IN THE SUPREME COURT
OF THE STATE OF OHIO

TAYLOR BUILDING CORPORATION OF AMERICA,	:	Supreme Court Case Nos.: 06-1890 (consolidated) 06-2043
Appellant,	:	
vs.	:	On Appeal from the Clermont County Court of Appeals, 12th Appellate District
	:	Court of Appeals Case No. CA2005-09-083
MARVIN BENFIELD, et al.,	:	
Appellees.	:	

REPLY BRIEF OF PLAINTIFF-APPELLANT TAYLOR BUILDING CORPORATION OF AMERICA

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I. INTRODUCTION

If one proposition can be gleaned from the briefs of Appellees Marvin and Mary Ruth Benfield ("Appellees") and purported Amicus Curia Attorney General Marc Dann ("Amicus"), it is that trial courts in Ohio should be stripped of all discretion in deciding on the enforcement of an arbitration clause. Appellees and Amicus would impose the most rigorous standard of review upon these decisions, granting an appellate court full authority to reconsider and re-weigh everything considered or excluded by the trial court. In short, Appellees and Amicus are not willing to entrust the decision to the trial court.

Appellees' and Amicus' position is internally inconsistent. By opposing a motion under O.R.C. §§ 2711.02 or 03, a party seeks to keep his case in the hands of a trial court. Thus, Appellees and Amicus seek to ensure that claims are decided by the same court whose independent judgment they have gone to great lengths to challenge in their briefs. The logical conundrums will not end here.

First, Appellees argue that the imposition of the "abuse of discretion" standard of review by Ohio's Courts of Appeal was a historical accident and may thus be discarded. Appellant Taylor in this Reply will show that the imposition of this standard was the result of sound judicial reasoning which arose from consideration of the unique posture of a motion under O.R.C. §§ 2711.02 or 03

Second, Amicus offers a novel model for evaluation of unconscionability and of arbitration clauses in general. Taylor will show that the proposed model is at best, redundant of existing law and useless to the trial court, and, at worst, in plain contradiction to the prior holdings of this Court.

Finally, Appellees and Amicus argue that "consumer contracts" should be exempted from the general rule of arbitrability created by the OAA and now enshrined by generations of Ohio common law. Taylor will show that the OAA was intended to apply to consumer contracts as it applies to all contracts and that the legislative policy of the OAA and other closely related statutes supports the imposition of a dual standard of review that favors efficient access to arbitration.

II. The common law history of the "abuse of discretion" standard applicable to review of motions to stay under the OAA.

Appellees make a cursory attempt to trace the history of the "abuse of discretion" standard, but fail to identify the source of the application of the rule. The lineage of this standard provides useful insight into the function and purpose for the rule in the context of the OAA.

A. The most cited case: Harsco Corporation v. Crane Carrier Company

Appellees are correct that the case of Harsco Corp. v. Crane Carrier Co. (1997), 122 Ohio App.3d 406, is the case most commonly cited for this rule. In Harsco, the court directly considered the enforcement of an arbitration contract. The Harsco court did not simply recite the standard, as Appellee suggests. Rather, the court undertook an in depth analysis of the significance of the standard of review:

> "The process of review for abuse of discretion has been summarized as follows, in Brennan, *Standards of Appellate Review,* 33 Def. L.J. 377 (1984):
>
> "1. Did the lower court have discretion to act as it did?
>
> " a. If not, an error of law was made, and the appellate court may freely review the action taken.
>
> "b. If so, then the appellate court may not review the action

> unless there was an abuse of discretion." Whiteside, Ohio Appellate Practice (1991), Standards of Review, 152, fn. 18.

> ***Applying the principle as set forth above, clearly the trial court judge in the present case had the discretion to determine whether to sustain or overrule Crane's motion for stay of proceedings and referral to arbitration.*** Therefore, we must review the action under the abuse of discretion standard.

> Harsco, FN 2 at 410 (emphasis added).

The above passage shows that the Harsco court's decision to apply the "abuse of discretion" standard was made with an awareness of how it would affect trial court procedure and with a view toward shaping a consistent policy.

