

IN THE SUPREME COURT OF MISSOURI

No. SC 87203

STATE ex rel. GAYLE VINCENT, et al.

Relators,

v.

**HONORABLE NANCY SCHNEIDER,
JUDGE, ELEVENTH JUDICIAL CIRCUIT,**

Respondent.

**APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY
HONORABLE NANCY SCHNEIDER**

**BRIEF OF AMICUS CURIAE
HOME BUILDERS ASSOCIATION OF GREATER ST. LOUIS**

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JURISDICTIONAL STATEMENT

Amicus Home Builders Association of Greater St. Louis adopts the jurisdictional statement of the Honorable Nancy Schneider, Respondent herein. Amicus Home Builders Association of Greater St. Louis files this Brief with consent of the Honorable Nancy Schneider, Respondent herein. Relators refused to consent to the filing of this Brief.

HBA began in 1934 when several builders started the builders guild and now has over 1,000 members. HBA helps create a region that promotes and protects the validity of the building industry by serving its members, who strive to meet the housing needs of Greater St. Louis. Due to those needs, HBA provides a Consumers Resources page on the HBA website which links to other consumer-related sites. The Home Builders Charitable Foundation (HBCF) was created in 1997 to provide assistance in housing to people or organizations with special shelter needs. HBA supports continuous learning by sponsoring numerous educational meetings. HBA represents its membership before the Missouri legislature, state regulatory agencies, the courts and the public.

STANDARD OF REVIEW

Amicus Home Builders Association of Greater St. Louis adopts the statement of the standard of review of the Honorable Nancy Schneider, Respondent herein.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts of the Honorable Nancy Schneider, Respondent herein.

POINTS RELIED ON

I.

**RESPONDENT DID NOT ERR IN GRANTING DEFENDANT'S
MOTION TO COMPEL ARBITRATION IN THAT THE
CONTRACT CONTAINING THE ARBITRATION CLAUSE WAS
NOT PROCEDURALLY UNCONSCIONABLE.**

Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. banc 1997)

Golden v. National Utilities Co., 201 S.W.2d 292 (Mo. 1947)

Swain v. Auto Services, Inc., 128 S.W.3d 103 (Mo. App. E. D. 2003)

Heartland Health Systems, Inc. v. Chamberlin, 871 S.W.2d 8 (Mo. App. W.D.
1993).

II.

**RESPONDENT DID NOT ERR IN GRANTING DEFENDANT'S
MOTION TO COMPEL ARBITRATION IN THAT THE
ARBITRATION CLAUSE WAS NOT SUBSTANTIVELY
UNCONSCIONABLE.**

Green Tree Financial Corp.—Alabama v. Randolph, 531 U.S. 79 (2000)

Rains v. Foundation Health Systems Life and Health, 23 P.3d 1249 (Colo. App. 2001)

State ex rel. Reed v. Reardon, 41 S.W.3d 470 (Mo. banc 2001)

Greenpoint Credit L.L.C. v. Reynolds, 151 S.W.3d 868 (Mo. App. S.D. 2004).

ARGUMENT

INTRODUCTION

Relators assert that the arbitration clause is unconscionable. Accordingly, the Relators have the burden to prove that in the commercial context the clause is unfair. *See* U.C.C. §2-302(2) (1979). In determining whether an alleged arbitration clause is unconscionable, this Court may consider both the procedural and the substantive aspects of a contract.

“It is suggested that there are procedural and substantive aspects of unconscionability, the former relating to the formalities of the making of the contract and the latter to the specific contract terms.” *Bracey v. Monsanto Co.*, 823 S.W.2d 946, 950 (Mo. Banc 1992.) “[P]rocedural unconscionability in general is involved with the contract formation process, and focuses on high pressure exerted on the parties, fine print of the contract, misrepresentation, or unequal bargaining position.’ *Funding Sys. Leasing Corp. v. King Louie Int’l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. W.D. 1979). ‘By substantive unconscionability is meant an undue harshness in the contract terms themselves.’ *Id.* ‘Generally there must be both procedural and also substantive unconscionability before a contract or a clause can be voided.’ *Id.* Furthermore, ‘it has been suggested ... that there be a balancing between the substantive and procedural aspects, and that if there exists gross procedural unconscionability then not much be needed by way of substantive unconscionability, and that the same ‘sliding

scale' be applied if there be great substantive unconscionability but little procedural unconscionability.' *Id.*”

Whitney v. Alltel Communications, Inc., 173 S.W.3d 300, 308 (Mo. App. W.D. 2005).

I.

