[Cite as *Coble v. Toyota of Bedford*, 2004-Ohio-238.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 83089

SARAH COBLE,	:	ACCELERATED CALENDAR
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	AND
TOYOTA OF BEDFORD, et al.,	:	OPINION
Defendants-Appellees	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		JANUARY 22, 2004
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-480190
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Plaintiff-Appellant:	DAVID LEVIN RONNA LUCAS Krohn & Moss, LTD. 120 West Madison Street Tenth Floor Chicago, Illinois 60602
For Defendant-Appellee:	ROBERT A. POKLAR HEATHER ROSS Robert A. Poklar &

Associates, Inc.
10100 Brecksville Road
Brecksville, Ohio 44141

ANNE L. KILBANE, P.J.

{¶1} Sarah Coble appeals from an order of Judge Michael J. Russo that granted a motion to stay, pending arbitration, her complaint against appellees Toyota of Bedford ("Toyota") and several of its employees for Consumer Trade Practice Act violations,[1] fraud, and conspiracy. She claims the arbitration clause in her automobile lease is unconscionable and unenforceable, that the judge erred by not holding the motion for stay in abeyance pending the outcome of further discovery, and that he failed to receive evidence about the enforceability of the clause. We affirm.

{¶2} From the record we glean the following: On June 20, 2002, Coble obtained a 2002 Celica from Toyota through a lease agreement that stated in part:

> **"By signing below, you agree that at the request of either you or us any controversy or claim (described in Section 44 of this Lease) between you and us shall be determined by neutral binding arbitration by either National Arbitration Forum ("NAF") or J*A*M*S/Endispute ("J*A*M*S"), (the "Administrator") in accordance with: (i) the Federal Arbitration Act; (ii) the Administrator's rules and procedures in effect at the time the claim is filed; and (iii) the rules set forth in Section 44 of this Lease. By initialing this Section, you acknowledge that you have read, understand and agree to the terms of this Section and**

[1]R.C. 1345.01 *et seq.*

Section 44."[2]

{¶3} Section 44 states in part:

> **"Arbitration- Except as set forth below, any controversy or claim between you and us, including any claim by you against any of our parents, wholly or majority owned subsidiaries, affiliates, predecessors, successors, servicers and assigns; and all of the officers, directors and employees of such entities, shall at the request of either you or us, be determined by neutral binding arbitration by one of the following Administrators selected by you: National Arbitration Forum ("NAF")...or JAMS/Endispute...in accordance with: (i) the Federal Arbitration Act; (ii) the Administrator's rules and procedures in effect at the time the claim is filed; and (iii) the rules set forth in this Section. If you fail to select an Administrator within twenty (20) days from the request for arbitration, we will select one. You agree that the right to elect arbitration as set forth herein, can be exercised, to the extent permitted by law, by any third party providing any product or service in connection with this Lease only if such third party is named as a co-defendant with us in a claim asserted by you. Any claims arising out of or relating to the Lease or any related agreements or relationships resulting therefrom are subject to arbitration, including, but not limited to: claims relating to the negotiation of the Lease, advertising or solicitation to the Lease, Lease charges, Least termination, violations of the Consumer Leasing Act, state leasing and disclosure laws, federal or state consumer protection statutes or regulations; enforcement of any obligation under the Lease; and whether a matter is subject to this Arbitration Agreement. ..."**

{¶4} Shortly thereafter she attempted to rescind the contract but was unsuccessful and, approximately three months later she filed a complaint against the dealership and three of its employees. Toyota moved to stay the proceedings citing the arbitration clause, the judge granted the motion and this appeal

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[2]Lease Agreement, Section 21.

followed on assignments of error set forth on appendix A.

STANDING TO ENFORCE A VALID AGREEMENT TO ARBITRATE

{¶5} Coble contends that because Toyota assigned her lease agreement to Toyota Lease Trust it had no evidence that it retained any rights under that agreement to utilize arbitration or to seek a stay. Toyota, however, points to Section 44 of the agreement which provides that "any party to the Lease may bring an action *** to compel arbitration of any controversy or claim in which this Section applies ..." Coble, within this assertion that the judge erred in granting the stay, alludes that the written agreement to arbitrate must be valid before a stay can be granted but fails to support this contention with facts.

{¶6} We review a decision to stay the proceedings pending arbitration under an abuse of discretion standard.[3] An abuse of discretion implies that the judge's attitude was unreasonable, arbitrary, or unconscionable.[4] Public policy encourages arbitration as a method to settle disputes,[5] and a presumption arises favoring arbitration when the claim in dispute falls within the scope of the

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[3]*Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 410, 701 N.E.2d 1040.

