COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1849 **Cir. Ct. No. 2011CV220**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BUILDING WERKS HOLDINGS, LLC, EA RESTORATION, LLC AND EVERETT FOYTIK, LLC,

PLAINTIFFS-APPELLANTS,

V.

PAUL DAVIS RESTORATION, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. This lawsuit arises out of three franchise agreements in which Paul Davis Restoration, Inc., granted Matthew Everett and his businesses permission to operate under the Paul Davis name in certain geographic territories within Wisconsin. Each franchise agreement contained a

provision requiring all disputes arising out of the agreement or the operation of the franchise to be submitted to binding arbitration. When Everett's businesses—Building Werks Holdings, LLC; EA Restoration, LLC; and Everett Foytik, LLC (collectively, Building Werks)—brought suit against Paul Davis for various claims related to the franchises, Paul Davis sought to enforce the arbitration provisions in the franchise agreements. The circuit court entered an order requiring Building Werks to submit its claims to arbitration, with the exception of its unconscionability claim, which the circuit court dismissed on summary judgment. Building Werks argues its claims should not be subject to arbitration, asserting that although the arbitration procedures appear fair on their face, the Paul Davis arbitration system is in practice a sham and will, in all cases, produce an outcome in favor of Paul Davis.

¶2 We conclude Building Werks' concerns about the fairness of the arbitration process are insufficient to permit anticipatory judicial intervention. Building Werks must submit its claims in this lawsuit to arbitration in accordance with the franchise agreements before seeking to vacate any award as tainted by fraud, bias or a manifest disregard of the law. However, because Building Werks' unconscionability claim was directed solely at the validity of the arbitration provisions, and not the entire franchise agreements, the case law dictates it was a proper subject for judicial resolution. We conclude the circuit court properly granted summary judgment on the unconscionability claim because, as a matter of law, Building Werks has not demonstrated procedural or substantive unconscionability. Furthermore, the circuit court acted within its discretion in not compelling additional discovery with respect to the unconscionability claim. Accordingly, we affirm.

BACKGROUND

¶3 Paul Davis operates a national franchise network of businesses that provide insurance restoration, remodeling, loss mitigation, and residential and commercial cleaning services. Paul Davis's network consists of specific geographical territories, which are assigned to individual operators pursuant to Paul Davis's standard franchise agreement.

¶4 Matthew Everett has been involved with Paul Davis for nearly two decades. Everett was the vice president of Paul Davis's southeast Wisconsin franchise in the late 1990s before he began sublicensing the Fox Valley franchise (FXWI) in 2002.[1] Everett ultimately became the owner of franchise rights to three of Paul Davis's Wisconsin territories. Specifically, in 2004, Everett formed EA Green Bay, LLC (EAGB), through which he executed a franchise agreement with Paul Davis for the northeast Wisconsin territory (NOWI). In 2007, Everett formed EA Restoration, LLC and executed a franchise agreement for FXWI. Also in 2007, Everett and his business partner formed Everett Foytik, LLC and executed a franchise agreement for the central Wisconsin territory (CTWI).

¶5 Each of the franchise agreements executed by Everett and his businesses contained substantively similar arbitration provisions that required "[a]ny controversy or claim arising out of or relating to this Agreement or the acquisition or operation of the franchise" to be submitted and resolved by binding arbitration "in accordance with the arbitration procedures as set forth in the Operations Manual." This type of arbitration, known as "Book Two" arbitration,

[1] In terms of the acronyms used to refer to the franchises, we have adopted the nomenclature the parties have used.

is a peer-review system in which disputes are resolved by a panel of other Paul Davis franchisees.

¶6 The franchise agreements also contained several choice-of-law provisions. The agreements were generally to be governed by and interpreted under Florida law. However, "[i]n the event of any issue regarding interpretation or enforcement" of the arbitration provisions, "the provisions of the Federal Arbitration Act, 9 U.S.C. [§] 1, et. seq., shall prevail over the law of any state." Further, attached to each franchise agreement was an amendment known as the "Wisconsin Addendum," which provided as follows:

> The Franchisor and Franchisee hereby acknowledge that the Franchise Agreement shall be governed by The Wisconsin Fair Dealership Law (Wisconsin Statutes, 1979-80, Title XIV-A, Chapter 135, Section 135.01 through 135.07) which makes it unlawful for a franchisor to terminate, cancel or fail to renew a franchise without good cause, as well as providing other protections and rights to the franchisee. To the extent anything in the Franchise Agreement is contrary to the laws in the State of Wisconsin, said laws shall prevail.

