

IN THE SUPREME COURT OF OHIO

TAYLOR BUILDING
CORPORATION OF AMERICA,

Supreme Court Case No.: ~~06-1896~~

06-2043

Appellant,

On Appeal from the Clermont County
Court of Appeals, 12th Appellate District

vs.

Court of Appeals
Case No. CA2005-09-083

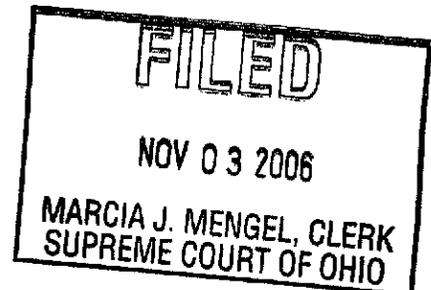
MARVIN BENFIELD, et al.,

Appellees.

NOTICE OF ORDER CERTIFYING CONFLICT

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Marvin and Mary Ruth Benfield



NOTICE OF ORDER CERTIFYING CONFLICT

Comes now the Appellant, Taylor Building Corporation of America ("Taylor") and hereby furnishes notice that on October 23, 2006, the Twelfth District Court of Appeals, filed the Entry Granting Motion to Certify Conflict. The question certified by that Court was as follows: Should an appellate court apply a "de novo" or "abuse of discretion" standard of review when reviewing a trial court's decision granting or denying a motion to compel arbitration where it is alleged that the arbitration clause is unconscionable?

A copy of the Entry Granting Motion to Certify Conflict is attached hereto along with copies of the decisions found to be in conflict.

Appellant Taylor furnished notice of the filing of its Motion to Certify Conflict on October 11, 2006 contemporaneous with the filing of its Notice of Appeal and Memorandum in Support of Jurisdiction. Taylor's petition for discretionary review is still pending before this Court.

Respectfully submitted,



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*Attorney for Appellant
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via ordinary United States mail this 30th day of October, 2006, to the following:

Donald W. White, Esq.
Nichols, Speidel & Nichols
237 Main Street
Batavia, OH 45103
Counsel for Appellees
Marvin and Mary Ruth Benfield



J. Robert Linneman

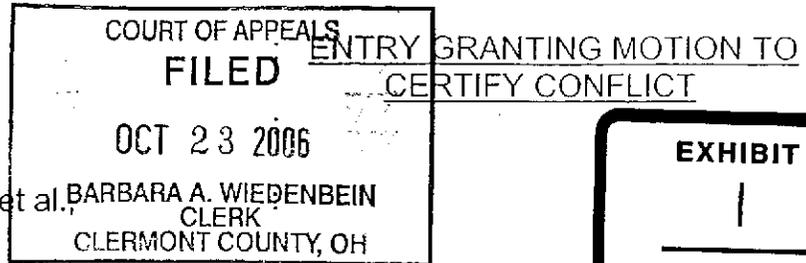
IN THE COURT OF APPEALS FOR CLERMONT COUNTY, OHIO

TAYLOR BUILDING CORPORATION : CASE NO. CA2005-09-083

OF AMERICA,
Appellee,

vs.

MARVIN BENFIELD, et al. BARBARA A. WIEDENBEIN
Appellants. CLERK
CLERMONT COUNTY, OH



The above cause is before the court pursuant to a motion to certify conflict to the Ohio Supreme Court filed by counsel for appellee, Taylor Building Corporation of America, on September 7, 2006.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinion of the two courts of appeal are inconsistent; the judgments of the two courts must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73.

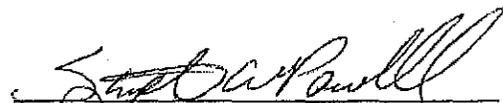
The issue involved in this case is the appropriate standard of review for a decision granting a motion to compel arbitration where the party opposing the motion alleges that the arbitration clause at issue is unconscionable. In the present case, this court held that when reviewing a trial court's ruling on the question of unconscionability of an arbitration contract, a de novo standard is applied. This court held that the un-

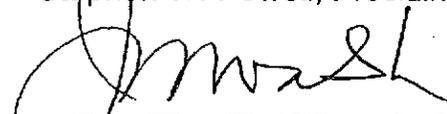
Appellee contends that this court's decision is in conflict with judgments rendered on the same question by the Sixth, Eighth, Ninth and Tenth Appellate Districts. These appellate districts have decided cases on the same question applying an abuse of discretion standard of review, although some of them have applied the de novo standard in other similar cases.

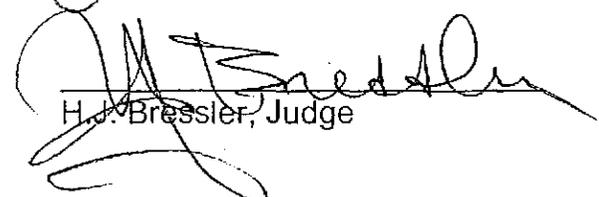
Specifically, appellee contends that this court's decision is in conflict with the following cases: *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757 (Sixth District Court of Appeals); *Sikes v. Ganley Pontiac Honda, Inc., et al.* Cuyahoga App. No. 82889, 2004-Ohio-155 (Eighth District Court of Appeals); *Harper v. J.D. Byrider of Canton* (2002), 148 Ohio App.3d 122 (Ninth District Court of Appeals); *Cronin v. California Fitness*, Franklin App. No. 04AP-1121, 2005-Ohio-3273 (Tenth District Court of Appeals).

Upon consideration of the foregoing, the court finds that the motion to certify conflict is with merit, and the same is hereby GRANTED. The certified question is as follows: Should an appellate court apply a de novo or abuse of discretion standard of review when reviewing a trial court's decision granting or denying a motion to compel arbitration where it is alleged that the arbitration clause is unconscionable?

IT IS SO ORDERED.


Stephen W. Powell, Presiding Judge


James E. Walsh, Judge


H.J. Bressler, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

TAYLOR BUILDING CORP. OF
AMERICA,

Plaintiff-Appellee,

- VS -

MARVIN BENFIELD, et al.,

Defendants-Appellants.

CASE NO. CA2005-09-083

JUDGMENT ENTRY

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

COURT OF APPEALS
FILED
AUG 28 2006
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

Stephen W. Powell
Stephen W. Powell, Presiding Judge

James E. Walsh
James E. Walsh, Judge

H.J. Bressler
H.J. Bressler, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

TAYLOR BUILDING CORP. OF AMERICA, :

Plaintiff-Appellee, :

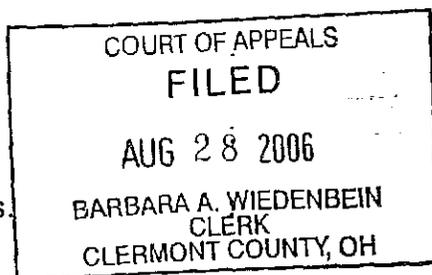
CASE NO. CA2005-09-083

- vs -

MARVIN BENFIELD, et al.,

Defendants-Appellants.

OPINION
8/28/2006



CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 03-CVE-1565

Santen & Hughes, J. Robert Linneman, C. Gregory Schmidt, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202, for plaintiff-appellee

Nichols, Speidel & Nichols, Donald W. White, 237 Main Street, Batavia, Ohio 45103, for defendants-appellants, Marvin and Mary Ruth Benfield

BRESSLER, J.

{11} Defendants-appellants, Marvin and Mary Ruth Benfield, appeal from a decision of the Clermont County Court of Common Pleas, granting the motion of plaintiff-appellee, Taylor Building Corporation of America, to stay judicial proceedings pending mediation and/or arbitration.

{12} Appellee is a Kentucky corporation whose principal place of business is in Louisville, Kentucky. Appellee is engaged in the business of constructing residential houses.



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OPIN

Appellants are a married couple who reside in Cincinnati, Ohio and own real estate in Clermont County, Ohio.

{13} On July 3, 2002, appellee entered into an agreement with appellants, whereby appellee agreed to construct a residential home for appellants on their property in Clermont County for \$89,977. After commencing work, appellee sent invoices to appellants requesting progress payments as called for under the terms of the parties' construction contract. Appellants, being dissatisfied with appellee's work, refused to pay the invoices.

{14} In July 2003, appellants sent appellee a "Stop Work" letter, and ordered appellee to leave the premises and not return. As of July 31, 2003, appellants allegedly owed appellee \$18,145.40 for materials and labor that appellee had furnished with respect to the parties' construction contract. In September 2003, appellee filed a mechanic's lien against appellants' Clermont County property.

{15} On November 26, 2003, appellee filed a complaint in foreclosure against appellants in the Clermont County Court of Common Pleas, raising claims of breach of contract, unjust enrichment, and quantum meruit. Appellee's complaint also sought foreclosure on the mechanic's lien that it had filed against appellants' property.

{16} At the same time it filed its complaint in foreclosure, appellee moved to stay the proceedings pending mediation and/or arbitration. Appellee based its motion on the mediation and arbitration clauses in the parties' construction agreement that required any claims or disputes arising under the agreement to be submitted to mediation, and upon failure of mediation, then to binding arbitration.

{17} On December 23, 2003, appellants filed an answer to appellee's complaint, denying the material allegations directed against them. Appellants also brought a counterclaim, alleging, among other things, that appellee: (1) had engaged in acts and practices in violation of the Ohio Consumer Sales Practices Act ("CSPA"), (2) had breached

its contractual obligations under the parties' contract, and (3) had made fraudulent misrepresentations to appellants regarding their competency as home builders.

{¶8} On December 24, 2003, appellants moved to dismiss Taylor's motion to stay judicial proceedings pending mediation and/or arbitration. Appellants argued, among other things, that several provisions of the parties' construction contract, including its mediation and arbitration clause, were "unconscionable" and, therefore, unenforceable.

