

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 2011-1701

APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CASE NO.: CA-10-095687

GARY L. HYDE
Plaintiff/Appellee

vs.

SHERWIN WILLIAMS CO., ET AL.
Defendants/Appellants

PLAINTIFF/APPELLEE GARY L. HYDES'S MEMORANDUM IN RESPONSE TO
MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

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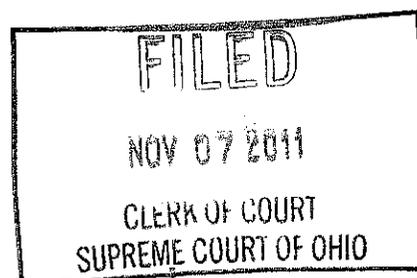
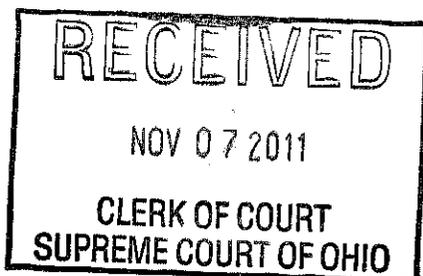


TABLE OF CONTENTS

	<u>PAGE</u>
I. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.....	1
II STATEMENT OF THE FACTS AND CASE.....	5
III. ARGUMENT	
<u>Proposition of Law:</u> Ohio courts properly deny a motion to stay pending arbitration when traditional contract interpretation principles demonstrate that the arbitration policy is permissive as opposed to mandatory.....	8
IV. CONCLUSION.....	15
CERTIFICATE OF SERVICE	

I. THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST.

Sherwin Williams dramatically contends that the Eighth District Court of Appeals “eviscerate[d] the liberal presumption favoring arbitration”¹ by “disregard[ing] established law and public policy” when it concluded that the use of the word “may” rendered “mandatory arbitration provisions” permissive. (Memorandum in Support of Jurisdiction (hereinafter “Memorandum”), pp. 1, 2). Sherwin Williams further predicts that, if this decision is allowed to stand, employers throughout the State of Ohio will eliminate voluntary dispute resolution procedures altogether which will, in turn, cause an increase in litigation costs and further weaken an already fragile state-wide economy. *Id.*, p. 4. While such predictions are sometimes proven true, neither the parties nor this Court need rely upon Sherwin Williams’ foresight to determine how or if the Eighth District’s decision will impact Ohio. Hindsight is more accurate.

On February 13, 2003, the Eighth District addressed whether two employees were required to arbitrate their dispute with their employer, Sherwin Williams, pursuant to the “Problem Resolution Procedures” (“PRP”). See *Hardwick v. The Sherwin-Williams Co.*, 2002 WL 31992364 (Ohio App. 8 Dist.). The Court of Appeals concluded that arbitration was not required because there was no evidence that the employees agreed to use the PRP as the sole dispute resolution method. *Id.*, ¶ 6. The Court of Appeals did not end its analysis there. It also “reject[ed] [Sherwin Williams’] contention that such procedures were clear and unambiguous, mandatory conditions of employment” because phrases such as “[t]hese procedures *may* be used by employees...” and the failure to use the procedures “*may* preclude employees from pursuing

¹This year alone, the Eighth District has enforced arbitration agreements on several occasions. See, e.g., *Wallace v. Ganley Auto Group*, 8th Dist. No. 95081, 2011-Ohio-2909; *Short v. Resource Title Agency, Inc.*, 8th Dist. No. 95839, 2011-Ohio-1577; *Milling Away, LLC v. UGP Properties, LLC*, 8th Dist. No. 95751, 2011-Ohio-1103; *Mak v. Silberman*, 8th Dist. No. 95590, 2011-Ohio-854; *Panzica Constr. Co. v. Zaremba, Inc.*, 8th Dist. No. 95103, 2011-Ohio-620.

any legal rights they may have in court or in other forums” “made [the PRP] seem optional.” *Id.*, ¶¶ 14, 16.