B. The underpinnings of Harsco: Phillips v. Lee Homes.

The Harsco court's application of the "abuse of discretion" standard was supported by citation to two authorities that had previously done the same in OAA cases: Bedford City School Dist. v. Trane, 1997 WL 127194 (Ohio App. 8 Dist., No 71024); and Phillips v. Lee Homes, 1994 WL 50696 (Ohio App. 8 Dist., No. 64353). Bedford simply cited to Phillips as authority for the standard without further comment. However, the Phillips court was quite clear in setting forth the rationale for the imposition of this standard.

The Phillips case dealt principally with waiver of enforcement of an arbitration clause. Th Phillips court also noted that it had been unable to identify any previous opinion setting forth the applicable standard of review. The court observed that this question involved many factual determinations.

> In Ohio, we defer to the factfinder's application of a legal standard to a set of facts just as we do to his findings with regard to the facts to which to apply the standard.
>
> . . .

> There are two reasons why we deferentially review a trial court's application of legal standards to facts. First, the trier of fact is closer to the facts than we are and therefore better able to assess their legal significance. Second, two of the appellate court's most important functions are to establish legal rules and resolve disputed propositions of law. When the answer to a question is closely bound up to the facts of a particular case, this function is not at stake because the resolution of the question in a particular case is not likely to establish uniform rules for future decisions.
>
> ...
>
> [I]t makes little sense for three appellate judges to redo the trial judge's work. Therefore, consistent with this state's general position on standards of review, we will review the trial court's decision under an abuse of discretion standard.
>
> Phillips at *3-4 (citations omitted).

The arguments of Appellees and Amicus fly in the face of the Phillips analysis. Their briefs state directly that what they seek is the mandatory "re-doing" of each trial judge's decision by an appellate panel each time a motion to refer to arbitration arises anywhere in the state in order to ensure that no consumer is subjected to arbitration. These arguments entirely misconstrue the role of the appellate courts as set forth by Phillips, and also ignore the objective of the OAA.

C. The "abuse of discretion" standard is appropriate in light of the highly detailed and factual nature of the inquiry.

The Phillips analysis is particularly salient in light of the detailed factual inquiry that a court must undertake in determining unconscionability. Appellees concede that the determination of unconscionability is one which rests on factual determinations. "[A] determination of unconscionability requires a case by case review of the facts and circumstances surrounding the agreement. Appellees Brief at 7 *citing* Harper v. J.D. Byrider of Canton (2002), 148 Ohio App.3d 122. The Appeals Court itself stated that it

would "examine the particular facts and circumstances surrounding the agreement." Appeals Court Decision at 6, para. 23 (Appx. at 10).

On this point, Appellees would have this Court believe that the Appeals Court in this case "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." Appellees' Brief at 5. Yet, this was clearly not the case. The Appeals Courts' Decision actually relied heavily on facts that were not even presented to the Trial Court. The Appeals Court's determination of unconscionability recited evidence of the purported cost of arbitration that was presented for the first time to the Appeals Court. The Trial Court, by contrast, expressly noted the absence of evidence on this point. *See* Trial Court Decision at p. 14 (Appx. at 31). There can be no clearer indication of the excessive breadth in the Appeals Court's view of its own power.

The Phillips analysis is also pertinent in its recognition of the unique position of a trial court in applying a rule to a set of facts. Where a party opposes arbitration based on unconscionability, that party bears the burden of production and proof to establish that affirmative defense. The trial court's decision thus includes a determination of whether the facts, as determined by the trial court, meet this burden. A trial court is well suited to evaluate the weight of particular evidence, while an appeals court must attempt to do so from the distance of a separate proceeding, based only on a record of proceedings. Indeed, under O.R.C. § 2711.03(B), a party has the right to demand a jury trial on the question of arbitrability. That an appeals court should review the findings of a jury under a "de novo" standard would be an absurd result, yet that would be the law if Appellees' and Amicus'

arguments are accepted. Therefore, an appeals court should review only for abuse of discretion where a trial court has granted a motion under the OAA.

In this regard, the questions concerning the evidence in the present case highlight the need for discretion in the trial court. Appellees submit that they fully supported their argument of unconscionability, on which they bore the burden, by virtue of a one paragraph, conclusory affidavit submitted eight months after the filing of their memorandum in opposition to arbitration. The affidavit was filed, without leave, in violation of local rule. *See* Clermont County Local Rule 4. It is an open question whether the Trial Court deemed the affidavit admissible or useful. It is also an open question whether the Trial Court even looked at the affidavit since Appellee never secured the Court's permission to supplement the record. Since the affidavit did nothing but "adopt" the "allegations"of the pleadings", Appellees left it up to the Trial Court to figure out what was fact and what was argument.