{¶9} The trial court held a hearing on appellee's motion to stay judicial proceedings pending mediation and/or arbitration. The only evidence submitted in the case was an affidavit from one of the appellants, Mary Ruth Benfield. In her affidavit, Mary Ruth adopted the allegations in appellants' answer, affirmative defenses, counterclaim, and response to appellee's motion to stay the proceedings pending mediation and/or arbitration.

{¶10} On August 17, 2005, the trial court issued a decision and entry finding that a provision in the mediation and arbitration clauses requiring that the mediation and/or arbitration take place in Kentucky was "substantively unconscionable" because it violated R.C. 4113.62. As a result, the trial court ordered that the mediation and/or arbitration proceedings must take place in Clermont County, Ohio. The trial court found that the remaining terms of the mediation and arbitration clauses and the construction contract, itself, are not unconscionable or otherwise unenforceable. Consequently, the trial court granted appellee's motion to stay the proceedings pending mediation and/or arbitration.

{¶11} Appellants now appeal, raising the following assignment of error:

{¶12} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE ARBITRATION CLAUSE IS ENFORCEABLE."

{¶13} Appellants argue that the trial court erred in finding the mediation/arbitration clauses in the parties' contract to be enforceable, because the clause is unconscionable as a matter of law. We agree with appellants' argument.

{¶14} Generally, appellate courts review a trial court's disposition of a motion to stay proceedings and compel arbitration under an "abuse of discretion" standard of review. See, e.g., *Yessenow v. Aue Design Studio, Inc.*, 165 Ohio App.3d 757, 2006-Ohio-1202, ¶11; *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App.3d 44, 49.

{¶15} However, when an appellate court is presented with a purely legal question, the appropriate standard of appellate review is "de novo." *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, ¶11. Under a de novo standard of review, an appellate court does not defer to a trial court's decision. *Id.* On questions of law, a trial court does not exercise discretion, and the appellate court's review is plenary. *Id.* at ¶12, citing *McGee v. Ohio State Bd. Of Psychology* (1993), 82 Ohio App.3d 301, 305.

{¶16} The determination as to whether a provision in a contract is unconscionable is a question of law. *Ins. Co. of N. America v. Automatic Sprinkler Corp.* (1981), 67 Ohio St.2d 91, 98. Therefore, in reviewing the trial court's ruling on the question of unconscionability, we apply a "de novo," rather than an "abuse of discretion" standard of review. See *Eagle*, 2004-Ohio-829 at ¶13; *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 2004-Ohio-6425, ¶19-20; *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, ¶8.

{¶17} In Ohio, "arbitration is encouraged as a method to settle disputes. [Citations omitted.] A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision. An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294.

{¶18} An arbitration clause may be unenforceable "upon grounds that exist at law or in

equity for the revocation of any contract." R.C. 2711.01(A). One such ground is "unconscionability." See *Eagle*, 2004-Ohio-829 at ¶16; *Porpora v. Gatliff Building Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, ¶6. "Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834.

{¶19} An arbitration clause is unconscionable where the clause is "so one-sided as to oppress or unfairly surprise [a] party." *Neubrandner v. Dean Witter Reynolds, Inc.* (1992), 81 Ohio App.3d 308, 311-312, quoting Black's Law Dictionary (5th Ed.Rev.1979) 1367. "The party seeking to establish that an arbitration clause is unconscionable must show that the provision is both procedurally and substantively unconscionable." *Porpora*, 2005-Ohio-2410 at ¶6.

{¶20} Procedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible. *Id.* at ¶7. To determine whether a contract provision is procedurally unconscionable, courts consider the following factors: (1) the relative bargaining positions of the parties; (2) whether the terms of the provision were explained to the weaker party; and (3) whether the party claiming that the provision is unconscionable was represented by counsel at the time the contract was executed. *Id.*

{¶21} Additionally, when "there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature," there is "considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464, 473, 1998-Ohio-294. Black's Law Dictionary (8th Ed.2004) 342, defines an adhesion contract as a "standard-form contract prepared by one party, to be signed by the party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms."

{¶22} Substantive unconscionability refers to the actual terms of the agreement. *Porpora*, 2005-Ohio-2410 at ¶8. Contract terms are substantively unconscionable if they are unfair and commercially unreasonable. *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.* (1996), 113 Ohio App.3d 75, 80. "Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular * * * clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Collins*, 86 Ohio App.3d at 834.

{¶23} "In order to determine whether a given contract provision is unconscionable, courts must examine the particular facts and circumstances surrounding the agreement." *Porpora* at ¶9. After a de novo review of the evidence in this case, we find abundant evidence in the record to show that the contractual provisions at issue in this case are both procedurally and substantively unconscionable.

{¶24} In its decision, the trial court found that there was no evidence that appellee presented the construction contract with the mediation/arbitration clauses to appellants on a "take it or leave it" basis. However, according to Mary Ruth Benfield's affidavit, she states that appellee's agent advised them that appellee "would not sign a contract without the arbitration/mediation clause[.]" The fact that appellee refused to negotiate this provision is a fact that weighs in favor of a finding of procedural unconscionability. See *Porpora* at ¶12.

{¶25} Furthermore, appellants were not represented by counsel. This is another factor that tends to demonstrate procedural unconscionability. See *Porpora* at ¶12; *Eagle*, 2004-Ohio-829 at ¶59. While the record indicates that appellants knew about the mediation and arbitration clauses, Mary Ruth Benfield's affidavit indicates that appellee's agent minimized

the importance of the clause, stating that, while appellee would not enter into an agreement without the clause, the clause was "not necessary since [appellee] never had any disputes over the quality of their product and workmanship * * * [and appellee] did not see the arbitration/mediation [clauses] as being a factor since [appellee was] concerned about keeping [its] customers happy."

{¶26} In appellee's favor, we note that appellants were unable to demonstrate that they could not have their house constructed by a builder other than appellee. As the trial court noted, "[t]here are a multitude of homebuilders in the local area." Furthermore, the trial court was permitted to take judicial notice of this fact since it is a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201(B).

{¶27} The fact that there are many other homebuilders in the area shows that there were "alternative sources of supply" for the goods and services in question. Hence, this fact weighs against a finding of procedural unconscionability. See *Collins*, 86 Ohio App.3d at 834. However, the weight of this fact is weakened by the representations made by appellee's sales representative in inducing appellants into entering into the agreement by minimizing the importance and effect of the mediation/arbitration clauses.

{¶28} Also, we note that the written agreement presented to appellants was a pre-printed form contract, prepared by appellee, with many clauses that were not subject to negotiation. Accordingly, we find that this contract is a clear example of an adhesion contract. Balancing the factors described above, we find that the mediation/arbitration clauses are procedurally unconscionable.

{¶29} With respect to the issue of substantive unconscionability, the contract in question contains numerous clauses that are notably unfair, including the following:

{¶30} "6. (a) "That [appellants have] no right of possession of the real estate and improvements until full and final payment including any additional amounts due as a result of Change Orders has been paid to [appellee]. [Appellants] further [agree] that notwithstanding the provisions for liquidated damages, in the event of a breach of the conditions of this Paragraph 6 of the Agreement, [appellee] will not have adequate remedy at law, and accordingly to prevent [appellants], or its successors in interest from occupying or causing others to occupy the real estate improvements prior to said full and final payment, that [appellee] may have a temporary restraining order, temporary and perpetual injunction restraining and enjoying the occupancy until said final payment is made.

{¶31} "(b) [Appellants] further [agree] that in addition to the equitable remedies provided for in Subparagraph (a) above upon violation of the terms of this Paragraph 6, [appellee] shall be entitled to recover as liquidated damages and not as a penalty \$950.00 for the initial moving in, occupancy, or storing of furniture in the housing unit, garage, or basement and \$60.00 per housing unit for each day the violation continues.

{¶32} "7. To pay reasonable legal costs for the enforcement of [appellee's] rights under this contract, including attorney's fees, court costs, fees and expenses.

{¶33} "9. * * * In the event of default by [appellants] it is agreed that in addition to or in lieu of its remedies for breach of contract, [appellee] may enforce its lien as liens against real estate are enforced.

{¶34} "10. To pay \$1,000.00 in addition to the amount shown on this contract if funding is provided by an institution using FHA, VA, FMHA, or STATE BONDED FUNDS or if any loan is insured by the parties referred to herein; or, if [appellants'] construction lender requires individual subcontractor affidavits/lien waivers.

{¶35} "12. * * * [Appellants] further [agree] that it has no right to interrupt construction for any reason whatsoever.

{¶36} "15. * * * (b) Arbitration—In the event the issues cannot be resolved by mediation, then any claims or disputes arising out of this Construction Agreement or the alleged breach thereunder shall be settled by **mandatory and binding** arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless both parties mutually agree otherwise. (This position shall not affect [appellee's] right to secure a mechanic's lien and to pursue those remedies described in Sections 6 and 9 hereof.) Notices of the demand for arbitration shall be filed with a copy of this Construction Agreement with the American Arbitration Association and the other party to this Agreement. The site for the arbitration proceedings shall be Louisville, Kentucky (Jefferson County).

{¶37} "16. That in the event any of the provisions of this Agreement as to mediation, arbitration or [appellee] buy back, are deemed unenforceable, or in the event of an action initiated by [appellee] pursuant to Paragraph 6 and 9 of this Agreement, both parties agree that any and all legal actions arising out of this Construction Agreement or the alleged breach thereunder shall be tried by a judge sitting without a jury and both parties do hereby Knowingly, Voluntarily and Intentionally waive any right to a jury trial. The site for the aforementioned action shall be Louisville, Kentucky (Jefferson County). Nothing herein is intended or shall be construed to limit or prevent [appellee] from pursuing and performing any mechanic's lien upon the Real Estate and Improvements for sums unpaid under this Agreement. The provisions in this paragraph are a material inducement for [appellee] to enter into this Construction Agreement." (Emphasis sic.)