**RESPONDENT DID NOT ERR IN GRANTING DEFENDANT'S
MOTION TO COMPEL ARBITRATION IN THAT THE
CONTRACT CONTAINING THE ARBITRATION CLAUSE WAS
NOT PROCEDURALLY UNCONSCIONABLE.**

In determining procedural unconscionability, the court may consider whether a) the contract was adhesive, b) there was unequal bargaining power, c) there was a lack of sophistication and poverty, and d) there was unfair surprise and lack of notice. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV., 1203, 1258-1268 (Fall 2003).

**A. DEFENDANT'S CONTRACT WAS NOT A CONTRACT OF
ADHESION.**

A contract of adhesion has been defined "...as a written contract, usually printed in boilerplate language, prepared by the stronger party and presented to the weaker on a take-it-or-leave-it basis. It is sold as a product; its terms are not negotiated between two contracting parties." *Heartland Health Systems, Inc. v. Chamberlin*, 871 S.W.2d 8, 11 (Mo. App. W.D. 1993).

The contract between Defendant and Relators was prepared and preprinted by Defendant. More than ninety-nine percent of all contracts are standard form contracts. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking*

Power, 84 Harv. L. Rev. 529, 529 (1971). Since most contracts are mass-produced, the mere fact that the contract was pre-printed does not invalidate the contract. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. E. D. 2003). The *Swain* court upheld the arbitration clause, except the venue for arbitration, though the arbitration clause was contained in an adhesive contract as none of the terms were negotiable and the arbitration clause was not discussed with the Buyer.

In the case at bar, unlike the *Swain* contract, Defendant's counsel attested that all terms in the contract were negotiable. (Rel. Ex. D. at 38-58.) There is no evidence that the terms were not negotiable. In addition, Relator Vincent initialed Paragraph 4 of the sales contract, which described the arbitration process and procedure. (Rel. Ex. B. at 10.) The last two sentences of Paragraph 4 state:

“As evidenced by Purchaser’s initials appearing in the space in the margin opposite this paragraph, Purchaser acknowledges and represents that Purchaser has read and understood this paragraph 4 in its entirety, and that Purchaser understands and agrees that, as an inducement to Seller to enter into this Contract and Purchaser accepting the benefits hereof, Purchaser has knowingly and willingly limited its remedies for breach of this Contract by Seller to the terms expressly set forth in this paragraph 4.”

Id. (Emphasis added.)

The Relators were aware of the arbitration clause as determined by their initialing of the paragraph. The contract was not a contract of adhesion.

B. PARTIES WERE NOT OF UNEQUAL BARGAINING POWER.

Bargaining power is a function of market forces as well as size. *See Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F.Supp. 807, 811 (E.D. Pa. 1981). Relator Vincent purchased a home in St. Charles County in 2002. (Rel. Ex. B. at 9.) The U.S. Census Bureau determined “in 2000 that St. Charles County was the fastest growing county in the state of Missouri.” U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING UNITS COUNT, PHC-3-27, MISSOURI 2-3 Washington, D.C. (2003).

Amicae has over 1000 home builders in its association. The home-building competition in St. Charles County in 2000 was very competitive and remains so. The market forces in St. Charles County evened the playing field between home sellers and home buyers. If Relators had not wanted to agree to arbitration, they could have negotiated with Defendant or signed a contract with the numerous other home builders in St. Charles County.

This Court has held that there was no bargaining disadvantage between a real estate corporation and a buyer when a clause waiving a jury trial was prominently displayed, clear and unambiguous was used and the print size was the same size used throughout the contract. *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. banc 1997). In the contract before this Court, above the line immediately preceding the signature block, which reads, “I/we have read this Sale Contract and fully understand

it” is the arbitration notification statement in larger and bolder type face than used elsewhere in the contract:

“THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.”

Relators and Defendant possessed equal bargaining power. In the alternative, should this Court determine that equal bargaining power was not present, the contract can still be enforced:

“An agreement choosing arbitration over litigation, even between parties or unequal bargaining power, is not unconscionably unfair.”

Swain, supra, at 108. The agreement, under the facts and the law, is not unconscionable because there was no unequal bargaining power.

C. RELATORS WERE NOT UNSOPHISTICATED OR IMPOVERISHED BUYERS.

Relator Vincent’s contract, executed on April 21, 2002, was for a total price of \$140,300. (Rel. Ex. B at 9.) The median price of a house in Missouri in 2000 was \$89,900. *See* U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING, SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS, PHC-2-27, MISSOURI 564 Washington, D.C. (2003). The average price of a house in St. Charles County in 2000 was \$125,200. *Id.* at 586. Relator proffered no evidence that she was unsophisticated. Relator purchased a home which cost 12.06% more than the median price of homes in St. Charles County. Relator was not impoverished. No unconscionability has been or can be shown.