The Wisconsin Addendum was fully incorporated into each franchise agreement.[2]

¶7 Each franchise agreement had a five-year term, and in 2009 Paul Davis and Everett began negotiating for renewal of the NOWI franchise. The parties were unable to reach an agreement, and Everett decided to escrow payments owed to Paul Davis under the NOWI franchise agreement. When Paul Davis stopped being paid, it terminated Everett's right to the NOWI franchise.

[2] The circuit court concluded the practical result of these choice-of-law provisions is that Wisconsin law controls, because the Wisconsin Addendum requires the application of that law in the event that Florida law or, as it pertains to the arbitration provisions, the Federal Arbitration Act contain contrary provisions. This conclusion has not been challenged on appeal.

Everett responded by transferring his interest in EAGB to his wife, Renee, who then changed the business name to Building Werks Holdings, LLC, and continued to provide the same services, out of the same location, with the same employees.

¶8 In June 2010, Paul Davis notified Everett that it intended to terminate his right to service the FXWI and CTWI territories because of Everett's involvement with Building Werks Holdings, LLC. Paul Davis eventually obtained an arbitration award against Everett, Renee and Building Werks Holdings, LLC for violating the NOWI franchise agreement's post-termination non-compete provisions. *See* ***Everett v. Paul Davis Restoration, Inc.***, 771 F.3d 380, 382-83 (7th Cir. 2014). After receiving the arbitration ruling, Paul Davis terminated Everett's FXWI and CTWI franchises.

¶9 Building Werks commenced this action against Paul Davis in January 2011. The amended complaint advanced three claims: (1) violations of Wisconsin's Fair Dealership Law (WFDL), WIS. STAT. ch. 135;[3] (2) intentional misrepresentation and fraud in the inducement as to all of the franchise agreements; and (3) violations of the Wisconsin Franchise Investment Law (WFIL), specifically WIS. STAT. §§ 553.41 and 553.51. Building Werks alleged these claims were not subject to arbitration because "the entire [franchise] agreement is invalid and rescinded as induced by fraud and the arbitration clause is unconscionable for a variety of reasons."[4] The parties filed a number of motions in 2011, including a motion by Paul Davis to compel arbitration.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[4] Although the complaint references a single franchise agreement, it is evident Building Werks is challenging arbitrability of its claims under all three agreements.

¶10 The parties' motions were heard by Judge Sue Bischel, who entered an order granting Paul Davis's motion to compel arbitration as to all matters except the unconscionability claim. Judge Bischel determined that federal law governed any issues arising out of the arbitration provisions, except to the extent federal law conflicted with Wisconsin law. She further concluded the arbitration provisions were sufficiently broad to require that nearly all disputes be resolved by arbitration, including disputes regarding the scope of the arbitration provisions themselves. Accordingly, Judge Bischel concluded the alleged WFDL and WFIL violations, as well as Building Werks' claim that each franchise agreement was fraudulently induced, needed to be arbitrated. However, she also concluded Building Werks' unconscionability claim was subject to judicial resolution because it was directed specifically to the validity of the arbitration provisions. Judge Bischel concluded the record was insufficiently developed to resolve the unconscionability issue as a matter of law and ordered further discovery solely on that issue.

¶11 Building Werks subsequently filed a motion to compel discovery. Paul Davis responded with a motion for summary judgment on the unconscionability claim. Due to Judge Bischel's retirement, these matters were heard by Judge Mark Warpinski, who ultimately denied the motion to compel discovery and granted the motion for summary judgment. Following Judge Warpinski's decision, the case was transferred to Judge Thomas Walsh, who granted Building Werks' request for relief from the judgment compelling arbitration because Building Werks had not been given an opportunity to fully respond to Paul Davis's summary judgment motion prior to Judge Warpinski's ruling.

