IN THE SUPREME COURT OF OHIO

OLD WORLD CLASSICS, LLC, Appellant v. MATTHEW & KATHERINE SNYDER, Appellees.	Case Nos. 2023-1616 & 2024-0074 On Appeal from the Medina County Court of Appeals Ninth Appellate District C.A. Case No. 23CA0019-M

MERIT BRIEF OF APPELLEES MATTHEW & KATHERINE SNYDER

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INTRODUCTION

It should be stated at the outset: The posture of this case is highly unusual. On the one hand, there is the procedural issue of whether Revised Code 2711.03 requires a trial court to hold an oral hearing on a motion to compel arbitration. That issue was injected *sua sponte* into the case at the eleventh hour by the court of appeals despite the fact that the trial court and the parties all universally agreed that an oral hearing was unwarranted. Even now, there is no adversity among the parties on the issue, as they both continue to agree that an oral hearing was not required. Thus, the Court must decide whether it wants to resolve once-and-for-all this procedural issue that has bedeviled lower courts for decades in a case where it will not have received arguments on both sides of the issue.

On the other hand, there is the substantive issue of whether the arbitration clause was void due to fraudulent inducement. That issue was briefed before both the trial court and the court of appeals, and it involves twenty-one exhibits that span over 300 pages in support of fraudulent inducement specifically related to the arbitration clause. The Court has never been faced with such a ripe record to advance the law on how an arbitration clause can be defeated by evidence of fraudulent inducement, a holding that could offer much-needed guidance to lower courts and consumers as they face increased arbitration clauses from businesses. Thus, the Court must decide whether it wants to seize a once-in-a-generation opportunity to resolve a substantive issue that it did not formally accept for review.

Although the posture of the case may be unusual, the Court can look to its usual precedent regarding appellate review. Specifically, the appellate review principles of serving justice, exercising judicial restraint, offering precedential guidance, and fostering judicial economy provide straightforward answers as to how to handle this case. Applied consistently and equally,

these appellate review principles can help resolve both of the aforementioned issues by applying the tried-and-true law to the facts of this case.

STATEMENT OF THE FACTS

The Appellees Matthew & Katherine Snyder ("Snyders"), who were new construction homebuyers, brought this action against the Appellant Old World Classics, LLC ("Old World"), a home construction company, in the Medina County Court of Common Pleas by alleging, *inter alia*, fraudulent misrepresentations and violations of the Home Construction Service Suppliers Act. (*See* Trial Index ("TI") # 2, Compl. ¶¶ 24-32). In their Verified Complaint, the Snyders alleged that the arbitration clause in the construction contract was voided due to fraudulent misrepresentations made by Old World regarding the arbitration clause itself. (*See id*. at ¶ 23).

The merits of the case were effectively put on hold as the parties litigated the preliminary question of proper venue, that is, whether the case should be heard in public before a trial court or in private before an arbitrator. From this preliminary question of venue arose the procedural issue and the substantive issue, the facts of which are stated in turn.

I. Facts Related to the Procedural Issue

The procedural issue – whether a motion to compel arbitration triggered a mandatory oral hearing – was introduced *sua sponte* by the court of appeals. Neither party had requested an oral hearing from the trial court. On appeal, neither party raised the lack of an oral hearing as an issue for appellate review. (*See* Appeal Index ("AI") # 10, Brief of Appellants Matthew & Katherine Snyder ("Snyder Ct. App. Br."); AI # 16, Brief of Appellee Old World Classics, LLC ("Old World Ct. App. Br.")). Both parties, in fact, explicitly briefed the court of appeals on the impropriety of remanding the case for an oral hearing. (*See* AI # 12, Appellee's Motion to Stay Pending Supreme Court Decision ("Old World Mot. Stay"); AI # 14, Appellant's Response to Appellee's Motion to

Stay Pending Supreme Court Decision ("Snyder Opp. Stay")). As a result, the parties lack any adversity whatsoever on the procedural issue.

II. Facts Related to the Substantive Issue

In contrast to the procedural issue, the substantive issue – whether the arbitration clause was fraudulently induced – always has been at the core of the case, so much so that the Snyders meticulously developed a vast factual record to support their Verified Complaint. It is not hyperbole to state that the amount of evidence in support of fraudulent inducement of the arbitration clause is unprecedented for a case before this Court. In its merit brief, even Old World pointed out to the Court that the factual record spans over 300 pages. (*See* Merit Brief of Appellant Old World Classics, LLC ("Old World S. Ct. Br.") at 6). That factual record can be divided temporally between (A) the pre-contract period, and (B) the post-contract period.

A. Pre-Contract Period

In 2020, the Snyders purchased land in Medina County and decided to engage a home construction company to build their home. (*See* TI # 2, Compl. ¶ 4). The Snyders met with Old World and other construction companies in the Fall of 2020; while they were considering their options, they received from Jim Yezbak, Old World's 'project visionary,' an email that was, he admitted, "geared towards getting you to move now vs. later," because "I will need to increase our pricing by $6.00/sq ft if we wait until after November 1st to sign a contract to build." (*See* TI # 16, Response in Opposition to Motion to Stay and Compel Arbitration ("Snyder Opp. Arbitr.") at Exh. A).

Spurred by a substantial price increase in less than ten days, the Snyders reviewed Old World's form contract that it furnished on October 22, 2020. (*See id*. at 4). Upon review, the Snyders were vocally reluctant to agree to an arbitration clause. (*See id*. at Exh. B). On October 28, 2020, the Snyders therefore met with Yezbak during which time they inquired whether Old

World ownership had a history of legal disputes, explaining that the absence of such a history would be meaningful and allay their concerns regarding the proposed arbitration clause. (*See* TI # 16, Snyder Opp. Arbitr. at Exhs. B, C).

At the meeting, the Snyders specifically asked Yezbak about the history of legal disputes of a similarly-named company, what turned out to be Old World Classics by Phil Eggeman, Inc. ("Old World Predecessor"), because the morning of the meeting the Snyders had searched the website of the Stark County Court of Common Pleas, which is the county in which Old World is located; although the dockets and corresponding documents were not viewable online, they saw what appeared to be a litigation history of the similarly-named company. (*See id*.). Yezbak explained that those cases were for the home construction company of the father of Old World's owner and that the ownership of Old World was completely separate from Old World Predecessor. (*See id*. at Exhs. B, C, D).

Satisfied by the representation that Old World had separate ownership from Old World Predecessor, the Snyders turned the discussion to any legal disputes that involved Old World and its ownership. (*See id*.). Yezbak answered that all told there only had been one arbitration, which involved a homeowner who complained that his home had been improperly constructed, but Yezbak explained that the homeowner had insisted that it be constructed as it was. (*See id*.). When asked when the arbitration took place, Yezbak answered that he could not recall the date but stated that it was within the past five years. (*See id*.).

In light of the representations made by Yezbak on behalf of Old World, the Snyders that same day revised the proposed contract to add the following language to the arbitration clause because it affirmed the only positive representation by Yezbak of a legal dispute that involved Old World and/or its ownership: "Contractor represents that it has been a party to one arbitration in the

last five years, which it previously disclosed to Owners." (TI # 16, Snyder Opp. Arbitr. at Exh. E). Yezbak replied the following day that he did not "see any issues" with the proposed language, though he had "sent it to [his] other partners just to confirm." (*Id*. at Exh. F). Later that same day, Yezbak emailed the Snyders regarding the added language in the arbitration clause: "This is what you get with a non-attorney . . . hah . . . I misspoke – we've never been in arbitration before. We have been party to 1 mediation that we mutually resolved (what I mentioned while we were talking [yesterday]). I think we're ok with the other wording in Paragraph 30, but we should take out the arbitration part." (*Id*. at Exh. G (parenthetical and ellipses in original)).

