA, it challenges both the Construction Contract as a whole and the arbitration/delegation provision. The court must determine this question. See *id.*; accord *Transcor*, 650 S.W.3d at 480; *Belk*, 349 S.W.3d at 881.

We overrule the Smiths’ first issue.

**C. The trial court did not err in denying the motion to compel arbitration because no arbitration agreement presently exists.**

We now turn to the Smiths’ second issue, in which they argue that, even if the court is entitled to decide the arbitrability question, the trial court erred in denying their motion to compel arbitration because this dispute falls within a valid and enforceable arbitration agreement. See *In re Rubiola*, 334 S.W.3d at 223; 9 U.S.C. §§ 2, 4.

The parties signed two contracts: (1) the Construction Contract, which sends arbitrability disputes to an arbitrator, but only if mediation is unsuccessful; and later, (2) the MSA, which makes no mention of arbitration whatsoever. The only alternative dispute resolution provision included in the MSA states the parties' agreement to resolve disputes regarding interpretation or performance of the MSA with the mediator who facilitated the settlement. Barring a settlement of any such dispute, the MSA contemplates "litigation"—not arbitration—to construe or enforce the agreement.<sup>1</sup> If the MSA constitutes the controlling agreement, then there exists no agreement to arbitrate this dispute.

As discussed, the MSA documents the parties' agreement to "compromise and settle" their dispute arising from the Construction Contract. As consideration, the parties agreed, among other things, to "a mutual walk away from the original construction agreement, which is hereby made *null and void*." (Emphasis added). The Smiths and Al Ross agreed that, except for the MSA's "undertakings," they would "mutually release, discharge, and forever hold each other harmless from any and all claims, demands or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the above case, as of this date, arising from, or related to, the events and transactions which are the subject matter of this

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<sup>1</sup> Specifically, the MSA provides:

If one or more disputes arise with regard to the interpretation and/or performance of this agreement or any of its provisions, the parties agree to attempt to resolve same by contacting the Mediator who facilitated this settlement and each party agrees to schedule with the Mediator, Judge Caroline Baker, a mediation, within thirty (30) days to make a good faith effort to resolve the dispute. If any party refuses to participate in a follow-up mediation, then that party may not recover attorneys' fees or costs in any litigation brought to construe or enforce this agreement. Otherwise, if the follow-up mediation is unsuccessful, the prevailing party or parties shall be entitled to recover reasonable attorneys' fees and expenses. The parties hereto and their attorneys agree that under no circumstances will the mediator be a fact witness regarding the interpretation of this Settlement Agreement.

case.” As the MSA makes clear, the “subject matter” of the case is the Construction Contract:

The underlying dispute, which is settled by this agreement, arises from [sic] Al Ross Luxury Homes, LLC furnished labor and materials for the construction and/or remodeling efforts at the [Smiths’] residential property . . . . Melissa Smith, Stacy Smith and Al Ross Luxury Homes, LLC (“ALRH”) executed a contractual agreement on March 31, 2021.

[ ] The parties hereto agree to compromise and settle the above-reverenced matter. . . .

In our view, these circumstances compare favorably with those in *Transcor*, in which the supreme court held that the settlement agreement *superseded* all prior agreements, including the agreement containing the arbitration provision. *Transcor*, 650 S.W.3d at 480-82. The *Transcor* court reached this conclusion after considering several factors, such as the settlement agreement’s merger clause, forum selection clause, and mutual release. *See id.* at 481-82. For example, the settlement agreement’s merger clause provided that the settlement agreement represented the parties’ entire agreement and superseded all prior written or oral agreements. *Id.* at 481. And the agreement’s forum selection clause provided that disputes about the agreement would be heard in courts in either state courts in Harris County or the federal district courts in the Southern District, Houston Division. *Id.* Finally, the parties agreed through the settlement agreement’s mutual release to release all claims, including those arising from the stock-purchase agreement that contained the arbitration provision. *Id.* As the court observed, none of these provisions contained any language that could be interpreted to preserve any claims regarding the stock-purchase agreement or its arbitration clause. *Id.* at 481-82.

