[Cite as *W. Res. Coop., Inc. v. Agarwal*, 2010-Ohio-2950.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

WESTERN RESERVE FARM COOPERATIVE, INC.,	:	**O P I N I O N**
Plaintiff-Appellee/ Cross-Appellant,	:	**CASE NO. 2009-G-2892**
- vs -	:	
MUNNA AGARWAL,	:	
Defendant-Appellant/ Cross-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08M 000459.

Judgment: Affirmed in part; reversed in part; and remanded.

David J. Wigham, and *Lucas K. Palmer*, Critchfield, Critchfield & Johnston, LTD., 225 North Market Street, P.O. Box 599, Wooster, OH 44691-0599 (For Plaintiff-Appellee/Cross-Appellant).

David M. Lynch, 29311 Euclid Avenue, #200, Wickliffe, OH 44092 (For Defendant-Appellant/Cross-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant/cross-appellee, Munna Agarwal, appeals the judgment of the Geauga County Court of Common Pleas, granting summary judgment in favor of appellee/cross appellant, Western Reserve Farm Cooperative, Inc., on a promissory note issued by Agarwal to Western Reserve. Agarwal argues the note is not enforceable due to lack of consideration. He also argues it was induced by fraud.

Western Reserve cross-appeals the trial court's denial of its request for attorney fees in connection with its efforts to collect the amount owed to it by Agarwal under the note. For the reasons that follow, we affirm in part; reverse in part; and remand to the trial court for further proceedings consistent with this opinion.

{¶2} On August 23, 2006, Agarwal signed a promissory note unconditionally promising to pay $65,000 to Western Reserve, a company which sells materials used in home construction. The note did not set forth a payment schedule. Instead, it provided that the entire amount owed under the note would be due in one balloon payment on December 31, 2006. According to the note, if the full amount of the note was paid when due, no interest would accrue. However, if the note was not fully paid by January 1, 2007, the entire amount of the balance would become due at Western Reserve's option, and interest would accrue at the rate of 10 per cent per annum. The note also contained a provision entitling Western Reserve to attorney fees.

{¶3} While Agarwal made certain payments under the note, he did not pay the principal balance by the due date. As a result, on January 1, 2007, the note was overdue. As of January 1, 2008, the amount due under the note was $47,938.04 plus interest at 10 per cent per annum from January 1, 2008. On April 21, 2008, Western Reserve filed a complaint, alleging that Agarwal had defaulted under the note and accelerating the balance owed. Western Reserve prayed for judgment in the amount of the balance owed plus interest at 10 per cent per annum and attorney fees. In his amended answer, Agarwal denied the material allegations of the complaint and alleged, inter alia, lack of consideration and "fraud as to the nature and/or legal effect of the instrument."

{¶4} The parties engaged in discovery, and each party took the other party's deposition. Agarwal fails to reference the record in support of his statement of facts, in violation of App.R. 16(A)(6). For this reason alone, his sole assignment of error is not well taken. The factual outline that follows is therefore based on our review of the evidence.

{¶5} William Bullock, Western Reserve's credit manager, testified that Western Reserve is a distributor of farm and construction materials and is a cooperative owned by some 650 farmers in Middlefield. Western Reserve sells materials to its members as well as non-members. He testified that in 2006, Jeet Bhogal, a custom home builder, his partner Richard Haas, and their company Homecrest Builders had an account with Western Reserve, and purchased large amounts of lumber used in the construction of homes in Solon. In that year they defaulted on the account when it reached a balance of $95,000, and Western Reserve filed suit against them in the trial court. In August 2006, Agarwal, Bhogal's close friend, contacted Bullock and said he wanted to sign a note to settle the balance owed on the account. Bullock agreed and the parties negotiated the balance due down to $65,000. They agreed that if Agarwal paid the note on time, the Homecrest account would be settled for $65,000; the suit pending in Geauga County would be dismissed; and Western Reserve would not pursue any additional collection efforts against Bhogal, Haas, or Homecrest. Bullock testified that Agarwal never discussed the nature of his relationship with Bhogal. Bullock assumed Agarwal had purchased Bhogal's business and had assumed responsibility for his debts.

