

IN THE SUPREME COURT OF OHIO

RANDY VAUGHN,

:

Case No.

**14-0281**

Plaintiff-Appellant,

:

On Appeal from the Hamilton  
County Court of Appeals,  
First Appellate District

vs.

:

PAYCHEX INSURANCE AGENCY, INC.

:

Court of Appeals  
Case No. C 1300396

Defendants-Appellee

:

MEMORANDUM IN SUPPORT OF JURISDICTION OF  
PLAINTIFF-APPELLANT, RANDY VAUGHN

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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This case raises the issue of whether arbitration clauses contained within contracts of adhesion, dramatically favoring the drafting party, should be enforced, or found unconscionable. The decision by the Court of Appeals below reversed a decision of the trial court which overruled the Defendant-Appellee's motion to dismiss Plaintiff-Appellant's complaint or to stay the action pending Arbitration. Defendant-Appellee's motion was based upon an adhesion contract which included an arbitration provision which is so favorable to Defendant-Appellee that it forecloses Plaintiff-Appellant from the opportunity to litigate its claims. The notice of appeal was served upon Defendant-Appellee's counsel by regular mail on the 21<sup>st</sup> day of February, 2014 with the attached date stamped entry and opinion of the First District Court of Appeals. Attached hereto, is a copy of the date stamped entry and opinion of the First District Court of Appeals and a date stamped copy of the Memorandum of Decision and Order of the Trial Court.

**STATEMENT OF THE CASE AND FACTS**

This case arose as a civil action in the Hamilton County, Ohio, Court of Common Pleas, filed by Randy Vaughn ("Vaughn") against Defendant Paychex Insurance Agency, Inc. ("Paychex") for breach of contract and negligence. Vaughn was injured while working for Vaughn Maintenance Services in August, 2010. In May, 2006, Vaughn as the sole owner of Vaughn Maintenance Services, entered into a contract with Paychex to pay his Ohio Workers' Compensation premiums. Since he works in the business, he elected to have self-coverage. He sustained a severe work-related injury on August 30, 2010. His BWC claim was initially allowed, however. While he was still in the hospital recovering from his injuries, the Bureau

Workers' Compensation revoked the allowance because several years earlier, Paychex cancelled his self-coverage. The BWC refused to grant retroactive coverage.

Therefore, he sought relief in the Hamilton County Court of Common Pleas for breach of contract and negligence against Paychex. Paychex filed a Motion to Dismiss, or in the alternative, to Stay Pending Arbitration. The Trial Court overruled Defendant-Appellee's motion finding that the arbitration provision was unconscionable. Paychex appealed that decision to the First District Court of Appeals, where the Trial Court's decision was overturned.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **Proposition of Law No. 1: Court of Appeals erred in reversing the trial court's denial of Paychex's Motion to Dismiss or Stay proceedings pending arbitration.**

The presumption in favor of arbitration is substantially weakened in a case when there are strong indications that the contract at issue is an adhesion contract and the arbitration clause itself appears to be adhesive in nature. *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 473, 1998-Ohio-294, 700 N.E.2d 859, 1998 Ohio LEXIS 2965 (Ohio 1998). An adhesion contract is defined as a "standardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording the consumer realistic opportunity to bargain, and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract." *Eagle v. Fred Martin Motor Co.*, 157 Ohio App. 3d 150, 173, 2004-Ohio-829, 809 N.E.2d 1161, 2004 Ohio App. LEXIS 765 (Ohio Ct. App., Summit County 2004); Black's Law Dictionary (5 Ed. 1979) 38.

The appellate court found that the trial court's decision was not supported by facts in the record. The Appellate Court should have remanded this case to the trial court for disposition of Appellee's Motion To Compel, discovery and for an evidentiary hearing on the issue of unconscionability, consistent with other appellate courts. See e.g. *Brownell v. Van Wyk*, 2010-

Ohio-6338, 2010 Ohio App. LEXIS 5311, 2010 WL 5452103 (Ohio Ct. App., Montgomery County Dec. 23, 2010)(appellate court found that the trial court made no factual findings supporting its determination that the arbitration provision was unconscionable, and the circumstances surrounding the arbitration agreement had not been sufficiently developed in the record for the appellate court to ascertain unconscionability); *Reynolds v. Crockett Homes, Inc.*, 2009-Ohio-1020, 2009 Ohio App. LEXIS 903, 2009 WL 581705 (Ohio Ct. App., Columbiana County Mar. 5, 2009) (court reversed the decision of the trial court and remanded the matter for further proceedings, including further development of the record and a ruling on the issue of unconscionability).