D. RELATORS WERE NOT UNFAIRLY SURPRISED OR GIVEN NO NOTICE OF THE ARBITRATION CLAUSE.

Relators have proffered no evidence, indeed have offered no argument, that they were surprised or given no notice of the arbitration clause.

This Court has determined that a person has notice when possessed of pertinent facts and circumstances. *Golden v. National Utilities Co.*, 201 S.W.2d 292, 297 (Mo. 1947). Having signed the contract with the large print notice of the arbitration clause and having initialed the arbitration clause, the Relators were given and did receive notice of the clause and cannot claim to have been surprised when Defendant enforced it.

II.

RESPONDENT DID NOT ERR IN GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION IN THAT THE ARBITRATION CLAUSE WAS NOT SUBSTANTIVELY UNCONSCIONABLE.

In determining substantive unconscionability, courts consider whether the alleged unconscionable term is one-sided, unreasonable or shocking. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV., 1203, 1273 (Fall 2003).

A. DEFENDANT HAS OFFERED TO MAKE THE SELECTION OF AN ARBITRATOR A MUTUAL DECISION.

Defendant offered to Relators the option of selecting another method of appointing the arbitrator, including using the American Arbitration Association, the United States Arbitration and Mediation Services, Pinnacle Arbitration and Mediation Services, having both parties voluntarily agree to an arbitrator or requesting the trial court to appoint an arbitrator. (Rel. Ex. B. at 27-36.) The issue regarding the validity of the arbitrator selection clause is now moot.

This Court has held that if its judgment would not have any practical effect on the outcome of a controversy then the issue is moot. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001). Defendant has submitted a wide range of options regarding the selection of an arbitrator, excluding the selection of the arbitrator by Amicae's President. As there is no longer a dispute regarding the authority of Amicae's

President to select an arbitrator, the controversy regarding selection is moot and this Court is not required to make an unnecessary decision regarding this issue. Such issue is simply not a factor in determining the substantive unconscionability of the arbitration clause.

B. MUTUALITY OF OBLIGATIONS IS PRESENT IN THE CONTRACT.

In the alternative, if the Court decides that the issue of the selection process of the arbitrator is not moot, in the most recent Missouri case addressing the concept of the mutuality of obligation the court held "...that the respective obligations need not be equal or commensurate with one another. *Warren v. Ray County Coal Co.*, 207 S.W. 883, 885 (1919)." *Greenpoint Credit L.L.C. v. Reynolds*, 151 S.W.3d 868, 874 (Mo. App. S.D. 2004). The *Greenpoint* Court, however, found the Buyer's limitation to state courts unconscionable since no buyer would expect that the seller could seek possession of the manufactured home in state courts but the buyer could not. Those case facts are easily distinguishable from the case at bar where the Seller may only repurchase the home, not repossess and move it.

Though in 2002 Relator Vincent authorized Amicae to select the arbitrator (Rel. Ex. B. at 10), Relators now assert that the selection process was unconscionable due to Relators' lack of participation in the selection process. This Court noted in *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 775 (Mo. banc 2005) that the Court had not resolved the issue of enforceability when one party appoints the arbitrator, however, a substantial majority of courts reject any requirement of mutuality in arbitration

enforcement clauses. Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537, 542 (2002). Most courts enforce nonmutual arbitration clauses. *Id.* at 544.

Ohio courts have determined that the mutuality of obligation only requires that the parties bind themselves to the outcome of any dispute that the parties have agreed to arbitrate. *Raasch v. NCR Corporation*, 254 F.Supp.2d 847, 855 (D.C.S.D. Ohio 2003). In the arbitration clause at bar, both parties have agreed to bind themselves to the decision of the arbitrator. (Rel. Ex. B. at 10.)

Colorado courts have held that not every obligation in an arbitration clause must be mutual "...as long as the parties have provided each other with consideration beyond the promise to arbitrate. *See Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3rd Cir. 1999) (noting that most federal and state courts have held that mutuality is not a requirement of a valid clause and summarizing state and federal cases so holding.)” *Rains v. Foundation Health Systems and Health*, 23 P.3d 1249, 1255 (Colo. App. 2001). Defendant has provided ample consideration by constructing houses for Relators.

The Seventh Circuit Court of Appeals has held that an arbitration clause which required the buyer to arbitrate but not the seller was valid. *Hawkins v. Aid Association for Lutherans*, 338 F.3d 801, 806 (7th Cir. 2003). The Court held that mutuality did not require that every obligation be countered by an equivalent obligation but rather that there was sufficient consideration to support the contract. *Id.* at 807 *citing Restatement (Second) of Contracts* §79 (1979).

