

[Cite as *Christ Holdings, L.L.C. v. Schleappi*, 2016-Ohio-4664.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHRIST HOLDINGS, LLC,)	CASE NO. 15 NO 0427
)	
PLAINTIFF-APPELLANT,)	
)	
VS.)	OPINION
)	
MARYELLEN SCHLEAPPI, et al.,)	
)	
DEFENDANTS-APPELLEES.)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Noble County, Ohio Case No. 213-0028
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JUDGMENT:	Reversed and Remanded.
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 15, 2016

[Cite as *Christ Holdings, L.L.C. v. Schleppi*, 2016-Ohio-4664.]

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[Cite as *Christ Holdings, L.L.C. v. Schleappi*, 2016-Ohio-4664.]
ROBB, J.

{¶1} Plaintiff-Appellant Christ Holdings, LLC appeals the decision of Noble County Common Pleas Court granting a directed verdict for Defendants-Appellees MaryEllen and Edward Schleappi (“Schleappis”). Two issues are raised in this appeal. The first is whether the trial court correctly determined that the September 10, 2008 Right of First Refusal is procedurally and substantively unconscionable. Second, if the September 10, 2008 Right of First Refusal is unconscionable, did the evidence show Christ Holdings was ready, able and willing to perform under the Right of First Refusal.

{¶2} At oral argument both parties agreed the second issue is not ripe for review. Therefore, that issue will not be addressed. As to the first issue, for the reasons expressed below, we hold that the September 10, 2008 Right of First Refusal is not procedurally or substantively unconscionable. Therefore, the trial court’s decision granting a directed verdict on Christ Holdings’ claims against the Schleappis is reversed and the matter is remanded for further proceedings consistent with the law and this opinion.

Statement of the Facts and Case

{¶3} Prior to 2006 MaryEllen Schleappi owned 80 acres of land (the farm) in Noble County, Ohio. The farm was originally in both her name and her husband’s. In 1994 or 1995, her husband, Edward, started having medical issues¹ so the property was transferred to MaryEllen. Their home and an apple orchard were located on a portion of the farm.

{¶4} In 2006, the Schleappis sold approximately 33 acres to Kevin Christ, the sole member of Christ Holdings, and his wife Tracy Christ. Tr. 395. The purchase price was \$60,000.00. Tr. 398. Kevin Christ and Edward Schleappi drafted the purchase contract; no attorneys or real estate agents were involved in the sale. The purchase contract included a right of first refusal and restrictions. Tr. 399. The restrictions were that neither party could have salvage yards, mobile homes, hunting camps, storage facilities, or commercial livestock farms on their respective properties. Tr. 399-400.

{¶15} The right of first refusal gave buyer, Kevin Christ, the right of first refusal on the “seller’s contiguous property.” Tr. 400. According to Kevin, the original negotiations between himself and Edward Schleappi were for the entire 80 acres. Kevin wanted the entire farm and wanted to operate the apple orchard. However, Edward and MaryEllen changed their minds about selling the whole farm in the midst of negotiations and only wanted to sell approximately 33 acres. Therefore, Kevin asked for a right of first refusal, which was added to the purchase contract. Tr. 402. The purchase agreement was never recorded; Kevin stated he did not know at the time it needed to be. Tr. 411.

{¶16} During the next two years, the Schleappis abided by the terms of the 2006 right of first refusal. Two offers were brought to Kevin and Tracy Christ. The first offer was in 2006. However, the Christs declined this offer because the price was too high - \$3,500 per acre. The party who originally made the offer did not buy the property.

{¶17} The second offer occurred in 2008. After being notified of the offer and determining that it was a valid offer, Kevin invoked his right of first refusal. This time Kevin involved his attorney in the purchase agreement; Kevin indicated that he involved his attorney in the deal because he had some bad dealings with the Schleappis and he did not trust them. Tr. 425. The contract was for 12.8 acres for \$2,225.00 per acre. Tr. 439, 442. The parties to the 2008 Purchase Agreement were the Schleappis and Christ Automotive, LLC. Christ Automotive is now Christ Holdings.

{¶18} The 2008 contract contained contingencies. One contingency was the negotiation and acceptance of deed restrictions and a right of first refusal within “30 days after the Effective Date.” 7/18/08 Purchase Agreement Paragraph 4. The language of the right of first refusal contingency was, “Sellers entering into a Right of First Refusal Agreement in favor of Buyer covering the land adjacent to the Premises which is retained by Seller, each upon such terms and conditions as are acceptable to Buyer.” 7/18/08 Purchase Agreement Paragraph 4(d).

¹ Medical issues included onset of Alzheimer’s Disease.

{¶9} The purchase contract also contained a paragraph titled Right of First Refusal. This provision provided:

Seller agrees to grant to Buyer an exclusive right of first refusal to purchase the Adjacent Land. In the event Seller receives a bona fide offer from a third party to purchase the Adjacent Land (**“Third Party Offer”**), and Seller decides to sell the Adjacent Land, Seller shall give notice of such Third Party Offer to Buyer. The notice shall be in writing and shall specifically set forth the terms of the Third Party Offer, including the name and contact information of the person making the Third Party Offer.