On the one hand, it would be entirely appropriate for the Trial Court to rely upon an unsworn allegations in a pleading in order to attribute an admission to Appellees. Yet, it would not be inconsistent for the same Trial Court to, on the other hand, find that an affidavit was insufficient for purposes of meeting an affirmative burden of proof which Appellees bore. In its Decision, the Trial Court repeatedly found that there was insufficient evidence to support Appellees' argument. That trial judges have authority to make such decisions that are matters of control of proceedings in their own courtrooms seems beyond question. Yet, the Appeals Court directly overruled the Trial Court's finding of fact on questions that depended upon the admission and weight of the Benfield Affidavit. *See e.g.* Appeals Court Decision at 6, para 24 (Appx. at 10). The Appeals Court

reversed the Trial Court, finding as a matter of fact that the Contract was presented on a "take it or leave it basis." This finding was made despite the fact that the Contract contained two full pages of handwritten modifications applicable only to the Appellees' project. *See* Supplement at 10-11.

Appellees would strip the Trial Court of the most basic rights to control its courtroom or decide any case. In this case, they would leave it to an appellate court to re-decide whether an affidavit was admissible, whether the Trial Court was required to permit Appellees to supplement the record eight months after the filing deadline, and whether the "catch-all" language of the affidavit was useful or credible.

Appellee would have this Court believe that the imposition of the "abuse of discretion" standard was an inadvertent act committed by Courts of Appeals that never substantively considered the rationale for the rule. The opposite is true. The application of this standard was the result of a progression of decisions, each of which reflects thoughtful and purposeful action in light of the statutory framework provided by the OAA. The history of the "abuse of discretion" standard shows that it was developed by the appellate courts of this State in order to serve a well defined objective: to provide an expedient summary proceeding for the limited determination required under O.R.C. 2711.02 and 03. This Court should impose the "abuse of discretion" standard."

III. The model proposed by Amicus is not useful nor well founded in Ohio law and it ignores the command of O.R.C. 2711

The arguments of both Appellees and Amicus Attorney General Marc Dann ("Amicus") are long on presumption of unconscionability, and short on analysis of the relevant statutory law, O.R.C. § 2711. The reason for this omission is obvious: a plain reading of the OAA would render arbitration agreements enforceable. The forthright

application of this statute is anathema to litigants such as these who oppose arbitration in any form. Amicus and Appellees therefore propose a sweeping and vaguely defined version of the common law defense of unconscionability in avoidance. This Court should read the statute plainly, and impose a standard of review that favors arbitration consistent with the intent of the legislature.

A. The Amicus Brief is not persuasive because Amicus has failed to adequately understand the facts and law applicable to the present case.

In its haste to condemn all arbitration clauses as oppressive and unfair, Amicus provides a statement as to proof of unconscionability that is without support in Ohio law. Without citation to authority, Amicus claims that "To prevail on a claim of unconscionability, a party **may** prove ***either*** procedural ***or*** substantive unconscionability." *See* Amicus Brief at 5 (emphasis added). As the precedents of many Ohio courts make abundantly clear, Amicus is dead wrong on this point. The Appeals Court and Trial Court both held, and Appellees agree, that in order to prove unconscionability, a party must show **both** procedural **and** substantive unconscionability. *See e.g.* Collins v. Click Camera & Video, Inc. (1993) 86 Ohio App.3d 826; *see also* Sikes v. Ganley Pontiac, 2004 WL 67224, (Ohio App. 8 Dist.) at ¶ 10.

There are other examples of Amicus' plain failure to comprehend the material facts of this case. Amicus alludes in its brief to "the trial court's failure to consider the unconscionability of the contract terms." Amicus Brief at 11. The Trial Court's decision devoted more than seven pages of text to a methodical analysis of the unconscionability defense. *See* Trial Court Decision, 9-17. Is it possible that Amicus is actually unaware of the Trial Court's exhaustive review on this point? If so, Amicus' allegation evidences an

irresponsible failure to investigate a case prior to offering the weight of the AG's office in support.