{¶38} The clauses referenced above are heavily skewed in favor of appellee, imposing significant restrictions on appellants alone. For example, according to the terms of this agreement, appellants are prohibited from interrupting construction under any circumstances and are prohibited from possession of their own property, even in the event of a breach on the

part of appellee. These clauses force appellants to wait until completion of construction before seeking relief, preventing appellants from mitigating damages in the event of a breach of contract. See *Propora*, 2005-Ohio-2410 at ¶16. In fact, these clauses prevented appellants from being able to correct building code violations before the Clermont County Building Inspector ordered that all construction cease.

{¶39} Furthermore, by entering into this agreement, appellants are required not only to waive their right to a jury trial, but to assume complete responsibility for paying appellee's "reasonable legal costs for the enforcement" of appellee's rights under the construction contract, including appellee's "attorney's fees, court costs, fees and expenses." Appellees, on the other hand, are not burdened with a similar responsibility to pay all reasonable costs, including attorney's fees, for the enforcement of appellants' rights under the contract.

{¶40} We note that this agreement, including its mediation and arbitration clause, cannot be deemed unconscionable merely because both parties to the contract do not have to pay the other's attorney fees for the enforcement of their rights under the agreement. See *Robbins v. Country Club Retirement Center IV, Inc.*, Belmont App. No. 04 BE 43, 2005-Ohio-1338, ¶25-26 (merely because an arbitration agreement can be read as being more favorable to one party does not invalidate the agreement as lacking mutuality of obligation, because the concept of "mutuality of obligations" in contract law does not mean that each party must have the exact same obligations). However, this provision is but one of multiple examples of the substantive unfairness of the terms in this contract.

{¶41} Moreover, the agreement does not disclose the costs of alternative dispute resolution, or the fact that those costs are often substantially higher than the costs associated with court proceedings. These clauses, which impose significant undisclosed costs on appellants, are comparable to those found substantively unconscionable in *Eagle*, 2004-Ohio-829 at ¶37-51, and *Propora* at ¶16.

{¶42} The provisions discussed above are troubling because they create a chilling effect, and are most certainly appellee's attempt to avoid potential liability for a breach of contract, should one occur. In the event of such a breach, appellants are unable to stop construction until completion. Then, to bring a claim against appellee, appellants are required to pay for and submit to out-of-state alternative dispute resolution, and in the event that any litigation arises out of the agreement and/or alternative dispute resolution, appellants are subject to out-of state litigation and are responsible for all court costs as well as both parties' legal fees. We find this to be substantively unconscionable.

{¶43} In addition, portions of the contract are in violation of R.C. 4113.62(D), which provides:

{¶44} "(1) Any provision of a construction contract, agreement, understanding, or specification or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that makes the construction contract or subcontract, agreement, or other understanding subject to the laws of another state is void and unenforceable as against public policy.

{¶45} "(2) Any provision of a construction contract, agreement, understanding, specification, or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding to occur in another state is void and unenforceable as against public policy. Any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually

agreed upon by the parties."

{¶46} The trial court correctly found that the portion of the mediation/arbitration clauses requiring alternative dispute resolution to take place in Kentucky violates R.C. 4113.62. However, paragraph 16 of the agreement requires all litigation arising from the contract to take place in Kentucky, which also violates R.C. 4113.62.

{¶47} The litigation clause in the agreement presents an additional problem. "For a dispute resolution procedure to be classified as "arbitration," the decision rendered must be final, binding, and without any qualifications or conditions as to the finality of an award.' An arbitration award may be challenged only through the procedure set forth in R.C. 2711.13 and on the grounds enumerated in R.C. 2711.10 and 2711.11. 'The jurisdiction of the courts to review arbitration awards is thus statutorily restricted; it is narrow and it is limited.'" (Internal citations omitted.) *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, ¶10. "By permitting a trial de novo in some instances, [an arbitration] provision unnecessarily subjects the parties to multiple proceedings in a variety of forums, increases costs, extends the time consumed in ultimately resolving a dispute, and eviscerates any advantage of unburdening crowded court dockets." *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 716. Accordingly, where an arbitration clause is not a provision providing for true arbitration, the entire arbitration clause is unenforceable. *Id.*

{¶48} As referenced above in paragraph 16, the agreement provides for judicial review in the event that the mediation and/or arbitration clauses are declared unenforceable. Accordingly, the mediation/arbitration clauses at issue do not provide for a final and binding decision. This is an additional reason for finding the mediation/arbitration clauses to be unenforceable.

{¶49} While mutuality of obligation in contract law does not mean that each party must have identical obligations, there is ample evidence in the record and in the contract itself

indicating that the parties' bargaining power in this case was so unfairly one-sided as to render the mediation/arbitration clauses unconscionable. In viewing the factors de novo to determine whether the clauses at issues are unconscionable, those factors weigh heavily in favor of finding these provisions to be procedurally and substantively unconscionable.

{¶50} The unconscionability of the mediation/arbitration clauses, and other unduly oppressive clauses discussed above demonstrate the complete lack of meaningful choice and ability to negotiate on appellants' part in entering into this agreement. Such unfairness permeates this contract to the extent that we find it void and unenforceable in its entirety.¹ Accordingly we sustain appellants' assignment of error.

{¶51} The trial court's judgment is reversed, and this cause is remanded for further proceedings consistent with this opinion.

POWELL, P.J., and WALSH, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

1. Since the issue of the enforceability of the entire contract was raised in the trial court and touched upon an appellant's brief, we find no application of the dicta in *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168.

Westlaw.

823 N.E.2d 19

159 Ohio App.3d 66, 823 N.E.2d 19, 2004 -Ohio- 5757
 (Cite as: 159 Ohio App.3d 66, 823 N.E.2d 19)

▶

Court of Appeals of Ohio, Sixth District, Wood
 County.

SMALL, Exr., et al., Appellants,

v.

HCF OF PERRYSBURG, INC., d.b.a. The Manor
 at Perrysburg, Appellee.
 No. WD-04-036.

Decided Oct. 29, 2004.

Background: Wife of deceased nursing home resident and executor of resident's estate brought negligence action against nursing home. The Court of Common Pleas, Wood County, No. 03-CV-800, granted nursing home's motion to stay matter and refer matter to arbitration pursuant to arbitration clause in admission agreement. Wife and executor appealed.

Holdings: The Court of Appeals, Pietrykowski, J., held that:

8(1) arbitration clause was substantively unconscionable, and

9(2) arbitration clause was procedurally unconscionable.

Reversed.

West Headnotes

[1] ⇨ 113

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(A) Nature and Form of Proceeding
 25Tk113 k. Arbitration Favored; Public Policy. Most Cited Cases

(Formerly 33k1.2 Arbitration)

⇨ 210

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(D) Performance, Breach, Enforcement, and Contest
 25Tk204 Remedies and Proceedings for Enforcement in General
 25Tk210 k. Evidence. Most Cited Cases

(Formerly 33k23.10 Arbitration)

Arbitration is encouraged as a method of dispute resolution, and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision.

[2] ⇨ 213(5)

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(D) Performance, Breach, Enforcement, and Contest.
 25Tk204 Remedies and Proceedings for Enforcement in General
 25Tk213 Review
 25Tk213(5) k. Scope and Standards of Review. Most Cited Cases

(Formerly 33k23.25 Arbitration)

Court of Appeals reviews a decision to stay the trial court proceedings pending arbitration under an abuse-of-discretion standard.

[3] ⇨ 134(1)

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(B) Agreements to Arbitrate
 25Tk131 Requisites and Validity
 25Tk134 Validity
 25Tk134(1) k. In General. Most Cited Cases
 (Formerly 33k6.2 Arbitration)

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An arbitration clause may be legally unenforceable where the clause is not applicable to the matter at hand, or if the parties did not agree to the clause in question. R.C. § 2711.01(A).

[4] ⇨ 134(6)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(6) k. Unconscionability.

Most Cited Cases

(Formerly 33k6.2 Arbitration)

An arbitration clause is unenforceable if it is found by a court to be unconscionable.

[5] Contracts 95 ⇨ 1

95 Contracts

95I Requisites and Validity

95I(A) Nature and Essentials in General

95k1 k. Nature and Grounds of

Contractual Obligation. Most Cited Cases

“Unconscionability” refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party.

[6] Contracts 95 ⇨ 1

95 Contracts

95I Requisites and Validity

95I(A) Nature and Essentials in General

95k1 k. Nature and Grounds of

Contractual Obligation. Most Cited Cases

Unconscionability of a contract consists of two separate concepts: (1) “substantive unconscionability,” which refers to the commercial reasonableness of the contract terms themselves, and (2) “procedural unconscionability,” which refers to the bargaining positions of the parties.

[7] ⇨ 134(6)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(6) k. Unconscionability.

Most Cited Cases

(Formerly 33k6.2 Arbitration)

To negate an arbitration clause on the ground of unconscionability, a party must establish a quantum of both substantive and procedural unconscionability.

[8] ⇨ 134(6)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(6) k. Unconscionability.

Most Cited Cases

(Formerly 33k6.2 Arbitration)

Arbitration clause in nursing home admission agreement was substantively unconscionable; although clause contained sentence providing that admission was not conditioned on agreement to clause, same clause stated that any “controversy, dispute, disagreement, or claim” of resident “shall be settled exclusively by binding arbitration” and bold print above signature line stated that, by signing agreement, parties agreed to arbitrate their disputes such that residents or their representatives were provided no means by which to reject arbitration clause, and arbitration clause provided for award of prevailing party attorney fees, which could discourage resident from pursuing claim.