On October 31, 2020, the Snyders signed the contract that included the arbitration clause as originally proposed in order to avoid a substantial price increase the next day, doing so by relying upon Old World's two representations: (1) that its owner had not been the owner of the litigation-plagued Old World Predecessor, and (2) that Old World and its ownership only had been involved in one mediation. (*See id*. at 6). All of the facts stated thus far occurred pre-contract and were inducements for the Snyders to agree to an arbitration clause. (*See* TI # 2, Compl. ¶ 8).

B. Post-Contract Period

After the contract was signed, the construction turned into a nightmare that left the home unfinished and in an unworkmanlike state that remains to this day. (*See id*. at ¶ 20). After it became clear that Old World was unable and unwilling to properly complete construction of the home, the Snyders commenced the lawsuit and began to conduct their own discovery into Old World's pre-contract inducements to accept the arbitration clause. As discussed, the specific representations by Old World were (1) Old World Predecessor had separate ownership from Old World, and (2) Old World and its ownership's legal history only comprised one mediation. (*See id*. at ¶ 7; TI # 16,

Snyder Opp. Arbitr. at 4-6). The Snyders discovered that both mutually exclusive representations were in fact false.

First, regarding the representation that Old World Predecessor had separate ownership, Old World double-downed on that story with the trial court: Old World's owner, who in this case has stylized his name as Andrew Eggeman, submitted an affidavit in which he attested that Old World Predecessor "was my father's company." (TI # 8-9, Defendant's Motion to Stay and Compel Arbitration ("Old World Mot. Arbitr.") at Andrew Eggeman Affidavit (Feb. 15, 2023) ("Eggeman Affidavit"), ¶ 14). The difficulty of divining the veracity of who actually owned Old World Predecessor was magnified by the fact that his father's name is Philip R. Eggeman, and Andrew Eggeman's formal name is Philip A. Eggeman, though he even more confusingly has presented himself in the past as Phillip A. Eggeman, P. Andrew Eggeman, and Andrew P. Eggeman (collectively "Eggeman"). (*See* TI # 16, Snyder Opp. Arbitr. at 1). Add to the confusion the fact that the party in this case is named Old World Classics, LLC, and the other company in question, *i.e.*, Old World Predecessor, was named Old World Classics by Phil Eggeman, Inc. (*See id*. at 1-2).

The Snyders did not have cause to sort through the nuances of the various Philip Eggemans and Old World Classics to discover the true ownership of Old World Predecessor until after they were induced to agree to the arbitration clause, and it was a laborious task at that. As stated, the Stark County Court of Common Pleas website allowed for a case name search, but the docket and underlying documents were not viewable online. The Snyders consequently had to travel to Canton in order to review in person the documents filed in Old World Predecessor lawsuits. (*See id*. at 1).

In those cases, the Snyders found exhibits to pleadings that included a promissory note in which Eggeman was identified as the President of Old World Predecessor but without indication

of his ownership of Old World Predecessor. (*See* TI # 16, Snyder Opp. Arbitr. at Exh. M). Another case included a pleading that stated that the "ownership of Old World Classics by Phil Eggeman, INC [*i.e.*, Old World Predecessor] changed ownership on December 31st, 2007." (*Id*. at Exh. Q). The Snyders then broadened their geographic search beyond Stark County and found more cases against Old World Predecessor in other counties. Those cases included exhibits to pleadings that revealed that Eggeman wore other hats at Old World Predecessor in addition to President, such as Contact Person, Secretary, and Vice President. (*See id*. at Exhs. J, K, L).

After traveling to numerous courthouses throughout Northeast Ohio, the mystery of Old World Predecessor's "changed ownership" in 2007 remained, however. The clue embedded in those cases was the realization that the litigation that Old World Predecessor faced resulted in bankruptcies, including the personal bankruptcy of Eggeman. The Snyders had to establish a federal PACER account and link a credit card to access the personal bankruptcy petition of Eggeman, which was filed under the name of Phillip A. Eggeman, not his apparently actual name of Philip A. Eggeman. (*See id*. at 9). There they found the smoking gun: Buried within the eighty-eight-page bankruptcy petition was a statement that Eggeman's personal property included "Old World Classics by Phil Eggeman Inc. [*i.e.*, Old World Predecessor] Closed July 2009; ***100% Ownership***." (*Id*. at Exh. R (emphasis added)). Only as a result of a necessarily time-consuming investigation hampered by Old World's subterfuge was it discoverable that Eggeman was the sole owner of Old World Predecessor, rendering the representation that Old World had separate ownership from Old World Predecessor to be absolutely false.

Second, regarding the representation that Old World and its ownership only had been involved in one mediation, Eggeman, as Old World's owner, clearly had been involved in more than one mediation by way of Old World Predecessor. Old World Predecessor, of which Eggeman

was the 100% owner, was sued in more than twenty lawsuits by subcontractors, suppliers, and homeowners. (*See* TI # 16, Snyder Opp. Arbitr. at 10). Many of those cases included serious allegations, including for fraud. (*See id*.).

In *Graves Lumber Co. v. Adams*, for example, the homeowners pled a cause of action for fraud, alleging that Old World Predecessor "intended to mislead the [homeowners] into believing that payment was made to the subcontractors, laborers, or providers of materials for labor performed or material furnished." (*Id*. at Exh. H).

Likewise, in *Old World Classics by Phil Eggeman, Inc. v. Gilbert*, the homeowners alleged that Old World Predecessor committed fraud by "misrepresenting that plans for the Residence . . . were prepared by a licensed architect when, in fact, they were prepared by an individual who was not an architect, licensed or otherwise." (*Id*. at Exh. J). Old World Predecessor also allegedly "falsely swore that it had 'paid in full for all work performed and for all labor, materials, machinery or fuel furnished in connection with making of improvements . . .' to induce the payment to [Old World Predecessor]." (*Id*.).

As the sole owner of Old World Predecessor, Eggeman naturally was involved in these cases, which, to be clear, were not successfully defended – the lawsuits only ended because Old World Predecessor and Eggeman went bankrupt and left behind creditors, including subcontractors, suppliers, and homeowners, who never recovered the nearly $1 million owed to them. (*See id*. at Exh. R). There also is ample evidence of the extent to which Eggeman was personally drawn into the lawsuits before they were prematurely ended by the bankruptcy filings. (*See id*. at Exh. Q).

In *Quinn Development, Inc. v. Old World Classics by Phil Eggeman, Inc.*, Eggeman even was accused of personally committing fraud himself by issuing "false Affidavits." (*Id*. at Exh. T).

Such an accusation of false affidavits in the past is highly relevant to the present case: Contrast Eggeman's affidavit offered in this case in which he attested that Old World Predecessor "was my father's company" (TI # 8-9, Old World Mot. Arbitr. at Eggeman Affidavit ¶ 14) with the fact that Old World Predecessor in truth was 100% his company. (TI # 16, Snyder Opp. Arbitr. at Exh. R).

In fact, his personal involvement in the lawsuits was even more extensive: Eggeman's familiarity with litigation was so complete that in another case he actually dismissed his attorney and then proceeded to litigate the case *pro se*. (*See id*. at Exh. Q). As a result, the second representation – that Old World ownership did not have a history of legal disputes beyond one mediation – is unquestionably false in light of Eggeman's substantial record of lawsuits in which his company was accused of fraud and other wrongdoing, he was accused of fraud and other wrongdoing, and he knew litigation practice well enough to act *pro se*.

In sum, the facts demonstrate that Old World's pre-contract representations were belied by post-contract discoveries. Old World induced the Snyders to agree to an arbitration clause by representing that Old World had separate ownership from the litigation-plagued Old World Predecessor; that representation was false. Old World induced the Snyders to agree to an arbitration clause by representing that Old World and its ownership only had been involved in one mediation; that representation was false. The Snyders consequently agreed to an arbitration clause, only to discover that Old World's business practices were no better than Old World Predecessor's had been.