¶12 Building Werks also requested that Judge Walsh reconsider Judge Warpinski's discovery ruling based on new evidence. Namely, after Judge Warpinski's ruling, Building Werks obtained an affidavit from Peter Hoiriis, a former Paul Davis franchisee in New Hampshire. Building Werks represented that the affidavit detailed "the inherent bias and coercion in Paul Davis's arbitration system" as well as the "non-attorney arbitrators' unwillingness or inability to follow the applicable law." Building Werks asserted the Hoiriis affidavit provided further support for its discovery requests regarding unconscionability.

¶13 Hoiriis averred he was previously a member of an arbitration panel in arbitration initiated by Paul Davis against Everett and his business partner in August 2011. At the time, Hoiriis was indebted to Paul Davis for about $50,000 in past-due franchise payments, and his franchise agreement was going to be up for renewal soon. Hoiriis stated he was concerned about his upcoming renewal negotiations and the potential for retaliation should he rule in Everett's favor. Hoiriis also averred that while he was on the panel, Everett sought discovery from Paul Davis regarding Everett's WFDL claim. Hoiriis stated he had no legal experience or training, nor did the other arbitrators, and they concluded they "would have to set aside the [WFDL] in its entirety" in deciding whether Everett was entitled to discovery. Hoiriis further averred that "[a]fter these initial conferences, the arbitration process went no further before [he] left the Paul Davis system."

¶14 Judge Walsh denied the motion to reconsider the earlier discovery ruling. He reaffirmed that the requested materials fell outside the scope of discovery authorized by Judge Bischel on the issue of unconscionability. Judge Walsh, observing the case had been pending for years, and expressing a need for finality, provided Building Werks with a final opportunity to submit "*narrowly*

tailored discovery requests explaining why each is necessary for a disposition." Building Werks filed another request for discovery, which was granted in part.[5]

¶15 Paul Davis then renewed its motion for summary judgment on Building Werks' unconscionability claim and again sought to compel Building Werks to submit the other claims to arbitration. The circuit court granted both motions, concluding there were no genuine issues of material fact as to the unconscionability claim. The court determined that the undisputed facts gave rise to only one reasonable inference—namely, Everett was a "savvy businessperson" who was sufficiently sophisticated to appreciate the nature of the arbitration system at the time he entered into the franchise agreements. Accordingly, the court concluded Building Werks failed to show the arbitration provisions were procedurally unconscionable. The court determined the arbitration provisions were not substantively unconscionable either, observing that, on their face, the Book Two peer arbitration procedures appeared to be fair. With respect to Building Werks' assertion that the arbitration provisions were substantively unconscionable in practice, the court concluded Hoiriis's affidavit was insufficient to establish a conclusive pattern of unfairness. Rather, Hoiriis provided only anecdotal evidence regarding his experiences in reaching one preliminary arbitration decision, and no final award had been issued in the matter for which Hoiriis was empaneled. Building Werks now appeals.

[5] The circuit court granted Building Werks' discovery requests seeking (a) identification of any arbitration rule changes relating to arbitrators' duties made after Everett signed his first franchise agreement; (b) identification of any arbitration in which Paul Davis lost in arbitration against a terminated franchisee; and (c) identification of discretionary favors, waivers, or modifications requested, offered, or granted to any of the arbitrators who have served on arbitrations involving Building Werks.

DISCUSSION

¶16 In this case, Building Werks challenges the enforceability of the arbitration clauses contained in the franchise agreements. Arbitration is a matter of contract. ***Riley v. Extendicare Health Facilities, Inc.***, 2013 WI App 9, ¶13, 345 Wis. 2d 804, 826 N.W.2d 398 (WI App 2012). As with all contracts, our goal is to ascertain the parties' intentions, as expressed in the contractual language. ***Id.*** Federal and Wisconsin statutory law, too, require courts to enforce arbitration agreements according to their terms. ***Id.***, ¶14. The interpretation of a contract, which includes the enforceability of arbitration and choice-of-law provisions, is a question of law we review de novo. ***Mortimore v. Merge Techs. Inc.***, 2012 WI App 109, ¶13, 344 Wis. 2d 459, 824 N.W.2d 155; ***Beilfuss v. Huffy Corp.***, 2004 WI App 118, ¶6, 274 Wis. 2d 500, 685 N.W.2d 373.

