

**IN THE SUPREME COURT
OF THE STATE OF OHIO**

**TAYLOR BUILDING
CORPORATION OF AMERICA,**

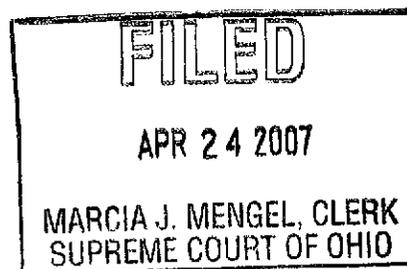
Appellant,

-vs-

MARVIN BENFIELD, et al.,

Appellees.

: Supreme Court Cases No.: 06-1890
: (Consolidated) 06-2043
:
: On Appeal from the Clermont County
: Court of Appeals, 12th Appellate District
:
: Court of Appeals
: Case No. CA2005-09-083



**MERIT BRIEF OF DEFENDANTS-APPELLEES
MARVIN BENFIELD AND MARY RUTH BENFIELD**

Donald W. White (0005630)
Nichols, Speidel & Nichols
237 Main Street
Batavia, Ohio 45103
(513) 732-1420
Counsel for Defendants-Appellants,
Marvin Benfield 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
Counsel for Plaintiff-Appellee,
Taylor Building Corp. of America

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	3
<u>Certified question:</u>	
Should a 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?	3
<u>Proposition of law:</u>	
“De novo” is 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 the party opposing the Motion alleges unconscionability of the arbitration clause.	3
CONCLUSION	12
CERTIFICATE OF SERVICE	13
APPENDIX	<u>Appx. Pg.</u>
UNREPORTED CASES	
<i>Cronin v. California Fitness</i> , 2005 WL 1515369 (Ohio App. 10 Dist.), June 28, 2005	15
<i>Sikes v. Ganley Pontiac Honda, Inc.</i> , 2004 WL 67224 (Ohio App. 8th Dist.)	20

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>ABM Farms, Inc. v. Woods</i> (1998), 81 Ohio St.3d 498	8, 9
<i>Acad. of Med. v. Aetna Health</i> (2006),108 Ohio St.3d 185	9
<i>Alexander v. Buckeye Pipe Line Co.</i> (1978), 53 Ohio St.2d 241	11
<i>Blakemore v. Blakemore</i> (1983), 5 Ohio St.3d 217	3
<i>Carter Steel & Fabricating Co. v. Danis Bldg. Constr. Co.</i> (1998), 126 Ohio App.3d 251 254-55	7
<i>Cronin v. California Fitness</i> , 2005 WL 1515369 (Ohio App. 10 Dist.), June 28, 2005, unreported	7, 8
<i>Harper v. J.D. Bryder of Canton</i> (2002), 148 Ohio App.3d 122	6
<i>Harsco Corp. v. Crane Carrier Co.</i> (1997), 122 Ohio App.,3d 406	5, 6, 7, 8
<i>Henderson v. Lawyers Title Insurance Corp.</i> (2006), 108 Ohio St.3d 265	11, 12
<i>In re All Kelley & Ferraro Asbestos Cases</i> (2004), 104 Ohio St.3d 605	11
<i>McGuffey v. LensCrafters, Inc.</i> (2001), 141 Ohio App.3d 44	8
<i>Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm</i> (1995), 73 Ohio St.3d 107	11
<i>Peters v. Columbus Steel Castings</i> (2006), 2006 Ohio 382	7
<i>Sikes v. Ganley Pontiac Honda, Inc.</i> , 2004 WL 67224 (Ohio App.8th Dist.), unreported	6, 8
<i>Small v. HCG of Perrysbury, Inc.</i> (2004), 159 Ohio App.3d 66	5
<i>Strasser v. Fortney Weygandt, Inc.</i> (Dec. 20, 2001),Cuyahoga App. No. 79621	6
<i>Taylor Building Corp. of Am. v. Benfield</i> (2006), 168 Ohio App.3d 517	1, 3, 4, 7, 8, 12
<i>Trucco Constr. Co. v. City of Columbus</i> , 2006 Ohio 6984	4

Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd. (1992), 63 Ohio St.3d 339 11

West v. Household Life Insurance Co., 2007 Ohio 845 7, 9, 10, 12

Williams v. Aetna Finance Co. (1998), 83 Ohio St.3d 464 9

Yessenow v. Aue Design Studio, Inc., 165 Ohio App.3d 757 8

STATUTE:

R.C. Chapter 2711 1, 3, 8, 9

INTRODUCTION

Under Ohio law, an arbitration clause is an agreement – or contract – to arbitrate. Upon proper application by a party to such agreement, the trial court must, upon initial review, determine the enforceability of the arbitration provision. The trial court’s determination of this issue is always subject to *de novo* review by an appellate court. Indeed, where an appellate court finds that an arbitration provision is unenforceable, the question whether a trial court has abused its discretion in granting or denying a motion to compel arbitration is moot and the trial court’s decision does not require further review.