All of the foregoing facts related to the substantive issue were introduced into the record by the Snyders before the trial court decided the motion to compel arbitration. (*See id*.). Old World did not introduce any countervailing facts into the record, thereby rendering the factual record uncontroverted. The same uncontroverted facts were presented and argued to the court of appeals

by the Snyders. (*See* AI # 10, Snyder Ct. App. Br.; AI # 17 Reply Brief of Appellants Matthew & Katherine Snyder ("Snyder Ct. App. Repl. Br.")). Old World likewise briefed the substantive issue on appeal. (*See* AI # 16, Old World Ct. App. Br.). Although Old World disagreed on the application of the law to the facts, it did not call into question the existence of the uncontroverted facts. (*See id*.). In fact, Old World admitted before the court of appeals that it was "not able to provide any evidence in response" to the Snyders' proffered facts, *id*. at 4, and Old World continues to this day to acknowledge their expansive existence in its brief to this Court: The record "includes Affidavits from both Matthew and Katherine Snyder, as well as over 300 pages of exhibits." (Old World S. Ct. Br. at 6). The fact that Old World does not want remand for an oral hearing is further proof that it accepts the record as it now stands. As a result, the factual record related to the substantive issue of fraudulent inducement of the arbitration clause is complete, uncontroverted, and fully briefed by both parties.

ARGUMENT

As stated in the introduction, the bedrock principles of appellate review – serving justice, exercising judicial restraint, offering precedential guidance, and fostering judicial economy – provide answers as to how the two issues can and should be decided. While the principles apply equally to both issues, the issues nonetheless are discussed separately for purposes of clarity, starting with (I) the procedural issue, and then (II) the substantive issue.

I. Argument Related to the Procedural Issue

> **Proposition of Law No. 1:** Revised Code 2711.03 does not require a trial court to hold an oral hearing on a motion to compel arbitration if an oral hearing would not have affected the outcome of the decision.

The proposition of law offered herein is narrower than a blanket rule that would apply to all future litigants. A narrow holding is warranted in light of the lack of adversity among the parties

on the procedural issue coupled with the uncontroverted evidence of fraudulent inducement that would render an oral hearing superfluous anyway. The primacy of these two key facts is supported by the appellate review principles of (A) exercising judicial restraint, and (B) fostering judicial economy.

A. Exercising Judicial Restraint

The Snyders acknowledge that the conflict before the Court – "Does R.C. 2711.03 require a trial court to hold an oral hearing on a motion to compel arbitration?" – is an important procedural issue that has flummoxed lower courts and litigants for years, and it certainly calls out for eventual resolution so that the law can be applied consistently throughout the state. This case, however, is not the proper vehicle by which the Court should decide the conflict *in toto*. Such a weighty issue should not be definitively decided once-and-for-all when both parties to the appeal concur that an oral hearing was not required in the present case.

For the Court to properly decide the issue of whether an oral hearing is required in all cases where a motion to compel arbitration is filed, it should have the benefit of having been briefed by parties who are adversarial to the issue and therefore can present the Court with well-crafted arguments on both sides of the issue. In fact, the Supreme Court of Ohio Rules of Practice envision this very point by specifying that an appellee's brief be adversarial in that it "answer the appellant's contentions, and make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken." S.Ct.Prac.R. 16.03(B)(1).

In this case, the Snyders do not contest Old World's contentions in its brief with regard to the procedural issue, nor do the Snyders seek affirmance of the Ninth District's Order on the issue. The parties have been sympatico in their view of the issue throughout the pendency of this case: At the trial court level, both parties implicitly agreed that an oral hearing was unnecessary by virtue

of the fact that neither party requested one; at the court of appeals level, both parties explicitly agreed on that point. *See* AI # 12, Old World Mot. Stay; AI # 14, Snyder Opp. Stay. In perhaps one of the rarest of circumstances in our adversarial system of civil justice, the Snyders do not stand in opposition to Old World's argument that an oral hearing was not required.

The lack of adversity on the issue warrants the exercise of judicial restraint in not deciding for all future litigants the broad issue of whether an oral hearing is always required in every case where a motion to compel arbitration is filed. Similar to this case in which the parties have not argued the issue from both sides, the Court earlier declined to hand down a sweeping decision when "the parties have not submitted complete evidence and argument on this issue." *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 51. A narrower decision instead was warranted out of a "reluctance to issue advisory opinions" and to exercise "judicial restraint." *Id*. Appellate courts accordingly should uphold the "cardinal principle of judicial restraint" by putting into practice the maxim that "if it is not necessary to decide more, it is necessary not to decide more." *State ex rel. King v. Cuyahoga Cty. Bd. of Elections*, 170 Ohio St.3d 42, 2022-Ohio-3613, 208 N.E.3d 787, ¶ 34 (quoting *Brunner*, 123 Ohio St.3d 322 at ¶ 51).

Directly on point, the Court just last year exercised judicial restraint on the very conflict currently before it in an earlier case because that case could be decided on other grounds: "Though we understand that this area of law may need clarification, we must exercise judicial restraint." *AJZ's Hauling, LLC v. Trunorth Warranty Programs of N. Am.*, Slip Opinion No. 2023-Ohio-3097, ¶ 22. So too is it not necessary to decide more in this case, because the case before the Court can be decided on other grounds. As such, the Court should save its ultimate decision for when it is presented with a case in which there are two adversarial parties who are able to vigorously argue both sides of the procedural issue. Such an outcome would be an exemplar of judicial restraint.

B. Fostering Judicial Economy

Accepting that this case is not the proper vehicle to decide the procedural issue of whether an oral hearing is always required, as was likewise done in *AJZ's Hauling*, the Court nevertheless should hold that an oral hearing was not required in this specific case due to the appellate review principle of judicial economy. For it is widely accepted that the law of Ohio is designed with an eye toward "conserving legal resources and promoting judicial economy." *Peyko v. Frederick*, 25 Ohio St.3d 164, 167, 495 N.E.2d 918 (1986). *See also Glidden Co. v. HM Holdings*, 109 Ohio App.3d 721, 725, 672 N.E.2d 1108 (8th Dist. 1996) (recognizing the "important policy designed to preserve judicial resources"); *Dworning v. City of Euclid*, 8th Dist. Cuyahoga No. 87757, 2006-Ohio-6772, ¶ 57 (acknowledging "the purposes of judicial economy"). As a paramount rule, "appellate courts must act to preserve scarce judicial resources." *State v. Inman*, 4th Dist. Ross No. 10CA3176, 2011-Ohio-3438, ¶ 5.

There is abundant precedent throughout Ohio for the proposition of law that a trial court does not commit reversible error by not holding an arguably-mandatory oral hearing if the hearing would not have affected the outcome of the decision, because remanding to have it do so would be a waste of judicial resources. In a myriad of cases that involved all sorts of substantive issues, appellate courts have recognized that scarce judicial resources can be preserved by reviewing the substantive issue on appeal to determine whether the trial court's failure to use a procedure would have affected the substantive outcome. This is logical, because there is no point in forcing the parties and the trial court to conduct procedures that would not impact the substantive outcome.

In the context of Environmental Review Appeals Commission ("ERAC") cases, for example, the applicable statute states that the ERAC "shall conduct a hearing de novo on the appeal." R.C. 3745.05(A). The Tenth District has repeatedly held that "although ERAC was statutorily required to hold a hearing de novo in this matter, we will affirm an ERAC order 'where

the result would not have been any different had the required hearing been held.'" *Zimmer Power Co., LLC v. Vogel*, 10th Dist. Franklin No. 22AP-451, 2023-Ohio-1953, ¶ 15 (quoting *Waste Mgt. of Ohio, Inc. v. Cincinnati Bd. of Health*, 159 Ohio App.3d 806, 2005-Ohio-1153, 825 N.E.2d 660, ¶ 88 (10th Dist.)). The rationale is that "[a]n appealing party is not harmed by ERAC's failure to conduct a de novo hearing where the result of the case would not have been any different had the required hearing been held." *Licking Cty. Citizens for a Safe Environment v. Schregardus*, 136 Ohio App.3d 645, 648, 737 N.E.2d 583 (10th Dist. 2000).