¶17 Building Werks' primarily argues that it should be permitted to present its claims in a judicial forum—and, conversely, Paul Davis should be denied the benefit of the arbitration clause in the franchise agreements with Building Werks—because Paul Davis's arbitration system is so fundamentally flawed that it is effectively a sham. Building Werks predicts that submitting its claims to arbitration would be pointless because the outcome is a foregone conclusion—the claims will be heard by a biased panel composed of fellow franchisees with conflicts of interest, who will ignore the applicable law and, in all cases, render a decision in Paul Davis's favor. This "sham arbitration" argument permeates each of Building Werks' substantive arguments regarding the arbitration clauses, including each clause's alleged unconscionability.

¶18 Building Werks' first variation of this argument is its contention that the circuit court erroneously granted Paul Davis's motion to compel arbitration.

To escape the arbitration provisions—which standing alone would require Building Werks' claims to be submitted to arbitration—Building Werks presents a complicated argument regarding how the franchise agreements interact with the Wisconsin Addendum. According to Building Werks, the circuit court erroneously concluded federal law applies to its claims, because there are substantive conflicts between federal law and Wisconsin law governing vacatur of arbitration awards.[6] In short, Building Werks believes that federal courts will turn a blind eye toward arbitration awards that lack any basis in law or that are the result of arbitrator bias. Wisconsin courts, Building Werks argues, are not so callous and will vacate such awards as contrary to public policy. Because of this purported "conflict," Building Werks argues it should be able to litigate its claims in Wisconsin courts pursuant to the Wisconsin Addendum, to avoid being "stuck with whatever the Paul Davis arbitration system awards in favor of Paul Davis."

¶19 Building Werks glosses over the fact that it contractually agreed to be "stuck with whatever the Paul Davis arbitration system awards." *See* ***Cirilli v. Country Ins. & Fin. Servs.***, 2009 WI App 167, ¶14, 322 Wis. 2d 238, 776 N.W.2d 272 ("There is a strong presumption of arbitrability where the contract in question contains an arbitration clause."). We fully appreciate Building Werks' argument that it agreed to arbitrate in a *fair* system, but if the parade of horribles Building Werks imagines comes to pass, we doubt that any court—Wisconsin or federal—will uphold the award. An arbitration award wherein the arbitration panel displayed a manifest disregard of the law will not withstand the deferential

[6] To the extent this argument requires that we determine whether federal law and Wisconsin law are in harmony, this issue presents a question of law that we decide de novo. *See* ***State v. Henley***, 2010 WI 12, ¶9, 332 Wis. 2d 1, 778 N.W.2d 853 (WI 2009) ("Questions of statutory interpretation and application are questions of law.").

scrutiny of either judicial system. *See* ***Renard v. Ameriprise Fin. Servs., Inc.***, 778 F.3d 563 (7th Cir. 2015); ***Baldwin-Woodville Area Sch. Dist. v. West Cent. Educ. Ass'n—Baldwin Woodville Unit***, 2009 WI 51, ¶21, 317 Wis. 2d 691, 766 N.W.2d 591. Similarly, both federal and Wisconsin courts have authority to vacate arbitration awards tainted by corruption, fraud or bias on the part of the arbitrators. *See* 9 U.S.C. § 10(a) (2012); WIS. STAT. § 788.10(1). There is simply no merit to the assertion that Building Werks' claims must be litigated in Wisconsin courts because federal courts will not provide relief from a fundamentally flawed process.