Buyer may exercise its purchase right at any time within Thirty (30) days of receiving written notice from Seller. Buyer shall notify Seller of its decision to exercise its purchase right by providing written notice to Seller.

In the event Buyer exercises its purchase right as provided in this Agreement, Buyer and Seller shall enter into a purchase agreement within Ten (10) days of the date Buyer exercised its right to purchase. The terms of said purchase agreement shall be negotiated by the parties and shall be similar to the format of this Agreement.”

7/18/08 Purchase Agreement Paragraph 17.

{¶10} There is no language in the above provision indicating the right of first refusal survived closing.

{¶11} On September 10, 2008, the parties executed the Right of First Refusal Agreement and Restrictive Covenant. The restrictive covenant portion of the document is similar to the restrictive covenant in the 2006 Purchase Agreement. It does not permit mobile homes, salvage yards, hunting camps, commercial livestock farms or storage facilities. As to the right of first refusal, the Agreement provides:

As a material inducement to CA's [Christ Automotive, LLC] execution of the Purchase Agreement, Schleappi agrees that she shall not, in whole

or in part, transfer, sell, lease, gift, license, grant an interest in, or otherwise alienate, voluntarily or by operation of law (each collective and singularly a "Transfer"), her interest in the Schleappi Property without having first complied with the following:

9/10/08 Right of First Refusal Agreement and Restrictive Covenant.

{¶12} The Agreement states if MaryEllen receives a bona fide offer, prior to any transfer, written notice has to be given to Christ Automotive. The written notice must include the Transferees identity, a copy of the offer and description of the terms, and MaryEllen's offer to transfer to Christ Automotive for a total price/consideration equal to the price/consideration set forth in Transferee's Offer.

{¶13} On April 2, 2010, the Schleappis signed an oil and gas lease with Northwood Energy Corporation. Thereafter, Kevin informed MaryEllen she should not have done that because of the 2008 Right of First Refusal. Tr. 468. He told her he could offer her a better lease; he leased other property in the area for a lot more money. Tr. 468. He stated the Schleappis would not listen to him.

{¶14} Northwood did not drill for a couple of years. When the drilling process started, an attorney for either Northwood or the Schleappis contacted Kevin and requested he sign a waiver indicating the September 10, 2008 Right of First Refusal only applied to surface rights. He refused. Northwood started drilling operations.

{¶15} Christ Holdings filed a complaint for declaratory judgment, quiet title, breach of contract, tortious interference with contractual relationship, and civil conspiracy against the Schleappis and Northwood. 2/14/13 Complaint.

{¶16} Northwood filed an answer. 3/15/13 Northwood Answer. The Schleappis filed an answer and counterclaim against Christ Holdings and third party-defendant Kevin Christ. 3/20/13 Answer and Counterclaim. In the answer, the Schleappis claimed there was no consideration for the September 10, 2008 Right of First Refusal. The counterclaims asserted against Christ Holdings and Kevin Christ were slander of title, fraud, extreme emotional distress, and civil conspiracy.

{¶17} Christ Holdings and Kevin Christ filed an answer to the counterclaims. 4/3/13 Answer to Counterclaim.

{¶18} During the course of the proceedings, Christ Holdings moved to amend its complaint twice. The first time it moved to amend the complaint to add Advanced Royalty, LLC as a party. 6/10/13 Motion for leave to Amend Complaint. During the lawsuit Christ Holdings discovered that on April 4, 2012, the Schleappis entered into a royalty conveyance with Advanced Royalty. That contract transferred a portion of the royalty payments from the oil and gas lease with Northwood to Advance Royalty LLC.

{¶19} The second time it moved to amend the complaint to add Anadarko E&P Company LP as a defendant because Northwood sold a portion of the oil and gas rights to them in December 2011. 9/6/13 Second Motion to Amend Complaint.

{¶20} The trial court granted both motions to amend and permitted the amended complaints to be filed instanter. 6/12/13 J.E.; 9/20/13 J.E.

{¶21} The Schleappis filed answers to the amended complaints. 7/15/13 Schleappis Answer; 10/24/13 Schleappis Answer. Northwood, Advanced Royalty and Anadarko also filed answers. 7/17/13 Northwood Realty Answer; 8/28/13 Advanced Royalty Answer; 11/6/13 Anadarko Answer.

{¶22} In July 2014, the Schleappis filed a motion for summary judgment arguing there was no consideration for the September 10, 2008 Right of First Refusal. 7/30/14 Summary Judgment Motion. A supplemental motion for summary judgment was filed about two weeks later. 8/8/14 Schleappis Supplemental Motion for Summary Judgment. In this motion, they argued the September 10, 2008 Right of First Refusal was procedurally and substantively unconscionable.

{¶23} Christ Holdings filed briefs in opposition to the summary judgment motions and filed its own motion for summary judgment. 8/8/14 Brief in Opposition to Summary Judgment and Motion for Summary Judgment; 8/22/14 Opposition brief to supplemental motion for summary judgment. In the opposition brief to the supplemental summary judgment motion, Christ Holdings argued the right of first refusal was not unconscionable.

{¶24} The Schleappis filed a motion in opposition to Christ Holdings' motion for summary judgment. 8/19/14 Opposition Motion.