Similarly, Amicus again overtly misstates the law applicable to a court's enforcement of an arbitration contract when it characterizes a court's duty under O.R.C. §§ 2711.02 and 03. Amicus would have this Court believe that the trial court's job is two fold: first, make a determination of enforceability of the contract; second, exercise some generalized discretion as to whether to actually enforce the legally binding contract. *See* Amicus Brief at 11. First, Amicus is simply in denial of the clear text of O.R.C. § 2711.02(B), which provides that a court "***SHALL***" stay the trial. (emphasis added). On this point, the remarks of Judge Bryant of the Third District Court of Appeals are quite pertinent: "No trial judge has discretion to enter an order clearly contrary to an express statute [O.R.C. § 2711.01, et seq.]" Harsco v. Crane, (1997), 122 Ohio App.3d at 417 (concurring opinion).

Second, Amicus' error or wishful thinking (whichever is the case) concerning this generalized discretion necessarily undermines Amicus' stated position favoring the "de novo" standard. It stands to reason that if the trial court in fact exercises such discretion, then on appeal, the proper question for the reviewing court becomes whether the trial court abused the discretion which Amicus now concedes that it holds. *See* Amicus Brief at 11. Both Appellee and Amicus are afflicted with a convenient inability to apply the clear mandate of the OAA to a consumer case, and the reasoning of their legal arguments suffers as a result.

B. The Amicus Brief is not persuasive because it assumes and never explains why a consumer is purportedly harmed by participation in arbitration.

Throughout Amicus' brief, it is presumed that consumers will be hurt by any other rule except one that ensures the most rigorous review of contracts at all levels. This Court should not accept Amicus' unsupported assumption that every arbitration clause is unconscionable, and that all arbitration is bad for consumers.

Consumers have in common with suppliers an interest in expedient dispute resolution. Conversely, consumers stand to be harmed by a standard of review that ensures that their remedies may be delayed or rendered impracticable because of litigation expense. Amicus' position on this point is short sighted. First, the "de novo" standard will naturally operate to the benefit of the non-prevailing party on a motion under O.R.C. 2711.02 or 03. It need not be assumed that the consumer will always be the non-prevailing party. Therefore, even where a consumer proves that an arbitration clause is unconscionable, the supplier will have every incentive to try its luck with the appeals court and thereby delay the consumer's access to any remedy in the underlying contract dispute. If, as Amicus presumes, unethical suppliers make use of arbitration clauses to deter consumers from vindicating their rights, then suppliers can accomplish the same goal by endlessly tying up grievances in the appeals process. Amicus and Appellees would play right into the hands of suppliers who actually seek to delay the administration of justice. Meanwhile, they would stymie suppliers who seek to provide quick and low cost procedures for resolution of consumer disputes. Amicus' position in this case is a knee-jerk reaction and is offered without thoughtful consideration of the real interest of consumers in Ohio.

C. Amicus correctly identifies the critical factors in a determination of unconscionability, but fails to apply them to this case.

For all its ideological bluster, Amicus does identify some critical factors that may render an arbitration clause unconscionable and are properly considered in this analysis. These include: deprivation of a fair opportunity to engage in discovery of relevant evidence; concealment or misrepresentation of the obligation to arbitrate; and, preclusion of assertion of lawful claims. First, Consumers already have protection on each of these matters under existing law.[1] Second, these factors are easily identified by a reviewing court. Such glaring impositions into the rights of a litigant can be adequately protected by a court of appeals under an "abuse of discretion" standard. Third, these are factors that relate directly to the process of arbitration, and are therefore likely to be found within an arbitration clause, rather than elsewhere in a contract. A court's review for unconscionability of an arbitration clause should be logically connected to the process provided for by that clause, consistent with the spirit of the OAA. The review should be narrow and focused to questions that actually bear on the arbitration process that will follow under the arbitration clause. Effective review is entirely achieveable under an "abuse of discretion" standard. Under the broader "de novo" standard, courts of appeal are encouraged to review a broader range of facts or contract terms that may be completely unrelated to arbitration. *See e.g.* Appeals Court Decision at ¶ 30, ¶ 31, ¶34, ¶ 35.