Likewise, in the context of sanctions for frivolous conduct, the applicable statute sets forth detailed requirements for an oral hearing in order to allow "the parties and counsel of record involved to present any relevant evidence at the hearing." R.C. 2323.51(B)(2)(c). The Fourth District has declined to remand for an oral hearing when "all of the facts necessary to decide it were already before the trial court," which meant that an oral hearing was unnecessary despite the statutory language. *Isaac v. Malott*, 4th Dist. Pickaway No. 18CA9, 2019-Ohio-3210, ¶¶ 83-88. The appellate court thus could properly review the appeal without further need of additional evidence from an oral hearing. *See id*.

In the context of unconscionability with regard to common law contract cases, the applicable statute requires that "the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." R.C. 1302.15(B). The Eighth District has held that the need for an oral hearing is "not always the case," such as "where facts in affidavits submitted in support of a motion for summary judgment are uncontroverted." *Women's Fed. S. & L. Assn. v. Potz*, 8th Dist. Cuyahoga No. 46690, 1983 Ohio App. LEXIS 15329, *3-5 (Nov. 17, 1983).

In the context of divorce cases, the applicable statute specifies that the marital property be considered through the time of the "final hearing." R.C. 3105.171(A)(2)(a). On appeal, the Fourth District was faced with the issue of whether "the trial court should have conducted a hearing to clarify the issues the trial court found to be inadequate or insufficient." *Richardson v. Richardson*, 10th Dist. Franklin No. 01AP-1236, 2002-Ohio-4390, ¶ 35. The court of appeals held that it was "not convinced that an oral hearing would have clarified the inadequate documentation." *Id*. at ¶ 36. Rather, there already was sufficient evidence in the written record for the appellate court to conduct a proper review of the substantive issues on appeal. *See id*. at ¶¶ 36-38.

Finally, and of particular relevance to the procedural issue in this case, an appellate court has held that remand for an oral hearing was unnecessary in the context of the arbitration statute when the record was sufficient to decide the substantive issue. Incredibly, that court was none other than the Ninth District. In *Eagle v. Fred Martin Motor Co.*, the Ninth District, like it did in the present case, found that "pursuant to the plain language of R.C. 2711.03, a trial court is explicitly required to hold a hearing on a motion to compel arbitration." 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161, ¶ 20 (9th Dist.). The court then acknowledged that "[i]t does not appear from the record that a hearing of any sort was held," *id*. at ¶ 21, but it further observed that the plaintiff was able to present a factual record in her brief before the trial court. *See id*. at ¶ 22. The court concluded that "[w]hile we do not intend to contradict the mandate in R.C. 2711.03 to hold a hearing on a motion to compel, we feel that at this point in *this* particular case it is unnecessary to hold a hearing on the matter." *Id*. at ¶ 23 (emphasis in original). After proceeding to consider the substantive issue on appeal, the court of appeals held that the arbitration clause was "unenforceable in its entirety," and that "the trial court erred in concluding that the clause was enforceable." *Id*. at ¶ 85.

In all of the foregoing cases, a diverse range of statutes were at issue among various appellate districts, and yet the common thread was that an oral hearing was deemed to be unnecessary despite statutory language that arguably required an oral hearing, *with the proviso that the record on appeal was sufficient enough to decide the substantive issue*. That even was the case with regard to the arbitration statute, as held by none other than the Ninth District.

The Court accordingly should enshrine into law the applicability of this well-used appellate review practice by holding that an oral hearing is not required pursuant to Revised Code 2711.03 if the existing record is sufficient to decide the issue of whether an arbitration clause is void. Although this case may be an imperfect vehicle for deciding the broader issue of whether an oral hearing always is required, it presents the perfect case and controversy to decide the proffered narrower holding because there is overwhelming evidence that an oral hearing would have been meaningless to resolution of the substantive issue. *See infra* § II.B.

II. Argument Related to the Substantive Issue

> **Proposition of Law No. 2:** An arbitration clause is void as a matter of law if there is uncontroverted evidence that it was fraudulently induced.

The proposition of law offered herein is possible because the factual record is uncontroverted; the only disagreement between the parties is on the application of the law to the uncontroverted facts, consequently rendering the case decidable on appeal as a matter of law. *See Op't Hof v. Ritz Paving, Inc.*, 10th Dist. Franklin No. 84AP-358, 1984 Ohio App. LEXIS 11468, *5 (Nov. 6, 1984) ("The effect of plaintiff's failure to meet defendants' factual assertions by proper factual statements to the contrary is to concede that those facts are true."). First though, and especially in light of the fact that the Court did not explicitly accept review of the substantive issue, it is important to establish (A) why the Court should decide the substantive issue before discussing (B) how the issue should actually be decided.

A. Why the Court Should Decide the Substantive Issue

In addition to the fact that the first proposition of law calls for a review of the substantive issue in order to determine whether the record was sufficient absent an oral hearing, reasons why the Court should decide the substantive issue also can be found through consideration of the well-accepted appellate review principles of (1) serving justice, (2) offering precedential guidance, and (3) fostering judicial economy.

1. Serving Justice

Of all the cases that are filed each year, decidedly few result in statewide precedent due, in part, to jurisdictional hurdles. The preliminary jurisdictional hurdle to address in this case is the fact that the Court did not explicitly accept jurisdiction for review of the substantive issue. That hurdle, to the extent it even exists, can be overcome by the fact that the purpose of appellate review at its fundamental core is to serve justice. *See State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169, ¶ 90 (Donnelly, J., dissenting) (expressing that "[a]ppellate review adds an important dimension to fundamental justice"); *Snyder v. Grover Evans Dev. Co.*, 7th Dist. Mahoning No. 83 C.A. 148, 1985 Ohio App. LEXIS 8406, *6 (Aug. 5, 1985) ("Our task on review is to insure that the parties have received substantial justice."). To that end, an appellate court can act "in the interests of justice" by deciding issues that are not formally before it. *State v. Zanni*, 2014-Ohio-2806, 15 N.E.3d 370, ¶ 21 (4th Dist.); *CitiMortgage, Inc. v. Asamoah*, 10th Dist. Franklin No. 12AP-212, 2012-Ohio-4422, ¶ 6; *Tonti v. Tonti*, 10th Dist. Franklin No. 06AP-732, 2007-Ohio-2658, ¶ 2. *See also Angus v. Angus*, 10th Dist. Franklin No. 14AP-742, 2015-Ohio-2538, ¶ 10 (acknowledging that "[m]any times, however, appellate courts instead review the appealed judgment using the appellants' arguments in the interest of serving justice").

The result is that "nothing prevents a Court of Appeals [and the Ohio Supreme Court by obvious extension] from passing upon an error which was neither briefed nor pointed out by a

party." *C. Miller Chevrolet, Inc. v. Willoughby Hills*, 38 Ohio St.2d 298, 301, 313 N.E.2d 400 (1974). *See also State v. Peagler*, 76 Ohio St.3d 496, 499, 668 N.E.2d 489 (1996) (recognizing that "a court of appeals [has] discretion in deciding to address an issue not briefed or raised below"). The requisite for an appellate court to serve justice by recognizing "error not assigned by the parties, [is that] there must be sufficient basis *in the record* before it upon which the court can *decide* that error." *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 342, 496 N.E.2d 912 (1986) (emphasis in original).