Sherwin Williams did not challenge the *Hardwick* decision. It admittedly heeded the Eighth District’s advice and “substantially expanded” the PRP to work “hand-in-hand” with an Employment Dispute Mediation and Arbitration Policy” (“EDMAP”). (Memorandum, pp. 4, 9). Sherwin Williams amended the PRP to reflect changes responsive to the issues highlighted in *Hardwick*; namely a provision whereby its employees mutually assented to the PRP/EDMAP. The end result was a multi-page document that remarkably failed to correct or eliminate the permissive language previously discussed by the Court of Appeals. Not only did the “new” PRP/EDMAP include the exact phrases the Eighth District previously identified as permissive, but it further stated that the employees had a “right to utilize mediation *and/or* arbitration”, that “[m]ediation is a voluntary, nonbinding dispute resolution process”, and any disputes not resolved in the first steps of the process “shall be subject to mediation *and/or* arbitration”.² Although Sherwin Williams represents to this Court that an optional arbitration policy is meaningless because “parties always retain the ability to agree to arbitrate a dispute”, the PRP/EDMAP advised employees that Sherwin Williams was “granting a benefit...to which they would not otherwise be entitled.” (Memorandum, p. 11).

In the eight years that followed, not one Ohio court cited *Hardwick* for the contention that the mere use of the word “may” in an otherwise mandatory arbitration policy rendered arbitration permissive. Employers in the State of Ohio, including Sherwin Williams, continued to utilize arbitration agreements as a viable method of resolving employee disputes. And, while the Ohio

² Importantly, Gary Hyde unsuccessfully mediated his dispute with Sherwin Williams. See Statement of Case and Facts, *infra*.

economy has admittedly declined, there is absolutely no evidence that the *Hardwick* decision contributed to that condition.

Ohio courts have not had an occasion to turn to the *Hardwick* decision until now. The Eighth District only returned to *Hardwick* because it was called upon to again evaluate one of the precise issues addressed therein: Whether Sherwin Williams' PRP/EDMAP, containing the exact language found in the previous PRP and the additional permissive phrases cited above, reflected a permissive arbitration agreement. See, *Hyde v. Sherwin-Williams Co.*, 2011-Ohio-4234. Even a cursory review of *Hyde* reveals that the Court's decision did not turn solely upon the fact that "may" appeared in the agreement on three separate occasions. The Eighth District Court conducted a fact-intensive analysis by first turning to *Hardwick* and then scrutinizing the additional language contained in the current version of the PRP/EDMAP, the context in which this language appeared in this agreement, and Sherwin Williams' conduct in handling this dispute. The result is a fact-specific holding reached after utilizing traditional contract interpretation principles; a holding that parties beyond this litigation will not successfully exploit to their benefit.

Sherwin Williams' decision to retain the permissive language, and add additional permissive content, after the Eighth District explicitly rejected their contention that the policy expressed mandatory arbitration obligations, reflects its intent to communicate a truly permissive policy. Minor revisions to the existing language would have easily transformed the phrases the Eighth District found to be permissive into mandatory obligations. Yet, Sherwin Williams seemingly ignored the Court's findings and, instead, presented its employees, including Gary Hyde, with a policy that was, in reality, as they touted it to be: an option. Sherwin Williams now asks this Court to use policy and presumptions to enforce that which they

voluntarily chose not to communicate: a mandatory obligation. However, federal and state law prohibit courts from ““overrid[ing] the clear intent of the parties’ ... simply because the policy favoring arbitration is implicated.” *Albert M. Higley Co. v. N/S Corp.*(2006), 445 F.3d 861, 863, quoting *E.E.O.C. v. Waffle House, Inc.*(2002), 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755; and *Summit Retirement Plan Svcs. Inc. v. Bergdorf*, 2006 WL 3373147 (Ohio App. 9 Dist.), citing *McManus v. Eicher*, 2003 WL 22927749 (Ohio App. 2 Dist.), 2003 -Ohio- 6669, ¶ 12. Therefore, the strong policy favoring arbitration cannot be utilized to force Mr. Hyde to submit to mandatory arbitration when he only agreed to arbitration as an optional remedy.