The Alabama Supreme Court has also determined that mutuality does not mean identical.

“Generally, mutuality does not necessarily mean ‘equal rights under a contract, or that each party is entitled to the same rights or covenants under the contract. So long as there is a valuable consideration moving from one side to the other, or there are binding promises on the part of each party to the other, there is adequate consideration for a valid contract.’ *Marcrum v. Embry*, 291 Ala. 400, 403, 282 S.2d 49, 52 (1973).”

Orkin Exterminating Co., Inc. v. Larkin, 857 So.2d 97, 102 (Ala. 2003). The arbitration clause between Relators and Defendant is valid and enforceable.

C. THE SELECTION OF THE ARBITRATOR BY AMICAE’S PRESIDENT IS NOT SUBSTANTIVELY UNCONSCIONABLE.

The arbitration clause states the arbitrator shall be selected by Amicae’s President. (Rel. Ex. B. at 10.) Such singular selections have been upheld by other courts.

In *Hottle v. BDO Seidman, LLP*, 846 A.2d 862 (Conn. 2004), a former partner of an accounting firm asserted that an arbitration clause was unenforceable because the arbitral panel would consist of five partners of the firm. *Id.* at 698. The Connecticut Supreme Court held that the arbitration clause was enforceable as plaintiff had agreed to the terms and if the panel was not impartial, the plaintiff could seek recourse in the courts. *Id.* at 720, 723. In the case at bar, Relator Vincent signed the arbitration clause authorizing the selection of the arbitrator by Amicae’s President and, if Relators determine that the arbitrator was not impartial, Relators may seek judicial intervention. *See* §435.360, RSMo.

When parties had recourse to a court for the appointment of an arbitrator, the Colorado court ruled that the initial selection of the arbitrator by one party was not unconscionable. *Rains v. Foundation Health Systems Life and Health*, 23 P.3d 1249, 1255 (Co. App. 2001). Relators have the statutory right under Missouri law to request a Court to appoint an arbitrator. § 435.460, RSMo. The proposed initial selection of the arbitrator by Amicae's President is not unconscionable.

In *Gauntt Construction Company/Lott Electric Company v. Delaware River and Bay Authority*, 575 A.2d 13 (N.J. Super. 1990), a contractor was seeking invalidation of an arbitration clause. The court held that it was not fundamentally unfair for the Director of the other party to arbitrate the issues. *Id.* at 322. In the case at bar, a neutral arbitrator would be presiding at the arbitration, not a party to the conflict.

D. THE COST ALLOCATION OF THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE.

Defendant has admitted that the cost allocation formula contained in the arbitration clause only refers to the costs to enforce the arbitration clause, not the costs of the arbitration. (Rel. Ex. B. at 28, 30, 32, 34 and 36.) The issue of cost allocation is moot as there is no justiciable controversy. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001).

In the alternative, if this Court determines that the issue of cost allocation continues to be in controversy, the U.S. Supreme Court has addressed the cost issue. *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79 (2000). When a buyer asserted that an arbitration clause should be invalidated due to the possibility that she

might incur prohibitive costs, the Court upheld the arbitration agreement: “The ‘risk’ that Randolph (buyer) will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.” *Id.* at 79.

When an insured party complained that the arbitration costs might be high, the Court upheld the contract since plaintiff did not proffer evidence of her inability to pay arbitration costs or that arbitration would cost more than litigation. *Rains v. Foundation Health Systems Life and Health*, 23 P.2d 1249, 1253 (Colo. App. 2001).

“We agree with the observation of the court in *Bradford v. Rockwell Semiconductor Systems, Inc.*, *supra*, 238 F.3d at 556, that an individual cannot reasonably claim to be ‘deterred from pursuing his statutory rights in arbitration simply by the fact that his fees would be paid to the arbitrator where the overall cost of arbitration is otherwise equal to or less than the cost of litigation in court.’”

Id.

Relators have offered no evidence of their inability to pay arbitration costs or that arbitration would be more costly than litigation. The arbitration clause should be upheld.

CONCLUSION

Because the arbitration clause is neither procedurally unconscionable nor substantively unconscionable, Amicus Home Builders Association of Greater St. Louis, on behalf of its members represented in the Greater St. Louis area, prays that this Court deny Relators’ request for issuance of a Writ of Mandamus against Respondent in the above-captioned matter.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 3,487 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 ½" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

James B. Deutsch

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief was sent U.S. Mail, postage prepaid, to the following on this 6th day of February, 2006:

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