[Cite as *Schaefer v. Jim Brown, Inc.*, 2015-Ohio-1994.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ROBERT SCHAEFER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
		CASE NO. 2014-L-073
- vs -	:	
JIM BROWN, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 13 CV 002558.

Judgment: Affirmed.

Thomas J. Connick, Connick Law, LLC, 25201 Chagrin Boulevard, Suite 375, Cleveland, OH 44122 (For Plaintiffs-Appellants).

Harry A. Tipping, *Harold M. Schwarz*, *III*, and *Kathleen A. Hahner*, Stark & Knoll Co., L.P.A., 3475 Ridgewood Road, Akron, OH 44333-3163; *I. James Hackenberg*, Baker, Hackenberg & Henning Co., L.P.A., 100 Society National Bank Building, 77 North St. Clair Street, Painesville, OH 44077 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Robert Schaefer and Cathleen S. Schaefer ("the Schaefers"), appeal the trial court's decision to stay trial pending the outcome of arbitration of a dispute arising under a service contract between the Schaefers and appellees, Jim Brown, Inc. and Classic Auto Group. For the reasons that follow, we affirm the decision of the trial court.

{¶2} On November 26, 2013, the Schaefers filed a complaint against appellees in the Lake County Court of Common Pleas, alleging violations of Ohio's Consumer Sales Practices Act, unjust enrichment, fraud, theft by deception, and violations of Ohio's Corrupt Practices Act, and seeking declaratory and injunctive relief. Pursuant to Civ.R. 23, the Schaefers also seek to represent a class of consumers comprised of "[a]ll Classic Auto Group customers who in the course of a repair attempt and/or service on their vehicle were charged a Hazardous Waste or Shop Supply or similar such charge * * *."

{¶3} The Schaefers assert that appellees imposed an illegal hazardous waste/supply fee to three of their automobile repair invoices; a fee they allege has already been deemed a violation of Ohio law under *Brooks v. Kia Motors America, Inc.*, Franklin C.P. No. 05 CVH 03-3159, Ohio Attorney General Public Inspection File No. 10002406.

{¶4} Appellees filed an answer on February 4, 2014, as well as a motion to dismiss or, alternatively, to stay the case pending arbitration. Appellees contended that because a valid and enforceable arbitration agreement exists and applies to the Schaefers' claims, the court must dismiss the complaint and the parties' dispute must be resolved through binding arbitration. In the alternative, appellees requested that the case be stayed pending binding arbitration. Motion practice continued on this matter through July 2014.

{¶5} On August 5, 2014, the trial court denied appellees' motion to dismiss and granted the motion to stay the case pending arbitration. Pursuant to R.C. 2711.02(C), the trial court's entry is a final, appealable order ("an order * * * that grants or denies a

stay of a trial of any action pending arbitration * * * is a final order"). The Schaefers now appeal and assign one assignment of error for our review:

{¶6} "The trial court erred by not finding the subject arbitration clause procedurally unconscionable and therefore unenforceable."

{¶7} The arbitration clause at issue reads:

> **ARBITRATION REQUIRED: I AGREE WITH DEALER THAT INSTEAD OF ANY ARBITRATION IN A COURT, ANY DISPUTE, CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THE PARTS, MATERIAL SERVICES OR REPAIRS FURNISHED IN THIS TRANSACTION OR ANY OTHER TRANSACTION BETWEEN THE PARTIES RELATING TO THE SERVICE OR REPAIR TO OR SALE OF PARTS OR MATERIAL FOR THE DESCRIBED MOTOR VEHICLE, IF ANY, SHALL BE SETTLED BY BINDING ARBITRATION ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION UNDER ITS COMMERCIAL ARBITRATION RULES. SUCH ARBITRATION SHALL BE CONDUCTED IN LAKE COUNTY, OHIO. EACH PARTY SHALL PAY THEIR OWN COSTS. ANY JUDGEMENT THE AWARD ORDERED BY THE ARBITRATION MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF.** [sic.]

The document in which the clause appears is a one-page invoice; the clause appears on the right side of the document, directly above the signature line, and is written in an upper-case, bold font (as shown), in the same size font as the rest of the invoice.

{¶8} The enforceability of an arbitration clause "in light of a claim of unconscionability" is a legal issue reviewed de novo. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶2. "The determination of whether a contractual provision is unconscionable is fact-dependent and requires an analysis of the circumstances of the particular case before the court." *Bayes v. Merle's Metro Builders*, 11th Dist. Lake No. 2007-L-067, 2007-Ohio-7125, ¶6 (citation omitted). Accordingly, although no deference is afforded to the trial court's legal analysis on review, this court must afford "appropriate deference" to any factual findings made by the trial court. *Id*.; *Taylor, supra*, at ¶2.

