

IN THE SUPREME COURT OF OHIO

**TAYLOR BUILDING  
CORPORATION OF  
AMERICA,**

Appellant,

vs.

**MARVIN BENFIELD, et al.,**

Appellees.

\* Supreme Court Case No.: 06-1890

\*

\*

\* On Appeal from the Clermont County  
Court of Appeals, 12<sup>th</sup> Appellate District

\*

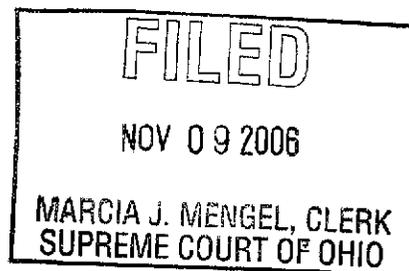
Court of Appeals

\* Case No. CA2005-09-083

\*

\*

\*



---

**APPELLEES' MEMORANDUM IN RESPONSE TO APPELLANT'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

---

Donald W. White (0005630)  
Nichols, Speidel & Nichols  
237 Main Street  
Batavia, Ohio 45103  
(513) 732-1420, Fax 732-0357  
Counsel for Appellees,  
Marvin and Mary Ruth Benfield

J. Robert Linneman (0073846)  
C. Gregory Schmidt (0006069)  
Santen & Hughes  
312 Walnut Street, Suite 3100  
Cincinnati, Ohio 45202  
(513) 721-4450, Fax 721-0109  
Counsel for Appellant,  
Taylor Building Corporation of America

TABLE OF CONTENTS

I. EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC AND GREAT GENERAL INTEREST ..... 1

II. STATEMENT OF THE CASE AND FACTS ..... 2

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW ..... 4

Proposition No. 1: The proper standard of review for a Court of Appeals reviewing a decision of a trial court granting or denying a motion to compel arbitration under O.R.C. 2711.02 where a party opposing the Motion alleges unconscionability of the arbitration clause is “abuse of discretion.” ..... 4

Proposition of Law No. 2: To defeat a motion for stay brought pursuant to O.R.C. 2711.02, a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, is unconscionable. .... 6

Proposition of Law No. 3: Arbitration agreements are presumed enforceable unless the party opposing arbitration demonstrates by clear and convincing evidence that there is some defense to enforcement. .... 6

Proposition of Law No. 4: A Court of Appeals may not consider evidence or arguments not presented to the trial court in its review of a decision granting or denying a motion for stay pursuant to O.R.C. 2711.02. .... 7

V. CONCLUSION ..... 8

VI. CERTIFICATE OF SERVICE ..... 9

**EXPLANATION OF WHY THIS CASE IS  
NOT ONE OF PUBLIC AND GREAT GENERAL INTEREST**

In its argument in support of jurisdiction, Appellant argues that “ ... in recent years, the enforcement of arbitration contracts has been fraught with peril. The objective of contracting parties when executing a contract with an arbitration clause is typically to provide a means of dispute resolution that is efficient and fair while avoiding formal litigation.”

Appellees, victims of an unconscionable arbitration provision, point out that the peril of which Appellant complains arises, time and again, from unscrupulous vendors and lenders attempting to use arbitration as a weapon against dissatisfied customers. In response, Ohio courts, including this one, have held in response that where an arbitration contract provides neither fairness nor efficiency it is unconscionable and unenforceable. Where courts refuse to enforce unconscionable contract provisions, public confidence in the courts remains strong.

Appellant claims, further, that this Court’s holding in *ABM Farms v. Woods* (1998), 81 Ohio St.3d 498, will be eviscerated should the holding of the Twelfth District Court of Appeals in the case at bar be permitted to stand. The holding in *ABM Farms*, however, pertains to a claim of fraudulent inducement with respect to the parties’ entire contract, which included an arbitration provision. Fraudulent inducement, according to *ABM Farms*, requires proof of “misrepresentation of facts outside the contract or other wrongful conduct [that] induced a party to enter into the contract ....” *Id.* at 503.