Sherwin Williams continues to ignore the permissive language and its effect by completely avoiding the issue in its brief submitted to this Court. The facts considered, the analysis conducted, and the decision reached by the Eighth District Court of Appeals were considerably more expansive than that relied upon by Sherwin Williams to invoke this Court’s jurisdiction. Therefore, even if this Court were to comply with Sherwin Williams’ request and confirm “that the use of ‘may’ in a dispute resolution procedure does not render an arbitration agreement optional”, that determination would not impact or change the outcome of this case. (Memorandum, p. 14).

Sherwin Williams’ consistent choice to avoid the policy language that persuaded the Eighth District to deny their demand for arbitration demonstrates that this case is not one of public and great general interest. It is nothing more than a dispute over the interpretation of the contractual language Sherwin Williams used in the PRP/EDMAP provided to its employees; a dispute where the Eighth District employed traditional contract principles to reach a resolution and ultimately ruled against Sherwin Williams. Sherwin Williams simply disagrees with the

result and seeks further appellate review of that decision. That is not this Court's function and jurisdiction should be declined.

II. STATEMENT OF THE FACTS AND CASE.

Mr. Hyde received exemplary performance reviews at Sherwin William. He alleges that Defendant Timothy White assumed the role of his supervisor and immediately down-graded his performance without the benefit of personal knowledge regarding his performance. Indeed, Mr. White modified the positive performance evaluation issued by Mr. Hyde's prior supervisor. James McIlwee then became Mr. Hyde's direct supervisor and engaged in discriminatroy acts including, but not limited to, issuing numerous, negative evaluations identifying Mr. Hyde's performance as "unsatisfactory"; all designed to force Mr. Hyde out of Sherwin Williams. Accordingly, Mr. Hyde initiated Sherwin Williams' PRP.

Although they now represent that the PRP/EDMAP constitutes two separate policies, up until this point, Sherwin Williams has referred to the EDMAP as a subpart of the PRP. The PRP provides in relevant part:

These procedures *may* be used by employees to challenge the unresolved differences regarding application of Company policies, procedures, or practices which affect their employment situation...Failure to use these procedures *may preclude* employees from pursuing any other legal rights they may have in court or in other forums...

Remember, if you fail to appeal a decision with which you disagree, you may be precluded from taking your complaint to an outside forum for resolution.
[Bold emphasis in original].

The EDMAP further provides that "[m]ediation is a voluntary, nonbinding dispute resolution process" and that by giving employees the right to "utilize mediation *and/or* arbitration", Sherwin Williams was giving the employee a right to which they would not otherwise be entitled.

Mr. Hyde initiated the first step of the PRP by submitting an Employee Complaint Form to Carolyn Lekan, Sherwin Williams' Human Resources Director, on December 8, 2008. Following his submission, Mr. Hyde asked "that the first phase of this PRP review process be shipped to someone in HR out of our division". Ms. Lekan denied that request and, instead, indicated that Sherwin Williams "will follow the procedures outlined in the Problem Resolution Procedure".

Pursuant to the PRP, Sherwin Williams' response to Mr. Hyde's Employee Complaint Form "*shall* be sent to the employee in writing within 10 working days of receiving the request, using the 'Management Response Form.'" Having received Mr. Hyde's complaint on December 8th, the PRP required Sherwin Williams to respond on or before December 22, 2008. Contrary to this explicit deadline, Ms. Lekan did not respond to Mr. Hyde's complaint until January 22, 2009. She then advised Mr. Hyde that he had ten days to appeal the decision.

Mr. Hyde asked for an opportunity to discuss Ms. Lekan's findings and provide additional information. She refused his request and instructed Mr. Hyde that the "next step of the PRP process" was to submit the "Employee Appeal Form" on or before February 5, 2009. Ms. Lekan reminded Mr. Hyde that they "need[ed] to follow the process...outlined in the [PRP]".