STATEMENT OF THE CASE AND FACTS

On November 26, 2003, Plaintiff-Appellant Taylor Building Corp., filed a complaint in foreclosure against Defendants-Appellees Marvin and Mary Ruth Benfield. Supp.1. Simultaneously, Appellant filed a Motion to Stay Judicial Proceedings Pending Mediation and/or Arbitration pursuant to the provisions of R.C. 2711.02(B). Supp. 20. Defendants timely filed a Response to Appellant’s Motion. Supp. 45. On August 10, 2004, Appellee Mary Ruth Benfield filed an affidavit with the court adopting the following as fact: the assertions in the Answer to the Complaint, the facts set forth in the Affirmative Defenses and Counterclaim as well as the facts asserted in Appellees’ Response to Appellant’s Motion to Stay. Supp. 63.

The trial court issued its decision granting Appellant’s Motion for Stay on August 17, 2005. On appeal, the Twelfth District Court of Appeals reversed the trial court. *Taylor Building Corp. v. Marvin Benfield* (2006), 168 Ohio App.3d 517.

The Benfields raised a single assignment of error before the Twelfth District: “The trial court erred as a matter of law in finding that the arbitration clause is enforceable.” *Id.* at P12. Holding that “[t]he determination as to whether a provision in a contract is unconscionable is a matter of law,” the court applied a *de novo* standard of review. *Id.* at P16, citing *Ins. Co. of N. America v. Automatic Sprinkler Corp.* (1981), 67 Ohio App.2d 91, 98. Ultimately, the court of appeals found the arbitration provision in the contract between the Benfields and Taylor to be unconscionable and, therefore, unenforceable.

Taylor thereafter filed a Notice of Appeal with this Court as well as a Motion to Certify a Conflict Among Appellate Districts with the Twelfth District Court of Appeals. On October 23, 2006, the Twelfth District issued an Entry Granting Motion to Certify Conflict. On December 27, this Court decided that a conflict exists and simultaneously accepted jurisdiction over the first proposition of law in Taylor’s appeal.

Taylor’s proposition of law is in essence identical to the question certified by the Twelfth District Court of Appeals. The question is one of law and is in no way dependent on the fact of the case at bar or any other. Nevertheless, in its Merit Brief Appellant has enhanced the facts by adding details that appear nowhere on the record, while at the same time continuing to complain about the reliance of the courts below on the affidavit filed by Mary Ruth Benfield.

Both the trial court and the Twelfth District Court of Appeals proposed certain facts to be supported by competent, credible evidence and relevant to the matter. The facts are not in dispute and are set forth in the decision of the Twelfth District.¹ Nevertheless, what this Court has asked

¹Although Appellant appears to argue that the affidavit of Mary Ruth Benfield should not be considered, at neither the trial court nor the appellate level did Appellant file a motion to strike.

the parties to brief is the issue of the proper standard of review of the law and facts in this matter. To be sure, the Court has specifically excluded from its jurisdictional review those propositions of law asserted by Appellant which go to the merits of the decision of the Twelfth District.

ARGUMENT

Certified question:

Should a 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?

Proposition of law:

“De novo” is 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 the party opposing the Motion alleges unconscionability of the arbitration clause.

A. The competing standards of review

To be sure, although it found that the venue portion of the arbitration clause was improper, the *Taylor* trial court found that the arbitration provision was otherwise enforceable. The Twelfth District, after a *de novo* review of the facts and law disagreed. Appellant herein argues that the Twelfth District should have reviewed the trial court’s decision for “abuse of discretion” rather than “de novo.”

“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. In an abuse of discretion review, the appellate court cannot

substitute its judgment for that of the trial court. *Id.* The Blakemore decision arose out of a domestic relations appeal where a trial court has broad discretion in fashioning an equitable division of property. *Id.*

“Issues of contract construction and interpretation are questions of law. Questions of law are subject to *de novo* review on appeal. The trial court's findings of fact, however, are entitled to deference on appeal and will not be overturned so long as there is competent, credible evidence to support them.” *Trucco Constr. Co. v. City of Columbus*, 2006 Ohio 6984 at P38, citing *The Sherman R. Smoot Co. of Ohio v. State of Ohio* (2000), 136 Ohio App.3d 166, 172.