[9] ⇨ 134(6)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(6) k. Unconscionability.

Most Cited Cases

(Formerly 33k6.2 Arbitration)

Arbitration clause in nursing home admission agreement was procedurally unconscionable, where wife signed agreement related to admission of husband when she was under great amount stress as

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husband appeared to be unconscious, agreement was not explained to wife, wife did not have attorney present, wife did not have any particularized legal expertise, and wife was 69 years old.

**20 *68 Jay E. Feldstein, Toledo, for appellants.
Todd M. Raskin and Jeffrey T. Kay, Cleveland, for appellee.

PIETRYKOWSKI, Judge.

{¶ 1} This case is before the court on appeal of the Wood County Court of Common Pleas March 31, 2004 judgment entry that ordered appellants, Michael Small, executor of the estate of Owen Small, Michael Small, individually, and Sybil Small, to submit their claims against appellee, HCF of Perrysburg, Inc., d.b.a. The Manor at Perrysburg ("The Manor"), to arbitration and stayed the case until the conclusion of arbitration. Appellants raise the following assignments of error:

{¶ 2} "First Assignment of Error

{¶ 3} "The trial court committed reversible error in granting defendant H.C.F. of Perrysburg, Inc., D/B/A/ The Manor at Perrysburg's, motion to stay and order referral to arbitration.

{¶ 4} "Second Assignment of Error

{¶ 5} "The trial court committed reversible error in not conducting a hearing prior to granting defendant HCF of Perrysburg, Inc., D/B/A The Manor at Perrysburg's, motion to stay and order referral to arbitration."

{¶ 6} An overview of the facts is as follows. On December 17, 2002, appellant Sybil Small transported her husband, Owen Small, to The Manor, a nursing-care facility. At the time of his admission, Mr. Small was semiconscious and was transported**21 immediately from The Manor to the hospital. Just prior to his transport, and pursuant to a durable power of attorney for health care, Mrs. Small signed an admission agreement that included an arbitration clause.

{¶ 7} On December 20, 2002, Mr. Small was back

at The Manor and was being transported, unrestrained, by wheelchair when he fell and sustained injuries. On December 29, 2002, Mr. Small passed away at the hospital. In a complaint filed *69 on December 29, 2003,^{FN1} appellants allege that appellee's negligence caused Mr. Small's fall and that Mr. Small's injuries proximately caused his death.

FN1. An amended complaint was filed on December 30, 2003. The amended complaint provided for service to appellee's statutory agent.

{¶ 8} On February 27, 2004, appellee filed a motion to stay the matter and requested an order referring the matter to arbitration pursuant to R.C. 2711.01 and 2711.02 and the admission agreement. Appellants opposed the motion, arguing that the arbitration clause in the agreement was unconscionable. On March 31, 2004, the trial court granted appellee's motion, and this appeal followed.

{¶ 9} In their first assignment of error, appellants contend that the trial court erroneously upheld the unconscionable arbitration clause. Appellants argue that the clause was unconscionable because Mrs. Small, at the time she signed the document, was concerned about the immediate health of her husband and was in no position to review and fully appreciate the terms of the agreement. Appellants further contend that the arbitration provision unfairly favors appellee because it preserves The Manor's right to pursue a claim for nonpayment in a court of law and awards the prevailing party attorney fees and costs.

[1] {¶ 10} Arbitration is encouraged as a method of dispute resolution, and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision. *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859. This public policy favoring arbitration is codified in Ohio's Arbitration Act, R.C. Chapter 2711. R.C. 2711.01(A) states:

{¶ 11} "A provision in any written contract,

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except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract."

[2] {¶ 12} We review a decision to stay the trial court proceedings pending arbitration under an abuse-of-discretion standard. *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

*70 {¶ 13} In this case, section IV of the admission agreement, captioned "Resolution of Legal Disputes," provides:

**22 {¶ 14} "A. Nonpayment of Charges. Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this Agreement regarding nonpayment by Resident or Responsible Party for payments due to the Facility shall be adjudicated in a court of law, or arbitrated if mutually agreed to by the parties.

{¶ 15} "B. Resident's Rights. Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this Agreement in which resident or a person on his/her behalf alleges a violation of any right granted Resident in a State or Federal statute shall be settled exclusively by binding arbitration.

{¶ 16} "C. All Other Disputes. Any controversy, dispute, disagreement or claim of any kind arising between the parties after the execution of this Agreement (other than those actions in sections

V.A. and V.B. of this Agreement) shall be settled exclusively by binding arbitration. This arbitration clause is meant to apply to all controversies, disputes, disagreements or claims including, but not limited to, all breach of contract claims, negligence and malpractice claims, and all other tort claims.

{¶ 17} "D. Conduct of Arbitration. The Resident's agreement to arbitrate disputes is not a condition of admission. If, however, the Resident and/or Responsible Party agree to arbitrate disputes by signing this Agreement, then the arbitration will be conducted as follows: Any arbitration conducted pursuant to this Article IV shall be conducted at the Facility in accordance with the American Health Lawyers Association ('AHLA') Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and judgment on the award rendered by the arbitrator shall be entered in any court having jurisdiction thereof. The parties understand that arbitration proceedings are not free and that any person requesting arbitration will be required to pay a filing fee and other expenses. The prevailing party in the arbitration shall be entitled to have the other party pay its costs for the arbitration, including reasonable attorneys' fees and prejudgment interest. The issue of whether a party's claims are subject to arbitration under this agreement shall be decided through the AHLA arbitration process noted above."

{¶ 18} The final page of the agreement, just above the signature lines, provides:

{¶ 19} "THE PERSON(S) SIGNING BELOW HAVE READ ALL THE TERMS OF THIS AGREEMENT, AND HAVE HAD AN OPPORTUNITY TO ASK QUESTIONS REGARDING THOSE TERMS. THE PARTIES UNDERSTAND*71 THAT BY SIGNING THIS AGREEMENT THAT THEY ARE AGREEING TO WAIVE THEIR RIGHTS TO SUE IN A COURT OF LAW AND ARE AGREEING TO ARBITRATE DISPUTES. THE PARTIES DO FOR THEMSELVES, THEIR HEIRS, ADMINISTRATORS AND EXECUTORS, AGREE TO THE TERMS OF THIS AGREEMENT IN CONSIDERATION OF THE FACILITY'S ACCEPTANCE OF AND

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RENDERING SERVICES TO THE RESIDENT.”

[3][4][5][6] {¶ 20} As set forth above, R.C. 2711.01(A) provides that an arbitration clause may be unenforceable based on legal or equitable grounds. An arbitration clause may be legally unenforceable where the clause is not applicable to the matter at hand, or if the parties did not agree to the clause in question. *Benson v. Spitzer Mgt., Inc.*, 8th Dist. No. 83558, 2004-Ohio-4751, 2004 WL 2002503, ¶ 13, citing *Ervin v. Am. Funding Corp.* (1993), 89 Ohio App.3d 519, 625 N.E.2d 635. Further, an **23 arbitration clause is unenforceable if it is found by a court to be unconscionable. Unconscionability refers to the absence of a meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to one party. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Accordingly, unconscionability consists of two separate concepts: (1) substantive unconscionability, which refers to the commercial reasonableness of the contract terms themselves, and (2) procedural unconscionability, which refers to the bargaining positions of the parties. *Id.* *Collins* defines and differentiates the concepts as follows:

{¶ 21} “Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular limitations clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. See [*Fotomat Corp. of Florida v. Chanda*] (Fla.App.1985), 464 So.2d 626; [*Richard A. Berjian [D.O., Inc. v. Ohio Bell Tel. Co.*] (1978), 54 Ohio St.2d 147, 8 O.O.3d 149, 375 N.E.2d 410] * * *

{¶ 22} “Procedural unconscionability involves

those factors bearing on the relative bargaining position of the contracting parties, e.g., ‘age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.’ *Johnson v. Mobil Oil Corp.* (E.D.Mich.1976), 415 F.Supp. 264, 268.” *Id.*

*72 [7] {¶ 23} In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability. *Id.* In reviewing the arbitration clause at issue, we will individually discuss each prong.

Substantive Unconscionability

[8] {¶ 24} Appellants contend that the arbitration clause is substantively unconscionable because (1) it gives The Manor the right to proceed in any forum its chooses for the resolution of fees disputes while limiting residents' claims to arbitration; (2) the arbitration clause, despite the language in the agreement, was a condition of admission; (3) the prevailing party is entitled to costs and reasonable attorney fees; (4) the issue of whether a resident's claim is subject to arbitration is improperly to be determined through the arbitration process; and (5) the clause requires that arbitration be conducted at the facility rather than a neutral setting. Appellee counters each assertion.

{¶ 25} The arbitration clause does contain a sentence that provides that admission is not conditioned on agreement to the clause. However, the same clause states that any “controversy, dispute, disagreement or claim” of a resident “shall be settled exclusively by binding arbitration.” Further, and most important, the bold print directly above the signature lines states that by signing the agreement, the parties agree to arbitrate their disputes and that the parties agree to the terms of the agreement “in consideration of the facility's acceptance of and rendering services to the resident.” The residents or **24 their representatives are provided no means by which they may reject the

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arbitration clause. Accordingly, we believe that the resident or representative is, by signing the agreement that is required for admission, for all practical purposes being required to agree to the arbitration clause.