{¶6} In his deposition, Agarwal testified that he is a professor at Case Western Reserve University with a Ph.D. and that he is engaged in cancer research. He said that at the time he signed the promissory note, his close friend Bhogal owed several creditors, including Western Reserve, large sums of money, and Agarwal wanted to help him pay them off.

{¶7} Agarwal testified that he thought the note he signed in favor of Western Reserve was merely a guaranty, not a promissory note. However, he admitted the instrument is captioned as a "promissory note." He admitted he read the note before he signed it, and that he had time to consult with an attorney before he signed it. He testified that no one from Western Reserve pressured him to sign it. He testified he signed the note to prevent Western Reserve from suing Bhogal. He said he thought that Western Reserve would eventually be paid from the sale of several homes that Bhogal was building. He said he had a verbal agreement with Bullock that Western Reserve would not collect on the note, but rather would wait for payment gradually over time after the houses sold. However, he conceded this verbal agreement was not included in the promissory note and that, by signing the note, he agreed to pay the full amount of the note by December 31, 2006. He said he did not pay the note because the houses did not sell. He acknowledged in deposition that because he did not pay the note as he had promised, he breached the note.

{¶8} Western Reserve moved for summary judgment on the note, and Agarwal filed a brief in opposition and his own summary judgment motion. The trial court found there were no genuine issues of material fact, and entered summary judgment in favor of Western Reserve and against Agarwal on the note in the amount of $47,938.04, plus

10 per cent interest from January 1, 2008, but denied Western Reserve's request for attorney fees. The court found that, contrary to Agarwal's argument, he did not execute a guaranty of the debt of another; instead, he made his own promise to pay a sum certain to Western Reserve. The court also found there was no evidence of lack of consideration or fraud.

{¶9} Agarwal appeals and Western Reserve cross-appeals the trial court's summary judgment, each asserting one assignment of error. For his assigned error, Agarwal contends:

{¶10} "The Court below erred in granting Summary Judgment for Plaintiff because genuine issues of material fact had yet to be determined."

{¶11} As a preliminary matter, we note that, throughout appellant's brief, he repeatedly fails to cite case law authority in support of his assignment of error. He provides legal maxims that purport to be derived from case law, but he does not cite the cases themselves, thus making it all but impossible for us to consider his legal arguments. His brief therefore violates App.R. 16(A)(7). For this reason alone, his assignment of error is not well taken. Moreover, based on our independent research, appellant's argument is without merit.

{¶12} Appellate courts review a trial court's grant of summary judgment de novo. *Alden v. Kovar*, 11th Dist. Nos. 2007-T-0114 and 2007-T-0115, 2008-Ohio-4302, at ¶34; *Brown v. Scioto County Comm'rs* (1993), 87 Ohio App.3d 704, 711. The *Brown* court held that "we review the judgment independently and without deference to the trial court's determination." Id. An appellate court must evaluate the record "in a light most favorable to the nonmoving party." *Link v. Leadworks Corp*. (1992), 79 Ohio App.3d

735, 741. Furthermore, a motion for summary judgment must be overruled if reasonable minds could find for the party opposing the motion. Id.

{¶13} In order for summary judgment to be granted, the moving party must prove:

{¶14} "*** (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389.

{¶15} The Supreme Court of Ohio held in *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 1996-Ohio-107:

{¶16} "*** [T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The 'portions of the record' to which we refer are those evidentiary materials listed in Civ.R. 56(C), such as the pleadings, depositions, answers to interrogatories, etc., that have been filed in the case. ***" (Emphasis omitted.)

{¶17} If the moving party satisfies its burden, then the nonmoving party has the burden to provide evidence demonstrating a genuine issue of material fact. If the nonmoving party does not satisfy this burden, then summary judgment is appropriate. Civ.R. 56(E).

{¶18} The Supreme Court of Ohio has held that "'the construction of a written contract is a question of law, which [is reviewed] de novo.'" *Gates v. Ohio Sav. Ass'n*., 11th Dist. No. 2009-G-2881, 2009-Ohio-6230, at ¶18, quoting *In re All Kelly & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, at ¶28.

{¶19} Under his assigned error, Agarwal raises two issues. First, he argues that he received no benefit in exchange for his execution of the note because it was given to pay an antecedent debt of a third party. As a result, he argues the note is unenforceable for lack of consideration.