{¶25} The trial court denied the motions for summary judgment. 9/2/14 J.E. The case proceeded to trial. Following Appellant's case in chief, the Schleappis moved for a directed verdict. They asserted there was no consideration for the September 10, 2008 Right of First Refusal, the Right of First Refusal was unconscionable, and the evidence did not demonstrate Christ Holdings was able to perform under the Right of First Refusal. The trial court granted the motion. It held the September 10, 2008 Right of First Refusal was unconscionable, and thus, was void ab initio. 4/21/15 J.E. Therefore, it held Appellant's remaining claims failed as a matter of law since the underlying contract was not enforceable. 4/21/15 J.E. In the alternative, the trial court held that even if the underlying contract was enforceable, Appellant failed to prove he was entitled to specific performance because Kevin Christ did not convey to the Schleappis that he was ready, willing and able to perform on the contract. 4/21/15 J.E.

{¶26} The case proceeded on the Schleappis' counterclaims against Christ Holdings and Kevin Christ. Following the Schleappis' case in chief, Christ Holdings and Kevin Christ moved for a directed verdict. A directed verdict was granted on the slander of title, extreme emotional distress and civil conspiracy claim. The fraud claim proceeded to the jury.

{¶27} The jury returned a verdict in favor of Kevin Christ and Christ Holdings.

{¶28} Christ Holdings appealed the trial court's grant of a directed verdict for the Schleappis. No other holdings by the trial court have been appealed.

First Assignment of Error

{¶29} Appellant's first assignment of error provides:

"The trial court committed reversible error in holding that the Right of First Refusal was unconscionable and void as a matter of law."

{¶30} A trial court's decision granting a motion for directed verdict presents a question of law, which an appellate court reviews de novo. *Carter v. R & B Pizza Co., Inc.*, 7th Dist. No. 09JE34, 2010–Ohio–5937, ¶ 15. The applicable standard of review for a directed verdict is set forth in Civ.R. 50(A)(4):

When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

Civ.R. 50.

{¶31} The trial court found the September 10, 2008 Right of First Refusal was substantively and procedurally unconscionable. 4/21/15 J.E.

{¶32} The notion of unconscionability includes “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 33, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383, 613 N.E.2d 183 (1993). The doctrine embodies two concepts: substantive unconscionability and procedural unconscionability. *Taylor Bldg.*

{¶33} The party contending the contract is unconscionable, which in this instance is the Schleappis, bears the burden of proving the agreement is both procedurally and substantively unconscionable. *Id.* citing White & Summers, Uniform Commercial Code (1988) 219, Section 4–7 (“One must allege and prove a ‘quantum’ of both prongs in order to establish that a particular contract is unconscionable”). Thus, “unconscionability is, in effect, a conjunctive test.” *Gates v. Ohio Sav. Assn.*, 11th Dist. No.2009–G–2881, 2009–Ohio–6230, ¶ 47.

{¶34} A determination of whether a written agreement is unconscionable is an issue of law that we review de novo. *Id.* at ¶ 34. It is “a fact-sensitive question that requires a case-by-case review of the surrounding circumstances.” *Brunke v. Ohio State Home Servs., Inc.*, 9th Dist. No. 08CA009320, 2008-Ohio-5394, ¶ 8.

Procedural Unconscionability

{¶35} The trial court stated the September 10, 2008 Right of First Refusal was procedurally unconscionable, as a matter of law. It reasoned:

Mrs. Schleappi and the Plaintiff did not have equal bargaining power. Mrs. Schleappi was under time pressure to close the sale with Plaintiff. It was procedurally unconscionable to put the Right of First Refusal in front of Mr. and Mrs. Schleappi to procure their signatures in that circumstance.

4/21/15 J.E.

{¶36} The trial court concluded the Schleappis were “under the gun. They had to sell this property. Okay. And they had a certain period of time within which to do it. Okay. That was the agreement that they had reached.” Tr. 638.

{¶37} “Procedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible.” *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, ¶ 7 (9th Dist.). “Procedural unconscionability considers the circumstances surrounding the contracting parties' bargaining.” *Taylor Bldg.*, 2008-Ohio-938 at ¶ 43. Courts consider each party's age, education, intelligence, business acumen and experience, who drafted the contract, and whether alterations in the printed terms were possible. *Id.*

{¶38} The undisputed facts in this case show that in July 2008, the parties reached an agreement for the Schleappis to sell approximately 12 acres to Appellant. The purchase contract contained contingencies, one of which was for the negotiation and acceptance of deed restrictions and a right of first refusal within “30 days after the Effective Date.” 7/18/08 Purchase Agreement Paragraph 4. On September 10, 2008, the parties signed the restrictive covenant and right of first refusal.²

{¶39} As stated above, in determining whether a contract is procedurally unconscionable, we consider the circumstances surrounding the bargaining process.

² Throughout trial, MaryEllen contested whether that was her signature on the right of first refusal. A handwriting expert was called and offered the opinion that it was her signature.

The first factors to consider are age, education, intelligence, business acumen and experience.