**Proposition of Law No. 2: Court of Appeals erred in finding there was no evidence presented of procedural unconscionability**

Plaintiff-Appellee, at the hearing on the Motion to Dismiss, offered his testimony to the trial court to support the procedural unconscionability of the contract, Appellant strenuously objected. The Court tacitly sustained the objection, and quickly ended the hearing. Appellee then submitted an affidavit, which was contained in the Record, to which there was no formal objection or motion to strike under the Civil Rules or Appellate Rule 9(E). By failing to file the appropriate motion under App.R. 9(E), appellant has waived this issue. *State v. Waddell*, 2008-Ohio-3556, P17, 2008 Ohio App. LEXIS 2987, 2008 WL 2779447 (Ohio Ct. App., Franklin County July 17, 2008) citing *State v. Mathias* (Mar. 31, 1994), Gallia App. No. 91 CA31, 1994 Ohio App. LEXIS 1458; *State v. Rathburn* (Apr. 28, 1992), Washington App. No. 90 CA 45, 1992 Ohio App. LEXIS 2305.

Moreover, a proffer of evidence is not required to preserve an objection under Evid. Rule 103(A)(2) where the nature of the evidence that has been excluded is apparent from the context.

Here, the testimony of Mr. Vaughn is reflected in his affidavit, part of the record below, and demonstrates the facts that support the Trial Court's finding of procedural and substantive unconscionability. The standard of review for the appeal was *de novo*; therefore, the fact that the trial court did not read the affidavit prior to making its decision is irrelevant to this court's analysis. Procedural unconscionability is not conditional on the existence of any one factor, but instead, is a fact-sensitive question that looks at the surrounding circumstances of each individual case. *Jamison v. LDA Builders, Inc.*, 2013-Ohio-2037, P55, 2013 Ohio App. LEXIS 1936, 2013 WL 2152748 (Ohio Ct. App., Portage County May 20, 2013).

Appellant is a publicly traded, multinational corporate entity with over 2 billion dollars in revenue in 2011. The arbitration clause was drafted by and provided to Mr. Vaughn by Defendant-Appellant. There was no negotiation of its terms. No evidence was presented by the Appellant that there was discussion and negotiation of the contract at issue. Mr. Vaughn completed the 8<sup>th</sup> grade, did not obtain a GED and cannot read or write well. He owns a small business which maintains equipment on a very small scale; as such, he is not experienced in evaluating lengthy contracts with arbitration clauses. Appellant's attempt to characterize Mr. Vaughn as a sophisticated businessman is completely self-serving. Mr. Vaughn did not know what arbitration was before he brought his suit into state court.; in fact, this section was not brought to his attention and he was unaware he was giving up a trial by jury. The clause was hidden in tight, small font columns on the last page of the Agreement. The trial court examined the contract with considerable skepticism and correctly found that the bargaining positions in this case were "absurdly unequal." Memorandum of Decision and Order of the Trial Court (Appendix C). See *Eagle v. Fred Martin Motor Co.*, 157 Ohio App. 3d 150, 174, 2004-Ohio-829, 809 N.E.2d 1161, 2004 Ohio App. LEXIS 765 (Ohio Ct. App., Summit County 2004)

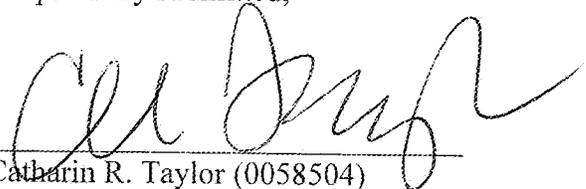
(Noting the Supreme Court of Ohio recognizes where in the context of sales agreements are between consumers and retailers, such arbitration clauses are subject to considerable skepticism upon review, due to the disparity in the bargaining positions of the parties).

The Appellate Court's refusal to consider the Affidavit as evidence supporting the Trial Court's decision has produced an unjust result. Defendant-Appellee objected to the testimony of Mr. Vaughn at the trial court level, failed to formally object to his affidavit, and refused to respond to Plaintiff-Appellant's discovery request for the entire contract between the parties. The Appellate Court should have remanded the case for a hearing on Plaintiff-Appellant's Motion to Compel and an evidentiary hearing on whether the contract arbitration provision was unconscionable.