{¶20} This court has held: "It is well-settled that a note given as security for an antecedent debt is sufficient consideration to establish a valid obligation under a promissory note." *Bertrand v. Lax*, 11th Dist. No. 2004-P-0035, 2005-Ohio-3261, at ¶20, citing *Dolce v. Lawrence* (Sep. 30, 1999), 11th Dist. No. 98-L-080, 1999 Ohio App. LEXIS 4650, *15.

{¶21} *In Novak v. CDT Dev. Corp*., 8th Dist. No. 83655, 2004-Ohio-2558, the Eighth District held: "It is well-settled that no consideration for a promissory note is necessary to establish a valid obligation as between the maker of the note and the payee if the note was given as security for the antecedent debt of a third party." (Citation omitted.) Id. at ¶16.

{¶22} Further, in *Sur-Gro Plant Food Co. v. Morgan* (1985), 29 Ohio App.3d 124, the Ninth District held:

{¶23} "'Valuable consideration within the contractual relationship created by a promissory note may consist of a benefit to the promissor or a loss or detriment to the promisee. *** This principle is applicable in a situation where an individual executes a

note, payable to another party, for and in behalf of a third party who receives the actual benefit from the payee. ***'" (Citations omitted.) *Eaton Natl. Bank & Trust Co. v. Harmon* (Dec. 5, 1983), [12th Dist. No. CA83-03-007, 1983 Ohio App. LEXIS 15865, *13]. Furthermore, in *Klamo v. Hobbs* (Aug. 10, 1983), [12th Dist. No. CA83-02-019, 1983 Ohio App. LEXIS 15906,] we held that the promise of one party to forbear from prosecuting or pursuing the legal right to collect a debt which is due and owing is sufficient consideration given in exchange for a promissory note. Such is the situation that was done here, with Sur-Gro agreeing to forbear from collecting the debt owed by Fred Morgan in exchange for the note and mortgage given by [his parents] Harry and Bertha Morgan.

{¶24} "***

{¶25} "We find that the note and mortgage executed by Harry and Bertha Morgan were given in exchange for the antecedent debt of their son, Fred Morgan. As such, there was sufficient consideration for the instrument. *** The fact that the Morgans did not receive any actual proceeds from the transaction does not invalidate the note for want of consideration. In accepting the note from the Morgans, Sur-Gro agreed to forbear from initiating an action against Fred Morgan to collect on the debt which he owed to Sur-Gro. Fred Morgan received the primary benefit of the transaction by receiving an extension on the payment of his obligation. There was ample and sufficient consideration for the promissory note ***. The assignment of error raised by Sur-Gro is well-taken and is hereby sustained." (Footnote omitted.) *Sur-Gro*, supra, at 129-130.

{¶26} Further, we observe that the promissory note at issue here recites that it is made "[f]or value received." R.C. 1303.33, regarding value and consideration for negotiable instruments, provides in pertinent part:

{¶27} "(A) An instrument is issued or transferred for value if any of the following apply:

{¶28} "***

{¶29} "(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due. ***

{¶30} "(B) 'Consideration' means any consideration sufficient to support a simple contract. *** If an instrument is issued for value as stated in division (A) of this section, the instrument is also issued for consideration."

{¶31} "[R.C. 1303.33(A)(3)] follows former section 3-303(b) in providing that the holder takes for value if the instrument is taken in payment of or as security for an antecedent claim, even though there is no extension of time or other concession, and whether or not the claim is due. *** [T]he provision is intended to apply to an instrument given in payment of or as security for the debt of a third person, even though no concession is made in return." Official Comment to R.C. 1303.33(a)(3), at ¶4.

{¶32} Agarwal testified that he signed the note in order to guarantee Bhogal's debt. Pursuant to the foregoing authority, because the note was given as security for an antecedent debt, no consideration for the note was necessary to establish an enforceable obligation by Agarwal.

{¶33} In any event, the record reveals that the note was supported by consideration for three reasons. First, in exchange for the note, Western Reserve

agreed to dismiss the pending litigation against Bhogal in the trial court. Second, in exchange for his promissory note, Agarwal was able to negotiate a settlement whereby Western Reserve agreed to forgive $30,000 of the $95,000 debt owed by Bhogal, Haas, and Homecrest to Western Reserve. Third, Agarwal admitted in his deposition that Bhogal received a benefit by virtue of his execution of the note. Agarwal testified:

{¶34} "Q. Would you say that [Bhogal] has benefitted as a result of your help here?