{¶40} At the time of signing the contract, MaryEllen was 70 years old, a psychiatric social worker, i.e. therapist. Tr. 96. She had two college degrees – a Masters’ Degree in psychiatric social work from Ohio State University and a Bachelor’s Degree in a similar area from the University of Akron. Tr. 97. She was licensed as a therapist in the State of Ohio. Tr. 97. Edward Schleappi, her husband, had medical issues including Alzheimer’s, starting in 1994 or 1995. Tr. 99. At the time of the trial he was in a nursing home due to the Alzheimer’s. During the pendency of the appeal he passed away. It appears from the record Edward was a high school English teacher.

{¶41} Kevin Christ was in his early 30s at the time the contract was signed. He had a bachelor’s degree in automotive technology from Southern Illinois University. Tr. 386. He started his career as a mechanic at a car dealership. Tr. 386. He had executive training at NCM Associates in Kansas for the automotive industry. Tr. 386. He worked for Chrysler Corporation for a number of years and at one point was a regional manager. Tr. 388, 517. During that period he was involved in litigation concerning lemon law cases; Chrysler gave him the authority to settle them. Tr. 518. He eventually left Chrysler and bought a car dealership in Caldwell, Ohio – Worl Thompson Motors. Tr. 389. He formed companies that he owned, one of which was APC Oil and Gas. Tr. 519.

{¶42} The above information indicates the parties’ education levels are somewhat equivalent. However, it does appear Kevin Christ has more business acumen and experience than the Schleappis. His experience, although specific to the automotive industry, is business experience. The issue here is a real estate transaction that involves a contract. Although Kevin may not have dealt with multiple real estate contracts through his business experience, he has dealt with contracts in the automotive field.

{¶43} Focusing solely on the above fails to acknowledge that the parties have a history of real estate contractual dealings. In 2006, the parties without the aid

of attorneys or real estate agents completed a real estate transaction; the Schleappis sold approximately 30 acres of land to Kevin Christ. The parties drafted the purchase contract, which included a right of first refusal and a restrictive covenant.

{¶44} Following that transaction, Kevin found out that some representations in the 2006 Purchase Agreement concerning oil and gas on the land he purchased were incorrect. Tr. 399.

{¶45} The right of first refusal from the 2006 Purchase Agreement was invoked in 2006 and in 2008. In 2006, the Schleappis notified Kevin of an offer to buy approximately 12 acres of their land for a price of \$3,500 per acre. Plaintiff's Exhibit 6; Tr. 419. Kevin thought the price was too high for the tract of land in question and investigated the offer. Tr. 420. He determined it was not a bona fide offer. Tr. 420. Therefore, he declined to purchase the property. Tr. 420; Plaintiff's Exhibit 7. The alleged offer never materialized into a sale.

{¶46} The second notification under the right of first refusal occurred in 2008. It was for the same tract of land, but the price was \$2,225 per acre. Tr. 433; Plaintiff's Exhibit 8. Kevin investigated this matter, deemed it was a bona fide offer, and opted to purchase the property at that price. Tr. 439. In doing so, he wrote a letter to the Schleappis. Plaintiff's Exhibit 10. Of importance in this letter are two things. First, he indicated he was concerned that they do not have an attorney representing them and suggested to them that they contact an attorney. Plaintiff's Exhibit 10. Second, he advised them that the transaction could not occur like the last one in that they cannot misrepresent their property again. Plaintiff's Exhibit 10.

{¶47} The above shows both parties are somewhat knowledgeable in real estate transactions. Although Kevin may have more business experience, that fact alone does not suggest the contract is procedurally unconscionable.

{¶48} Other factors to consider under procedural unconscionability are who drafted the contract and whether alterations in the printed terms were possible. It is undisputed that Kevin's attorney drafted the September 10, 2008 Right of First Refusal. However, there is a dispute as to whether the Schleappis knew the terms of the agreement prior to signing it.

{¶49} Kevin Christ said he had negotiations with Edward Schleappi about the terms of the right of first refusal. He indicated MaryEllen listened to these conversations. Tr. 456. He testified he gave drafts of the agreement to the Schleappis. Tr. 449.

{¶50} MaryEllen testified the first time she saw the contract was when it was signed. She testified it was always her intention to will the property to her son and this right of first refusal does not allow such transfer. She avowed she told Kevin it was her intention to will the remainder of her land to her son. Tr. 104. Kevin claimed she never told him it was her intention to will the remainder of her land to her son; he asserted the right of first refusal does not prevent her from willing the land to her son. Tr. 410, 458.

{¶51} There is no evidence to show the terms of the contract could not have been changed or the Schleappis were pressured into signing it without reading it. There was discussion at trial as to where the parties were when the contract was signed.

{¶52} The notary who witnessed the signature testified. He could not verify where the parties were when the contract was signed. The exhibits introduced through his testimony indicated that each party was going to sign the contract at their respective homes. Exhibits 12 and 13. However, the notary testified the place of signing could have changed. Tr. 53. Also given the number of notarizations he had done, he could not remember this specific signing; he testified since 2006 he had notarized 3,000 closings and that did not include other documents he notarized. Tr. 36, 56.