In preparation for his appeal, Mr. Hyde asked if he was permitted to identify individuals to review the appeal to ensure "a grouping of people to review a case that are balanced between management's and the employee's position." Ms. Lekan again referred Mr. Hyde to the PRP and indicated that the procedures therein were "non-negotiable". She explained:

In order to maintain the integrity of the Problem Resolution Procedures we must adhere to the procedure as outlined. No additional panel members will be added...

Mr. Hyde filed his appeal in compliance with the PRP by submitting his "Employee Appeal Form" on February 5, 2009. When Mr. Hyde signed the form, he acknowledged that he "MAY BE PRECLUDED FROM PURSUING ANY OTHER LEGAL RIGHTS I MAY HAVE IN COURT OR IN OTHER FORUMS."

The PRP required the panel to review the information and provide its response "in writing within 10 business days of receiving the 'Employee Appeal Form'". Thus, the panel was required to provide its written response to Mr. Hyde on or before February 19, 2009. Instead, Ms. Lekan advised Mr. Hyde that the meeting:

...will be...on Thursday, February 19th, at 2:00 p.m. Based on...travel schedules...it was difficult to find a date and time that worked for everyone...It is ten (10) business days from the date you submitted the appeal, therefore it is impractical that they will be able to conduct the meeting and provide you their written response in the same day. They will prepare their response and provide it to you as soon as practical...

The panel did not provide their response to Mr. Hyde until March 11, 2009; approximately three weeks after the deadline established by their "non-negotiable" PRP procedures.

The parties then participated in a mediation. That, too, was unsuccessful. In the interim, Defendants' disparate treatment of Mr. Hyde continued and they ultimately terminated his employment during the pendency of the PRP process and without regard to any potential outcome.

Mr. Hyde's counsel requested that the parties submit their "dispute with respect to performance evaluation" to arbitration. The PRP indicates that "the issues covered under these procedures shall include the full range of employment-related issues including...performance evaluations" and Sherwin Williams argued on appeal that "the PRP and the EDMAP explicitly encompass Hyde's claims...which allegedly arose out of...his performance evaluations". Having just concluded the mediation, Sherwin Williams was also well aware of the subject of

Mr. Hyde's claims. Yet, Diane Hupp, the Vice President of Employee Relations for Sherwin Williams, indicated that "disputes regarding performance evaluations per se are not subject to mediation/arbitration pursuant to the EDMAP policy."

Given the PRP's indication that he could pursue mediation or arbitration, his participation in an unsuccessful mediation, and Ms. Hupp's subsequent refusal to submit his dispute to arbitration, Mr. Hyde filed his lawsuit with the Cuyahoga County Court of Common Pleas. Sherwin Williams moved the Court to stay the proceedings pending arbitration. Based upon the same arguments it presented to this Court, Sherwin Williams maintained that Mr. Hyde was required to arbitrate his dispute despite the permissive language found throughout the documents explaining the process and Sherwin Williams' previous response stating that his dispute was not subject to arbitration under their policy. The trial court denied Sherwin Williams' Motion without explanation.

The Eighth District Court of Appeals affirmed the trial court's decision and explicitly held that "[d]espite the strong policy favoring arbitration, we are compelled to find that in light of the language of the PRP/EDMAP and appellants' actions with respect to Hyde's dispute, Hyde did not agree to mandatory arbitration as the exclusive remedy for his dispute." *Hyde*, 2011-Ohio-4234, ¶ 33. Justice Cooney dissented but did not premise her opinion upon an interpretation of the contractual terms at issue. *Id.*

III. ARGUMENT

Proposition of Law: Ohio courts properly deny a motion to stay pending arbitration when traditional contract interpretation principles demonstrate that the arbitration policy is permissive as opposed to mandatory.

Sherwin Williams implores this Court to follow the federal doctrine "specifying that 'permissive' language does not render mandatory arbitration agreements unenforceable."