{¶ 26} On review of the arbitration clause and the arguments of the parties, we find troubling the fact that the prevailing party is entitled to attorney fees. Typically, attorney fees are not awarded to the prevailing party in a civil action unless ordered by the court (such as following a finding of frivolous conduct). Though the prevailing party may be the resident or representative, individuals may be discouraged from pursuing claims because, in addition to paying their attorney and, pursuant to the arbitration clause, the costs of the arbitration, they may be saddled with the facility's costs and attorney fees. Such a burden is undoubtedly unconscionable.

Procedural Unconscionability

{¶ 27} As stated above, procedural unconscionability involves an examination of the bargaining position of the parties. In her affidavit, Mrs. Small stated that when she arrived at The Manor, she was concerned about her husband's *73 health because he appeared to be unconscious. Shortly after his arrival, she was informed that Mr. Small was going to be transported by ambulance to the hospital. Mrs. Small was then approached by an employee of The Manor and asked to sign the admission agreement. The agreement was not explained to her, and Mrs. Small stated that she signed the agreement "while under considerable stress." Mrs. Small stated that the entire process, from their arrival at The Manor until the ambulance left, took approximately 30 minutes.

{¶ 28} After careful review of the particular facts of this case, we find procedural unconscionability. When Mrs. Small signed the agreement, she was under a great amount of stress. The agreement was not explained to her; she did not have an attorney present. Mrs. Small did not have any particularized legal expertise and was 69 years old on the date the agreement was signed.

{¶ 29} In finding that The Manor's arbitration clause is unconscionable, we must make a few observations. Though we firmly believe that this case demonstrates both substantive and procedural unconscionability, there is a broader reason that arbitration clauses in this type of case must be closely examined. Arbitration clauses were first used in business contracts between sophisticated businesspersons as a means to save time and money should a dispute arise. As evidenced by the plethora of recent cases involving the applicability of arbitration clauses, the clauses are now being used in transactions between large corporations and ordinary consumers, a use that is cause for concern. Particularly problematic in this case, however, is the fact that the clause at issue had potential application in a negligence action. Such cases are typically fact-driven and benefit from the discovery process afforded in a civil action. Further, negligence cases often hinge on the reasonableness of a particular action or inaction. Such a subjective analysis is often best left to a jury acting as the fact finder. These observations are not intended to prevent the application of arbitration clauses in tort cases; we merely state that these additional facts should be considered in determining the parties' intentions.

{¶ 30} Based on the foregoing, we find that appellants' first assignment of error is well taken. Due to our disposition of appellants' first assignment of error, we find that appellants' second assignment of error is moot.

**25 {¶ 31} On consideration whereof, we find that substantial justice was not done the party complaining, and the judgment of the Wood County Court of Common Pleas is reversed. The case is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, costs of this proceeding are assessed to appellee.

Judgment reversed.

HANDWORK, P.J., and KNEPPER, J., concur.
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EXHIBIT

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(Cite as: 2004 WL 67224 (Ohio App. 8 Dist.))

H
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.
Kitty L. SIKES, et al., Plaintiffs-Appellees,
v.
GANLEY PONTIAC HONDA, INC., et al.,
Defendants-Appellants.
No. 82889.

Decided Jan. 15, 2004.

Background: Automobile dealership filed motion to compel binding arbitration of claim related to purchased automobile. The Court of Common Pleas, Cuyahoga County, No. CV-413639, denied motion, and dealership appealed. The Court of Appeals, Anne Dyke, J., affirmed as to individual who did not sign purchase agreement and remanded as to individual who signed agreement. The Court of Common Pleas determined that arbitration clause in agreement was unconscionable. Dealership appealed.

Holding: The Court of Appeals, Colleen Conway Cooney, J., held that arbitration clause was not unconscionable.
Reversed and remanded.

James J. Sweeney, P.J., dissented and filed opinion.

West Headnotes

Arbitration ⇨6.2
33k6.2 Most Cited Cases

Arbitration ⇨23.10
33k23.10 Most Cited Cases
Automobile buyer failed to establish that arbitration

clause contained in automobile purchase agreement was unconscionable, where buyer failed to offer any evidence as to nature and execution of clause and arbitration filing fee provided for in clause did not exceed damages sought by buyer.

Civil appeal from Court of Common Pleas, Case No. CV-413639.

Ronald I. Frederick, Cleveland, OH, for plaintiffs-appellees.

Russell W. Harris, Lakewood, OH, for defendants-appellants.

COLLEEN CONWAY COONEY, J.

*1 {¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant Ganley Pontiac Honda ("Ganley") appeals the trial court's decision denying its motion to compel binding arbitration. For the following reasons, we reverse the decision of the trial court.

{¶ 3} In their amended complaint, plaintiffs-appellees Aline Dudash ("Dudash") and Kitty Sikes ("Sikes") alleged that Ganley committed violations of the Magnuson-Moss Warranty Act, Ohio Consumer Sales Practice Act ("CSPA"), and that it breached express and implied warranties in connection with its sale of a 1996 Chrysler Sebring to Sikes. In response to the amended complaint, Ganley moved to stay proceedings and to compel arbitration based on an arbitration clause contained in the purchase agreement signed by Sikes. The arbitration clause provided:

"ARBITRATION--Any dispute between you and dealer (seller) will be resolved by binding arbitration. You give up your right to go to court to assert your rights in this sales transaction (except for any claim in small

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claims court). Your rights will be determined by a neutral arbitrator not a judge or jury. You are entitled to a fair hearing, but arbitration procedures are simpler and more limited than rules applicable in court. Arbitrator decisions are enforceable as any court order and are subject to a very limited review by a court. See General Manager for information regarding arbitration process."

{¶ 4} The trial court denied the motion to stay the proceedings, finding the arbitration clause unconscionable and unenforceable. Subsequently, Ganley appealed to this court. See, *Sikes v. Ganley Pontiac Honda* (Sept. 13, 2001), Cuyahoga App. No. 79015 ("*Sikes I*").

{¶ 5} In *Sikes I*, we affirmed the trial court's decision as it applied to Dudash because she never signed the purchase agreement and, therefore, never agreed to submit any dispute to arbitration. As to *Sikes*, however, we held that the record was not well-developed as to the circumstances surrounding the nature and execution of the provision. *Id.* As a result, we remanded the case for the trial court to make a determination as to the unconscionability of the clause after the record was more developed.

{¶ 6} Upon remand, the trial court ordered the parties to submit supplemental briefs as to the issue of whether the arbitration clause was unconscionable. Following the filing of the briefs, the trial court ruled that the arbitration clause was unconscionable and, therefore, unenforceable. From this decision, Ganley appeals.

Enforceability of Arbitration Clause

{¶ 7} In its sole assignment of error, Ganley argues that the trial court erred by finding that the arbitration clause is unconscionable. Ganley contends that in contravention of this court's order in *Sikes I*, *Sikes* failed to offer any evidence as to the nature and execution of the arbitration clause, precluding a finding by the trial court that the clause is unconscionable. We agree.

*2 {¶ 8} We review the trial court's decision denying a motion to compel binding arbitration pursuant to an abuse of discretion. *Stasser v.*

Fortney Weygandt, Inc. (Dec. 20, 2001), Cuyahoga App. No. 79621; *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. Absent a finding that the trial court's decision is unreasonable, arbitrary, or unconscionable, we must affirm the decision of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 9} As we stated in *Sikes I*, arbitration is encouraged as a method to settle disputes. *Sikes I*, supra, citing, *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 692 N.E.2d 574. A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision. *Williams v. Aetna Finance Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859. Despite the general presumption in favor of enforcing an arbitration clause within a contract, an arbitration clause is not enforceable if it is found to be unconscionable. *Sikes*, supra, citing, *Sutton v. Laura Salkin Bridal & Fashions* (Feb. 5, 1998), Cuyahoga App. No. 72107; see, also, R.C. 2711.01(A).

{¶ 10} Under Ohio law, "a contract clause is unconscionable where there is the absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." *Sikes I*, supra, citing, *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826,834. To establish that a contract clause is unconscionable, the complaining party must demonstrate: 1) "substantive unconscionability," i.e. contract terms are unfair and unreasonable, and 2) "procedural unconscionability," i.e. the individualized circumstances surrounding the contract were so unfair as to cause there to be no voluntary meeting of the minds. *Id.* See, also, *McCañ v. New Century Mort. Corp.*, Cuyahoga App. No. 82202, 2003-Ohio-2752. Satisfying one prong of the test and not the other precludes a finding of unconscionability. See *DePalmo v. Schumacher Homes*, Stark App. No.2001CA272, 2002-Ohio-772

{¶ 11} Substantive unconscionability pertains to the contract itself without any consideration of the

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individual contracting parties. It requires a determination of whether the contract terms are commercially reasonable in the context of the transaction involved. *Collins*, supra, at 834. Although there is no exhaustive list of factors to apply in determining whether a clause is substantively unconscionable, courts generally consider "the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Id.*

{¶ 12} Procedural unconscionability, on the other hand, involves the specific circumstances surrounding the execution of the contract between the two parties. Specifically, it involves those factors bearing upon the "real and voluntary meeting of the minds," of the contracting parties, e.g., "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed forms were explained to the weaker party, whether alterations in the printed forms were possible, whether there were alternative sources of supply for the goods in question." *Id.*, quoting, *Johnson v. Mobil Oil Corp.* (E.D.Mich.1976), 415 F.Supp. 264, 268.

*3 {¶ 13} In the trial court, Sikes argued that the arbitration clause was procedurally unconscionable because it was a contract of adhesion and material terms of the arbitration were not disclosed in the agreement, and that it was substantively unconscionable because it imposed excessive fees without disclosing the costs in the agreement. On appeal, Sikes maintains that the trial court properly concluded that the arbitration clause is unconscionable because the record contains undisputed evidence that the clause imposed excessive fees, that the clause failed to disclose the fees, that Ganley refused to negotiate the arbitration clause with any of its customers, and that case law overwhelmingly disfavors upholding an arbitration clause that imposes excessive fees on a consumer. In response, Ganley asserts that even after the remand from this court, Sikes failed to produce any additional evidence surrounding the execution and

nature of the agreement and, therefore, the trial court abused its discretion in finding the agreement unconscionable.