{¶53} Kevin testified he signed the right of first refusal at his house located at 43157 Parrish Ridge Road, Caldwell Ohio. Tr. 451. The Schleappis were not there when he signed the contract and he was not present when they signed it. Tr. 453. Kevin avowed the right of first refusal was not signed at his dealership. Tr. 445, 496.

{¶54} MaryEllen disagreed. She testified the contract was signed at Kevin's dealership and he was present when she and Edward signed it. She claimed Kevin called her and asked her and Edward to come down to his car dealership to sign

something. Tr. 169. She signed the deed and then was handed some papers, which were flipped to the signature page, and was asked to sign those documents. Tr. 173-174. She admitted she did not read the document. Tr. 184. She testified that no one told her what she was signing, but she assumed it had to do with the van they leased from the dealership. Tr. 147. However, evidence indicated she leased a vehicle from Appellant's dealership in April 2008 and signed the paperwork for the van at that time. Plaintiff's Exhibit 20; Tr. 496. Later, she testified she was told she was signing the right of first refusal. Tr. 184.

{¶55} The trial court in reaching its procedural unconscionability ruling stated MaryEllen was under time constraints to sign the document. Her testimony does show time constraints; however, these time constraints were not placed on her by Kevin. She testified:

I was getting – I was taking Ed to the doctor's. Kevin called. We went down there. I – we were in a hurry. I signed what I needed to sign and didn't make copies. They said go out and get Ed out of the car. So I went and got Ed out of the car. And they said he needed to sign this, and then we left. There was no discussion. There wasn't anything. It was just sign these, and – and we were in a hurry. He had a doctor's appointment.

* * *

I do now because I – like I said, when we signed this, down at his garage, I would – we were in a hurry to go take Ed to the doctor's. He said, you just need to sign this, it's the right – giving me the right to purchase your land if you don't will it to your kids.

Did I read all of this? No. That was my ignorance, I guess. No, I did not read it. I took Kevin at his word, and he cheated us. Sorry.

Tr. 175, 184.

{¶56} Nothing in the above statement indicates Kevin would not let her read it, he was forcing her to sign it right there, or he would not have given her time to read it

if she asked. She did not testify that she asked for more time to go over it and her request was denied. She did not testify she attempted to change the terms.

{¶57} Kevin testified he never put the right of first refusal in front of MaryEllen and asked her to sign it. Tr. 497. He asserted he did not trick her into signing it and he did not lie about the transaction. Tr. 497.

{¶58} Even if we take Mary Ellen's testimony as true (which we are **not** supposed to do under a directed verdict review – we are supposed to take his statements as true), there was no misrepresentation. Mary Ellen testified that Kevin told her the right of first refusal gave him the right to purchase the land if she did not will it to her children. Kevin testified he believed the language of the right of first refusal allowed her to will her land to her children. His statement is not a misrepresentation, but rather an accurate response to her concern over estate planning. She raised no concern over what else the right of first refusal granted.

{¶59} In considering procedural unconscionability, the trial court erred in finding the circumstances in this case lead to procedural unconscionability as a matter of law. There are many factual disputes in this case. The only way to find procedural unconscionability is to believe MaryEllen's testimony and disbelieve Kevin. However, in reviewing a directed verdict, we have to view the evidence most strongly in favor of the party against whom the motion is directed. Civ.R. 50. Thus, we view it in Kevin's favor for purposes of reviewing the grant of a directed verdict.

{¶60} Furthermore, even if MaryEllen's testimony is believed, it does not support a finding of procedural unconscionability. The Sixth Appellate District has found in a case where similar arguments were made that the contract was not unconscionable. *Wells Fargo Bank, N.A. v. Lee*, 2014-Ohio-4514, 20 N.E.3d 1236, ¶ 47-53 (6th Dist.). In *Lee*, the borrowers argued the contract was unconscionable because they signed the loan documents without reading the documents, were unsophisticated borrowers, did not receive copies of the documents they signed, and relied on the false representations made by the employees of the mortgage company. *Id.* at ¶ 52 (stating these arguments are substantive unconscionability arguments). However, the borrowers did not produce any evidence they were

coerced into entering into the new loan and mortgage. *Id.* at ¶ 53. Although they presented evidence they were misled and did not read or receive the documents they executed, there was no evidence they could not have read or requested the documents they executed. *Id.* Thus, there was no evidence of unconscionability.

{¶61} Likewise, the Eighth Appellate District has stated a contract is not procedurally unconscionable when addressing arguments akin to the ones asserted here. *Hedeen v. Autos Direct Online, Inc.*, 2014-Ohio-4200, 19 N.E.3d 957, ¶ 31-37 (8th Dist.). The purchaser of a car argued the contract was procedurally unconscionable because the salesperson had “far superior business experience” in selling cars than she did in buying cars, she had no bargaining power in negotiating the standard form arbitration agreement, the dealer drafted the agreement, and the circumstances under which the agreement was consummated were questionable. *Id.* at ¶ 31. In that case, the appellate court concluded there was no evidence in the record the purchaser, who was a second-grade teacher, was prevented from reading the contract before signing or she was incapable of understanding the document. *Id.* at ¶ 33. The appellate court cited the Ohio Supreme Court for the proposition, “If a person can read and is not prevented from reading what he signs, he alone is responsible for reading what he signs.” *Id.* quoting *Haller v. Borrer Corp.*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (1990). The court also explained there was no evidence she attempted to negotiate or alter any of the terms of the agreement. *Id.* at ¶ 36. Thus, the court concluded the facts of the case demonstrated the purchaser, a second-grade teacher, had reasonable opportunity to understand the terms of the contract. *Id.* at ¶37.