(Memorandum, pp. 2, 14). However, the United States Supreme Court has explicitly determined that state law governs arbitration agreements when the law at issue applies to the enforceability of contracts generally. *Perry v. Thomas*(1987), 482 U.S. 483, 492-493, 107 S.Ct. 2520, 96 L.Ed.2d 426. Only in circumstances where state law creates a special rule regarding the validity, enforceability, or revocability of an arbitration agreement in particular will federal law prevail. *Id.* The Eighth District’s opinion does not extend beyond general contract principles and, therefore, federal law is not implicated here. More importantly, even federal courts turn first to the language of an arbitration agreement to determine the parties’ intent as expressed therein. See, e.g., *AT&T Mobility LLC v. Concepcion* (2011), 131 S.Ct. 1740, 1745 (“[C]ourts must place arbitration agreements on equal footing with other contracts...and enforce them according to their terms”); *General Revenue Corp. v. Ortega*, 2005 WL 2124129 (S.D. Ohio); *Raytheon Engineers & Contractors, Inc. v. SMS Shcloemann-Siemag Akiengesellschaft*, 2000 WL 420866, 2 (N.D.Ill. 2000). Thus, if this Court were to exercise its jurisdiction for the sole purpose of “confirm[ing] that Ohio arbitration law and policy recognize and parallel federal law and policy”, it would be a gratuitous act as opposed to a legal intervention necessary to elude a precedential catastrophe.

While remaining ever mindful of the prevailing policy favoring arbitration as a dispute resolution method, courts, including the Eighth District Court of Appeals, must also remember that arbitration is fundamentally a matter of contract. *AT&T Mobility LLC*, 131 S.Ct. at 1746. More specifically, arbitration is “a matter of consent, not coercion.” *Volt Info. Scis., Inc. v. Bd. Of Trs. Of Leland Stanford Junior Univ.*(1989), 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488. Therefore, courts cannot ““override the clear intent of the parties, or reach a result

inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.” *Albert M. Higley Co.*, 445 F.3d at 863, quoting *E.E.O.C.*, 534 U.S. at 294.

An interpreting court should strive to ascertain and give effect to the intent of the parties as expressed in the written document. *Cooper v. Chateau Estate Homes, LLC*, 2010 WL 4188759, ¶ 12 (Ohio App. 12 Dist.). The contractual language used, unless ambiguous, should be given its plain and ordinary meaning. *Id.*, citing *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*(1989), 46 Ohio St.3d 51, 544 N.E.2d 920, syllabus. In addition to the words utilized in the agreement, attention must be paid to “the actual placement or typography of the words in the printed contract, as well as the structure and punctuation used in drafting the contract”. *Id.* at ¶ 15, quoting *Farrell v. Deuble*, 175 Ohio App.3d 646, 888 N.E.2d 514, 2008-Ohio-1124, ¶ 21 (citations omitted).

After acknowledging the Federal Arbitration Act and Ohio’s Arbitration Act as well as “the strong presumption in favor of arbitration”, the Eighth Appellate District followed the above legal precedent by conducting a painstaking analysis of Sherwin Williams’ PRP/EDMAP. The Court considered not only the language used but also the specific context in which the language appeared. The Court explained:

“...[T]he PRP states that ‘if you fail to appeal a decision with which you disagree, you *may* be precluded from taking your complaint to an outside forum for resolution’ and ‘[f]ailure to use the procedures *may* preclude employees from pursuing any other legal rights the employees may have in court or other forums.’ These sentences clearly suggest that there may be situations where an employee is not precluded from pursuing his claim in court and, hence that the procedures are not the final, mandatory means of resolving all employee disputes.

“...The ‘and/or’ language suggests that an employee is allowed to chose one or the other and that arbitration was not required in this case because Hyde engaged in mediation.” *Hyde*, 2011-Ohio-4234, ¶¶ 23, 27.