{¶ 14} An adhesion contract is a "standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract." *O'Donoghue v. Smythe, Cramer Co.*, Cuyahoga App. No. 80453, 2002-Ohio-3447, at ---25-26, citing Black's Law Dictionary (5 Ed. Rev.1979) 38.

{¶ 15} Despite the strong public policy in favor of arbitration, a weaker presumption exists when an arbitration clause is found in an adhesion contract between a businessman and an unsophisticated consumer. *Williams*, supra, at 472, 700 N.E.2d 859. See, also, *Miller v. Household*, Cuyahoga App. No. 81968, 2003-Ohio-3359 (an arbitration clause between a consumer and a sophisticated business whereby consumer waives the constitutional right to a trial warrants a heightened scrutiny by the court to ensure the clause was freely entered into). However, it is incumbent upon the complaining party to put forth evidence demonstrating that the clause is adhesive and, moreover, that as a result of the adhesive nature, the clause is unconscionable. See *O'Donoghue*, supra, at ---25 (noting that a contract of adhesion is not unconscionable per se, and that all unconscionable contracts are not contracts of adhesion).

{¶ 16} Here, there is no evidence in the record that the purchase agreement, including the arbitration clause, was presented to Sikes on a "take it or leave it" basis. Nor was there any evidence demonstrating a severe imbalance of bargaining power between Sikes and Ganley. Although it is undisputed that Ganley drafted the contract, there is no additional evidence surrounding the circumstances of the execution of the agreement. Specifically, there was no evidence presented as to Sikes' understanding of the agreement, whether the terms of the agreement were explained to her, whether Sikes was able to negotiate any part of the

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contract, whether alterations to the contract were allowed, and whether Sikes could have purchased a vehicle elsewhere. Moreover, Sikes failed to present any evidence regarding her age, education, intelligence, and business acumen and experience. See *Collins*, supra, at 834.

*4 {¶ 17} The only evidence offered by Sikes is that the clause was part of a pre-printed contract containing boilerplate language, and that based on Ganley's responses to its interrogatories, it had never previously modified the arbitration agreement nor sold a car without the customer agreeing to the arbitration clause since the inception of the clause in the purchase agreement. However, Ganley answered the interrogatory by stating that the clause had never been modified because no customer had requested a modification. Without evidence that a customer actually requested a modification and Ganley refused, Sikes can hardly assert that Ganley refused to negotiate the contract. Although evidence that Ganley failed to consummate a sale with one customer who refused to sign the arbitration agreement is suggestive of an adhesion contract, without more evidence as to the specific circumstances surrounding the instant sale, this court cannot conclude that the arbitration clause is procedurally unconscionable.

{¶ 18} Sikes also contends that material terms of the contract were not disclosed and, therefore, there was no meeting of the minds. In her supplemental brief, Sikes included an extensive list of items the arbitration clause failed to disclose, which included: an explanation of arbitration, the designated arbitration program, the costs of arbitration, the party responsible for paying, the applicable law governing arbitration, the discovery process, the right to bring an attorney, the right to punitive damages, and the appeal process. However, Sikes cites no authority supporting her proposition that the arbitration clause is required to relay all of the above information to be enforceable. To the contrary, courts have consistently held that an arbitration clause does not have to include the specific costs. See *O'Donoghue*, supra, at ---13, citing, *Green Tree Fin. Corporation-Alabama v. Randolph* (2000), 531 U.S. 79, 121 S.Ct. 513, 148

L.Ed.2d 373. Likewise, Sikes advanced this same argument in *Sikes I* but this court previously rejected it because of the absence of any evidentiary support.

{¶ 19} Despite this court's earlier remand, Sikes failed to set forth any additional evidence concerning the surrounding circumstances of the nature and execution of the purchase agreement. As a result, we are unable to conclude that the instant arbitration clause is part of an adhesion contract warranting a finding that it is procedurally unconscionable.

{¶ 20} Because Sikes failed to establish that the clause is procedurally unconscionable, she has failed to satisfy the two-prong test of unconscionability, and, therefore, we find that the trial court abused its discretion in finding the arbitration clause unconscionable.

{¶ 21} As to Sikes' claim that the excessive arbitration fees alone warrant a finding of unconscionability and require the court to strike the entire arbitration clause, we disagree. Courts have consistently recognized that given the strong public policy in favor of arbitration, a court shall not deem an arbitration clause unconscionable simply because it imposes higher fees than filing a complaint in the trial court. See *Dunn v. L & M Building* (Oct. 26, 2001), Cuyahoga App. No. 77399.

*5 {¶ 22} On the other hand, if the costs associated with the arbitration effectively deny a claimant the right to a hearing or an adequate remedy, then courts have stricken an arbitration clause. In *O'Donoghue*, supra, this court affirmed the trial court's denial of a motion to compel arbitration because the arbitration filing fee exceeded the amount the plaintiff could recover pursuant to a limitation of liability clause within the contract. Similarly, in *Sutton*, supra, this court refused to uphold the arbitration provision within a sales contract because the costs of arbitration exceeded the amount of damages the plaintiff sought to recover in small claims court. However, both *O'Donoghue* and *Sutton* are distinguishable from the instant case.

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{¶ 23} Here, Sikes is seeking damages of \$55,000 for her first three claims and an indefinite amount for her last nine claims. Because she has not specified the amount of her damages, she asserts she would be required to pay the more expensive filing fee of \$3,250. Unlike *O'Donoghue* and *Sutton*, Sikes' filing fee does not exceed the amount of damages sought. Additionally, the amount of the filing fee depends on the amount sought in the complaint's prayer. For consumer cases where the claims do not exceed \$75,000, the fees do not exceed \$375. Arguably, every consumer who voluntarily signed an arbitration clause could defeat its application by simply asserting an indefinite demand amount and claim that the amount of the filing fee is unconscionable.

{¶ 24} We also note that the Restatement of the Law 2d (1981), Contracts, § 208, states that, if a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result. See *O'Donoghue*, supra, at ---10. Because Sikes clearly agreed to arbitrate any claims by signing the arbitration clause and she failed to present any evidence to the contrary, we find that the trial court abused its discretion by refusing to uphold the arbitration clause. Even if the trial court was convinced that the fees were excessive, we find the more equitable remedy is to order that the costs be borne by Ganley and grant the motion to stay proceedings and compel arbitration. [FN1]

FN1. Ganley's counsel admitted at the oral argument that the trial court had the authority to order Ganley to pay the fees.

{¶ 25} Accordingly, Ganley's assignment of error is sustained.

{¶ 26} Judgment reversed and case remanded for further proceedings consistent with this opinion.

{¶ 27} This cause is reversed and remanded to the lower court for further proceedings consistent with

this opinion.

ANTHONY O. CALABRESE, JR., J., concurs.

JAMES J. SWEENEY, P.J., dissents.

{¶ 28} JAMES J. SWEENEY, P.J., dissenting.

{¶ 29} I respectfully dissent from the decision of the majority to reverse the trial court's order which denied Ganley's motion to stay proceedings and compel arbitration. We are to review such determinations under the abuse of discretion standard. *Miller v. Household Realty Corp.*, Cuyahoga App. No. 81968, 2003- Ohio-3359, P8, citing *Strasser v. Fortney & Weygandt, Inc.* (Dec. 20, 2001), Cuyahoga App. No. 79621 and *Reynolds v. Lapos Constr., Inc.* (May 30, 2001), Lorain App. No. 01CA007780; *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. "The term 'abuse of discretion' connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.*, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 5 OBR 481.

*6 {¶ 30} The majority opines that the plaintiff failed to present sufficient evidence to establish the procedural unconscionability necessary to deem the arbitration clause unconscionable. I disagree. As the majority notes, the probative factors of procedural unconscionability include the "relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed forms were possible." All of these factors weigh in favor of the trial court's finding of unconscionability in this case. The matter involves a large commercial business operation and an individual consumer which establishes a clear disparity in bargaining power; Ganley drafted the contract; the terms of arbitration are not explained in the clause but instead instruct the consumer to "See General Manager for information regarding arbitration process"; and there is no indication that alterations to the contract were possible. Indeed, none of Ganley's customers have ever successfully

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challenged the arbitration provision.

{¶ 31} Sikes further challenged the conscionability of the arbitration clause based on its imposition of excessive fees. The majority reasons that any unconscionable result from these excessive fees can be cured by resorting to court. The majority states that courts may "enforce the remainder of the contract without the unconscionable term, or may so limit the application of an unconscionable term * * *." I cannot agree with logic that would deny individuals their right to litigate disputes in court on the one hand, but permit the court to exercise just enough jurisdiction over the matter to modify the unconscionable terms of the arbitration clause on the other. It places unreasonable burdens upon consumers to bear the costs of court litigation just to avoid the imposition of excessive arbitration fees only to have the court proceedings stayed and the matter compelled to arbitration. While some consumers may have the means and acumen to avail themselves of such protracted procedures, others may not, which will result in the imposition of excessive fees on those individuals. That, in and of itself, is unconscionable.

{¶ 32} Based on the foregoing, I would affirm the trial court's decision that denied Ganley's motion to compel arbitration.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R.

26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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▶

Court of Appeals of Ohio, Ninth District, Wayne
County.

HARPER, Appellee,

v.

J.D. BYRIDER OF CANTON, Appellant, et al.
No. 01CA0064.

Decided June 5, 2002.