In the *Taylor* matter, in addition to some of the language of the arbitration provision itself, the trial court considered the fact that the contract was preprinted. The trial court took judicial notice of the fact that “there are a multitude of homebuilders in the local area” and considered that the Benfields acknowledged that “there was some discussion regarding the arbitration provision, so they were aware of it.” The trial court found further that the Taylor salesperson indicated that there would be no need for the arbitration provision, but that he was expressing an opinion. These facts were, of course, gleaned from Mary Ruth Benfield’s affidavit.

The Twelfth District considered not just the facts presented by the trial court but the balance of facts presented to the trial court via Mary Ruth Benfield’s affidavit. The appellate court did not weigh or determine disputes of fact. In this matter there was no need to do so. The appellate court, therefore, did not overturn any of the trial court’s finding of fact, finding apparently that Mary Ruth Benfield’s affidavit constituted competent, credible evidence to support those facts. What the Twelfth District did, however, was to look at all of the competent, credible evidence provided by Mary Ruth Benfield’s affidavit. The appellate court thereafter

applied the facts to language of the

arbitration provision to determine whether both procedural and substantive unconscionability existed. When the court so found, it held the arbitration provision unenforceable.

B. The Conflict in the Appellate Districts

The appellate court decisions cited by the Twelfth District Court of Appeals as using an abuse of discretion standard rely on inapposite cases for their authority and in fact perform *de novo* review.

This matter is before the Court because of an apparent conflict among Ohio's appellate districts regarding the proper standard of review of a trial court's decision granting or denying a motion to compel arbitration where it is alleged that the arbitration clause is unconscionable. To be sure, the word "apparent" is significant in evaluating whether a conflict even exists.

Specifically, the Twelfth District cited a number of cases in its Entry certifying a conflict to demonstrate that certain courts purport to use an abuse of discretion standard when reviewing the question of unconscionability in arbitration agreements. Two things are clear from a review of these decisions: first, the courts used a *de novo* review despite language in the decisions to the contrary; second, none of the decisions each court cited as authority for the abuse of discretion standard dealt with questions of contract law.

In the abuse of discretion cases, it is clear that each court, rather than accepting the trial court's application of the facts to the law, performed its own review. That is, each appellate court examined those facts supported by competent, credible evidence before the trial court and applied or reapplied them with regard to the elements of procedural and substantive unconscionability.

For example, in *Small v. HCG of Perrysbury, Inc.* (2004), 159 Ohio App.3d 66, the Sixth District Court of Appeals reversed the trial court's decision to stay proceedings before it pending arbitration. Before beginning its review, the *Small* court held that "[w]e review a decision to stay the trial court proceedings pending arbitration under an abuse of discretion standard." *Id.* at P12 citing *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.,3d 406, 410. It is important to note that, however, the *Harsco* case had nothing to do with interpretation of an arbitration provision or contract construction in general, addressing instead the whether the motion to stay proceedings was timely.

In its review, the *Small* court held that the arbitration provision was unconscionable and not, therefore, enforceable. The Court of Appeals examined both the facts and the contract provisions, then set forth the law regarding unconscionability. Applying the facts to the law, the Court of Appeals found both procedural and substantive unconscionability.

Next, in *Sikes v. Ganley Pontiac Honda, Inc.*, 2004 WL 67224 (Ohio App.8th Dist.), unreported, the Eighth District Court of Appeals, stating that it was using an abuse of discretion standard, reversed the trial court's finding that the arbitration provision in question was unconscionable. The *Sikes* court cited two cases as authority for use of the abuse of discretion standard: *Harsco* and *Strasser v. Fortney Weygandt, Inc.* (Dec. 20, 2001), Cuyahoga App. No. 79621 ("In this case, the issue centers around the terms of an arbitration agreement and disclaimer found within an employee handbook.) As in *Harsco*, there was no question of unconscionability or contract construction of any kind before the *Strasser* court.

Indeed, the *Sikes* court acknowledged that the question of unconscionability is one of contract law. *Sikes* at P10. The *Sikes* court reapplied the facts developed in the trial court to the

law and made its own finding that, as a matter of law, the arbitration provision in question was enforceable.