{¶35} "A. Absolutely.

{¶36} "Q. At the time that you signed the note, did you think he would benefit from you signing the note?

{¶37} "A. Yeah. He would. Yeah."

{¶38} As a result, we hold the trial court did not err in finding there was no genuine issue of material fact regarding a lack of consideration.

{¶39} For his second issue, Agarwal argues that, in order to induce him to execute the note, Bullock told him Western Reserve would not enforce the note against him without first exhausting its remedies against Bhogal, Haas, and Western Reserve. Agarwal concedes this alleged verbal agreement is not included in the promissory note, but argues that parol evidence of the parties' oral discussions should have been admitted to prove he was induced by fraud to sign the note.

{¶40} The Supreme Court of Ohio addressed the admissibility of parol evidence in the context of a claim of fraudulent inducement in *Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7, as follows:

{¶41} "The parol evidence rule states that '*** the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.' 11 Williston on Contracts (4 Ed. 1999) 569-570, Section 33:4. ***

{¶42} "***

{¶43} "Nevertheless, the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement. *Drew v. Christopher Constr. Co., Inc.* (1942), 140 Ohio St. 1, *** paragraph two of the syllabus. See, also, *Union Mut. Ins. Co. of Maine v. Wilkinson* (1871), 80 U.S. (13 Wall.) 222, 231-232 ***.

{¶44} "***

{¶45} "However, *the parol evidence rule may not be avoided 'by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing.* Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms.' *Marion Prod. Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, paragraph three of the syllabus. *** [A] fraudulent inducement case is not made out simply by alleging that a statement or agreement made prior to the contract is different from that which now appears in the written contract. Quite to the contrary, attempts to prove such contradictory assertions is [sic] exactly what the Parol Evidence Rule was designed to prohibit.' Shanker, Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds *** (1989), 23 Akron L.Rev. 1, 7.

{¶46} "*** *Unless the false promise is *** consistent with the written instrument, evidence thereof is inadmissible*.' *Alling v. Universal Mfg. Corp*. (1992), 5 Cal. App. 4th 1412, 1436 ***. ***" (Emphasis added and footnote omitted.) *Galmish* at 27-30.

{¶47} Thus, parol evidence can only be introduced to challenge a written contract when the alleged oral misrepresentations are *consistent* with the written contract.

{¶48} The alleged oral agreement between Bullock and Agarwal, which conditioned Western Reserve's right to enforce the note against Agarwal on Western Reserve's prior exhaustion of remedies against the account debtors Bhogal, Haas, and Homecrest, is directly contradicted by the promissory note, pursuant to which Agarwal unconditionally promised to pay $65,000 by December 31, 2006. As a result, the parties' alleged oral agreement is not admissible to vary the terms of the promissory note.

{¶49} Although Agarwal does not contend on appeal that he was somehow prevented from reviewing the note before he signed it, we note that in his deposition, Agarwal admitted he read the instrument that was captioned as a promissory note before he signed it, and that he was given sufficient time to consult with counsel before he signed it. Further, he testified that Bullock did not pressure him into signing it. It should also be noted that Agarwal testified he has a Ph.D. and is a professor. He is obviously very intelligent and well-educated. We must therefore presume he understood the document he read and signed.

{¶50} In view of the foregoing evidence, we hold the trial court did not err in finding there was no genuine issue of material fact concerning whether the note was fraudulently induced.

{¶51} Further, we observe that Agarwal failed to allege his fraud defense with particularity as required by Civ.R. 9(B). That rule provides:

{¶52} "In all averments of fraud ***, the circumstances constituting fraud *** shall be stated with particularity. ***"

{¶53} This court set forth guidelines to determine whether a fraud claim meets the Civ.R. 9(B) requirement of particularity in *Johnson v. F & R Equip. Co*. (Sept. 27, 1996), 11th Dist. Nos. 94-T-5092, 94-T-5142 and 94-T-5147, 1996 Ohio App. LEXIS 4211. This court held: "'(1) plaintiff must specify the statements claimed to be false; (2) the complaint must state the time and place where the statements were made; and, (3) plaintiff must identify the defendant claimed to have made the statement.'" Id. at *6, quoting *Korodi v. Minot* (1987), 40 Ohio App.3d 1, 4.