Sherwin Williams directs this Court's attention to a litany of federal cases that have concluded the word "may" in an arbitration agreement still conveys a mandatory obligation. (Memorandum, pp. 5 at FN 1, 11). In each case, the arbitration agreement "essentially stated in various ways that "disputes may be referred to arbitration". *Hyde*, 2011-Ohio-4234, ¶ 30. Sherwin Williams presented the same argument to the Court of Appeals. The Eighth District acknowledged and effectively distinguished those cases by demonstrating that "may" in Sherwin Williams' PRP/EDMAP "appears in a different context and is not used in reference to presenting a claim for arbitration." *Id.*; See, also, *Briggs & Stratton Corp. v. Local 232, Int'l Union Allied Indus. Workers Am.*, 36 F.3d 712, 715-716 (7th Cir. 1994) (arbitration under "this agreement" is an option when it states that either party "may" submit their grievance to arbitration).

The Appellate Court also rejected Sherwin Williams' claim that, like the cases it referenced, its use of "may" indicated its employees could pursue arbitration or abandon their claims altogether. The Court explained that the phrase "failure to use these procedures may preclude employees from pursuing any other legal rights they may have in court or in other forums" could mean there were some situations where the PRP would be optional or that an employee was "required to use the PRP in order to preserve his right to an outside forum." *Hyde*, 2011-Ohio-4234, ¶ 30. Under no circumstances did the Court find this phrase consistent with the interpretation offered by Sherwin Williams. *Id.*

Sherwin Williams insists that the use of the word "may" alone influenced the Eighth District's decision and that the policy at issue only uses "may" on three separate occasions. (Memorandum, pp. 11-12). It remained mum on the remaining language that renders the PRP/EDMAP, and specifically arbitration, permissive. The PRP/EDMAP repeatedly states that disputes not successfully resolved through the early stages of the PRP are subject to "mediation

and/or arbitration”. The Eighth District reasonably concluded that Hyde’s participation in mediation rendered his participation in arbitration unnecessary. *Hyde*, 2011-Ohio-4234, ¶ 27.

Both federal and state law obligated the Eighth District to interpret the contract before it and to enforce the parties’ intent as expressed therein. That is precisely what the Court did. The fact that the Court reached a decision different from those of various federal courts does not render the Eighth District’s decision in *Hyde* an aberrant rule of law that sharply strays from controlling precedent. It simply means that the Eighth District was presented with contractual language which sharply differed from that considered by the federal courts. Although Sherwin Williams disagrees with the *Hyde* decision and admittedly believes the Eighth District erred, the fact that the Eighth District properly relied upon state law contract principles to reach its decision excludes this case from further review.

Assuming, without admitting, that the PRP/EDMAP may be ambiguous, Sherwin Williams represents to this Court that such ambiguities must be resolved in favor of arbitration. (Memorandum, pp. 5, 13). In making this argument, Sherwin Williams confused the standards applicable to determining the “existence” of an arbitration agreement and the “scope” of an agreement. See, e.g., *Bell Atlantic Corp. v. CTC Comm. Corp.*, 159 F.3d 1345, 1998 WL 536731(C.A.2(N.Y.)) (issue of whether there is an agreement to arbitrate is a distinct issue from that of whether a particular dispute falls within the scope of an “already-established agreement” to arbitrate); *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 830-831 (2d Cir.1988) (court must first “determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement”); *Doran v. Bondy*, 2005 WL 1907252, 7 (W.D. Mich. 2005) (issue was not one of scope, i.e., whether the claims there fell within the scope of the arbitration clause, but rather, the issue was whether the arbitration clause was

permissive or mandatory). The presumption in favor of arbitration only attaches after an enforceable arbitration clause exists. *Bell Atlantic*, 159 F.3d 1345, citing *First Options of Chicago, Inc. v. Kaplan*(1995), 514 U.S. 938, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985; *Raytheon Engineers & Constructors, Inc.*, 2000 WL 420866 (federal policy favoring arbitration does not “carry any weight until an enforceable agreement to arbitrate is found”); See, also, *Adamovic v. Metme Corp.*, 961 F.2d 652, 654 (7th Cir.1992). A case Sherwin Williams relied upon supports this proposition. See, e.g., *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.* (1983), 460 U.S. 1, 24-25 (“any doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration”).