In the present case, neither the Trial Court, the Appeals Court, Appellees nor Amicus have suggested that the Contract deprives Appellees of the right to discovery. The

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[1] *See e.g.* ORC 2711.06, 07 (providing for basic mechanisms ensuring production of evidence); ABM Farms, Inc. v. Woods (1998), 81 Ohio St.3d 498 (providing for review in cases of fraudulent inducement of arbitration contract); Stehli v. Action Homes, 1999 WL 778381 (Ohio App. 11 Dist)(Observing that arbitrators are empowered under Ohio law to hear and decide on statutory claims such as OCSPA).

Trial Court expressly found that the Contract does not preclude Appellees from presenting any claim. *See* Appx. at 23. Furthermore, there is no assertion that Appellees were surprised or duped by the arbitration clause. Amicus and Appellee argue that the evil to be prevented is a denial of rights of due process in the arbitration itself; yet in explaining why this contract is unconscionable, they rely entirely upon provisions of the Contract that have no effect at all upon Appellees' right to a fair hearing in an arbitration forum. In this way, the standard applied by the Appeals Court has succeeded only in delaying any resolution of the dispute, while protecting only against contract terms that never became applicable to these parties.

Amicus, Appellees and Taylor are in agreement that in evaluating unconscionability, the fundamental question for the court is whether the parties genuinely agreed to arbitrate. Appellees admit that they were aware of the arbitration clause and openly discussed it with a Taylor salesperson at the time of the execution of the Contract. *See* Appellees Response to Motion to Stay, Supp. at 46. Appellees have never claimed that they didn't understand the arbitration clause or that they were pressured or misled in any way concerning the clause or the Contract overall. Appellees signed the Contract, and also inscribed their initials next to paragraph 15 of the Contract, specifically indicating their agreement to the arbitration clause. With these admissions and the objective evidence of their consent, it is utterly preposterous that Appellees could question whether there was a genuine agreement to arbitrate.

Appellees therefore must play a shell game, and apparently Amicus is willing to play too. They offer no real critique of the arbitration clause or the process by which they agreed to it, and point to other contract clauses to show unconscionability. Without any

context, they claim that provisions which never became applicable to them render the straightforward arbitration clause, which bears their initials, unconscionable.

This tactic must fail because Ohio's courts recognize the principle of severability of contract clauses. *See e.g.* Newell v. Marc W. Lawrence Bldg. Corp. (May 8, 1995), Oh Ct. App. 5 Dist. No. 94-CA-292, *citing* Toledo Police Patrolmen's Association v. City of Toledo (Ct. App. 1994) 94 Ohio App.3d 734, 740, 641 N.E.2d 799. The Contract itself contains an express severability clause. *See* Contract, ¶ 18, Supp. p. 9. This Court has also recognized that an arbitration clause is essentially a separate contract inside a contract. *See* ABM Farms, 91 Ohio St. 3d at 501. The inquiry should thus be focused on the clause in dispute; the arbitration clause. The Appeals Court relied upon the "de novo" standard in order to conduct a broad and unfocused inquiry. This Court should not give its approval to this logically bankrupt approach.

In this regard, the arguments of both Appellees and Amicus are premature. They assume that the arbitration process will somehow be unfair to Appellees. Yet, Appellees already have protection against such an unfair process in O.R.C. §§ 2711.10 and 11. Once the arbitration has taken place, if such unfairness does occur, the correct remedy for Appellees is to move the Trial Court to set aside or modify the arbitration award. This Court should not adopt Appellees' and Amicus' assumption that the process will be unfair and thereby establish a rule that calls into question the soundness of contracts in this State.

D. The Amicus Brief is unpersuasive because the proposed analytical model contradicts the settled law of this Court and provides no useful guidance to trial courts.

On other points though, it becomes clear that Amicus' agenda is the wholesale evisceration of the OAA as applicable to consumer contracts. Amicus urges this Court to

discard the existing precedent on unconscionability and enforcement of arbitration clauses and adopt a new standard recently promulgated by the AG. *See* Amicus Brief at 6, *citing* OAC 109:4-3-28. Preliminarily, this reflects a clear lack of perspective of the AG's role in government. Enforceability of contracts is historically a subject governed by precedent from the Ohio Supreme Court. In this case, there is unambiguous legislation directly addressing the subject. Yet, the AG reinterprets the statute and this Court's holdings in a clear attempt to change the law in the state by promulgation of regulations.