Moreover, arguments fully briefed may be decided on appeal even if they are not formally part of the assignment of error. *See Mid Am. Constr., LLC v. Univ. of Akron*, 10th Dist. Franklin No. 18AP-846, 2019-Ohio-3863, ¶ 23 (holding that because a party "has responded to the arguments in its merit brief" the court would "not confine our discussion of appellant's fifth assignment of error"). As a result, an appellate court "has the discretion to consider and rule on arguments made in an appellate brief in the absence of an assignment of error." *Wood v. Simmers*, 10th Dist. Franklin No. 17AP-269, 2017-Ohio-8718, ¶ 8. *See also State v. Blackburn*, 11th Dist. Trumbull No. 2001-T-0052, 2003-Ohio-605, ¶ 45 ("Although this issue was not specifically briefed by the parties, App.R. 12(A)(2) allows an appellate court to consider issues not briefed by the parties."). If an issue is already fully briefed, no further arguments from the parties are needed, nor is there need to provide the parties with any additional notice. *See id*.

In this case, more so than in *C. Miller Chevrolet* and *Peagler*, which allowed resolution of an unbriefed issue, the substantive issue of fraudulent inducement of the arbitration clause was fully briefed by the parties. *See* AI # 10, Snyder Ct. App. Br.; AI # 16, Old World Ct. App. Br. The factual record is complete and uncontroverted – the statement of facts provided herein was taken directly from the Snyders' merit brief filed with the court of appeals. *See* AI # 10, Snyder

Ct. App. Br. at 3-11. The issue also was fully briefed by the parties on appeal – the arguments made herein were taken directly from the Snyders' merit and reply briefs filed with the court of appeals. *See id.*; AI # 17, Snyder Ct. App. Repl. Br. Old World equally had its say before the court of appeals, *see* AI # 16, Old World Ct. App. Br., and it in fact opened the door to consideration of the substantive issue now by virtue of the fact it that raised the substantive issue before the Court in its merit brief. *See* Old World S. Ct. Br. at 6. As a result, justice can be served by deciding the substantive issue, if the Court so desires. The opportunity to offer precedential guidance and to foster judicial economy make rendering a decision desirable.

2. Offering Precedential Guidance

Having established that the Court would not be breaking new ground if it decided the substantive issue, the appellate review principle of offering precedential guidance tilts in favor for why the Court should decide the substantive issue. One of the primary roles of the Ohio Supreme Court is to establish precedent that is to be followed. *See State v. Reyes*, 12th Dist. Butler No. CA2015-06-113, 2016-Ohio-2771, ¶ 21 ("It is axiomatic that a court of appeals must follow established Ohio Supreme Court precedent."); *State v. Skatzes*, 2nd Dist. Montgomery No. 15848, 2003-Ohio-516, ¶ 392 ("It is well settled that courts of appeals must accept and enforce the law as promulgated by the supreme court and may not change, modify, or ignore that law."); *Conrail v. Forest Cartage Co.*, 68 Ohio App.3d 333, 341, 588 N.E.2d 263 (8th Dist. 1990) ("All trial courts and intermediate courts of appeal are charged with accepting and enforcing the law as promulgated by the Supreme Court not changing, modifying or ignoring that law."); *Thacker v. Bd. of Trustees*, 31 Ohio App.2d 17, 285 N.E.2d 380, paragraph one of the syllabus (10th Dist. 1971) ("A Court of Appeals is bound by and must follow decisions of the Ohio Supreme Court.").

Lower courts cannot "review, ignore, or overturn" precedent established by the Court. *State v. Worrell*, 10th Dist. Franklin No. 23AP-244, 2024-Ohio-442, ¶ 17. *See also Zakel v. State*, 8th Dist. Cuyahoga No. 111379, 2022-Ohio-4637, ¶ 7 ("[W]e do not have the authority to review or overturn decisions of the Ohio Supreme Court."); *State ex rel. Duley v. Eberlin*, 7th Dist. Belmont No. 07 BE 51, 2008-Ohio-3084, ¶ 17 ("[W]e cannot overturn or ignore the various Supreme Court cases, which are in fact binding upon this court as precedent."); *Darrah v. Baumberger*, 7th Dist. Monroe No. 15 MO 0002, 2017-Ohio-8025, ¶ 24 ("An appellate court is an intermediate court and is therefore bound by Ohio Supreme Court decisions."). The directive of lower courts to follow precedent established by the Court is absolute. *See State v. Houston*, 10th Dist. Franklin No. 06AP-662, 2007-Ohio-423, ¶ 4 ("[I]t is unlikely the Ohio Supreme Court would direct inferior courts to violate the constitution, and, in any event, inferior courts are bound by Ohio Supreme Court directives.").

With the Court's vital role of establishing statewide precedent, the propriety of doing so is acute for areas of law that have long remained ill-defined (*e.g.*, fraudulent inducement of an arbitration clause); the sense of duty to act is further increased for areas of law that are not arcane but rather are commonly litigated (*e.g.*, arbitration clauses); the call to act is especially heightened when the ideal factual record is about as rare as hen's teeth (*e.g.*, this case's factual record).

Taken together, the substantive issue is particularly in need of precedential guidance from the Court now that it finally has before it a robust record to advance a vital area of law. Use of arbitration clauses continues to steadily rise, inviting the increased potential for bad actors to mislead consumers through fraudulent misrepresentations. *See Williams v. Aetna Fin. Co.*, 65 Ohio St.3d 1203, 1204, 602 N.E.2d 246 (1992) (Wright, J., dissenting) ("The number of commercial arbitrations grows each year."). Meanwhile, the law has not kept pace. There is scant Ohio law to

provide proper guidance to parties, trial courts, and courts of appeal for them to understand how fraud in the inducement of an arbitration clause can sufficiently defeat a motion to compel arbitration.

The history of uncertainty surrounding the interplay between arbitration clauses and fraudulent inducement is long and storied. Its unsettled resolution even has divided the Court in the past. One particular case, *Williams v. Aetna Finance*, was appealed to the Court multiple times, leading to vigorous dissents each time. First, in 1992, the Court was faced with the appeal of "whether it was proper for the trial court to deny [a] motion to compel arbitration when the validity of the arbitration provision itself was challenged." 65 Ohio St.3d at 1204 (Wright, J., dissenting). The majority refused to hear the appeal, which Justice Wright cautioned in dissent was "too important to be ignored." *Id.* at 1203. Leaving the issue unresolved, as the majority did, would cause the trial court to become "confused and dismayed," according to Justice Wright. *Id.*

Justice Wright instead wanted to substantively resolve the issue and replied upon federal precedent to argue his dissent:

> [W]hen a contract contains a broadly worded arbitration clause the question of whether the entire contract is invalid due to fraud in the inducement must be decided by an arbitrator. However, "if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it."

Id. at 1205 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). Because the party in the case had "explicitly challenged the validity of *the arbitration clause*" rather than "the validity of *the contract*," the law should have been clarified to hold that the issue be decided by the trial court rather than by an arbitrator. *Id.* at 1206 (emphasis in original).

Such precedent advocated by Justice Wright, however, would have to wait due to the majority's decision to not take up the issue. Justice Wright consequently concluded that the majority's decision to "decline to provide guidance on such a basic issue as that presented in this case is to avoid our judicial responsibilities," but the Court rather should have "act[ed] to clarify arbitration law when the need and opportunity to do so present[ed] itself." *Id*.

It took another six years for the case to once again reach the Court for possible resolution of the issue. Faced again with the question of whether the trial court properly invalidated a challenged arbitration clause, the Court first noted that the "[t]rial court merely found the arbitration clause invalid, but gave no reason for the finding of invalidity." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471-472, 700 N.E.2d 859 (1998). As Justice Wright had predicted, "the trial court may have been somewhat confused on what effect the resolution of the appeal on that issue by the court of appeals (left untouched by this court's decision to dismiss the further appeal) had on subsequent proceedings on remand." *Id*. at 472. In its second review of the case, a majority of the Court nonetheless upheld the invalidation of the arbitration clause without the benefit of a developed record. *See id*.

This time Justice Cook dissented. Justice Cook took issue with the invalidation of the arbitration clause because "the unlawful act underlying the civil conspiracy claim was fraud" whereas "[t]here is neither evidence nor a finding by any court that [the defendant] fraudulently induced [the plaintiff] into agreeing to arbitrate her disputes[.]" *Id*. at 484 (Cook, J., dissenting). The law thus remained largely unsettled once again as to the effect of fraudulent inducement toward an arbitration clause because of a scant record, thereby twice dividing the Court in one case alone.