The case at bar pertains solely to the question of whether the arbitration provision in the parties’ contract is unconscionable. Therefore, a more apposite decision to review in determining

whether the Court should accept jurisdiction over this matter is *Williams v. Aetna Fin.Co.* (1998), 83 Ohio St.3d 464, a case which actually involved the question of the specific unconscionability of an arbitration provision in a consumer lending contract. Unconscionability, this Court held, requires a determination of whether “the arbitration clause violated principles of equity, given all of the attendant facts and circumstances.” After holding that “any presumption in favor of arbitration was overcome based on the entire record of this case,” the Court went on to state that

the 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.

This Court recognized in *Williams* that an “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.”

Appellant’s propositions of law present more of a wish-list for vendors who rely on arbitration clauses to avoid their responsibilities than a genuine attempt to obtain answers to questions regarding the enforcement of contracts. Indeed, as argued below, the underlying “questions” presented by Appellant have answers that are readily found in the well-settled law of Ohio.

### **STATEMENT OF THE CASE AND FACTS**

This case arose out of a contract between Appellant and Appellees whereby Appellant agreed to build a house for Appellees. Appellant having failed to perform the work in a

workmanlike fashion or at all, Appellees declined to pay the balance due to Appellant. Appellant filed a complaint in foreclosure as well as a motion to stay proceedings pending the outcome of contractually mandated mediation and/or arbitration in the Clermont County Court of Common Pleas. 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. The mediation and/or arbitration was to be governed by the American Arbitration Association under its construction industry mediation rules.

Appellees filed their answer and counterclaims and a response to Appellant's motion to stay. In support of their position, Appellees provided, an extensive affidavit of Appellee Mary Ruth Benfield, in which she attested to facts relevant to the mediation/arbitration provision as well as other aspects of the dispute. Indeed, this affidavit was the only evidence of record before the trial court.

After a hearing, the trial court granted Appellant's motion, issuing 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 and ordering 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, not unconscionable or otherwise unenforceable.

Appellees filed an appeal in the Court of Appeals for Clermont County, Twelfth Appellate District. In its sole assignment of error, Appellees asserted that the trial court erred as a matter of

law in finding the arbitration provision enforceable. The Twelfth District, after a lengthy de novo review of the arbitration provision as well as the facts of record, held that the arbitration provision was unconscionable and unenforceable.

Appellant timely filed a Notice of Appeal asking the Court to accept discretionary jurisdiction over this matter after an unfavorable decision in the Court of Appeals. Appellant has previously filed a Motion to Certify a Conflict which was granted after the filing of its Notice of Appeal. Appellant has timely filed a Notice of the Order Certifying Conflict.

Appellant does not dispute the facts found by the Twelfth District Court of Appeals in its decision. Rather, Appellant argues that well-settled rules of construction should be swept away so that Appellant can avoid liability to Appellees.

#### **ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW**

**Proposition No. 1: The proper standard of review for a Court of Appeals reviewing a decision of a trial court granting or denying a motion to compel arbitration under O.R.C. 2711.02 where a party opposing the Motion alleges unconscionability of the arbitration clause is “abuse of discretion.”**

Revised Code section 2711.01(A) provides that an arbitration provision “shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.” In *ABM Farms, Inc. v. Woods, supra*, this Court held that “R.C. 2711.01 more generally acknowledges that an arbitration clause is, in effect, a contract within a contract, subject to revocation on its own merits.” *ABM Farms, Inc.*, 81 Ohio St.3d at 501. This Court has held, further, that the determination of 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. A de novo review requires a reexamination of the trial court’s determinations.

The Twelfth District Court of Appeals has issued an Order Certifying Conflict on the following question: “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?”

In its decision in the case at bar, the Twelfth District determined the proper standard of review as follows:

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, 848 N.E.2d 563, ¶ 11; *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App.3d 44, 49, 749 N.E.2d 825.

{¶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, 809 N.E.2d 1161, ¶ 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, 611 N.E.2d 902.

Appellees urge this Court to accept the analysis provided by the Twelfth District. This analysis is consistent with the provisions of R.C. 2711.01(A) and the above-cited holdings of this Court.

To be sure, once a trial court finds an arbitration clause to be unconscionable and therefore unenforceable, the motion to compel arbitration becomes moot. While there may be reasons for which a trial court may grant or deny a motion to compel arbitration that are subject to review under the abuse of discretion standard, when the question is whether a provision in a contract is

unconscionable, the law is well-settled by this Court that the standard of review is de novo.