{¶54} In his amended answer, for his defense of fraudulent inducement against Western Reserve, Agarwal alleged as follows: "Defendant was induced to execute the promissory note of Plaintiff through fraud as to the nature and/or legal effect of the instrument." Agarwal failed to allege the statements allegedly made by Western Reserve that were false. He failed to allege who allegedly made the statements or when or where they were made. In addition, Agarwal failed to allege how he was induced to sign the promissory note.

{¶55} Agarwal's assignment of error is overruled.

{¶56} For the sole assignment of error in its cross-appeal, Western Reserve contends:

{¶57} "The trial court erred by refusing to award Western Reserve its reasonable attorney's fees as required under the Promissory Note."

{¶58} The attorney fee provision in the instant promissory note provides: "The undersigned shall pay all costs of collection and attorney's fees incurred or paid by the holder in enforcing this promissory note when the same has become due, whether by acceleration or otherwise."

{¶59} This court in *J.B.H. Props. v. N.E.S. Corp*., 11th Dist. No. 2007-L-024, 2007-Ohio-7116, stated:

{¶60} "'When an award of attorney fees is not authorized by *** contract, the award is a matter of the trial court's sound discretion. See *Pasco v. State Auto Mut. Ins. Co*., 10th Dist. No. 04AP-696, 2005-Ohio-2387, at ¶9. The interpretation of a written contract, however, is a question of law. See *Alexander v. Buckeye Pipe Line Co*. (1977), 49 Ohio St.2d 158 ***, paragraph one of the syllabus. Therefore, in this case, the trial court's interpretation *** [of the contract] is subject to de novo review. See *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 1998-Ohio-186, ***, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147 ***. Absent ambiguity in the language of the contract, the parties' intent must be determined from the plain language of the document. See *Hybud Equip. Co. v. Sphere Drake* (1992), 64 Ohio St.3d 657, 665 ***.'" *J.B.H. Props*., supra, at ¶10, quoting *Keal v. Day*, 164 Ohio App.3d 21, 24, 2005-Ohio-5551.

{¶61} Western Reserve relies on *Nottingdale Homeowners' Assn.*, *Inc. v. Darby* (1987), 33 Ohio St.3d 32, and contends that it is entitled to attorney fees because parties may provide for the award of such fees by agreement.

{¶62} In *Nottingdale*, the Supreme Court of Ohio held that an attorney fee provision was "*** enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case." Id. at 37.

{¶63} In *Nottingdale* the Court noted that: "[i]t has long been recognized that persons have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. This freedom 'is as fundamental to our society as the right to write and to speak without restraint.' *** Government interference with this right must therefore be restricted to those exceptional cases where intrusion is absolutely necessary, such as contracts promoting illegal acts. ***" (Internal citation omitted.) Id. at 36.

{¶64} Furthermore, the Court stated that it "will not interfere with the right of the people of this state to contract freely and without needless limitation. A rule of law which prevents parties from agreeing to pay the other's attorney fees, absent a statute or prior declaration of this court to the contrary, is outmoded, unjustified and paternalistic." Id. at 37.

{¶65} First, we note that Agarwal has not filed any brief in opposition to Western Reserve's cross-appeal. He has, therefore, failed to argue or set forth any evidence of duress or unequal bargaining power. As a result, there is no issue before us concerning whether the attorney fee provision is unenforceable as against public policy.

{¶66} With respect to Western Reserve's request for attorney fees, the trial court found:

{¶67} "Although the court is entering judgment in favor of Plaintiff and against Defendant, the Court will not award Plaintiff its attorney's fees. The promissory note states: 'The undersigned shall pay all costs of collection and attorney's fees incurred or paid by the holder in enforcing this promisssory note when the same has become due, whether by acceleration or otherwise'. The note does not limit the obligation of the debtor to pay attorney's fees to circumstances of default; rather, the note specifically obligates the debtor to pay all costs of collection and attorney's fees when the note becomes due, whether by acceleration or otherwise. By the terms of the note, if the holder had written the debtor a letter saying, in essence, 'The note is soon to become due, please pay', the debtor is responsible for payment of all costs and fees incurred in the writing of such a letter. This is unconscionable."