In *Harper v. J.D. Bryder of Canton* (2002), 148 Ohio App.3d 122, the court held that a determination of unconscionability “requires a case by case review of the facts and circumstances surrounding the agreement.” *Id.* at P13. The court went on, however, to parrot the standard of review it did not follow citing to *Harsco. Id.* at P16.

The final case on the Twelfth District’s list, *Cronin v. California Fitness*, 2005 WL 1515369 (Ohio App. 10 Dist.), June 28, 2005, unreported, again purports to perform its review under the abuse of discretion standard. *Id.* at P.7. The authority relied upon by the *Cronin* court for the abuse of discretion standard included *Harsco* and *Carter Steel & Fabricating Co. v. Danis Bldg. Constr. Co.* (1998), 126 Ohio App.3d 251 254-55 (question of scope of arbitration provision).

Two things are important about *Cronin*. First, the Tenth District, after stating that “unconscionability is a question of law to be decided by the court,” performed a *de novo* review of the arbitration provision before it. *Id.* at P9. Second, the Tenth District, in 2006, agreed that the *de novo* standard of review is appropriate when making determinations regarding the enforceability of arbitration provisions. See, *Peters v. Columbus Steel Castings* (2006), 2006 Ohio 382 at P.10; *West v. Household Life Insurance Co.*, 2007 Ohio 845 at P.7.

Accordingly, what appears to be a conflict among the appellate districts cannot be substantiated by anything more than the courts’ rote use of the words “abuse of discretion.” Not only do the courts purporting to review under an abuse of discretion not do so, but the cases upon which they rely as authority to use this standard do not involve questions of contract construction.

To be sure, appellate courts faced with the issue of the unconscionability of an arbitration provision, acknowledge that this is a question of contract law, and perform a *de novo* review under fundamental principles of Ohio contract law.

The Twelfth District in *Taylor* stated, “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.” *Taylor*, 168 Ohio App.3d 516 at P14. Yet, the court cited to *Yessenow v. Aue Design Studio, Inc.*, 165 Ohio App.3d 757, and to *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App.3d 44, 49. And, of course, both of those decisions cited to *Harsco*, *Sikes* and *Cronin*.

Simply put, there is no support in Ohio decisional law, despite the apparent conflict, for the use of an abuse of discretion standard of review when any question of contract construction is at issue.

While appellate courts appear to be performing their reviews of contract issues according to established Ohio law, i.e., pursuant to *de novo* review, somewhere along the way appellate courts have begun, in fact, saying one thing and doing another. There is, of course, no reason for this Court to continue to rely on appellate courts to find their own way in this matters. A holding in this matter that *de novo* is the proper 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 will eliminate this type of confusion.

C. The propriety of de novo review

1. An arbitration provision is a contract in itself.

As an initial matter, *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498 holds: R.C.

2711.01 “acknowledges that an arbitration clause is, in effect a contract within a contract subject to revocation on its own merits.” *Id.* at 501. The rationale set forth by the Tenth District in *Cronin* and *West*, as well as by the Twelfth District in the case at bar, in support of *de novo* review of an arbitration agreement, is the correct one. The *West* decision provides both a summary of Ohio and federal law in the area of review of arbitration provisions and sets forth, as well, a cogent and well-supported rationale for the use of *de novo* review.

Like *ABM Farms*, *West* cites to R.C. 2711.01(A) for the proposition that when the parties to a contract include a provision to settle a particular dispute or controversy arising out of the contract (“or out of the refusal to perform the whole or any part of the contract”), that the contractual provision “shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.” In this regard, *Williams v. Aetna Finance Co.* (1998), 83 Ohio St.3d 464, 472, provides that an allegation of unconscionability is an equitable ground upon which a contract may be found unenforceable.

That an arbitration provision is itself an agreement between parties is well-supported by other of this Court’s recent decisions. The “first principle” guiding determinations of arbitrability is that “‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’ * * * This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration.” *Acad. of Med. v. Aetna Health* (2006), 108 Ohio St.3d 185, citing *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661 relying heavily on *AT & T Technologies, Inc. V. Communications Workers of America*, 475 U.S. 643, 648-649.

To be sure, in *Academy of Medicine*, this Court reiterated that “The second principle is that ‘the question of arbitrability -- whether an * * * agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.’ *Acad. of Med.*, 108 Ohio St.3d at P.12.

Accordingly, an arbitration provision is a contract and, as such, when the making of such agreement is attacked on legal or equitable grounds, the attacking party has raised a question of law.