{¶9} Ohio public policy favors arbitration; therefore, such provisions are ordinarily valid and enforceable. *See* R.C. 2711.01(A). As a result, courts must indulge a strong presumption in favor of arbitration and resolve any doubts in favor of arbitrability. *Bayes*, *supra*, at ¶7, citing *Ball v. Ohio State Home Servs., Inc.*, 9th Dist. Summit No. 23063, 2006-Ohio-4464, ¶6; *see also Taylor*, *supra*, at ¶26. "However, an arbitration provision may be held unenforceable under [R.C. 2711.01(A)] on 'grounds that exist at law or in equity for the revocation of any contract.'" *Ball*, *supra*, at ¶6. One such ground is unconscionability. *Id*.; *Bayes*, *supra*, at ¶7.

{¶10} "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."'" *Taylor*, *supra*, at ¶33, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383 (1993). An arbitration clause is rendered invalid for unconscionability where the clause is both procedurally and substantively unconscionable. *Bayes*, *supra*, at ¶8; *Ball*, *supra*, at ¶6. The party challenging the enforceability of the arbitration agreement has the burden to "prove a *quantum* of *both* procedural and substantive unconscionability." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶30, citing *Taylor*, *supra*, at ¶34 (emphasis added). In other words, the presence of both prongs, even slightly, would result in a finding that the arbitration clause is unconscionable. However, both prongs "need not be present in equal measure in the agreement in question." *Hayes*, *supra*, at ¶70 (Pfeifer, J., dissenting).

{¶11} This court has stated that "substantive unconscionability goes to the specific terms of the contract. * * * [T]he court should observe whether the terms of the

contract are commercially reasonable." *Bayes*, *supra*, at ¶9 (citations omitted). Applying this standard, the trial court found that the clause at issue is substantively unconscionable. Specifically, the trial court found the language ambiguous, the costs high, and the waiver of jury trial unarticulated. The parties have not appealed this finding; thus, our review is limited to the trial court's finding that the clause is not procedurally unconscionable.

{¶12} "Procedural unconscionability concerns the formation of the agreement, and occurs where no voluntary meeting of the minds was possible." *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, ¶7 (9th Dist.). In determining whether an arbitration clause is procedurally unconscionable, "courts consider the relative bargaining positions of the parties, whether the terms of the provision were explained to the weaker party, and whether the party claiming that the provision is unconscionable was represented by counsel at the time the contract was executed." *Id*. In relation to the relative bargaining positions of the parties, the following factors must be considered: "'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*, *supra*, at ¶43, quoting *Collins v. Click Camera & Video*, 86 Ohio App.3d 826, 834 (2d Dist.1993). Procedural unconscionability is not conditional on the existence of any one factor, but instead, is a fact-sensitive question that considers the surrounding circumstances of each individual case. *Bayes*, *supra*, at ¶6.

{¶13} The Schaefers assert the arbitration clause is procedurally unconscionable because (1) "the contract is adhesive in nature, thus preventing a

meeting of the minds"; (2) appellees "possess superior knowledge with their business/service contracts"; and (3) the Schaefers "were not provided any information about the American Arbitration Association Rules and/or associated rules and protocols."

{¶14} An adhesion contract is a "'standard-form contract prepared by one party, to be signed by the party in a weaker position, usu(ally) a consumer, who adheres to the contract with little choice about the terms.'" *Bayes*, *supra*, at ¶33, quoting *Black's Law Dictionary* 342 (8th Ed.2004) (citation omitted). "[T]he more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability." *O'Donoghue v. Smythe, Cramer Co.*, 8th Dist. Cuyahoga No. 80453, 2002-Ohio-3447, ¶24. However, not every contract of adhesion is unconscionable per se, and "it is incumbent upon the complaining party to put forth evidence demonstrating that the clause is adhesive and, moreover, that as a result of the adhesive nature, the clause is unconscionable." *Sikes v. Ganley Pontiac Honda, Inc.*, 8th Dist. Cuyahoga No. 82889, 2004-Ohio-155, ¶15; quoted in *Bayes*, *supra*, at ¶33.

{¶15} In its judgment entry, the trial court held:

> Plaintiffs have neglected to address factors the Court must consider relating to the ultimate bargaining positions of the contracting parties, including *age, education, intelligence, business acumen, and experience*. * * * Additionally, there is no indication that Plaintiffs were under duress, or in a stressful situation in which they needed immediate repairs to the vehicles, or that they faced pressure to purchase the services of Classic Mazda. Plaintiffs have not alleged that they have difficulty reading or that they attempted to ask any questions about the arbitration clause. Finally, the arbitration provision is very visible, as it is written in upper case letters on the repair orders, and appears directly above the signature line where Plaintiffs signed when service was requested.