[4]*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

[5]*Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 711-12, 590 N.E.2d 1242; *Bellaire City Schools Bd. of Edn. v. Paxton* (1979), 59 Ohio St.2d 65, 70, 391 N.E.2d 1021; *Griffith v. Linton* (1998), 130 Ohio App.3d 746, 750-51, 721 N.E.2d 146.

arbitration provision.[6] Therefore, a judge should give effect to an arbitration provision in a contract "unless it may be said with positive assurance that the subject arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[7]

{¶7} Arbitration is governed by R.C. 2711.02 which states in relevant part:

> **"If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration."**

{¶8} Throughout the course of litigation, Coble has asserted fraudulent inducement claims about the contract itself, not that she was fraudulently induced to signing the arbitration provision. As we recognized in *Krafcik v. USA Energy Consultants:*[8]

> **"A claim that the contract containing the arbitration clause was induced by fraud does not defeat a motion to compel arbitration unless the claimant can demonstrate specifically that the arbitration clause itself was fraudulently induced."**[9]

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[6]*Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464, 1998-Ohio-294, 471, 700 N.E.2d 859.

[7]*Neubrander v. Dean Witter Reynolds, Inc.* (1992), 81 Ohio App.3d 308, 311, 610 N.E.2d 1089.

[8](1995), 107 Ohio App.3d 59, 63, 667 N.E.2d 1027.

[9]Id. citing *In re Mgt. Recruiters Internatl., Inc. v. Nebel* (N.D. Ohio, 1991), 765 F.Supp. 419, 420.

{¶9} The rationale behind this rule is that a broad arbitration clause requires that the question of fraud in the inducement of the contract itself be subject to arbitration.[10] Therefore, the only relevant issue is whether the arbitration clause itself was fraudulently induced, and Coble makes no such claim. Whether a release of liability is void or voidable upon an allegation of fraud is dependent on the nature of the fraud alleged, and Coble confuses fraud in the factum with fraud in the inducement. *Haller v. Borror Corp.*[11] provides an example of fraud in the inducement and fraud in the factum.

> **"A release is obtained by fraud in the factum where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement. Thus, when the actions or representations of the releasee so impair the mind and judgment of the releasor that he fails to understand the nature or consequence of his release, there has been no meeting of the minds."[12]**

{¶10} A release obtained by fraud in the factum is void ab initio, while a release obtained by fraud in the inducement is merely voidable upon proof of fraud.[13]

{¶11} Where device, trick, or want of capacity produces "'no

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[10]*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270.

[11](1990), 50 Ohio St.3d 10, 13, 552 N.E.2d 207, 210.

[12]Id.

[13]Id. citing *Picklesimer v. Baltimore & Ohio RR. Co.* (1949), 151 Ohio St. 1, 84 N.E.2d 214.

knowledge on the part of the releasor of the nature of the instrument, or no intention on his part to sign a release or such a release as the one executed,'" there has been no meeting of the minds.[14] In cases such as these, the act or representation of one party against the other constitutes fraud in the factum and renders the release obtained void ab initio.

{¶12} Where, however, there is mere misrepresentation by one party of the contents of a release, the agreement is not void for fraud in the factum when the releasor has an opportunity to read and understand the document before execution. "A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed. * * * If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs."[15]

{¶13} So long as the releasor understands the nature and character of his act of release and that the releasee will no longer be liable on the claims concerned, or has an opportunity to do so, the fraud is in the inducement only and does not constitute a basis to find the agreement void.[16] Coble alleges in her

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[14]*Picklesimer v. Baltimore & Ohio RR. Co.*, 151 Ohio St. at 5, 84 N.E.2d at 216.

[15]*Dice v. Akron, Canton & Youngstown RR. Co.* (1951), 155 Ohio St. 185, 191, 98 N.E.2d 301, 304, reversed, cited by *Haller v. Borror Corp.*, supra.

[16]*Haller v. Borror Corp.*, supra.

complaint that Toyota: (1) inflated the manufacturer's suggested retail price ("MSRP"), (2) misrepresented her financial ability to lease and not purchase the car, and (3) failed to attach the manufacturer's label to the car. She never claims that she was unaware that she was signing a lease or that she was unable to read and understand the agreement prior to signing. She only claims that she was fraudulently induced into signing the contract based on Toyota's misrepresentations. This is fraud in the inducement, making any alleged fraud still subject to arbitration. There is no error in granting Toyota's motion to stay. This third assignment of error lacks merit.