¶20 But more to the point, because arbitration has not yet begun in earnest, we do not have sufficient information about what the composition of the arbitration panel will be or what it would do if given the opportunity to resolve Building Werks' claims. Building Werks argues to the contrary, essentially claiming Hoiriis's affidavit conclusively proves it cannot receive a fair hearing and will lose in arbitration for reasons other than the merits. However, even assuming the veracity of Hoiriis's averments in his affidavit (which have not yet been adversarially tested), Hoiriis was involved only in preliminary matters of the arbitration, and he was removed from the panel before it reached any substantive decisions on the merits.[7] Although Building Werks perceives its argument to have an evidentiary foundation, in fact Building Werks' arguments are based only on its speculation and predictions about what might happen. The single, anecdotal account from one prior arbitrator and Building Werks' speculation therefrom are

[7] Paul Davis's general counsel averred that no final decision has yet been reached in arbitration. Building Werks represents that Paul Davis "has not pressed the arbitration forward to date and it remains stalled."

insufficient, at this time, to avoid application of the plain contract language requiring that Building Werks' claims be submitted to arbitration.

¶21 If, after the arbitration has run its course, Building Werks does not prevail and it believes the arbitration award must be vacated under the law, it can then seek such relief under established procedures. In ***Midwest Generation EME, LLC v. Continuum Chemical Corp.***, 768 F. Supp. 2d 939 (N.D. Ill. 2010), the court observed that "[p]ost-arbitration discovery is rare, and courts have been extremely reluctant to allow it" because it is often "a 'tactic' employed by disgruntled or suspicious parties who, having lost the arbitration, are anxious for another go at it." ***Id.*** at 943. However, when there is clear evidence of impropriety, as determined from the vantage point of a reasonable observer, then such discovery—including discovery concerning the arbitrators themselves—is warranted. ***Id.*** at 945-46; *accord* ***Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.***, 2009 WI 73, ¶45, 319 Wis. 2d 52, 768 N.W.2d 596 ("If fraud, bad faith, material mistake, or a lack of understanding of the [arbitration] process are reasonably implicated, it is within a judge's discretion to allow further inquiry or discovery."). The "clear evidence" standard is less onerous than the "clear and convincing" standard the aggrieved party ultimately must satisfy to overturn an arbitration award. *See* ***Continuum Chem. Corp.***, 768 F. Supp. 2d at 946; *see also* ***Nicolet High Sch. Dist. v. Nicolet Educ. Ass'n***, 118 Wis. 2d 707, 712, 348 N.W.2d 175 (1984) (arbitration awards disturbed only when "invalidity is demonstrated by clear and convincing evidence").

¶22 At this time, however, Building Werks can avoid arbitration only by showing that it did not agree to arbitrate the particular claims at issue in the first instance. *See* ***Mortimore***, 344 Wis. 2d 459, ¶15. Agreements to arbitrate, as with all contracts, are "grounded on the principle of freedom of contract, which protects

the justifiable expectations of the parties to an agreement, free from governmental interference." ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶27, 290 Wis. 2d 514, 714 N.W.2d 155. Arbitration provisions are presumed valid in Wisconsin, although such provisions may be invalidated "for reasons that apply to all contract provisions." ***Id.***, ¶28.

¶23 In this respect, it is important to note that Building Werks did plead fraud in the inducement, having alleged its assent to the franchise agreements was procured by fraud. Building Werks asserted that, as a result, the agreements as a whole were invalid and subject to rescission. Building Werks argues that there is a conflict between federal law and Wisconsin law regarding the validity of an arbitration clause where fraud in the inducement is pleaded as to the entire agreement, with Wisconsin permitting this claim to be litigated in the judicial system. Building Werks asserts that the fraud in the inducement claim must therefore be tried before the court rather than submitted to arbitration, per the Wisconsin Addendum.

¶24 Once again, the purported conflict between federal and Wisconsin law is nonexistent. In ***Buckeye Check Cashing, Inc. v. Cardegna***, 546 U.S. 440 (2006), the Supreme Court stated that challenges affecting the validity of arbitration provisions can be divided into two types. ***Id.*** at 444. The first type "challenges specifically the validity of the agreement to arbitrate," while the second type "challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." ***Id.*** "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"—and this is true in both state and federal courts. ***Id.*** at 445-46. The

Wisconsin Supreme Court has recognized that the U.S. Supreme Court's declaration in ***Cardegna*** is to direct Wisconsin courts on this issue. *See* ***Jones***, 290 Wis. 2d 514, ¶¶5-6; *see also* ***Sands v. Menard, Inc.***, 2010 WI 96, ¶55 n.27, 328 Wis. 2d 647, 787 N.W.2d 384 (Because Wisconsin's arbitration statute governing review of arbitration awards is "nearly identical" to the federal statute, Wisconsin courts will look to federal cases to assist their interpretation.). It is undisputed that Building Werks' fraud in the inducement claim was directed at the validity of the *entire* franchise agreements, not just their arbitration provisions.