On at least one point, the AG's proposed standard directly contradicts current Ohio law. Amicus urges that an attorney's fees provision should automatically render an arbitration clause unenforceable for unconscionability. Yet, in Nottingdale Homeowners Ass'n., Inc. v. Darby (1996), 33 Ohio St.3d 32, 514 N.E.2d 702, this Court held that attorney's fees provisions are enforceable, even as against a consumer homeowner.

Other portions of Amicus' proposed standards are entirely redundant of existing protections under Ohio law. For example, Amicus' point # 8 would render unconscionable a contract that fails to provide an appeal process. Yet, all arbitrants have the right to judicial review under O.R.C. §§ 2711.10, 11 and 15. Similarly, under its point 6, Amicus would declare unconscionable an arbitration agreement that fails to provide for discovery and presentation of evidence. Yet, under O.R.C. §§ 2711.06 and 07, arbitrators have powers and duties that ensure these procedural rights.

In the crowning jewel of Amicus' proposed standard, Amicus would have courts review for "an unconscionable liquidated damages clause." Amicus Brief at 6, point #2. In employing the term "unconscionable" in its test for unconscionability, Amicus has provided a standard that is entirely circular. Under this test, the Court will know that a

contract is *unconscionable* when the court identifies an *unconscionable* clause. This provision is utterly useless to any trial court.

To summarize, the model proposed by Amicus contains standards which: (a) contradict the holdings of this Court; (b) are redundant to existing statutory law providing basic protections to arbitrants; and, (c) are circular in their definitions. This Court should reject Amicus' arguments.

IV. The legislative intent behind O.R.C. 2711.01 et seq. requires imposition of a standard of review that favors speedy and efficient access to arbitration.

This case arises as a matter of enforcement of a statutory right. It stands to reason that the principal consideration of this Court in imposing a standard of review for motions under §§ 2711.02 and 03 should be the intent of the legislature. It is clear that the intent of the OAA was to favor arbitration, and the standard of review should also serve to encourage arbitration.

Both Appellees and Amicus go to great pains to argue that consumers require special protection beyond the text of the OAA. *See* Amicus Brief at 10. Appellee and Amicus attempt to divide the world into consumers, who are assumed to always be harmed by arbitration, and suppliers, who are assumed to always benefit from some lurking bias in every arbitral forum. Yet, over and over again, the Ohio and federal legislatures have made the finding that consumers benefit from the use of arbitration.

As early as 1924, with the passage of the Federal Arbitration Act, the U.S. Senate rejected the argument that consumers would not benefit from enforcement of arbitration agreements. "The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests **as well as to individuals**." U.S. Senate Report No.

536, 68th Congress, 1st Session (1924)(emphasis added). It is a matter of historical record that the FAA, which preempts any contradictory state law, is applicable to consumers as written. The OAA is the direct descendent of the FAA.

The Ohio legislature has specifically recognized the problem of excessive litigation in the context of consumer residential construction contracts, and has acted to encourage alternative resolution of such disputes. Under §§ 1312.01-1312.08, a contractor may require a homeowner to attempt informal resolution of construction disputes prior to filing suit by simply serving a notice upon the homeowner. A homeowner's failure to do so is grounds for dismissal of the complaint under the statute. *See* O.R.C. §1312.08(B) This act of the legislature evidences clearly its belief that litigation of such factually intensive disputes is endemically complex, time consuming and expensive. The passage of this statutory framework demonstrates the legislative view that alternative dispute resolution is particularly appropriate for consumer construction cases. This legislative act also evidences a legislative comfort with the placement of dispute resolution in hands outside the trial courts of the State.