UNCONSCIONABILITY OF THE ARBITRATION CLAUSE

{¶14} Coble expands upon the previous assignment of error and asserts it was error to grant the motion to stay because the arbitration provision was unconscionable and unenforceable. Although there is a presumption favoring the enforcement of an arbitration clause within a contract, it is not enforceable if it is found to be unconscionable.[17] Under Ohio law, a contract clause is unconscionable where there is the absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party.[18] In making such a determination, we apply a two-part test: (1) are

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[17]*Sutton v. Laura Salkin Bridal & Fashions* (Feb. 5, 1998), Cuyahoga App. No. 72107.

[18]*Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294.

there unfair and unreasonable contract terms, i.e., "substantive unconscionability;" and (2) are there individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., "procedural unconscionability."[19] Satisfying one prong of the test and not the other precludes a finding of unconscionability.[20]

{¶15} Coble claims unconscionablity because of the cost imposed by arbitration, but she provided no evidentiary material to the judge to demonstrate the unconscionablity of the arbitration provision and there is nothing in the record to support the elements of the unconscionability test. Because there was no evidence of disputed facts on one prong of the unconscionability test, there was no error in granting the motion to stay.

{¶16} Additionally, the issue of unconscionability was raised for the first time on appeal, meaning that this issue was never properly before the judge. A party cannot assert new legal theories for the first time on appeal.[21] Appellant did not raise these issues at the trial court level and has waived the assertion

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[19]*Sikes v. Ganley Pontiac Honda*, (Sept. 13, 2001), Cuyahoga App. No. 79015, citing *Collins v. Click Camera & Video, Inc.*, supra.

[20]*DePalmo v. Schumacher Homes*, Stark App.No. 2001CA272, 2002-Ohio-772.

[21]See *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220, 574 N.E.2d 457 (It is axiomatic that issues not properly presented to the trial court for consideration may not be considered on appeal.)

of any error on appeal.[22] This fourth assignment of error lacks merit.

EVIDENCE AGAINST THE ENFORCEABILITY OF THE ARBITRATION PROVISION.

{¶17} In her first and second assignments of error, Coble contends that the judge should have permitted her to obtain discovery and receive evidence about the enforceability of the arbitration clause before granting the stay. Although below she challenged Toyota's standing to raise the defense of arbitration, she again failed to raise the issue of unconscionability at the trial level or assert that further discovery was necessary to prove the lack of enforceability. She moved to compel Toyota to "File Better Answers," however, none of the requested answers related to the arbitration provision which she now seeks to void.

{¶18} To overcome the presumption favoring arbitration, it was necessary for Coble to raise the issue of unconscionablity and the need for further discovery before the judge. On its face, the arbitration provision provides that all questions about whether the contract is itself subject to arbitration are to be resolved in arbitration.

{¶19} Section 44 of the Lease contract, entitled "Arbitration", provides in part:

> **"Any claims arising out of or relating to the Lease or any related agreements or relationships resulting therefrom are subject to arbitration, including, but not limited to:**

[22] *Nozik v. Kanaga* (Dec. 1, 2000), Lake App. No. 99-L-193.

> **claims relating to the negotiation of the Lease, advertising or solicitation to the Lease, Lease charges, Lease termination, violations of the Consumer Leasing Act, state leasing and disclosure laws, federal or state consumer protection statues or regulations; enforcement of any obligation under the Lease; *and whether a matter is subject to the Arbitration Agreement.*"**[23]

{¶20} Therefore, "in the face of a valid arbitration clause, questions regarding the validity of the entire contract must be decided in arbitration."[24] The judge was not required to permit further discovery on an issue that was never raised.

{¶21} The judgment is affirmed.

Judgment affirmed.

FRANK D. CELEBREZZE JR., and TIMOTHY E. MCMONAGLE, JJ., concur.

APPENDIX A: ASSIGNMENTS OF ERROR

[23]Emphasis added.

[24]*Krafcik*, supra, citing *Weiss v. Voice/Fax Corp.* (1994), 94 Ohio App.3d 309, 313, 640 N.E.2d 875. See, also, *Smith v. Snap-On Tools Corp.* (Jan. 6, 1993), Hamilton App. No. C-910902.

"I. THE TRIAL COURT ERRED BY DENYING PLAINTIFF'S REQUEST TO HOLD DEFENDANTS' MOTION FOR STAY IN ABEYANCE UNTIL DISCOVERY COULD BE CONDUCTED."

"II. THE TRIAL COURT ERRED BY COMPELLING ARBITRATION WITHOUT RECEIVING EVIDENCE RELATING TO THE ENFORCEABILITY OF THE ARBITRATION CLAUSE."

"III. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO STAY."

"IV. THE TRIAL COURT ERRED BY STAYING PLAINTIFF'S CLAIMS AGAINST DEFENDANTS WHEN THE ARBITRATION PROVISION WAS UNCONSCIONABLE AND UNENFORCEABLE."

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).