¶25 Building Werks reaches its conclusion that Wisconsin and federal law conflict on the proper forum for resolving a fraud claim through an incorrect reading of Wisconsin law. Building Werks cites WIS. STAT. § 788.03, which it perceives as requiring that the circuit court, upon receiving a petition to arbitrate a dispute, "shall" set the matter for a jury trial. In fact, § 788.03 is entirely consistent with ***Cardegna***, in that it directs that only the "making of the arbitration agreement or the failure, neglect or refusal to perform the same" is subject to judicial resolution. Indeed, it would be surprising to find federal and Wisconsin law in conflict on this matter, as federal law contains a statutory provision that is nearly identical to § 788.03. *See* 9 U.S.C. § 4 (2012).

¶26 Building Werks also cites ***Maryland Casualty Co. v. Seidenspinner***, 181 Wis. 2d 950, 512 N.W.2d 186 (Ct. App. 1994), in support of its argument. Building Werks contends ***Seidenspinner*** stands for the broad proposition that "Wisconsin courts will not enforce contracts containing arbitration clauses, and indeed will *enjoin* arbitration under such contracts, where fraud or duress renders the contract voidable." However, ***Seidenspinner*** did not involve a claim of fraud or duress, and there is no indication that by stating that fraud or duress renders "the agreement" voidable, the ***Seidenspinner*** court meant to suggest a claim that

the *entire* agreement was obtained by fraud need not be arbitrated. *See* ***id.*** at 956. Regardless, to the extent ***Seidenspinner*** can be read as Building Werks suggests, such an interpretation has clearly been abrogated by ***Jones***.

¶27 Building Werks next argues it should not have to arbitrate its claims because the Wisconsin Addendum effectively "cancels" the franchise agreements' arbitration provisions. Building Werks reasons that the Wisconsin Addendum amends the franchise agreement to incorporate the WFDL, including WIS. STAT. § 135.05, which, according to Building Werks, "only authorizes arbitration agreements that provide for all of the protections afforded under the WFDL." Since the arbitrators in this case *will* ignore the WFDL, the argument goes, the arbitration provision is contrary to the Wisconsin Addendum, and effectively canceled.

¶28 Again, Building Werks' argument in this regard is too speculative and premature to warrant relief in a judicial forum at this time. It is undisputed that the franchise agreements, by virtue of the Wisconsin Addendum, expressly provide the protections afforded by the WFDL. Paul Davis concedes, and the Seventh Circuit Court of Appeals has recently held, that the arbitration in this case *must* comply with the WFDL. *See* ***Everett***, 771 F.3d at 386 ("[T]here is no doubt that the [WFDL] governs any arbitration arising from the agreement."). Despite Building Werks' repeated references to Hoiriis's affidavit, it is not certain, at this time, that the arbitration panel selected to resolve Building Werks' claims will ignore this clearly applicable law governing the franchise agreements. This court does not decide issues that are based on hypothetical or future facts. ***State v. Armstead***, 220 Wis. 2d 626, 635-36, 583 N.W.2d 444 (Ct. App. 1998).

¶29 Building Werks' final argument is that the circuit court erroneously rejected its claim that the arbitration provisions in the franchise agreements were unconscionable. Because this claim targeted only the validity of the arbitration clauses, not the contracts as a whole, it was a proper matter for judicial resolution. *See* ***Jones***, 290 Wis. 2d 514, ¶6. The circuit court resolved this claim on a motion for summary judgment, which we review de novo. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. The moving party is entitled to summary judgment if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. ***Id.***; *see also* WIS. STAT. § 802.08(2). We must determine whether the pleadings join issue on a proper claim for relief, then we must evaluate whether a genuine issue of material fact exists based upon the parties' submissions. ***Chapman***, 351 Wis. 2d 123, ¶2.