{¶68} The trial court noted the attorney fee provision does not limit the obligation of the debtor to pay attorney fees to circumstances of default. However, we observe that the attorney fee provision in the note limits the award of attorney fees to those incurred in enforcing the note when it has become due. Moreover, R.C. 1301.21(A)(2) defines a "commitment to pay attorneys' fees" as an "obligation to pay attorneys' fees that arises in connection with the enforcement of a contract of indebtedness." We see no real distinction between the attorney fee provision at issue here and the statutory definition. In any event, in its complaint, Western Reserve alleged that Agarwal was in default for the balance due under the note. On appeal, Western Reserve concedes the

only attorney fees to which it would be entitled are those incurred as a result of Agarwal's default.

{¶69} In its judgment, the trial court stated that under the note, if Western Reserve sent a demand letter to Agarwal stating "the note is soon to become due, please pay," Agarwal would be liable for attorney fees in sending this letter, which the court found to be unconscionable. However, according to the attorney fee provision at issue, attorney fees are limited to those incurred in collecting the note when it has become due. Since the demand letter in the court's example was sent to the debtor before the note became due, he would not be liable for attorney fees incurred in sending it.

{¶70} Western Reserve argues at great length that the attorney fees provision in the promissory note is clear and unambiguous and therefore enforceable. However, this point is not in dispute. Agarwal does not argue on appeal and the trial court did not find the provision to be ambiguous.

{¶71} Moreover, the trial court's finding of unconscionability is not supported by case law. The Supreme Court of Ohio in *Hayes v. Oakridge Homes*, 122 Ohio St.3d 63, 2009-Ohio-2054, held:

{¶72} "'Unconscionability includes both '"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."' *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 383, *** quoting *Williams v. Walker-Thomas Furniture Co*. (C.A.D.C.1965), 350 F.2d 445, 449 ***; see also *Collins v. Click Camera & Video*, *Inc*. (1993), 86 Ohio App.3d 826, 834 ***. The party asserting unconscionability of a contract bears the

burden of proving that the agreement is both procedurally and substantively unconscionable. See generally *Ball v. Ohio State Home Servs.*, *Inc*., 168 Ohio App.3d 622, 2006-Ohio-4464 ***; see also *Click Camera*, 86 Ohio App.3d at 834 ***, 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").' *Taylor Bldg*. [*Corp. of Am. v. Benfield*,] 117 Ohio St.3d 352, 2008-Ohio-938, ¶34.

{¶73} "***

{¶74} "In determining whether an arbitration agreement is procedurally unconscionable, courts consider 'the circumstances surrounding the contracting parties' bargaining, such as the parties' "'age, education, intelligence, business acumen and experience, *** who drafted the contract, *** whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.'"' *Taylor Bldg*., 117 Ohio St.3d 352, 2008-Ohio-938 ***, ¶44, quoting *Collins v. Click Camera*, 86 Ohio App.3d at 834 ***, quoting *Johnson v. Mobil Oil Corp*. (E.D.Mich.1976), 415 F.Supp. 264, 268.

{¶75} "***

{¶76} "An assessment of whether a contract is substantively unconscionable involves consideration of the terms of the agreement and whether they are commercially reasonable. *John R. Davis Trust 8/12/05 v. Beggs*, 10th Dist. No. 08AP-432, 2008-Ohio-6311, ¶13; *Dorsey v. Contemporary Obstetrics & Gynecology*, *Inc*. (1996), 113 Ohio App.3d 75, 80 ***. Factors courts have considered in evaluating whether a contract is substantively unconscionable include 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. *John R. Davis Trust* at ¶13; *Collins v. Click Camera*, 86 Ohio App.3d at 834 ***. No bright-line set of factors for determining substantive unconscionability has been adopted by this court. The factors to be considered vary with the content of the agreement at issue." (Parallel citations omitted.) *Hayes*, supra, at 67-69.

{¶77} Based on our review of the record, Agarwal did not allege unconscionability in his amended answer. Nor did he argue the issue on summary judgment or argue it on appeal. Moreover, there is no evidence the provision at issue is either substantively or procedurally unconscionable.

{¶78} While we hold the trial court did not err in entering summary judgment in favor of Western Reserve, we hold the trial court erred in not awarding attorney fees.

{¶79} Western Reserve's assignment of error is sustained.

{¶80} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed in part; reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.