Although the MSA contains no merger clause or forum-selection clause as were present in *Transcor*, this does not indicate, as the Smiths urge, that the parties intentionally chose not to supersede or revoke the arbitration agreement. We reach

this conclusion for more than one reason. First, the MSA’s “null-and-void” clause is plain enough; a “null and void” contract is no contract at all, binds no one, and has no legal effect. *E.g.*, *Null*, Black’s Law Dictionary (12th ed. 2024) (defining “null” as “[h]aving no legal effect; without binding force; VOID”); *Void*, Black’s Law Dictionary (12th ed. 2024) (defining “void” as “of no legal effect; to null”). As Texas courts have held, a “null and void” contract is considered to have never existed. *See Bannum, Inc. v. Mees*, No. 07-12-00458-CV, 2014 WL 2918436, at \*1 (Tex. App.—Amarillo June 24, 2014, no pet.) (mem. op.) (“Before one can sue another for breach of contract, there must first be a contract susceptible to breach. An agreement rendered ‘null and void’ is not such a contract because a void contract never came into existence.”); *Ragira v. VIP Lodging Grp., Inc.*, 301 S.W.3d 747, 754 (Tex. App.—El Paso 2009, pet. denied) (“Because we find that Ragira’s failure to pay the review-period fees rendered the contracts null and void, no contracts existed, and therefore, Ragira was not entitled to specific performance.”).

Moreover, one may not reasonably interpret the MSA’s broad release provision as excepting or preserving the Construction Contract’s arbitration agreement. *Cf. Transcor*, 650 S.W.3d at 481. The parties broadly released all claims they had or that could arise under the Construction Contract.

For their part, the Smiths do not dispute that the MSA is a binding contract. They claim, however, that the arbitration provision in the Construction Contract survives the “termination or repudiation of the contract in which it is contained.” They cite *Greystone Multi-Family Builders, Inc. v. TES Electric, LP*, No. 01-15-00640-CV, 2016 WL 3362208, at \*6 (Tex. App.—Houston [1st Dist.] June 16, 2016, no pet.) (mem. op.); *Cleveland Construction, Inc. v. Levco Construction, Inc.*, 359 S.W.3d 843, 854 (Tex. App.—Houston [1st Dist.] 2012, pet. dismissed); and *Pepe International Development Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 932 (Tex.

App.—Houston [1st Dist.] 1996, no writ). All three of these cases stand for the proposition that an arbitration agreement survives the termination of the contract in which it is contained. *See Graystone*, 2016 WL 3362208, at \*6; *Cleveland Constr.*, 359 S.W.3d at 854; *Pepe Int’l Dev.*, 915 S.W.2d at 932.

Here, however, the parties did not, as the Smiths characterize it, simply “terminate” the Construction Contract; instead, they declared it “null and void” by agreement. By signing the MSA, the Smiths and Al Ross nullified the Construction Contract and with it the arbitration agreement. Thus, as in *Transcor*, we cannot conclude that a “presently enforceable agreement to arbitrate” exists. 650 S.W.3d at 480.

In sum, based on the MSA’s plain and unambiguous language,<sup>2</sup> we conclude that the MSA superseded and replaced the Construction Contract. Absent a presently existing agreement to arbitrate, the trial court did not abuse its discretion in denying the Smiths’ motion to compel arbitration. *Cf. id.* at 481-82; *see also AIG Specialty Ins. Co. v. ExxonMobil Oil Corp.*, No. 05-23-00719-CV, 2024 WL 1089475, at \*5-8 (Tex. App.—Dallas Mar. 13, 2024, pet. denied) (mem. op.) (trial court did not abuse its discretion in denying motion to compel arbitration when later agreement superseded agreement containing arbitration provision).

We overrule the Smiths’ second issue.

**D. The trial court did not err by enjoining arbitration.**

Our disposition of the Smiths’ second issue controls their third issue, in which they argue that the trial court abused its discretion in granting the temporary injunction because this dispute is covered by a valid arbitration agreement. *See Tex.*

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<sup>2</sup> We must enforce such a plain and unambiguous contract as written. *See Skeels v. Suder*, 671 S.W.3d 664, 671 (Tex. 2023).

R. App. P. 47.1. For the reasons discussed above, we conclude that the trial court did not err in signing the second order granting the temporary injunction, and we overrule the Smiths' third issue.

### **Conclusion**

We affirm the trial court's orders.

/s/ Kevin Jewell  
Justice

Panel consists of Chief Justice Christopher and Justices Jewell and McLaughlin.