2. When the question is raised by a party to a contract containing an arbitration provision, as an initial matter, the trial court must determine whether the parties have agreed to arbitrate.

The *West* decision, citing to two decisions of the United States Supreme Court in this area, next addresses a court’s responsibility in determining whether, in fact, the parties have agreed to arbitrate. Thus, before a court can order litigants to submit to an arbitration proceeding, the court must first determine whether the parties have actually agreed to arbitrate the dispute in question. *Id.* at P12 citing *Prima Paint Corp. v. Flood & Conkling Mfg. Co.* (1967), 388 U.S. 395, 404. *West* points out that without an agreement to arbitrate, an arbitrator lacks jurisdiction over to resolve the parties’ disputes. *Id.*

This preliminary inquiry pertains only to the validity or enforceability of the arbitration clause itself (i.e., not the underlying merits of the parties’ dispute). If the court answers * * * in the affirmative, and finds the clause is valid, then the court must compel arbitration. If, however, the court finds that one or both of the preliminary requirements is not met, or otherwise finds the clause to be unenforceable, then the court may consider issues pertaining to the validity of the entire contract.

Id.

Accordingly, a trial court must find agreement between the parties in the formation of the arbitration provision. This fundamental issue of contract construction is reviewed *de novo*.

3. The formation of an arbitration provision is subject to review on the same basis as any other question of contract construction.

In the case at bar, the foundation of Appellant's argument is that an arbitration provision takes a contract into another legal realm with the most lenient standard of review possible. This argument is not supported by Ohio law.

Indeed, the *Henderson* decision is completely dispositive of this argument. *Henderson v. Lawyers Title Insurance Corp.* (2006), 108 Ohio St.3d 265. In addressing the argument set forth by appellee Lawyers Title, *Henderson* began, "Lawyers Title seems to be asking for special protection for arbitration provisions." *Henderson*, applying the Federal Arbitration Act ("FAA"), to appellee's argument, found that the law governing review of arbitration provisions, both state and federal, do not "require that general principals governing the formation and validity of contracts be relaxed in order to sustain arbitration provisions." *Id.* at P.28 (additional citations omitted). In Ohio these principles include *de novo* review on appeal.

To be sure, the law is well-settled that "the construction of a written contract is a question of law, which we review *de novo*." *In re All Kelley & Ferraro Asbestos Cases* (2004), 104 Ohio St.3d 605 at P.28, citing *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St. 3d 501, 502; *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108; *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, paragraph one of the syllabus; *Alexander v.*

Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, paragraph one of the syllabus.

Accordingly, an arbitration agreement is subject to review as any other agreement. The appellate standard is *de novo*.

4. Because the question of unconscionability goes to the formation of a contract, it is, therefore, subject to de novo review

As argued above, an agreement to arbitrate is a matter of contract. *West, supra*, at P.12m citing *AT&T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 648. *West* points out, further, that before a court can order litigants to submit to an arbitration provision, the court must first determine whether the parties have agreed to arbitrate the dispute in question. *Id.*, citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 404. Such agreement to arbitrate is subject to the same review as any other question pertaining to contract construction. *Henderson*, 108 Ohio St.3d 256 at P.28 (arbitration provisions to be placed on a par with other contract provisions).

With regard to unconscionability, Ohio law requires a finding of both procedural and substantive unconscionability before an agreement is found to be unenforceable. As the Twelfth District Court of Appeals stated in the case giving rise to this question, “[p]rocedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible.” *Taylor Building Corp. of Am. v. Benfield* (2006), 168 Ohio App.3d 517 at P.20 citing *Porpora v. Gatliff Building Co.*, 2005 Ohio 2410 at P16. “Substantive unconscionability refers to the actual terms of the agreement.” *Taylor* at P22.

Both elements of the doctrine of unconscionability go directly to the elements of the formation of any contract. The question of unconscionability is, therefore, subject to *de novo*

review by an appellate court.

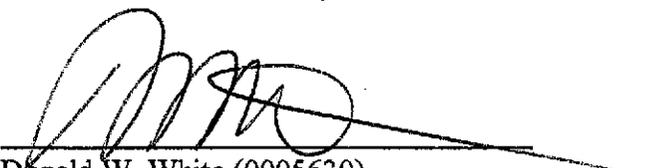
CONCLUSION

This Court has, over the past several years, addressed various aspects of R.C. Chapter 2711. In each of the Court's decisions, one is left with no doubt that arbitration agreements are contracts with no greater or lesser protection on review than other contract provisions. Nor can there be any dispute that this Court has held time and again that the standard of review for questions of contract construction is *de novo*.