¶30 The concept of unconscionability has "deep roots in both law and equity but was developed primarily in equity." ***Jones***, 290 Wis. 2d 514, ¶29. It is "an amorphous concept that evades precise definition." ***Id.***, ¶31. However, the underlying principle is that oppression or unfair surprise should be prevented; it is not that we should disturb the parties' allocation of risk because of superior bargaining power. ***Id.***, ¶32. "Unconscionability has often been described as the absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party." ***Id.***

¶31 To establish unconscionability, Building Werks must demonstrate the arbitration provisions were both procedurally and substantively unconscionable. *See* ***id.***, ¶33. The degree of proof necessary on each component is flexible; if the facts demonstrate an extreme degree of procedural unconscionability, then less substantive unconscionability need be present, and

vice versa. ***Id.*** When the facts are undisputed, whether unconscionability exists is a question of law. *See* ***id.***, ¶38.

¶32 Determining whether procedural unconscionability exists requires examining factors relating to the formation of the contract, including the age, intelligence, education, business acumen and experience of each party, a disparity in bargaining power, which party drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were or would have been permitted. ***Id.***, ¶34. Substantive unconscionability is a more elusive concept but requires consideration of whether "the contract terms … are 'commercially reasonable'"—i.e., whether the terms lie "outside the limits of what is reasonable or acceptable" in light of the general commercial background of the transaction. ***Id.***, ¶36.

¶33 Building Werks argues the arbitration provisions are procedurally unconscionable because Paul Davis held the superior bargaining position and drafted the franchise agreements. Building Werks also observes that Paul Davis would not permit alteration of the arbitration provisions. Building Werks argues that Everett was not as sophisticated a businessperson as the circuit court suggested and, in any event, the "utterly confusing and inherently complicated way the franchise agreement interplays with the Wisconsin Addendum meant that no matter how sophisticated, no business[person] could reasonably be expected to understand that Paul Davis could terminate and then use its puppet arbitrators to eliminate the franchise's statutory rights."

¶34 Building Werks does not argue the arbitration provisions are substantively unconscionable because their *content* is per se objectionable. Indeed, Building Werks concedes that "the language of the franchise agreements

themselves suggests an arguably fair process of peer adjudication." However, Building Werks argues that in "actual practice" the arbitration provisions "tilt the entire dispute resolution process in favor of Paul Davis, particularly in the context of a terminated franchise." Because this process will occur in such a way as to undermine the fairness of the proceedings and produce results inconsistent with the applicable law, Building Werks argues the provisions must be found commercially unreasonable and, therefore, substantively unconscionable.

¶35 We conclude the circuit court properly granted Paul Davis summary judgment on the unconscionability claim. To the extent Building Werks' unconscionability argument is based on its predictions about the composition, conduct and decision of the arbitration panel that will eventually hear its claims, we once again reject this argument as speculative. *See supra* ¶¶20, 28.[8] Moreover, substantive unconscionability turns on the actual terms of the contract, not how or whether those terms are later implemented or followed. *See* ***Jones***, 290 Wis. 2d 514, ¶¶35-36; ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis. 2d 83, 90, 483 N.W.2d 585 (Ct. App. 1992) ("[S]ubstantive unconscionability pertains to the reasonableness of the contract terms themselves."). We further conclude that none of the other factors Building Werks cites in support of its unconscionability argument are sufficiently compelling to warrant judicial relief at this time.

[8] In addressing Hoiriis's affidavit, Paul Davis improperly cites to an unpublished 1997 opinion of this court. We admonish counsel that only unpublished, authored cases issued on or after July 1, 2009 may be cited, and then only as persuasive authority. *See* WIS. STAT. RULE 809.23(3)(b).

¶36 The Seventh Circuit Court of Appeals has observed that the franchise agreements at issue in this appeal are "not the typical consumer contract involving a highly sophisticated party and one without sophistication." ***Everett***, 771 F.3d at 386. Rather, in rejecting a similar argument to the one Building Werks advances here, the Seventh Circuit stated:

> To suggest, as Ms. Everett does, that the power balance between [Paul Davis] and Mr. Everett, an experienced business[person], were so one-sided so as to deprive Mr. Everett of any meaningful choice, or that the terms were so unreasonable as to be outside any notion of normal commercial relations is to misunderstand the doctrine of unconscionability.