That same year, in 1998, the Court had another opportunity to clear up the law on the interplay of arbitration clauses and fraudulent inducement when it found that the following conflict existed among the lower courts:

> When the validity of a contract containing an arbitration clause is challenged based on a general claim of fraudulent inducement, must the trial court first determine whether the contract is valid before submitting the case to arbitration, or is this only required when the claim of fraudulent inducement is specifically directed at the arbitration clause?

Beecher v. Ohio State Home Serv., 81 Ohio St.3d 1456, 690 N.E.2d 549 (1998). The conflict, however, was stayed due to another case then pending before the Court that also involved allegations of fraudulent inducement of an arbitration clause. *See id*.

That case, *ABM Farms v. Woods*, went on to establish the precedent that "[t]o defeat a motion for stay brought pursuant to R.C. 2711.02 a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced." 81 Ohio St.3d 498, 692 N.E.2d 574, paragraph one of the syllabus (1998). The *ABM Farms* case unfortunately had a scant factual record to flesh out the contours of the holding, because the record was devoid of any discussion of the arbitration clause, let alone an alleged misrepresentation. *See id*. at 502 ("There was no evidence presented to the trial court that Maust discussed arbitration at all with Woods, much less that he made a misrepresentation about it[.] Woods herself testified that arbitration was 'never brought up, ever.'"). The result was that the Court had answered the preliminary question of whether fraudulent inducement could defeat an arbitration clause, but the lack of a meaningful factual record meant that it could not offer any real guidance as to how such an occurrence would happen in practice.

As far back as 2000, the Tenth District recognized the lack of direction and called out for further guidance from the Court: "Additional guidance from the Supreme Court of Ohio as to the

exception to the syllabus law set forth in *ABM Farms* would be helpful for both the trial courts and the intermediate appellate courts." *Battle v. Bill Swad Chevrolet*, 140 Ohio App.3d 185, 191, 746 N.E.2d 1167 (10th Dist. 2000). And yet in the quarter-century since the *ABM Farms* decision, the Court has not had an opportunity to expound upon its precedential holding in order to provide the requested guidance. More to the point, it has not had before it a case where the record includes uncontroverted evidence of misrepresentations directly related to the arbitration clause.

The lower appellate courts likewise have been routinely bereft of an ample record to review fraudulent misrepresentations related to the arbitration clause. *See, e.g., Smith v. Nationwide Mut. Ins. Co.*, 2018-Ohio-3758, 120 N.E.3d 72, ¶ 31 (10th Dist.) ("As set forth in the complaint, Smith's fraud allegations only concern the Advantage Agreement as a whole, not the arbitration provision."); *Koudela v. Johnson & Johnson Custom Builders, LLC*, 11th Dist. Lake No. 2017-L-024, 2017-Ohio-9331, ¶ 20 ("[T]his court stresses that neither in the Koudelas' complaint nor in their brief in opposition to appellees' motion to dismiss/motion for stay did they allege that the *arbitration provision itself* was fraudulently induced.") (emphasis in original). The lack of guidance from the Court has meant that consumers are left largely uncertain as to an arbitration clause's enforceability when a business makes representations, consequently enhancing the temptation for a business to say whatever it pleases, fraudulent or otherwise.

That said, the Court now has an opportunity to exercise its judicial responsibilities, as advocated by Justice Wright in *Williams*, and to provide additional guidance, as requested by the Tenth District in *Battle*, by reviewing the robust record in order to explain how Old World's fraudulent inducements to accept the arbitration clause voided it pursuant to *ABM Farms*. The Court should not wait another potential quarter century to have before it a case with a factual record that includes over 300 pages of evidence to demonstrate fraudulent misrepresentations directly

related to the arbitration clause at issue. A clear voice from the Court now will protect future consumers who may be fraudulently induced to agree to an arbitration clause, and it will act as a much-needed corrective and deterrent to businesses that improperly induce consumers to accept the possibility of arbitration. As more and more contracts include arbitration clauses, this is the right and proper moment to act on a robust record that can flesh out the bare-bones holding of *ABM Farms*.

3. Fostering Judicial Economy

A third and final reason that the Court should decide the substantive issue is because of the appellate review principle of fostering judicial economy. *Peyko*, 25 Ohio St.3d at 167 (recognizing the importance of "conserving legal resources and promoting judicial economy."). Old World in its brief before the Court also raised the importance of not forcing lower courts "to expend limited judicial resources unnecessarily." Old World S. Ct. Br. at 8.

The Snyders raised and preserved the substantive issue for appeal. *See* AI # 10, Snyder Ct. App. Br. If the Court does not resolve the substantive issue now, the issue will then be decided by the Ninth District, whose decision would not precedentially bind the other appellate districts. Moreover, no matter how the Ninth District would rule, it is highly likely that the issue would then be appealed back up to this Court. The Court therefore should foster judicial economy by deciding the substantive issue in the here and now so that scarce judicial resources are not wasted.[1]

B. How the Court Should Decide the Substantive Issue

If the Court decides to take up the substantive issue, the existing precedent directly on point is scarce, as discussed. *See supra* § II.A.1. That said, the *ABM Farms* decision provides the initial

[1] The Snyders also argued on appeal to the Ninth District that the arbitration clause was void pursuant to the Home Construction Service Suppliers Act ("HCSSA"). *See* AI # 10, Snyder Ct. App. Br. at 22-30. While the Snyders continue to preserve that issue on appeal, they present for consideration only the substantive issue of fraudulent inducement of the arbitration clause, which has a greater need for precedential guidance from the Court. Exercising judicial restraint would forgo the need for the Court to also decide the case on HCSSA grounds.

framework: "[P]roof of fraud in the inducement of the arbitration provision itself ***does*** defeat a motion to compel arbitration." 81 Ohio St.3d at 501 (emphasis added). The key proof is that "a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced." *Id*. at 502. Such proof is achieved if "the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment." *Id*.

While the Court has not been met with such a pristine record before, the general law of fraud in the inducement can be applied to the facts in this case to establish that the arbitration clause indeed was fraudulently induced. The general law, as stated in *ABM Farms*, is to consider the six elements of fraud without restrictions from the parol evidence rule. *See Galmish v. Cicchini*, 90 Ohio St.3d 22, 28, 734 N.E.2d 782 (2000) ("[T]he parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement," and "the presence of an integration provision does not vitiate the principle that parol evidence is admissible to prove fraud."). To that end, all of the requisite elements of fraudulent inducement are presented as met in this case: (1) knowing, (2) material, (3) misrepresentation, (4) intent to induce, (5) reliance, and (6) detriment.

1. Knowing

A party makes a knowing representation if it does so by rendering "an assertion of knowledge concerning the fact." *Pumphrey v. Quillen*, 165 Ohio St. 343, 347, 135 N.E.2d 328 (1956) (quoting 19 Ohio Jurisprudence, 377, Section 75). Doing so satisfies the knowing element because the defendant "implied knowledge on his part." *Id*. at paragraph two of the syllabus. It thus is immaterial if the defendant "made the representation knowing that it was false." *Id*. at paragraph one of the syllabus.

In this case, Old World made knowing representations when it stated unequivocally that its ownership was separate from Old World Predecessor's ownership, and that Old World and its ownership's history of legal disputes only comprised one mediation. *See* TI # 2, Compl. ¶ 7(a); TI # 16, Snyder Opp. Arbitr. at 4-6. Yezbak, as a partner at Old World, spoke with apparent authority. *See id*. He had time after the meeting with the Snyders to reflect on his representations. During that time, he explicitly conferred with his partners regarding the representations that he had made, and a second time he knowingly missed another opportunity to come clean when he emailed further assurances to the Snyders. *See id*. at Exhs. F, G. He not once offered any caveats or qualifications. *See id*. As such, the representations were made knowingly.