The issue of the unconscionability of an arbitration provision addresses one of the most fundamental aspect of contract construction: a meeting of the minds. For this reason, Appellees respectfully request the Court to reject Appellant's first proposition of law and answer the certified question that a court should apply a *de novo* 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.

Respectfully submitted,

Nichols, Speidel & Nichols
Counsel for Defendants-Appellants
Marvin Benfield and Mary Ruth Benfield

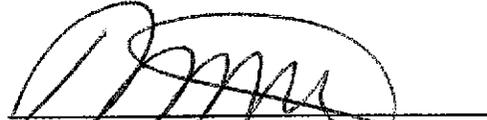


Donald W. White (0005630)
237 Main Street
Batavia, Ohio 45103
(513) 732-1420

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing brief was served upon the following persons by regular U.S. Mail, postage prepaid, this _____ day of April, 2007.

J. Robert Linneman (#0073846)
C. Gregory Schmidt (#0006069)
Santen & Hughes
312 Walnut Street, Suite 3100
Cincinnati, Ohio 45202


Donald W. White (#0005630)
Counsel for Appellant

APPENDIX



Slip Copy

Page 1

Slip Copy, 2005 WL 1515369 (Ohio App. 10 Dist.), 2005 -Ohio- 3273
(Cite as: Slip Copy)



Briefs and Other Related Documents

Cronin v. Fitness Ohio App. 10 Dist., 2005.

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.

West Headnotes

T 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)

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

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Slip Copy, 2005 WL 1515369 (Ohio App. 10 Dist.), 2005 -Ohio- 3273
(Cite as: Slip Copy)

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 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.*

Slip Copy, 2005 WL 1515369 (Ohio App. 10 Dist.), 2005 -Ohio- 3273
(Cite as: Slip Copy)

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 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

Slip Copy, 2005 WL 1515369 (Ohio App. 10 Dist.), 2005 -Ohio- 3273
(Cite as: Slip Copy)

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.

Ohio App. 10 Dist., 2005.

Cronin v. Fitness

Slip Copy, 2005 WL 1515369 (Ohio App. 10 Dist.), 2005 -Ohio- 3273

Briefs and Other Related Documents (Back to top)

• 2005 WL 2451066 (Appellate Brief) Merit Brief of Defendant-Appellee California Fitness Inc., I

Slip Copy

Page 5

Slip Copy, 2005 WL 1515369 (Ohio App. 10 Dist.), 2005 -Ohio- 3273
(Cite as: Slip Copy)

(Jan. 10, 2005) Original Image of this Document
with Appendix (PDF)

- 2005 WL 2451067 (Appellate Brief) Merit Brief
of Defendant-Appellee California Fitness Inc., I
(Jan. 10, 2005) Original Image of this Document
with Appendix (PDF)

END OF DOCUMENT

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Westlaw.

Not Reported in N.E.2d

Page 1

Not Reported in N.E.2d, 2004 WL 67224 (Ohio App. 8 Dist.), 2004 -Ohio- 155
(Cite as: Not Reported in N.E.2d)

H

Sikes v. Ganley Pontiac Honda, Inc. Ohio App. 8 Dist., 2004.

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

↔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)

↔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)

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**

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in N.E.2d, 2004 WL 67224 (Ohio App. 8 Dist.), 2004 -Ohio- 155
(Cite as: Not Reported in N.E.2d)

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 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

Not Reported in N.E.2d, 2004 WL 67224 (Ohio App. 8 Dist.), 2004 -Ohio- 155
 (Cite as: Not Reported in N.E.2d)

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, *McCann 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 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

Not Reported in N.E.2d, 2004 WL 67224 (Ohio App. 8 Dist.), 2004 -Ohio- 155
(Cite as: Not Reported in N.E.2d)

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 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

Not Reported in N.E.2d, 2004 WL 67224 (Ohio App. 8 Dist.), 2004 -Ohio- 155
(Cite as: Not Reported in N.E.2d)

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.

{¶ 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

Not Reported in N.E.2d, 2004 WL 67224 (Ohio App. 8 Dist.), 2004 -Ohio- 155
 (Cite as: Not Reported in N.E.2d)

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 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).

Ohio App. 8 Dist., 2004.
 Sikes v. Ganley Pontiac Honda, Inc.
 Not Reported in N.E.2d, 2004 WL 67224 (Ohio App. 8 Dist.), 2004 -Ohio- 155

END OF DOCUMENT