{¶62} Given the above, we hold the right of first refusal is not procedurally unconscionable. The facts as set forth in the transcript (even when viewed in the Schleappis’ favor) do not render the contract procedurally unconscionable.

{¶63} As this court finds the contract was not procedurally unconscionable, we now examine the contract for substantive unconscionability.

Substantive Unconscionability

{¶64} Substantive unconscionability refers to the actual terms of the agreement and is found when the contract terms are unfair and commercially unreasonable. *Renken Ent. v. Klinck*, 11th Dist. No. 2004–T–0084, 2006-Ohio-1444, ¶ 19; *Porpora*, 2005-Ohio-2410, ¶ 8. No specific list of factors has been developed for this category of unconscionability because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case. *Hedeen*, 2014-Ohio-4200 at ¶ 30; *Caley v. Glenmoor Country Club, Inc.*, 1 N.E.3d 471, 480, 2013-Ohio-4877, ¶ 42 (5th Dist.). That said, some of the factors courts have considered when determining substantive unconscionability are: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. *Hedeen*, citing *Click Camera*, 86 Ohio App.3d at 834, 621 N.E.2d 1294.

{¶65} Here, the trial court found substantive unconscionability for three reasons. 4/21/15 J.E. Each will be addressed and analyzed in turn.

{¶66} First, the trial court found the restrictions under the Right of First Refusal far exceeded the restriction on selling. 4/21/15 J.E. The trial court found a right of first refusal is limited to the purchase of real estate, not to leasing or licensing real estate:

To give you some idea of what we ought to be talking about here, I went to Black's Law Dictionary to find out what a first right of refusal is, and it says a right to have a first opportunity to purchase real estate when such becomes available or right to meet any other offer. Okay.

Purchase of real estate. Now, let's see what we're doing. Let's – talk about some of those things.

Tr. 639. See also 4/21/15 J.E.

{¶67} This reasoning is too limited. A right of first refusal is not confined to the purchase of property. The definition the trial court used contemplates a right of first refusal may be used for something other than a purchase. The language “or

right to meet any other offer” contemplates something other than a purchase, such as a lease or a license.

{¶68} Case law in Ohio has not defined a right of first refusal to include or exclude a lease or license.

{¶69} Other states when discussing rights of first refusal do not narrowly limit the definition to purchase of property. Wisconsin and Minnesota courts have clearly indicated it can apply to leases. *MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust*, 362 Wis.2d 258, 273 (2015) (includes opportunity to lease; “The right of first refusal ‘remains in an unripened or suspended state, awaiting the energizing spark provided when the condition precedent of intent and offer is met.’”); *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 584 (Minn.App.2003) (quotation omitted), aff’d, 689 N.W.2d 779 (Minn.2004) (“a right of first refusal is in essence a dormant option to buy or lease property.”). Missouri courts have indicated that a right of first refusal can include a prohibition on gifting it, but gifting the property from one family member to another does not trigger a right of first refusal. *Blue Ridge Bank & Trust Co. v. Trosen*, 309 S.W.3d 812, 816 (Mo.App.2010), citing *Schroeder v. Duenke*, 265 S.W.3d 843, 847 (Mo.App. E.D.2008).

{¶70} Here, Kevin Christ testified he wanted the lease language in the contract because he did not want the Schleappis to lease the apple orchard to someone else. Tr. 454. Kevin testified that from the very beginning he wanted to purchase all of the Schleappis property, which included the orchard. His testimony established he was very interested in maintaining the apple orchard. Kevin testified Edward Schleappi changed his mind about selling the apple orchard because Edward wanted to maintain it himself. Kevin also testified it was very important to Edward that whoever bought the apple orchard would keep it as a functioning orchard.

{¶71} Kevin also avowed he did not want neighbors, and the lease language under the right of first refusal gave him protection from the Schleappis leasing to tenants.

{¶72} Lastly, nothing in contract law prevents parties from applying a right of first refusal to something other than a purchase. As long as there is a meeting of the

minds, the parties are free to contract for a right of first refusal to apply to lease, licenses, and gifts. See *Nieman v. Bunnell Hill Dev. Co.*, 12th Dist. NO. CA2007-07-174, 2008-Ohio-5541, ¶ 2-5 (facts show right of first refusal encompassed lease); *MS Real Estate Holdings, LLC*, 362 Wis.2d at 273; *Dyrdal*, 672 N.W.2d at 584; *Blue Ridge Bank & Trust Co.*, 309 S.W.3d at 816.

{¶73} Consequently, the trial court's first reason for finding the contract substantively unconscionable is without merit.