Hyde asked that his dispute involving his performance evaluations be submitted to arbitration. Sherwin Williams denied his request based upon its determination that “disputes regarding performance evaluations per se are not subject to mediation/arbitration pursuant to the EDMAP policy.” Sherwin Williams has since recanted that position and represented at each judicial level that “both the PRP and the EDMAP explicitly encompass Hyde’s claims...including his performance evaluations”.³ Thus, the “scope” of the PRP/EDMAP has not been disputed in this litigation.

The only issue presented to the Court of Appeals was whether the terms of the parties’ agreement required, or simply permitted, Mr. Hyde to proceed to arbitration. When analyzing this issue, ambiguities in the contract language are to be construed against the drafter of the agreement; especially when it is a form agreement between two parties with unequal bargaining power. *General Revenue Corp.*, 2005 WL 2124129 *4; See, also, *Bell Atlantic Corp.*, 159 F.3d 1345, citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*(1995), 514 U.S. 52, 115 S.Ct. 1212,

³ This quote was taken from the brief Defendants filed in the Eighth District Court of Appeals.

1218-19, 131 L.Ed.2d 76 (arbitration agreement interpreted by applying common law contract principles, including principle that requires ambiguities to be construed against the drafter).

Sherwin Williams' PRP/EDMAP clearly constitutes a form agreement between two parties with unequal bargaining power. Sherwin Williams drafted the agreement and its employees were required to sign it as a condition of their employment. The employees were precluded from negotiating specific terms and were, instead, relegated to those selected by Sherwin Williams. Therefore, any ambiguities regarding the terms of the parties' agreement must be construed against Sherwin Williams. Otherwise, Sherwin Williams and employers throughout Ohio could intentionally create ambiguous documents that seemingly leave the employees with a choice regarding the manner in which they resolve their disputes while they simultaneously rely upon presumptions and rules of construction, unknown to the typical employee, to provide the result they actually desire without having to explicitly articulate that result in the terms of their agreement.

The Court of Appeals highlighted some of the ambiguities created by the terms of the agreement and turned to extrinsic evidence to resolve the inconsistencies. Extrinsic evidence is properly considered in order to give effect to the parties' intentions when ambiguities exist. *Orwell Natural Gas Co., Inc. v. PCC Airfoils, L.L.C.*, 189 Ohio App.3d 90, 95, 937 N.E.2d 609, 2010 -Ohio- 3093, ¶ 12, citing *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499. Sherwin Williams' determination that the word "shall" communicated permissive acts when describing its obligations under the PRP/EDMAP, as evidenced by its failure to meet every deadline imposed by the policy, and its ultimate determination that Mr. Hyde's dispute was not subject to the PRP/EDMAP convinced the Eighth District that the policy was "in actuality permissive, not mandatory." *Hyde*, 2011-Ohio-4234, ¶ 32.

This holding did not render the remaining provisions meaningless as Sherwin Williams' contends. In truth, the Appellate Court's interpretation preserves the cohesiveness of the entire agreement more so than the interpretation offered by Sherwin Williams. Under the Eighth District's interpretation, the agreement outlines the manner in which arbitration will be conducted if the parties choose to pursue that method and, if so, that arbitration will be the final, binding result. Thus, the binding nature of arbitration is preserved. To the contrary, Sherwin Williams' interpretation renders the numerous clauses containing the permissive language in the policy wholly useless. Accordingly, the Eighth District Court of Appeals fully complied with Ohio law when deciphering the terms of the parties' agreement.

IV. CONCLUSION

For the foregoing reasons, this case is not one of public or great general interest and this Court should decline to exercise its jurisdiction.

Respectfully Submitted,



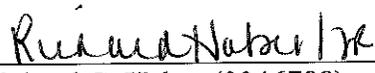
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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Response to Memorandum in Support of Jurisdiction of Appellants* has been sent via regular U.S. Mail on the 4th day of November, 2011 upon:

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