Car buyer brought action against dealer, alleging that dealer had turned back odometer. The Court of Common Pleas, Wayne County, denied dealer's motion for stay to pursue arbitration, and dealer appealed. The Court of Appeals held that arbitration clause was not unconscionable.

Reversed and remanded.

Carr, J., dissented and filed opinion.

West Headnotes

T ⇌ 134(6)

25T Alternative Dispute Resolution

25TII Arbitration

25TIII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(6) k. Unconscionability.

Most Cited Cases

(Formerly 33k6.2 Arbitration)

Arbitration clause in car sales contract was not unconscionable, although preprinted form contract made assent to arbitration clause a condition precedent to sale; preprinted contracts were commonly used, and buyer could have bought a car elsewhere.

**190*122 David B. Levin, Chicago, IL, for appellee.

Rex W. Miller, Canton, for appellant.

PER CURIAM.

{¶ 1} Appellant-defendant J.D. Byrider of Canton appeals the order of the **191 Wayne County Court of Common Pleas. This court reverses.

{¶ 2} On February 17, 2001, plaintiff-appellee Jason W. Harper purchased a 1996 Ford Escort from J.D. Byrider for \$13,017.64. At the time of purchase, the odometer read 50,305 miles. Subsequently, Harper believed that the odometer had been rolled back and the mileage misrepresented, causing him to file suit against J.D. Byrider.

*123 {¶ 3} On August 9, 2001, J.D. Byrider filed a motion for stay so that the case could be referred to arbitration pursuant to the terms of the sales agreement. Harper filed a motion in opposition.

{¶ 4} On November 6, 2001, the trial court denied J.D. Byrider's motion, finding that the arbitration clause in the sales agreement was adhesive and unconscionable.

{¶ 5} J.D. Byrider has timely appealed, asserting one assignment of error.

ASSIGNMENT OF ERROR

{¶ 6} "The trial court erred in denying appellant's motion pursuant to R.C. 2711.02 to stay the litigation and order the case to arbitration."

{¶ 7} In its sole assignment of error, J.D. Byrider claims that the trial court erred when it denied the motion for stay after concluding that the arbitration clause in the sales agreement with Harper was adhesive and unconscionable. This court agrees.

{¶ 8} The Ohio Supreme Court has stated:

{¶ 9} "Ohio and federal courts encourage

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arbitration to settle disputes. *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 27, 623 N.E.2d 39, 40; *Southland Corp v. Keating* (1984), 465 U.S. 1, 10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1, 12. Our General Assembly also favors arbitration. R.C. 2711.02 requires a court to stay an action if the issue involved falls under an arbitration agreement, and under R.C. 2711.03, a party to an arbitration agreement may seek an order directing the other party to proceed to arbitration." *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574. R.C. 2711.02 empowers a party to motion for stay to compel arbitration.

{¶ 10} To defeat a motion for stay to compel arbitration, "a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced." *ABM Farms, Inc.*, supra, at 502, 692 N.E.2d 574.

{¶ 11} "A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. The fraud relates not to the nature or purport of the contract, but to the facts inducing its execution. *Haller v. Borrer Corp.* (1990), 50 Ohio St.3d 10, 14, 552 N.E.2d 207, 210. In order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment. *Beer v. Griffith* (1980), 61 Ohio St.2d 119, 123, 15 O.O.3d 157, 160, 399 N.E.2d 1227, 1231." Id.

*124 {¶ 12} In the instant case, the sales agreement between Harper and J.D. Byrider contained an arbitration clause. However, the trial court concluded that the arbitration clause was unenforceable not due to fraudulent inducement. Rather, the trial court based its ruling upon the issue of "unconscionability," concluding that "the arbitration clause in the contract between Plaintiff and Defendant is adhesive and unconscionable, rendering it unenforceable."

**192 {¶ 13} It is true that an unconscionable arbitration provision is not enforceable. See

Williams v. Aetna Fin. Co. (1998), 83 Ohio St.3d 464, 471-473, 700 N.E.2d 859. An unconscionable contract clause is one where there is the absence of meaningful choice for the contracting parties, coupled with draconian contract terms unreasonably favorable to one party. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Such a determination requires a case-by-case review of the facts and circumstances surrounding the agreement. See *Burkette v. Chrysler Industries, Inc.* (1988), 48 Ohio App.3d 35, 37, 547 N.E.2d 1223; *Vincent v. Neyer* (2000), 139 Ohio App.3d 848, 745 N.E.2d 1127.

{¶ 14} The trial court concluded that the arbitration clause was unconscionable because (1) the clause was in a preprinted form, lessening Harper's bargaining power without input on the contract's construction; (2) the unsupported rumination that a "true 'meeting of the minds' " may not have occurred; and (3) the predicate language-"IN ORDER TO COMPLETE THE PURCHASE"-to the arbitration clause evinced a condition precedent to finalizing the sale.

{¶ 15} The trial court is mistaken. The record is bereft of Harper's absence of meaningful choice, i.e., that he was unable to purchase an analogous motor vehicle from another dealership without an arbitration clause. The record is devoid of a claim that the arbitration clause was concealed or misrepresented. Preprinted forms are a fact of commercial life and do not serve to demonstrate prima facie unconscionability with regard to arbitration clauses. See *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 156, 8 O.O.3d 149, 375 N.E.2d 410; and *Collins*, 86 Ohio App.3d at 833, 621 N.E.2d 1294 ("[T]he fact that the Click Camera order form is a standardized agreement does not require that we find it to be against public policy. There are many legitimate business reasons for utilizing standard forms, e.g., cost reduction, and thus such agreements are not necessarily in conflict with the public interest.").

{¶ 16} This court must review the trial court's judgment in this case under an abuse-of-discretion standard. See *Harsco Corp. v. Crane Carrier Co.*

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(1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. This court concludes that a *125 preprinted sales agreement which contains an arbitration clause as a condition precedent to the final sale, without more, fails to demonstrate unconscionability of the arbitration clause. Accordingly, the trial court abused its discretion.

{¶ 17} J.D. Byrider's sole assignment of error is sustained. This court reverses the judgment of the court of appeals and remands the cause to the trial court for entry of an order staying the matter.

Judgment reversed and cause remanded.

SLABY, P.J., and BAIRD, J., concur.

CARR, J., dissents.

CARR, Judge, dissenting.

{¶ 18} I respectfully dissent. The Ohio Supreme Court has recognized that arbitration clauses that arise in sales agreements between consumers and retailers are subject to considerable skepticism upon review because of the disparity in the bargaining positions between the parties:

****193** {¶ 19} "In the situation presented here, the arbitration clause, contained in a consumer credit agreement with some aspects of an adhesion contract, necessarily engenders more reservations than an arbitration clause in a different setting, such as in a collective bargaining agreement, a commercial contract between two businesses, or a brokerage agreement. See, generally, I Domke on Commercial Arbitration (Rev.Ed.1997) 17-18, Section 5.09. * * *

{¶ 20} " * * * [T]he presumption in favor of arbitration should be substantially weaker in a case such as this, when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Williams v. Aetna Fin. Co.*

(1998), 83 Ohio St.3d 464, 472-473, 700 N.E.2d 859.

{¶ 21} In *Williams*, the court reviewed all the circumstances surrounding the agreement, taking special note of the requirement that the borrower had to prepay a substantial fee even to get access to an arbitration before endorsing the trial court's conclusion that the contract at issue was an adhesion contract that vitiated the arbitration clause. *Id.*

{¶ 22} In the instant case, the trial court reviewed the contract and circumstances surrounding the contract. Considering the skepticism with which such clauses are held by the Ohio Supreme Court in *Williams*, I cannot conclude that the trial court committed error with its determination in this case. Accordingly, I respectfully dissent.

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EXHIBIT

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Briefs and Other Related Documents

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

John CRONIN, Plaintiff-Appellant,

v.

California FITNESS, Defendant-Appellee.

No. 04AP-1121.

June 28, 2005.

Background: Health club member brought action against health club for breach of contract and violation of Consumer Sales Practices Act (CSPA) and federal Fair Credit Reporting Act, arising out of alleged billing irregularities and difficulties obtaining entrance to club. The Court of Common Pleas, Franklin County, No. 04CVH-05-4963, granted health club's motion for stay pending arbitration pursuant to an arbitration provision in membership contract. Member appealed.

Holding: The Court of Appeals, Petree, J., held that member failed to establish that arbitration provision was unenforceable. Affirmed.

Arbitration ↪ 6.2**33k6.2 Most Cited Cases**

Health club member failed to establish that arbitration provision in membership contract with health club was unenforceable, despite contention that provision conflicted with policies embodied in Consumer Sales Practices Act (CSPA); there was no evidence that provision was substantively or procedurally unconscionable, in that member

knowingly and voluntarily signed agreement, and member was not in a disadvantageous bargaining position and was not induced to sign by adverse circumstances, and CSPA did not reflect a policy that its protections should be enforced in court, rather than arbitration. R.C. § 1345.01 et seq. Appeal from the Franklin County Court of Common Pleas.

Charley W. Hess, for appellant

Jack D'Aurora, for appellee.

OPINION

PETREE, J.

*1 {¶ 1} Plaintiff-appellant, John Cronin, appeals from an order of the Franklin County Court of Common Pleas that granted the motion of defendant-appellee, California Fitness, for a stay pending arbitration of this fitness club contract dispute.