{¶74} The trial court's second reason for finding the September 10, 2008 Right of First Refusal substantively unconscionable was based on its interpretation of the language of the agreement. It found the language of the Right of First Refusal required MaryEllen to convey any bona fide offer she received to Christ Holdings, even if the bona fide offer was less than she was willing to accept. 4/21/15 J.E. That would mean she would be required to sell the property to Christ Holdings at a price she was not willing to accept. 4/21/15 J.E.

The Court: Somebody goes down to the Auditor's Office and says, I want the property cards from the Schleappi property because I'm interested in buying it. I go in there and I find out what the appraised value is, which is no ways near what the property's probably worth. I go out, and I make an offer to the Schleappis, says I would like to buy your property for the amount that's set forth in the Auditor's records, and you say, well gee Mr. – Mr. and Mrs. Schleappi are just going to deny that. They're not – they're not going to accept it.

Well, under the original purchase agreement, if you read the black and white language, you will see that there's a provision for a right of first refusal and if the seller doesn't like it – okay – it'll be exercised only if the seller decides to sell.

Now, let's go to the new agreement. There's nothing in there about the seller having to agree to that sale, so does that mean that once they get

the offer – okay – they have to present it to Mr. – Mr. Christ and let him buy it at that moment?

Mr. Scarpitti [Counsel for Christ Holdings]: No.

The Court: Why?

Mr. Scarpitti: Because it said that they will not transfer, they will not consummate that deal, they will not sell, they will not lease. In other words, they have to be willing to accept.

The Court: It doesn't say that. As a matter of fact – as a matter of fact, when – when you and Mr. Gerney [Counsel for Christ Holdings] then get involved in litigation on that matter and say – and – and somebody comes in and says – wait a minute. Okay. No. We – we're just not going to. We have the right to refuse that. And you know what you're going to say. Oh, no, no, no, no, no. Let's go back to the original – if we would have wanted to put that in that agreement, we could have because we knew how to do it. Okay. But we didn't put it in here.

Tr. 640-641.

{¶75} As aforementioned, the July 2008 Purchase Agreement contained a right of first refusal that did not survive closing. The language of that agreement provided, "In the event Seller receives a bona fide offer from a third party to purchase the Adjacent Land (**"Third Party Offer"**), and Seller decides to sell the Adjacent Land, Seller shall give notice of such Third Party Offer to Buyer."

{¶76} Clearly, this language indicates the right of first refusal does not come to fruition unless there is an offer and the seller agrees to sell.

{¶77} The language of the September 10, 2008 Right of First Refusal does not contain that exact language. Rather it provides: "If Schleappi receive a bona fide offer (the "Transferee Offer") from any other individual or entity (each a Transferee") to Transfer all or any portion of any interest or rights in the Schleappi property, then,

prior to any Transfer to such Transferee, Schleappi shall give CA [Christ Holdings] written notice * * *.”

{¶78} This language logically means if the Schleappis are willing to accept the offer from the Transferee, then the offer must be conveyed to Christ Holdings. Implicit within this language is the obligation of the Schleappis to convey an offer to Christ Holdings only when they are willing to accept the offer. The language “prior to any Transfer to such Transferee” indicates Schleappis’ acceptance of the offer.

{¶79} Reading the language of the September 10, 2008 Right of First Refusal to include any offer is illogical and does not give meaning to the words used. Merely because the language used in the July 2008 Purchase Agreement’s right of first refusal was more concise and undeniably stated the offer had to be one the Schleappis were willing to accept does not mean the language of the September 10, 2008 Right of First Refusal does not also express that intent by the parties. Just because the language in the second contract is different does not mean it should be read in an illogical manner or given a meaning different from the first contract. There are many ways to say one thing. This is an example of different ways to state the offer must be bona fide and the seller must be willing to accept the offer.

{¶80} For those reasons, the trial court’s second reason for finding the September 10, 2008 Right of First Refusal unconscionable is incorrect.

{¶81} Lastly, the trial court found the language of the Right of First Refusal to be overbroad and this rendered the contract substantively unconscionable:

Under the terms of the Right of First Refusal Agreement, Mrs. Schleappi is prohibited from gifting her property to anyone without first offering it to Plaintiff, which might interfere with her ability to conduct sound estate planning. She is also prohibited from licensing the property to anyone without first offering it to Plaintiff, which might impede her ability to allow friends or family to hunt on her land, and the Court is troubled by the language “otherwise alienate . . . voluntarily or by operation of law.”

The Court: Okay. We can't gift the property? We talked about that. But that's what – that's what this says. She can't gift it. A lot of people do estate planning. I might want to convey it to a trust. I might want to just give it to my kids. Okay. The agreement says you gotta [sic] offer that first to Mr. Christ.

What in the world is the word license doing in here? I'm thinking, well, I go over to the Bureau of Motor Vehicles and get my license. I understand the license with respect to real property is a privilege to go on premises for certain purposes, but does not operate to confer on or vest in the licensee with any title, interest, or estate in such property.

That sounds to me like hunting. If somebody showed up on Mrs. Schleappi's step, gee, I'd like to hunt some rabbits today. It might be her grand – it might be her grandson and her son. Maybe she doesn't have a grandson. Well, I would like to let you, but I've got to convey this offer to Mr. Christ first. He has 30 days to consider it. Then you – then you come back.