> Therefore, the Court finds that Plaintiffs fail to demonstrate procedural unconscionability * * *.

{¶16} After a de novo review of the record, we agree. Although the invoices were preprinted and drafted by appellees, there is no evidence of any unconscionability in the formation of the contract between the parties. In fact, the signature agreeing to the arbitration provisions set forth above is directly below that portion of the agreement. Nothing in the record, including the Schaefers' own affidavits, allows us to conclude that the arbitration clause was concealed from the Schaefers, that they did not have an opportunity to read the language, that they were misled as to the contents of the clause, or that they were limited in understanding its impact in any way. In essence, there is nothing to suggest that the procedure employed to secure the Schaefers' signatures was in any way coercive or surreptitious.

{¶17} As stated above, the party challenging the enforceability of the arbitration agreement has the burden to prove both substantive and procedural unconscionability. Therefore, because the Schaefers have not established procedural unconscionability by even a quantum of evidence, their assignment of error is without merit.

{¶18} The judgment of the Lake County Court of Common Pleas, staying the case pending arbitration, is affirmed.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶19} I respectfully dissent.

{¶20} This matter involves an assertion by the Schaefers that Jim Brown, Inc. and Classic Auto Group imposed an illegal hazardous waste/supply fee to three of their automobile repair invoices. Jim Brown, Inc. and Classic Auto Group contend that the Schaefers are bound by an arbitration agreement.

{¶21} In affirming the decision of the trial court to stay the matter pending the outcome of arbitration, the majority finds that the Schaefers have not established procedural unconscionability. For the reasons stated, I disagree.

{¶22} When enacted, Ohio's Arbitration Act has been codified in Revised Code Chapter 2711, and arbitration was encouraged as a method of settling disputes. *See Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464 (1998). "Ohio's strong policy favoring arbitration is consistent with federal law supporting arbitration." *See* Federal Arbitration Act, Section 2, Title 9, U.S. Code; *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶26, fn.1.

{¶23} However, the black letter law in Ohio supporting arbitration belies the data wherein arbitration is contested and disfavored. *See Consumer Protection Financial Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1028(a),* consumerfinance.gov (March 2015) ("The advantages and disadvantages of pre-dispute arbitration provisions in connection with consumer financial products or services — whether to consumers or to companies — are are fiercely contested. Consumer advocates generally see pre-dispute arbitration as unfairly restricting consumer rights and remedies. Industry

representatives, by contrast, generally argue that predispute arbitration represents a better, more cost-effective means of resolving disputes that serves consumers well.") (The Consumer Financial Protection Bureau's findings establish that forced arbitration clauses impose conditions that restrict consumers' rights, block their access to courts, and very few consumers actually go to individual arbitration to settle disputes. Few practices are as abusive, unfair, and deceptive as the widespread use of forced arbitration clauses in most consumer contracts.)

{¶24} "We review the legal issue of whether an arbitration provision in an underlying contract is unconscionable de novo." *Wascovich v. Personacare of Ohio, Inc.*, 190 Ohio App.3d 619, 2010-Ohio-4563, ¶23 (11th Dist.). "Federal courts in cases brought under the Federal Arbitration Act have [also] applied de novo review to issues of contract interpretation and enforceability of an arbitration clause alleged to be unconscionable." *Benfield*, *supra,* at ¶34, citing *Edwards v. HOVENSA, L.L.C.*, 497 F.3d 355, 362-363 (3rd Cir.2007).

{¶25} "'Unconscionability embodies two separate concepts: (1) substantive unconscionability (* * *) and (2) procedural unconscionability (* * *).' (Internal citations omitted.) *Hurst* [*v. Enterprise Title Agency, Inc.,* 157 Ohio App.3d 133, 2004-Ohio-2307,] ¶21 [(11th Dist.)]. To establish unconscionability, the party claiming it must demonstrate both substantive and procedural unconscionability. *Id.*

{¶26} "'Substantive unconscionability refers to the actual terms of the agreement. Contract terms are unconscionable if they are unfair and commercially unreasonable.' *Porpora v. Gatliff Building Co.,* 160 Ohio App.3d 843, 2005-Ohio-2410,

at ¶8, * * *." (Parallel citation omitted.) *Renken Ent. v. Klinck*, 11th Dist. Trumbull No. 2004-T-0084, 2006-Ohio-1444, ¶18-19.