{¶ 2} In 1999, appellant purchased a monthly membership in appellee's Columbus fitness club. At the time, appellant understood he and his wife would be taking advantage of a "2 for 1" promotion, allowing them both to join for the price of one membership. In initiating his membership, appellant completed a multi-page "membership agreement" which, among other things, contained various contractual clauses intended to govern the parties' relationship. One clause of the contract indicated that the parties would submit to arbitration of any dispute over \$500, and read in full, as follows:

7. ARBITRATION & LIMITATION OF LIABILITY

If there is any dispute over \$500 between you and California Fitness, both parties agree to submit it to binding arbitration, using the American Arbitration Rules (Rules). Arbitration means that neither you nor California Fitness can sue each

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other in court over the dispute and that a neutral arbitrator will decide it, not a jury or judge. The arbitration shall be held at the AAA office nearest to the club you joined and based on AAA's Rules, the parties agree they cannot conduct any discovery. California law governs the dispute.

The arbitration covers any dispute related to your membership and this Agreement, including financial obligations, Facilities, representations, personal injury, and property, contract, and tort damage of any kind. If there is any dispute over the applicability of arbitration or the validity of the Assumption of Risk/Waiver provision only an Arbitrator, not a court, may decide the dispute, which the Arbitrator must determine a separate hearing before arbitration may proceed.

If the arbitration proceeds further, the Arbitrator is limited to the terms of this Agreement and whether you or California Fitness prevail in the arbitration, the maximum an Arbitrator may award is the cost of your annual membership. The Arbitrator cannot award you any direct, indirect, special, consequential, or punitive damages, even if you told California Fitness you might suffer these damages.

The party who makes the claim must pay the costs of arbitration, including the arbitrator's fees, but each party will pay its own expenses, including attorney's fees and costs. Any judgement on the arbitrator's award may be entered in any court with jurisdiction. The parties shall not disclose the existence, contents, or results of the arbitration without the written consent of both parties.

{¶ 3} In May 2004, appellant filed this action, alleging that, when he attempted to use the membership, he experienced repeated difficulty in gaining entrance to the club because club personnel did not recognize his membership. He additionally asserted that, despite the fact that appellee was continuing to withdraw dues from his checking account pursuant to an electronic funds transfer agreement he had executed as part of the membership agreement, he received notices that payments were past due. He asserts that, as a result of these difficulties, he lost his incentive to use the facility, and thus did not receive the benefit of the

bargain. In his complaint, he sought compensatory, punitive, and other damages for breach of contract and related violations of the Ohio Consumer Sales Practices Act ("CSPA") and the federal Fair Credit Reporting Act, Section 1681, et seq., Title 15, U.S.Code.

*2 {¶ 4} On September 14, 2004, the trial court issued its decision and entry granting defendant's motion to stay pending arbitration. Finding that the arbitration clause governed this dispute, the court reasoned that because the facts demonstrated that appellant's submission to the terms of the agreement was knowing and voluntary, and because appellant did not successfully argue that the arbitration provision was unconscionable, the matter should be stayed so that arbitration could take place. Appellant now appeals and assigns the following as error:

The trial court erred as a matter of law in its Decision and Entry Granting Motion of Defendant to Stay Pending Arbitration, Filed July 20, 2004, and found in the record at # 29 and # 30, on 091404, Fiche A6771, Frame F09.

{¶ 5} By this assignment of error, appellant argues that the trial court erred in concluding this arbitration clause is enforceable because the clause is substantively unconscionable in several respects. First, appellant claims the arbitration provision invaded a policy consideration of the CSPA because it took away the consumer's right to redress grievances against suppliers of consumer goods and services. Appellant also claims the provision's confidentiality requirement was unconscionable because it thwarts a CSPA purpose in allowing the public to have access to information about a supplier's wrongdoing as a deterrent against unscrupulous business practices. Thus, appellant urges this is an unenforceable arbitration clause because it conflicts with policies embodied in the CSPA.

{¶ 6} Ohio's public policy encourages arbitration as a dispute resolution tool. *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 711-712, 590 N.E.2d 1242. Thus, R.C. Chapter 2711 authorizes direct enforcement of arbitration agreements

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through an order to compel arbitration pursuant to R.C. 2711.03, and indirect enforcement pursuant to an order staying trial court proceedings pursuant to R.C. 2711.02(B), which provides:

If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

{¶ 7} When addressing whether a trial court has properly granted or denied a motion to stay proceedings, the standard of review is an abuse of discretion. *Carter Steel & Fabricating Co. v. Danis Bldg. Constr. Co.* (1998), 126 Ohio App.3d 251, 254-255, 710 N.E.2d 299; *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040. An abuse of discretion is more than an error of judgment but, instead, demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency," *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748, or an arbitrary, unreasonable, or unconscionable attitude. *Schafer v. Schafer* (1996), 115 Ohio App.3d 639, 642, 685 N.E.2d 1302.

*3 {¶ 8} In examining an arbitration clause, a court must be cognizant of the strong presumption in favor of arbitrability, resolving any doubts in favor of coverage under the arbitration clause. *Sasaki v. McKinnon* (1997), 124 Ohio App.3d 613, 616-617, 707 N.E.2d 9, quoting *Didado v. Lamson & Sessions Co.* (1992), 81 Ohio App.3d 302, 304, 610 N.E.2d 1085. Ohio law encourages participation in arbitration over litigation. *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574; *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 623 N.E.2d 39.

{¶ 9} Absent unconscionability, Ohio courts have held the concept of freedom of contract to be fundamental to our society. *Dorsey v.*

Contemporary Obstetrics & Gynecology, Inc. (1996), 113 Ohio App.3d 75, 80, 680 N.E.2d 240. Unconscionability has been defined as an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party. *Orlett v. Suburban Propane* (1989), 54 Ohio App.3d 127, 129, 561 N.E.2d 1066. Unconscionability is a question of law to be decided by the court. *Jeffrey Mining Prod., L.P. v. Left Fork Mining Co.* (2001), 143 Ohio App.3d 708, 718, 758 N.E.2d 1173.

{¶ 10} "The unconscionability doctrine consists of two prongs: (1) substantive unconscionability, i.e., unfair and unreasonable contract terms, and (2) procedural unconscionability, i.e., individualized circumstances surrounding parties to a contract such that no voluntary meeting of the minds was possible." *Dorsey*, supra, at 80, 680 N.E.2d 240. A certain "quantum" of both substantive and procedural unconscionability must be present to find a contract unconscionable. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 621 N.E.2d 1294.

{¶ 11} Further, substantive unconscionability involves factors relating to the contract terms themselves and whether they are commercially reasonable. Examining whether a particular limitations clause is substantively unconscionable, courts have considered the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. See *id.* at 834, 621 N.E.2d 1294, citing *Fotomat Corp. of Florida v. Chanda* (Fla.App.1985), 464 So.2d 626; *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 375 N.E.2d 410.

{¶ 12} On the other hand, procedural unconscionability involves factors bearing on the relative bargaining position of the contracting parties, such as "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were

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possible, whether there were alternative sources of supply for the goods in question." *Collins*, supra, quoting *Johnson v. Mobil Oil Corp.* (E.D.Mich.1976), 415 F.Supp. 264, 268.

{¶ 13} In the case at bar, the trial court determined that the arbitration clause was neither substantively nor procedurally unconscionable. Regarding whether the contract was substantively unconscionable, the court noted that the clause binds both parties equally, that the clause is written in the same type size and font as the rest of the agreement, and that it is clearly marked "Arbitration and Limitation of Liability" in bold, capital letters. The court additionally noted that appellant failed to allege that the cost of arbitration operated to effectively deter appellant from enforcing the provision, thus distinguishing the facts in *Eagle v. Fred Martin Motor Co.* (2004), 157 Ohio App.3d 150, 809 N.E.2d 1161.

*4 {¶ 14} Regarding whether the contract was procedurally unconscionable, the trial court stated in its decision and entry:

The membership contract Plaintiff signed is two pages long, and is largely preprinted, except for Plaintiff's personal information. Plaintiff has failed to produce any evidence to show, or even to allege, that he did not have a realistic opportunity to bargain. Plaintiff does not allege that he ever asked for a contract without an arbitration clause. Plaintiff initialed a provision of the contract that granted him the right to rescind the contract at any time prior to midnight of the third business day after the date of the contract, thereby having ample time to examine the contract's terms away from any pressure that might have existed when he signed it. Plaintiff has failed to produce evidence of other circumstances that might demonstrate procedural unconscionability, such as a lack of ability to understand the nature of the agreement, or a relative weakness in bargaining power. * * *

Id. at 3-4, 809 N.E.2d 1161 (citation omitted).

{¶ 15} Addressing appellant's argument that the arbitration clause violated the public policy embodied in the CSPA, the trial court indicated

that, where the clause is not otherwise unconscionable, the strong presumption in favor of arbitrability outweighs consumer protection interests represented by the CSPA. Finally, the trial court concluded appellant's right to jury trial was not violated by the agreement because appellant's signing constituted a valid waiver.

{¶ 16} In reviewing the signed contract, the trial court's decision, the record, and the arguments of both sides in this action, we agree with the trial court that appellant failed to present compelling evidence that the arbitration clause was unenforceable. From the facts, it appears that appellant's signing of the agreement was knowing and voluntary. Unlike the plaintiff in *Eagle*, appellant was not in a disadvantageous bargaining position, and was not induced to sign by adverse circumstances. As this court has held, the CSPA does not reflect a policy that claims falling under it should be enforced in court and not in arbitration. *Vincent v. Neyer* (2000), 139 Ohio App.3d 848, 852, 745 N.E.2d 1127. Therefore, we reject appellant's argument that the purpose of the CSPA, or any other consumer protection law, is thwarted by enforcement of this arbitration provision.

{¶ 17} Based upon these considerations, we cannot say that the trial court abused its discretion in granting appellee's motion to stay this matter pending arbitration. There simply was no evidence that the arbitration provision was unconscionable, and, therefore, the trial court was within its authority to enforce its terms. We overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and SADLER, J., concur.

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