And that's not all this agreement provides for. If that isn't – we're also talking about – or otherwise alienate – and we can do that voluntarily or by operation of law. Okay.

This – this – this agreement is so overreaching. Okay. I just – I just – I think it's unconscionable, and I don't think it's enforceable in the state of Ohio. So where's that leave us?

Tr. 645-646.

{¶82} The language the trial court is focusing on in the September 10, 2008 Right of First Refusal states:

As a material inducement to CA's [Christ Automotive, LLC] execution of the Purchase Agreement, Schleappi agrees that she shall not, in whole or in part, transfer, sell, lease, gift, license, grant an interest in, or

otherwise alienate, voluntarily or by operation of law (each collective and singularly a “Transfer”), her interest in the Schleappi Property without having first complied with the following:

September 10, 2008 Right of First Refusal.

{¶83} The trial court’s reasoning for substantive unconscionability examines everything that is effected by the Right of First Refusal. However, the issue and the breach in this case pertains to the leasing of mineral interests. As previously mentioned, right of first refusal may apply to leases; there is nothing unconscionable about a right of first refusal applying to a lease.

{¶84} Since the inclusion of a lease does not render the right of first refusal substantively unconscionable, this court will now look to the entire definition of “transfer” to determine if it is unconscionable.

{¶85} In looking at the individual parts of this definition, the term “sell” is not unconscionable. Likewise, as discussed above, “lease” is not unconscionable.

{¶86} We now review inclusion of a gift. As discussed above, other states permit the gift language and find it does not prevent one from gifting property to a family member. Following that logic, the word “gift” would not affect one’s ability to do estate planning. For example, a transfer to an inter vivos trust may still cause the property to be owned for the grantor’s benefit. Furthermore, this right of first refusal, like many others, contains language that it is binding on “the parties, their respective heirs, executors, administrators and successors in interest.” September 10, 2008 Right of First Refusal, Paragraph 3. Therefore, it would bind any trust holding the property or any family member receiving the property as a gift.

{¶87} The next term is “license”. While the word license can pertain to many things, it may be applicable to mineral interests depending on the language used in the instrument conveying rights. *Chesapeake Expl., L.L.C. v. Buell*, __ N.E.3d __, 2015-Ohio-4551, ¶ 45-48 (discussing Ohio Supreme Court case law addressing oil and gas leases and licenses); *Eisenbarth v. Reusser*, 18 N.E.3d 477, 2014-Ohio-3792 (7th Dist.), ¶ 24 (indicating the word license has been used with mineral interests). Thus, the word license may refer to mineral interests.

{¶88} It may also refer to hunting, as the trial court suggested. Black's Law Dictionary defines license as, "A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit a prendre) that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game." Black's Law Dictionary 938 Eighth Edition 1999.

{¶89} A right of first refusal to license, in and of itself, is not unconscionable.

{¶90} The last phrase is the catch-all phrase "otherwise alienate, voluntarily or by operation of law." "Alienate" is defined by Black's Law Dictionary as "To transfer or convey (property or a property right) to another." Black's Law Dictionary 80 Eighth Edition 1999. Voluntary or by operation of law would apply to situations such as mortgage foreclosures, bankruptcy and eminent domain. There is no case law indicating this "catch-all phrase" is unconscionable.

{¶91} By these terms, MaryEllen is limited in any transfer of any portion of her land and in any permission she grants others in use of to her land. While she has the right to build a garage on her property, the Right of First Refusal may limit whether she can sell timber from the property, permit a friend to hunt on her land, or lease her mineral rights without first offering the same right to Christ Holdings.

{¶92} Considering all the above, this court finds the September 2008 Right of First Refusal was not substantively unconscionable.

Conclusion

{¶93} This court finds the September 10, 2008 Right of First Refusal was not substantively and procedurally unconscionable. The contract is therefore enforceable. The claims against Northwood, Advanced Royalty and Anadarko are revived; those claims were dismissed because they were based on the underlying contract, which was deemed by the trial court unenforceable.

Second Assignment of Error

{¶94} The Schleappis' second assignment of error states:

“The trial court erred in holding, in the alternative, that Plaintiff failed to meet its burden that it is entitled to specific performance of the Right of First Refusal.”

{¶195} Under the first assignment of error, we held that the contract is not unconscionable and thus, is enforceable. At oral argument, the parties conceded that if we reached such a conclusion, the issue of specific performance is not ripe for review. We agree, and as such, this assignment of error will not be addressed.

Conclusion

{¶196} The first assignment of error has merit. The second assignment of error is not ripe for review. The trial court’s decision to grant a directed verdict for the Schleappis following the close of Christ Holdings’ case-in-chief is reversed. The matter is remanded for a new trial on Christ Holdings’ claims that were not permitted to go to the jury - quiet title, breach of contract, civil conspiracy and intentional interference with contractual relations. The trial court’s decision to grant Christ Holdings’ request for a directed verdict on Schleappis’ slander of title, extreme emotional distress and civil conspiracy counterclaims and jury verdict in favor of Christ Holdings on the Schleappis’ fraud claim were not appealed to this court. Those rulings remain unaffected by our decision.

Donofrio, P.J., concurs.

Waite, J., concurs.