Similarly, Ohio's legislature has recognized the need to provide special protections to highly vulnerable parties in the context of arbitration contracts, yet has never taken any action to limit the application of the OAA to consumer contracts in general. In 2003, the legislature passed O.R.C. § 2711.21, et seq., the Ohio Medical Malpractice Arbitration Act ("OMMAA"). This statutory scheme makes consumer arbitration contracts for medical care enforceable, and provides specific safeguards and rights to patients. O.R.C. § 2711.22. In the OMMAA, the legislature has seen fit to provide a right of recission and has also closely prescribed substantive terms and formalities that must be part of every

medical arbitration agreement in order for it to be enforceable. O.R.C. § 2711.23. The passage of the OMMAA evidences the awareness of the legislature to the potential for abuse of arbitration contracts, and the need to provide protection for vulnerable persons. Despite these concerns, it evidences the legislative intent to allow arbitration as a means of dispute resolution and to compel parties to agree to such a procedure to honor their word. However, while recognizing a need for special safeguards in the field of medical malpractice claims, the legislature made O.R.C. 2711.01-16 applicable to all contracts in Ohio and has never carved out any special provisions or limitations applicable to consumers.

The distinction that Amicus and Appellees have attempted to draw between "consumer contracts" and contracts generally is a false one. Despite the oft-repeated claims of Amicus and Appellees that consumers are somehow subject to a different standard under the OAA, neither one has produced any evidence or authority that would allow such an inference. The legislative records of both the Ohio legislature and the U.S. Congress create a consistent, clear policy favoring arbitration by parties who freely contract to do so, and at no point has either body indicated any willingness or desire to exempt consumers from the general enforceability of arbitration agreements. The opposite is true: the passage of the OAA evidences the strong belief of the legislature that the act as written provides ample protections to the most vulnerable of our citizens.

The standard of review imposed by this Court should reflect the legislative policy underlying the OAA. The standard should favor arbitration by allowing for a prompt and streamlined procedure for the determination on the limited question of arbitrability. In this

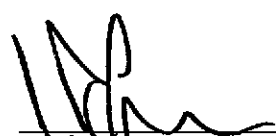
case, and in all cases where a trial court grants a motion under O.R.C. §§ 2711.02 or 03, the standard that best serves this purpose is "abuse of discretion."

IV. CONCLUSION

This Court should adopt a dual standard of review applicable to courts of appeal that review decisions of trial courts granting or denying motions to stay litigation and refer cases to arbitration under R.C. §§ 2711.02 and 03. This Court should impose the "abuse of discretion" standard of review where a court of appeals reviews the decision of a trial court *granting* a motion to compel arbitration. This Court should impose the "de novo" standard of review where a court of appeals reviews the decision of a trial court *denying* a motion to compel arbitration.

Without regard for this Court's holding on the certified question and proposition of law, in light of the plain error committed by the Appeals Court in admitting and relying on new evidence, this Court should reverse the Appeals Court's Decision and remand the case with instructions to affirm the Trial Court Decision.

Respectfully submitted,



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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 14th day of May, 2007 to the following:

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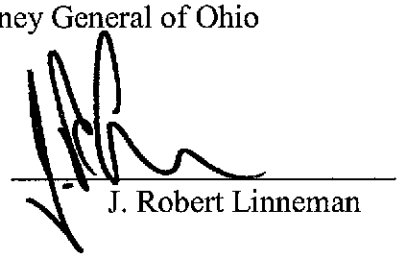

J. Robert Linneman

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RULE 4
MOTIONS

4.1 Motions shall be submitted and determined upon the motion and a brief memorandum. Unless an extension of time is granted for good cause shown, any memorandum in opposition to a motion, or a co-party's memorandum in support of the motion, shall be filed within 14 days of the filing of the motion. The movant shall file any reply memorandum within 7 days of the filing of the last memorandum in opposition. Counsel shall deliver to the assigned judge a file stamped copy of the motion, reply or additional memoranda. Motions may be set for an oral hearing on the court's motion or on any party's written motion with consent of the court. This Rule shall not apply to motions filed under Ohio Civil Rules 22, 23, 24, 55, 56 and 65.

4.2 A response to a motion for summary judgment must be filed within 14 days of service, unless extended by court order. The movant shall serve and file any reply brief within 7 days of the service of the brief in opposition, but shall be limited to responding to issues raised in the brief in opposition. The court may grant leave for an oral hearing upon the Court's own motion or upon a written application filed with the motion or filed with any responsive pleading.