### III. CONCLUSION

For these reasons, Plaintiff-Appellant Vaughn prays that this Court accept jurisdiction over this appeal and to hear arguments on the substantive issues presented.

Respectfully submitted,

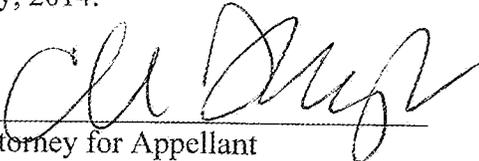


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Attorney for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing was served upon all counsel of record by regular U.S. mail on this 21st day of February, 2014.

  
\_\_\_\_\_  
Attorney for Appellant

# APPENDIX A

ENTERED  
JAN 10 2014

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

RANDY VAUGHN, : APPEAL NO. C-130396  
Plaintiff-Appellee, : TRIAL NO. A-1204123  
vs. :  
PAYCHEX INSURANCE AGENCY, :  
INC., :  
Defendant-Appellant. :

JUDGMENT ENTRY.

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is reversed and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on January 10, 2014 per order of the court.

By: Patricia J. Durbel  
Presiding Judge



# **APPENDIX B**

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

RANDY VAUGHN,

Plaintiff-Appellee,

vs.

PAYCHEX INSURANCE AGENCY,  
INC.,

Defendant-Appellant.

APPEAL NO. C-130396  
TRIAL NO. A-1204123

*OPINION.*

PRESENTED TO THE CLERK  
OF COURTS FOR FILING

JAN 10 2014

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas..

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: January 10, 2014



*Clements Taylor & Cohen, LPA, Co., Catharin R. Taylor, and Mackenzie M. Farmer, for  
Plaintiff-Appellee,*

*Taft Stettinius & Hollister, LLP, Samuel M. Duran, and Beth A. Bryan, for Defendant-  
Appellant.*

Please note: this case has been removed from the accelerated calendar.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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**SYLVIA SIEVE HENDON, Presiding Judge.**

{¶1} Defendant-appellant Paychex Insurance Agency, Inc., appeals the judgment of the Hamilton County Common Pleas Court denying its motion to stay this action by plaintiff-appellee Randy Vaughn, pending arbitration. Because nothing in the record supports the trial court's determination that the parties' arbitration agreement was unconscionable or otherwise unenforceable, we reverse the court's judgment and remand the matter for the trial court to issue a stay pending arbitration.

***Relevant Background***

{¶2} In May 2006, Vaughn was the sole owner of Vaughn Maintenance Services, LLC, when he filed paperwork with the Ohio Bureau of Workers' Compensation ("BWC") electing to have self-coverage under the workers' compensation system. He signed a two-page contract on behalf of the company entitled, "Paychex Ohio Workers' Compensation Payment Service Agreement." Under the contract, Paychex agreed to remit premiums for workers' compensation coverage to the BWC.

{¶3} In August 2010, Vaughn suffered a work-related injury, and the BWC denied him workers' compensation benefits.

{¶4} In May 2012, Vaughn initiated this action against Paychex for breach of contract and for negligence. Vaughn alleged that Paychex had breached the contract by cancelling his workers' compensation coverage without his knowledge and by failing to pay the necessary workers' compensation premiums. In his negligence claim, Vaughn alleged that Paychex had breached its duty to him by breaching the contract. As a result of Paychex's conduct, he alleged, he was denied the right to participate in the Ohio workers' compensation system for his 2010 injury.

{¶5} In response, Paychex filed a motion to dismiss Vaughn's complaint or to stay the action pending arbitration. Paychex argued that Vaughn was bound by the contract's arbitration clause, which provided in pertinent part:

**14. Governing Law and Arbitration.** The Agreement shall be governed by the laws of the State of New York. Except as provided herein, any dispute arising out of, or in connection with, the Agreement shall be determined by binding arbitration in Rochester, New York, in accordance with the commercial rules of the American Arbitration Association. \* \* \* Client hereby waives any jurisdictional defenses and submits to the exclusive jurisdiction of the New York courts.