{¶27} Before discussing procedural unconscionability, this writer points out here, and as stated in the majority opinion, that the trial court in the case sub judice found the following arbitration clause substantively unconscionable:

{¶28} "ARBITRATION REQUIRED: I AGREE WITH DEALER THAT INSTEAD OF ANY ARBITRATION IN A COURT, ANY DISPUTE, CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THE PARTS, MATERIAL SERVICES OR REPAIRS FURNISHED IN THIS TRANSACTION OR ANY OTHER TRANSACTION BETWEEN THE PARTIES RELATING TO THE SERVICE OR REPAIR TO OR SALE OF PARTS OR MATERIAL FOR THE DESCRIBED MOTOR VEHICLE, IF ANY, SHALL BE SETTLED BY BINDING ARBITRATION ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION UNDER ITS COMMERCIAL ARBITRATION RULES. SUCH ARBITRATION SHALL BE CONDUCTED IN LAKE COUNTY, OHIO. EACH PARTY SHALL PAY THEIR OWN COSTS. ANY JUDGEMENT THE AWARD ORDERED BY THE ARBITRATION MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF."

{¶29} The trial court found the arbitration clause substantively unconscionable. The trial court determined the language ambiguous, the costs high, and the waiver of jury trial unarticulated. No party appealed the trial court's holding.

{¶30} Turning now to procedural unconscionability, the Schaefers assert on appeal that the arbitration clause is procedurally unconscionable and, therefore, unenforceable. Specifically, the Schaefers allege the arbitration clause is procedurally

unconscionable because the contract is adhesive, thereby preventing a meeting of the minds; Jim Brown, Inc. and Classic Auto Group possess superior knowledge; and they were never provided any information about any AAA rules or protocol.

{¶31} Based on the totality of the circumstances and the facts presented, this writer agrees with the Schaefers that the arbitration clause is procedurally unconscionable.

{¶32} "[P]rocedural unconscionability requires a court to consider factors related to the bargaining power of each party, 'including age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, and who drafted the contract.' *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶31, * * *. 'Procedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible.' *Porpora* [,*supra*,] at ¶7, * * *." (Parallel citations omitted.) *Bayes v. Merle's Metro Builders*, 11th Dist. Lake No. 2007-L-067, 2007-Ohio-7125, ¶11. The Supreme Court of Ohio has held that "[a]ll of the factors must be examined and weighed in their totality in determining whether an arbitration agreement is procedurally unconscionable." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶30.

{¶33} This case involves a consumer transaction. There is a distinction between a consumer contract and a commercial contract. "Courts should scrutinize consumer contracts more closely for unconscionability, especially regarding the parties' ability to deal at arm's length, and their relative bargaining power." *Manley v. Personacare of Ohio*, 11th Dist. Lake No. 2005-L-174, 2007-Ohio-343, ¶54 (O'Toole, J., dissenting). Although "[t]he law favors arbitration: it abhors contracts of adhesion." *Id.* at ¶61.

{¶34} The arbitration provision relied upon by Jim Brown, Inc. and Classic Auto Group not only fails to make the cost reasonable for a consumer, it makes the cost prohibitive. For example, the illegal shop supply fees in this case total around $13.00, but a non-refundable $200 is required to file a claim. This is simply nonsensical.

{¶35} The arbitration provision is procedurally unconscionable because the service contract is adhesive in nature, thereby preventing a meeting of the minds. Jim Brown, Inc. and Classic Auto Group possess superior knowledge with respect to their business/service contracts. Jim Brown, Inc. and Classic Auto Group never provided the Schaefers with any information about the AAA rules and protocols that governed the arbitration provision and they received no explanation whatsoever. Thus, the Schaefers did not have the opportunity to understand the contract terms. They had no ability to meaningfully negotiate. They had no meaningful choice. At the time the Schaefers signed the service agreement containing the arbitration clause, they had no knowledge of the AAA rules or requirements.

{¶36} The "age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, and who drafted the contract" establish procedural unconscionability in this case as Jim Brown, Inc. and Classic Auto Group clearly possessed superior knowledge. *Bayes, supra,* at ¶11. In rendering its decision, I believe the trial court failed to consider the issue of adhesion which weighs heavily toward procedural unconscionability. I further believe the trial court failed to consider the totality of the circumstances as the Supreme Court of Ohio instructs Ohio courts to do. *Hayes, supra,* at ¶30. As indicated, there certainly was no meeting of the minds in this case.

{¶37} For the reasons stated, I respectfully dissent.