4.3 Upon filing any motion, counsel shall file a certificate of readiness with the Assignment Office stating whether leave of court has been obtained for oral argument. If no leave for oral argument has been obtained, the case shall be set upon the court's docket for "submission on the pleadings" at the expiration of the time allowed by civil rule for opposition and reply briefs. If motions for summary judgment, or other dispositive motions, are filed by multiple parties in succession, counsel filing the later motion shall reset the submission date to conform to time limitations for opposition and reply briefs of the later motion.

R.C. § 2711.22

Baldwin's Ohio Revised Code Annotated Currentness
Title XXVII. Courts--General Provisions--Special Remedies
Chapter 2711. Arbitration (Refs & Annos)
Medical Claims
2711.22 Written contract for arbitration binding on parties

(A) Except as otherwise provided in this section, a written contract between a patient and a hospital or healthcare provider to settle by binding arbitration any dispute or controversy arising out of the diagnosis, treatment, or care of the patient rendered by a hospital or healthcare provider, that is entered into prior to the diagnosis, treatment, or care of the patient is valid, irrevocable, and enforceable once the contract is signed by all parties. The contract remains valid, irrevocable, and enforceable until or unless the patient or the patient's legal representative rescinds the contract by written notice within thirty days of the signing of the contract. A guardian or other legal representative of the patient may give written notice of the rescission of the contract if the patient is incapacitated or a minor.

(B) As used in this section and in sections 2711.23 and 2711.24 of the Revised Code:

(1) "Healthcare provider" means a physician, podiatrist, dentist, licensed practical nurse, registered nurse, advanced practice nurse, chiropractor, optometrist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, emergency medical technician-paramedic, or physical therapist.

(2) "Hospital," "physician," "podiatrist," "dentist," "licensed practical nurse," "registered nurse," "advanced practice nurse," "chiropractor," "optometrist," "physician assistant," "emergency medical technician-basic," "emergency medical technician-intermediate," "emergency medical technician-paramedic," "physical therapist," "medical claim," "dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in section 2305.113 of the Revised Code.

(2002 S 281, eff. 4-11-03; 1976 H 1426, eff. 7-1-76; 1975 H 682)

R.C. § 2711.23

Baldwin's Ohio Revised Code Annotated Currentness
Title XXVII. Courts--General Provisions--Special Remedies
Chapter 2711. Arbitration (Refs & Annos)
Medical Claims

2711.23 Agreement before medical care to submit any controversy to arbitration; conditions for validity

To be valid and enforceable any arbitration agreements pursuant to sections 2711.01 and 2711.22 of the Revised Code for controversies involving a medical, dental, chiropractic, or optometric claim that is entered into prior to a patient receiving any care, diagnosis, or treatment shall include or be subject to the following conditions:

(A) The agreement shall provide that the care, diagnosis, or treatment will be provided whether or not the patient signs the agreement to arbitrate;

(B) The agreement shall provide that the patient, or the patient's spouse, or the personal representative of the patient's estate in the event of the patient's death or incapacity, shall have a right to withdraw the patient's consent to arbitrate the patient's claim by notifying the healthcare provider or hospital in writing within thirty days after the patient's signing of the agreement. Nothing in this division shall be construed to mean that the spouse of a competent patient can withdraw over the objection of the patient the consent of the patient to arbitrate;

(C) The agreement shall provide that the decision whether or not to sign the agreement is solely a matter for the patient's determination without any influence;

(D) The agreement shall, if appropriate, provide that its terms constitute a waiver of any right to a trial in court, or a waiver of any right to a trial by jury;

(E) The agreement shall provide that the arbitration expenses shall be divided equally between the parties to the agreement;

(F) Any arbitration panel shall consist of three persons, no more than one of whom shall be a physician or the representative of a hospital;

(G) The arbitration agreement shall be separate from any other agreement, consent, or document;

(H) The agreement shall not be submitted to a patient for approval when the patient's condition prevents the patient from making a rational decision whether or not to agree;

(I) Filing of a medical, dental, chiropractic, or optometric claim within the thirty days provided for withdrawal of a patient from the arbitration agreement shall be deemed a

withdrawal from the agreement;

(J) The agreement shall contain a separately stated notice that clearly informs the patient of the patient's rights under division (B) of this section.

(2002 S 281, eff. 4-11-03; 1976 H 1426, eff. 7-1-76; 1975 H 682)