{¶6} The trial court heard arguments on Paychex's motion, but it did not receive any evidence at the hearing. Thereafter, on June 3, 2013, the court issued its decision denying the motion upon its finding that the contract's arbitration clause was unconscionable. On June 26, 2013, Paychex filed a timely notice of appeal. Two days later, Vaughn filed an affidavit in the trial court with respect to the contract negotiations.

***Arbitration is Strongly Favored***

{¶7} In three assignments of error, Paychex argues that the court erred by (1) failing to find that the arbitration clause was valid and enforceable; (2) finding that the clause was procedurally unconscionable; and (3) finding that the clause was substantively unconscionable.

{¶8} In Ohio, arbitration is strongly favored as a means for resolving disputes. *See* R.C. Chapter 2711; *Hayes v. The Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408. This is reflected in R.C. 2711.01(A), which provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, except upon grounds that exist at

law or in equity for the revocation of any contract.” Unconscionability is recognized as a ground for revocation. *Taylor Bldg. Corp. of Amer. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 32.

{¶9} A party asserting that an arbitration agreement is unconscionable must prove that it is both procedurally and substantively unconscionable. *Taylor* at ¶ 33. A determination of procedural unconscionability involves consideration of the circumstances surrounding the parties’ negotiations, while a determination of substantive unconscionability involves consideration of the reasonableness of the terms of the agreement. See *Taylor* at ¶ 43; *Hayes* at ¶ 32. We review de novo a trial court’s determination of whether an arbitration agreement is enforceable in light of alleged unconscionability. *Taylor* at ¶ 37.

{¶10} In order to overcome the presumption of the validity of the arbitration agreement in this case, Vaughn had the burden to demonstrate that it was both procedurally and substantively unconscionable. Without a showing on both aspects, Vaughn’s challenge to the validity of the agreement must fail.

***No Evidence of Procedural Unconscionability***

{¶11} At the hearing before the trial court, Vaughn presented no evidence of the circumstances surrounding the parties’ contract negotiations. In finding that the arbitration agreement was procedurally unconscionable, the trial court erroneously relied upon facts not in the record. See *Hayes* at ¶ 25. Moreover, we cannot consider any assertions in the affidavit that Vaughn filed well after the trial court’s judgment. Because Vaughn failed to demonstrate the procedural unconscionability of the arbitration agreement, the trial court erred by refusing to grant Paychex’s motion for a stay of proceedings pending arbitration. Consequently, we sustain the first and second assignments of error. Given our disposition of these assignments of error, the third assignment of error is moot.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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{¶12} We therefore reverse the trial court's judgment and remand the cause to the court with instructions to stay the proceedings pursuant to R.C. 2711.02.

Judgment reversed and cause remanded.

**DINKELACKER and DEWINE, JJ.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

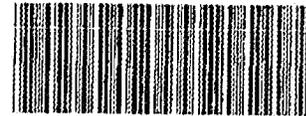
# APPENDIX C

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

ENTERED  
JUN 09 2013

RANDY VAUGHN :  
 :  
 Plaintiffs, :  
 -vs- :  
 PAYCHEX INSURANCE AGENCY, :  
 INC. :  
 Defendant. :

CASE NO. A1204123  
Judge Norbert A. Nadel  
MEMORANDUM OF  
DECISION AND ORDER



D102317505

This case is before the Court on Defendant Paychex Insurance Agency, Inc.'s Motion to Dismiss, or in the alternative, to Stay Pending Arbitration pursuant to Ohio Revised Code §2711.02.

Plaintiff Randy Vaughn is the owner of Vaughn Maintenance Services, LLC (Vaughn Maintenance). In or around May, 2006, Vaughn Maintenance elected to have self-coverage under the Ohio workers' compensation system and entered into an Agreement with Defendant to facilitate this decision. Per the Agreement, Defendant was to pay the necessary workers' compensation premiums and report payroll to the Ohio Bureau of Workers' Compensation (OBWC) on behalf of Vaughn Maintenance.

Plaintiff now claims Defendant has breached the aforementioned Agreement and filed this action for damages sounding in breach of contract and negligence. Defendant has since filed a Motion to Dismiss, or in the alternative, to Stay Pending Arbitration. Plaintiff opposes Defendant's Motion and contends the arbitration clause should not apply to his suit because he was not a party to the Agreement between Vaughn Maintenance and Defendant, and because the terms of the arbitration clause are unconscionable.