2. Material

A court views materiality through the prism of "the transaction at hand." *State ex Rel. Ellis v. Indus. Comm.*, 92 Ohio St.3d 508, 511, 751 N.E.2d 1015 (2001). *See also Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987) (same). A representation is material to the transaction at hand "if it is essential to contract formation." *Burke Lakefront Servs. v. Lemieux*, 8th Dist. Cuyahoga No. 79665, 2002-Ohio-4060, ¶ 40. It in turn is essential if the agreement would not have arisen "but for" the representation. *Id*.

Whether the agreement would have been formed but for the representation generally is considered under an objective standard, but a subjective standard is applied if "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Saxe v. Dlusky*, 10th Dist. Franklin 09AP-673, 2010-Ohio-5323, ¶ 50 (quoting Restatement (Second) of Torts (1977), Section 538(b)). *See also Brannon v. Mueller Realty Notaries*, 1st Dist. Hamilton No. C-830876, 1984 Ohio App. LEXIS 11140, *10 (Oct. 24, 1984)

(applying subjective standard if a party is "peculiarly disposed to attach importance to a particular subject in such an instance . . . regardless of its significance to a reasonable person under similar circumstances").

In this case, the representations were material to the transaction at hand because the Snyders explicitly informed Old World that the absence of a history of legal disputes would be meaningful and allay their concerns regarding the proposed arbitration clause. *See* TI # 16, Snyder Opp. Arbitr. at Exhs. B, C. They went so far as to meet with Old World to discuss face-to-face whether such a history existed, and they prepared for the meeting by performing an online case name search of Old World in Stark County. *See id*. They were satisfied with the reassuringly reasonable representations of Old World, and they acted on them by agreeing to the arbitration clause. *See* TI # 2, Compl. ¶ 8. As such, the representations were material.

3. Misrepresentation

A representation is deemed a misrepresentation if it is false. *See Mulvey v. King*, 39 Ohio St. 491, 495 (1883) (describing a misrepresentation as being "that it was false"); *Van Camp v. Bradford*, 63 Ohio Misc.2d 245, 254, 623 N.E.2d 731 (C.P. 1993) (describing a misrepresentation as an "expression of a falsehood"). Intent is not yet at play with regard to this element: An innocent misrepresentation, while perhaps not resulting in liability because other elements are not satisfied, nonetheless is still considered a misrepresentation if it is inaccurate or untrue. *See Dillahunty v. Assn.*, 36 Ohio App.2d 135, 137, 303 N.E.2d 750 (2nd Dist. 1973).

A misrepresentation may exist by giving a "false impression." *Klott v. Real Estate*, 41 Ohio App.2d 118, 121, 322 N.E.2d 690 (2nd Dist. 1974). This can occur through "conduct, calculated and intended to produce a false impression, as well as by words." *Ziliox v. Apt. Storage Co.*, 20 Ohio App. 156, 158, 153 N.E. 183 (9th Dist. 1925). Moreover, "a representation which is true as

far as it goes may be rendered false by reason of a failure to disclose facts, or, in other words, may be half true only[.]" *Id*.

In this case, the two representations in actuality were misrepresentations because they were utterly false. It was false that Old World and Old World Predecessor were separate companies with separate ownership because Eggeman, the current owner of Old World, had been the sole owner of Old World Predecessor, as discovered in his personal bankruptcy petition. *See* TI # 16, Snyder Opp. Arbitr. at Exh. R. It also was false that the history of legal disputes of Old World's ownership only comprised one mediation. Eggeman had been involved in over twenty lawsuits as the owner of Old World Predecessor, including in cases that alleged fraud against the company and against him personally; his personal involvement in legal disputes rose to the level of litigating a case *pro se*. *See id*. at Exhs. H, J, Q. As such, the representations are better characterized as misrepresentations.

4. Intent to Induce

Intent to induce "must be inferred from the totality of the circumstances, because it is rarely provable by direct evidence." *Leal v. Holtvogt*, 123 Ohio App.3d 51, 76, 702 N.E.2d 1246 (2nd Dist. 1998). Intent to induce consequently is shown through circumstantial evidence. *See Doyle v. Fairfield Mach. Co., Inc.*, 120 Ohio App.3d 192, 208, 697 N.E.2d 667 (11th Dist. 1997).

Intent is "conclusively imputed upon the principle that a party must be presumed to intend the necessary consequences of his own acts or conduct." *Fulton v. Aszman*, 4 Ohio App.3d 64, 72, 446 N.E.2d 803 (12th Dist. 1982) (quoting 24 Ohio Jurisprudence 2d 703, Fraud and Deceit, Section 113, at 706). In fact, "[i]ntent need not be proved where the facts show that the party making the fraudulent representations must have known their falsity and intended them to be an inducement to the transaction." *Id.*

In this case, the misrepresentations were made by Old World with an intent to induce the Snyders. Old World emailed the Snyders explicitly to prod them to hurry up to enter into a contract or face substantial price increases within days. *See* TI # 16, Snyder Opp. Arbitr. at Exh. A. The Snyders voiced their hesitation to do so because of the proposed arbitration clause. *See id*. at Exhs. B, C. The parties then met to discuss the Snyders' concerns with the arbitration clause. *See id*. Old World afterward continued to induce the Snyders via email to have them believe that it was a reputable company run by ownership without a troubling history of legal disputes. *See id*. at Exhs. F, G. After spending months considering multiple builders, the Snyders agreed to an arbitration clause within days of being prodded by Old World to do so. *See* TI # 2, Compl. ¶ 8. As such, the circumstantial evidence establishes that Old World intended to induce the Snyders to believe its misrepresentations.

5. Reliance

The standard for reliance is whether it was justifiable. *See Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984). Under this standard, "[r]eliance is justifiable if the representation does not appear unreasonable on its face and if there is no apparent reason to doubt the veracity of the representation under the circumstances." *Amerifirst Savs. Bank v. Krug*, 136 Ohio App.3d 468, 495, 737 N.E.2d 68 (2nd Dist. 1999). *See also Lepera v. Fuson*, 83 Ohio App.3d 17, 26, 613 N.E.2d 1060 (1st Dist. 1992) (holding that reliance is justifiable if "the representation does not appear unreasonable on its face" and there is "no apparent reason to doubt the veracity of the representation"); *Andrew v. Power Marketing Direct, Inc*., 978 N.E.2d 974, 2012-Ohio-4371, ¶ 60 (10th Dist.) (same).

The U.S. Supreme Court has explained how justifiable reliance is a lower standard of proof than reasonable reliance: A person "is justified in relying on a representation of fact 'although he

might have ascertained the falsity of the representation had he made an investigation.'" *Field v. Mans*, 516 U.S. 59, 70, 116 S.Ct. 437, 133 L.E.2d 351 (1995) (quoting Restatement (Second) of Torts (1976), § 540). The high court provided an apt example: A buyer of land can justifiably rely upon a seller who represents that the land is free of encumbrances "even if he could have 'walk[ed] across the street to the office of the register of deeds in the courthouse' and easily have learned of an unsatisfied mortgage." *Id*. (quoting same). As a result, a plaintiff's failure to detect the fraud is unjustified "only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." *Id*. (quoting W. Prosser, Law of Torts §108, p. 718 (4th ed. 1971)).

Ohio courts expressly have adopted the high court's reasoning: "[W]e agree with . . . the Supreme Court's definition of justifiable reliance, as contrasted to reasonable reliance, in *Field v. Mans*[.]" *Krug*, 136 Ohio App.3d at 496. *See also Jack Turturici Family Trust v. Carey*, 2nd Dist. Miami No. 2012 CA 8, 2012-Ohio-6191, ¶ 34 (quoting *Krug* and *Field* with approval); *Pearl of the Orient III, Inc. v. Struhar (In re Struhar)*, Case No. 20-11957, at *14 (Bankr.N.D.Ohio Mar. 24, 2021) (applying Ohio law and citing *Field* when holding that justifiable reliance is the applicable standard and that a party "need not pass the higher standard of reasonable reliance").