Id. While Building Werks contends the Seventh Circuit reached this conclusion without the benefit of the Hoiriis affidavit, as just explained, *supra* ¶35, such evidence, even taken as true, is immaterial to an analysis of an arbitration agreement's unconscionability.

¶37 Like the Seventh Circuit, the circuit court in this case determined that the only reasonable inference from the undisputed facts was that Everett was a "savvy businessperson." We agree. Everett spent two decades in the insurance industry, including several years as a Paul Davis franchise executive, before sublicensing his own franchise in 2002. After Everett signed his first franchise agreement in 2004, he personally participated in a Paul Davis, Book Two peer arbitration process in 2005, after which he went on to sign two more franchise agreements. Based on these undisputed facts, we cannot conclude that Everett lacked a "meaningful choice" when deciding whether to enter into the franchise agreements with Paul Davis. *See* ***Aul v. Golden Rule Ins. Co.***, 2007 WI App 165, ¶25, 304 Wis. 2d 227, 737 N.W.2d 24.

¶38 That the arbitration provisions were apparently standard, non-negotiable provisions drafted by Paul Davis does not alter our conclusion. A disparity in bargaining power alone is generally insufficient to establish procedural unconscionability. ***Jones***, 290 Wis. 2d 514, ¶49 n.42. Here, any such disparity is indisputably minor. Moreover, adhesion contracts, while frowned upon, "are common and allow for savings in transaction costs." ***Id.***, ¶53. Given the degree of Everett's sophistication and experience with the very arbitration provisions at issue in this case, we cannot conclude that the addition of nonnegotiable, boilerplate dispute resolution provisions prevented "a true meeting of the minds." *See* ***Pietroske, Inc. v. Globalcom, Inc.***, 2004 WI App 142, ¶9, 275 Wis. 2d 444, 685 N.W.2d 884.

¶39 Building Werks also has not demonstrated the arbitration provisions were substantively unconscionable. Building Werks does not even argue the arbitration provisions on their face are commercially unreasonable. Indeed, several other courts have remarked that the Book Two arbitration procedures are adequate to protect the franchisee, with one federal court going so far as to say that the procedures are an "inherently fair method of dispute resolution," given that arbitration occurs before a committee of fellow franchise owners. *See, e.g.*, ***Swanson Restoration & Design, Inc. v. Paul Davis Restoration, Inc.***, No. SACV 07-1018 AG (RNBx), 2007 U.S. Dist. LEXIS 96520, at *11-13 (C.D. Cal. Nov. 26, 2007) (collecting cases). Reference to the facts alleged in the Hoiriis affidavit (or in Everett's own affidavit or in other evidence, for that matter) does not overcome the facial commercial reasonability of the arbitration provisions, for the reasons we have stated. Again, to the extent the arbitration process impermissibly deviates from what is promised, Building Werks' remedy is to seek vacatur of the eventual arbitration award.

¶40 Lastly, Building Werks states that if the evidence of record is "insufficient" to conclude that the arbitration clauses are unconscionable, we should reverse to provide Building Werks additional opportunities for discovery. Building Werks contends this discovery is warranted to demonstrate the unfairness inherent in the Paul Davis arbitration system, as that system operates in practice. However, because arbitration has not yet begun in earnest on Building Werks' claims, at best the desired discovery would show there is a *risk* that Building Werks will be treated unfairly. Once again, Building Werks has procedural rights, including that of discovery, in the context of any post-award proceedings seeking vacatur of the award. *See supra* ¶21. Moreover, Building Werks has already been given multiple opportunities to craft discovery requests that complied with Judge Bischel's order in this case. For these reasons, we cannot conclude the circuit court erroneously exercised its discretion when it partially denied Building Werks' motion to compel discovery. *See* ***Sands v. Whitnall Sch. Dist.***, 2008 WI 89, ¶13, 312 Wis. 2d 1, 754 N.W.2d 439 (erroneous exercise of discretion standard applies to orders resolving motions to compel discovery).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.