Where the terms in an existing contract are clear and unambiguous, a court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246. A clause in a contract providing for dispute resolution by arbitration should not be denied effect unless it may be said with positive assurance that the subject arbitration clause is not susceptible to an interpretation that covers the asserted dispute.

*Independence Bank v. Erin Mechanical* (1998), 49 Ohio App.3d 17. In examining such a clause, a court must bear in mind the strong presumption in favor of arbitration, and any doubts should be resolved in favor of coverage under the arbitration clause. *Didado v. Lamson & Sessions Co.* (1992), 81 Ohio App.3d 302, 304.

In relevant part, the arbitration clause in the Agreement states as follows:

Governing law and Arbitration: The Agreement shall be governed by the laws of the State of New York except as provided herein, any dispute arising out of, or in connection with, the agreement shall be determined by binding arbitration in Rochester, New York, in accordance with the commercial rules of the American Arbitration Association.

The Court will first address whether the arbitration clause is unconscionable. "A contract clause is generally considered unconscionable when there is an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834. To establish that a contract clause is unconscionable, a party must show both substantive unconscionability and procedural unconscionability. *Id.*

Procedural unconscionability concerns the circumstances surrounding the execution of the contract and exists when there is not a voluntary meeting of the minds,

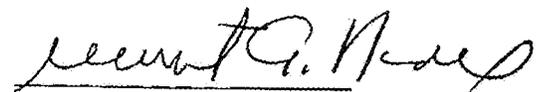
because the circumstances surrounding the contract's execution were so unfair. *Sikes v. Ganley Pontiac Honda, Inc.* 2004 Ohio 155. "In determining procedural unconscionability, a court considers "those factors bearing on the relative bargaining position of the contracting parties, e.g., "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the good in question. *Collins*, supra, quoting *Johnson v. Mobil Oil Corp.* (E.D. Mich. 1976).

The bargaining power of the two parties in this case was absurdly unequal. There can be no dispute that Vaughn Maintenance, with Plaintiff as its negotiator, was an unsophisticated party when compared to Defendant, a national corporate entity. Plaintiff claims the arbitration clause was never discussed during the negotiations and maintains he was required to sign the document as it was written in order to receive the services under the Agreement. There is no evidence that Plaintiff received the advice of adequate legal counsel during the negotiations and the contract itself, which appears to be a standard, preprinted contract, was drafted by Defendant. It is clear Plaintiff had only a limited understanding of the details and consequences of the Agreement, and the corresponding arbitration clause he signed. Consequently, the Court must conclude that the subject clause is procedurally unconscionable.

The arbitration clause is also substantively unconscionable. Substantive unconscionability relates to the contract itself and exists when the terms of the contract are unreasonable and unfair. *Collins*, at 834. The arbitration clause as written is vague, broad and misleading. Despite the clause significantly limiting Vaughn Maintenance

and/or a third-party beneficiary's legal rights, it fails to adequately explain that arbitration serves to replace any possible court action and that it effectively forfeits the right to a trial by jury. The costs and fees imposed by the clause are also troubling as they are clearly meant to deter any type of legal action by Vaughn Maintenance and/or third-party beneficiary arising out of the Agreement. Ohio courts have found that if the costs associated with arbitration effectively deny a claimant the right to a hearing or an adequate remedy in cost-effective and efficient manner, the clause is invalid. *Eagle v. Fred Martin MOTO Co.*, 157 Ohio App.3d 150, 167. Apart from the costs of the proceedings itself, the clause requires Plaintiff to travel hundreds of miles to Rochester, New York, for proceedings that could last several days. The clause additionally compels the "losing party" to reimburse the prevailing party for its costs and attorney's fees (including in-house counsel fees) from arbitration, which effectively discourages any type of litigation from Vaughn Maintenance and/or Plaintiff to protect their rights under the Agreement. The requirements of the arbitration clause are prohibitive and simply unfair to a small business owner located in Cincinnati, Ohio.

The Court finds that the arbitration clause of the subject contract is both substantively and procedurally unconscionable and therefore unenforceable. Consequently, Defendant's Motion to Dismiss, or in the alternative, to Stay Pending Arbitration is hereby DENIED. This matter is set on July 2, 2013, at 1PM for CMC.



Norbert A. Nadel, Judge

6/3/13

Date

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