Justifiable reliance occurs *ipso facto* if access to the underlying truth is not equally accessible to both parties: "Where the means of obtaining the information in question were not equal, the representations of the person believed to possess superior information may be relied upon." *Andrew*, 978 N.E.2d 974 at ¶ 62 (quoting *Fort Washington Resources, Inc. v. Tannen*, 858 F.Supp. 455, 460 (E.D.Pa.1994)). *See also Mar Jul, LLC v. Hurst*, 4th Dist. Washington No. 12CA6, 2013-Ohio-479, ¶ 63 (same).

Justifiable reliance also occurs if a plaintiff makes an inquiry to the defendant who then makes a misrepresentation: "Where a party makes a representation in direct response to an 'inquiry,' the individual is entitled to a full and truthful answer; any representation made may be justifiably relied upon." *Mike Castrucci Ford Sales, Inc. v. Krull*, Clermont C.P. No. 99-CVH-333 (Jul. 31, 2000). The rationale for this outcome can be found in principles of equity because "a defendant who has been guilty of conscious misrepresentation can not offer as a defense the plaintiff's failure to make the investigation or examination to verify the same." *Field*, 516 U.S. at 72 (quoting F. Harper & F. James, Law of Torts §7.12, pp. 581-583 (1956)). Or, as the Seventh Circuit succinctly stated, "if you ask the defrauder point blank, you need not investigate further." *Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992).

In this case, the Snyders justifiably relied upon Old World's misrepresentations when they asked it point blank. On appeal, Old World nonetheless offered as an excuse that the Snyders are attorneys, *see* Old World S. Ct. Br. at 5, as if that gave them superpowers to avoid being defrauded. While attorneys may possess a certain level of sophistication, they are not supersleuths. No one, not John Marshall nor Learned Hand, would have been able to realistically see through the falsity of Old World's representations at a "cursory glance," as described by the *Field* Court.

Moreover, the Snyders decidedly did not stick their heads in the sand either, but instead, before asking Old World point blank, they performed an online case search in the home county of Old World. *See* TI # 16, Snyder Opp. Arbitr. at Exhs. B, C. The results listed cases that involved a company that looked to be Old World, though the dockets and documents were unviewable, and so the Snyders met with Old World to have it explain the truth given that it possessed superior information. *See id*. at Exhs. B, C.

Old World offered a reasonable answer that did not call into doubt its veracity: The cases that the Snyders found from the online search were for a similarly-named company that had completely different ownership, according to Old World. *See id*. at Exhs. B, C, D. That the two companies were so similarly named made sense, because Old World stated that the litigation-plagued Old World Predecessor was owned by the father of Old World's owner. *See id*. A day later, Old World put the Snyders further at ease by stating via email that the representations had been discussed internally among ownership, and actually the one arbitration mentioned at the meeting was less severe in that it actually had been one mediation. *See id*. at Exhs. F, G.

At that point, the Snyders could have relied upon these seemingly-reasonable representations, or they could have made an hour drive to Canton in order to pull case files to discover in exhibits to pleadings that Eggeman had been an employee of Old World Predecessor, though perhaps not the owner. *See id*. at 1, Exh. M. They then could have searched other counties to find that Eggeman had gone bankrupt along with Old World Predecessor. *See, e.g., id*. at Exhs. H, J, Q. Somewhere along the way they could have learned that Eggeman's formal name is Philip A. Eggeman, not Philip R. Eggeman like his father, but that Eggeman filed for bankruptcy under the incorrect name of Phillip A. Eggeman, *i.e.*, with two 'l's in his first name instead of one 'l.' *See* Snyder Opp. Arbitr. at Exh. R. That sorted, they could have signed up for a federal PACER account, paid to download a bankruptcy petition, and perused its eighty-eight pages to find out that, lo and behold, Eggeman was the sole owner of Old World Predecessor, thereby putting the lie to Old World's representations. *See id*.

The Snyders ultimately chose to justifiably rely upon Old World's representations because, as held in *Krug* and *Lepera*, the representations were not unreasonable on their face and there were no apparent reasons to doubt them, and because, as held in *Andrew*, Old World possessed superior

information regarding its ownership's history. To hold to the contrary and decide that such reliance was not justified would be to effectively find that attorneys can never be fraudulently induced, an outcome that the Court, comprised as it is by attorneys, doubtfully would want to render.

Doing so also would unquestionably chill commerce, as every commercial transaction would require an investigatory audit of any and all representations made by companies. Ask a landscaping company if it is certified in landscape design. Receive an affirmative answer but still be expected to pull the records from the certification board. Visit a medical provider who displays a degree but still be expected to investigate by contacting the university for confirmation of a degree. Thankfully, that level of investigatory standard is not the law for anyone, attorney or otherwise. As the U.S. Supreme Court held, and as has been adopted by Ohio courts, the Snyders were justified in their reliance because there were no warnings that the seemingly-reasonable representations were false. That is sufficient for a finding of justifiable reliance.

6. Detriment

Detriment simply means "that some type of harm is suffered." *Choi v. Ohio Univ.*, Ct. of Cl. No. 2015-00256-AD, 2015-Ohio-4898, ¶ 10. It would be exceedingly unusual for detriment to be lacking if the preceding elements of fraud in the inducement exist, because the harm "flow[s]" from the preceding elements. *FV-I, Inc. v. Townsend-Young*, 8th Dist. Cuyahoga No. 109191, 2020-Ohio-5184, ¶ 59.

In this case, the detriment flowed from the preceding elements. The Snyders first suffered to their detriment by having their home attempted to be constructed by a company that represented that its history of legal disputes was nearly without blemish whereas the truth was that it was owned by someone who had owned another construction company that was the subject of over twenty lawsuits, allegedly committed fraud, went bankrupt, left behind unpaid suppliers and

subcontractors who in turn sought recovery from homeowners, and forced those homeowners to become engaged in costly litigation that for some lasted years. *See* TI # 16, Snyder Opp. Arbitr. at 10, Exhs. H, J, K, L, Q, T. The failure to disclose that truth absolutely led to substantial financial detriment to the Snyders.

The second detriment is that, if enforced, the arbitration clause would waive many of the rights that the Snyders otherwise would enjoy with a trial court, including formal discovery and a trial decided by a jury of their peers. As such, the final element of a fraud in the inducement claim is satisfied as to the arbitration clause. The Court accordingly should accept the second proposition of law and hold as a matter of law that the uncontroverted evidence defeats the arbitration clause due to fraudulent inducement.

CONCLUSION

Based upon the foregoing, the Snyders respectfully request that the Court refrain from deciding the entire procedural issue of whether a motion to compel arbitration triggers a mandatory oral hearing in favor of a narrower proposition of law; the narrower proposition is that Revised Code 2711.03 does not require a trial court to hold an oral hearing on a motion to compel arbitration if an oral hearing would not have affected the outcome of the decision.

Acceptance of the second proposition of law – an arbitration clause is void as a matter of law if there is uncontroverted evidence that it was fraudulently induced – is warranted in order to put into practice the first proposition of law. Further, the Snyders respectfully submit that so holding would be in line with the Court's appellate review principles of serving justice, offering precedential guidance, and fostering judicial economy. This case, with its once-in-a-generation factual record, offers the Court the perfect opportunity to advance the law of Ohio in an area of

substantive law that sorely needs guidance for lower courts, consumers, and businesses that would use arbitration clauses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2024, a copy of the foregoing Merit Brief of Appellees Matthew & Katherine Snyder was served upon counsel for the Appellant via e-mail pursuant to Practice Rule 3.11(C)(1).

/s/ Matthew L. Snyder
MATTHEW L. SNYDER