**Proposition of Law No. 2: To defeat a motion for stay brought pursuant to O.R.C. 2711.02, a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, is unconscionable.**

In support of this proposition of law, Appellant argues that a finding of unconscionability should be made on the same basis as a determination of fraud in the inducement. As stated above, according to this Court's holding in *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, a determination of fraud in the inducement requires proof of "misrepresentation of facts outside the contract or other wrongful conduct [that] induced a party to enter into the contract ...." *Id.* at 503. Appellant provides no legal support – merely a preference – for a review based on the type of facts that are not at issue in this matter. The facts at issue, of course, have provided a sound basis for the Twelfth District Court of Appeals, relying on the well-settled law of Ohio, including *Williams, supra*, to determine that the arbitration provision in the parties' contract is both procedurally and substantively unconscionable.

**Proposition of Law No. 3: Arbitration agreements are presumed enforceable unless the party opposing arbitration demonstrates by clear and convincing evidence that there is some defense to enforcement.**

Appellant asks not only that this Court change the elements of unconscionability to match that of fraudulent inducement, but would have the Court impose a "clear and convincing" standard of proof. In support of its argument, Appellant asserts only that "the imposition of such a burden would be consistent with the Ohio Arbitration Act and Ohio common law," providing neither statutory nor decisional support for this statement.

**Proposition of Law No. 4: A Court of Appeals may not consider evidence or arguments not presented to the trial court in its review of a decision granting or denying a motion for stay pursuant to O.R.C. 2711.02.**

In the case at bar, the parties' contract states that the rules of the AAA are applicable to any dispute resolution. In its decision, the Twelfth District stated in this regard that "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* [*v. Fred Martin Motor Co.* (2004)], 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 at ¶ 37-51, and *Porpora* [*v. Gatiff Building Co.* (2005)], 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081 at ¶ 16."

The courts in *Eagle* and *Porpora* both made specific findings regarding the costs of arbitration. In *Porpora* the court cited the initial fee of \$2,750 and the case-service fee of \$1,250 as well as additional costs described by AAA rule 51, *Porpora*, ¶17. In *Eagle*, the court cited that the NAF filing fee for a \$75,000 claim was \$750, an amount substantially greater than that required by the Summit County Court of Common Pleas. The court noted also that the NAF required additional fees, including those for the arbitrator. *Eagle*, ¶¶37, 38

Ohio Evidence Rule 201 (B) permits a court to take judicial notice of these types of facts. In the case at bar, both Evid.R. 201(B)(1) and (2) are applicable to the information pertaining to the costs of mediation and arbitration under the rules of the AAA. A judicially noticed fact "must be one 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 reasonable [sic] be questioned.”

The costs of arbitration are generally known within the territorial jurisdiction of the trial court. The information is readily found on the website of the AAA. Further, the accuracy of the information is not disputed by either party.

In addition, Evid.R. 201 provides that a court may take judicial notice, whether or not upon request of a party. Evid.R. 201 (C). Indeed, upon request of a party who supplies the necessary information, the court is required to take judicial notice. Evid.R. 201 (D). The court may grant a party’s request to take judicial notice *after* such notice has already been taken. Evid.R. 201 (E). Finally, judicial notice may be taken at any stage of the proceeding. Evid.R. 201 (F).

Appellant can provide no justification for overturning Evid.R. 201.

### CONCLUSION

For the reasons set forth above, this matter is not one of public or great general interest. Appellees request that the Court decline jurisdiction.

Respectfully submitted,



Donald W. White, Esq. (0005630)  
Nichols, Speidel & Nichols  
237 Main Street  
Batavia, Ohio 45103  
(513) 732-1420, Fax 732-0357  
Counsel for Appellees,  
Marvin and Mary Ruth Benfield

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served upon J. Robert Linneman and C. Gregory Schmidt, counsel for Appellant, Taylor Building Corporation of American, Santen & Hughes, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202, this 6 day of November, 2006, by regular U.S. mail, postage prepaid.

  
\_\_\_\_\_  
Donald W. White, Esq.