

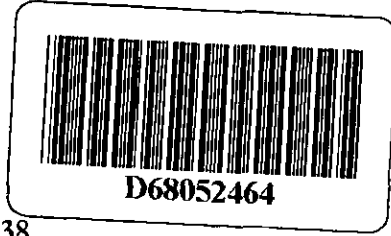
**FILED**  
**COURT OF APPEALS**

APR 20 2006

**GREGORY HARTMANN**  
**CLERK OF COURTS**  
**HAMILTON COUNTY**

**COURT OF APPEALS**  
**FIRST APPELLATE DISTRICT**  
**HAMILTON COUNTY, OHIO**

Patrick M O'Neill (0062519)  
Edward P Akin (0074357)  
*Attorneys for Defendant Meyer Builders/Douglas Homes, Ltd.*



Brian Oswald, <i>et al.</i>	:	Appeal No.: C-060038
	:	
Plaintiffs/Appellees	:	Trial No.: A0508601
	:	
v.	:	
	:	
Meyer Builders/Douglas Homes, Ltd., <i>et al.</i>	:	
	:	
Defendants/Appellants.	:	

---

**BRIEF OF DEFENDANTS-APPELLANTS**  
**MEYER BUILDERS/DOUGLAS HOMES, LTD., ET AL.**

---

Patrick M O'Neill (0062519)  
Edward P Akin (0074357)  
ARONOFF, ROSEN & HUNT  
2200 U.S. Bank Tower  
425 Walnut Street  
Cincinnati, Ohio 45202  
Telephone (513) 241-0400  
Facsimile (513) 241-2877  
*Trial Attorneys for Defendant/Appellant*  
*Meyer Builders/Douglas Home, Ltd.*

Courtney Caparella (0077016)  
LYONS & LYONS  
8310 Princeton-Glendale Road  
West Chester, Ohio 45069  
Telephone (513) 942-5555  
Facsimile (513) 870-5442  
*Trial Attorney for Plaintiffs/Appellees,*  
*Brian L. & Angela M Oswald and Constance Smith*

1206  
 GR  
 157

**I. TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR**

I     TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR . . . . . 1

II    STATEMENT OF THE CASE . . . . . 1

      A     Procedural Posture . . . . . 1

      B     Statement of Facts . . . . . 1

III   ARGUMENT . . . . . 2

FIRST ASSIGNMENT OF ERROR:  
      The Trial Court erred by not granting Defendant/Appellant’s Motion for Stay of  
      Litigation Pending Arbitration. . . . . 2

Issues Presented for Review and Argument: . . . . . 2

          1.     The Trial Court erred in concluding that the arbitration clause contained  
              in the parties Agreement of Sale was “one-sided” and therefore  
              unenforceable. . . . . 2

Authorities

*Barnes v. McKellar*, (1994) 434 Pa Super. 597, 644 A. 2d 770 . . . . . 5

*Kedzior v. CDC Development Corp* , (1997) 123 Ohio App. 3d 301, 303, 704  
              N.E 2d 54, 55, 56 . . . . . 4

*Peppers v. Meyer Builders*, 1<sup>st</sup> Dist. No C-030894, 2004-Ohio-5057 . . . . . 3

              O.R.C §2711 01(B) . . . . . 3

              O.R C §2711 01(B)(1) . . . . . 4

              Ham County Com. Pl. Loc. R 24 . . . . . 5

              Ham County Com. Pl. Loc R 24(A)(1) . . . . . 5

2. An arbitration clause is not rendered unconscionable by its mere failure to impose identical obligations on each party . . . . . 5

Authorities

*Harris v. Green Tree Financial Corp* , (3<sup>rd</sup> Cir 1999) 183 F 3d 173, 180-181, 183 . . . . . 5

*Ishmael v. Dutch Housing, Inc.*, (Aug 13, 1997) 5<sup>th</sup> Dist No 96Ap100084, 1997 Ohio App. LEXIS 3974 . . . . . 6

SECOND ASSIGNMENT OF ERROR:

*Stare decisis* applies here, because the First District previously held that the selfsame arbitration clause, involving the same Defendant was enforceable . . . . . 7

Authorities

*Harlamert v. Fischer Attached Homes* (2003), 1<sup>st</sup> Dist No C-02046 2003 WL 328025. . . . . 7

*Peppers v Meyer* (2004), 1<sup>st</sup> Dist 2004-Ohio-5057, ¶¶7-10 . . . . . 7

*Westfield Ins Co. v. Galats*, (2002) 96 Ohio St.3d 1446, 2002-Ohio-0932, ¶¶43. . . . . 7

IV CONCLUSION . . . . . 8

V CERTIFICATE OF SERVICE . . . . . 9

## II. STATEMENT OF THE CASE

### A. Procedural Posture

Defendant-Appellee Meyer Builders/Douglas Homes, Ltd , appeals from the Order denying its Motion for a Stay Pending Arbitration filed and docketed by the Trial Court on January 10, 2006. Plaintiffs-Appellees Brian L. & Angela M Oswald and Constance Smith (“Oswalds” and “Smith”) sued Meyer Builders/Douglas Homes, Ltd (“Meyer Builders”) alleging breach of contract, breach of warranty, negligence, rescission and other claims arising from performance of a contract for sale of a residential lot and new construction home. (See T d 2) Meyer Builders moved for a stay pending arbitration pursuant to the Agreement of Sale (T.d.7) As noted, the Court denied this Motion on January 10, 2006. (T d 14) Meyer Builders now appeals from that Order (See T.d.15)

### B. Statement of Facts

The Oswalds and Smith contracted with Meyer Builders to purchase a residential lot upon which Meyer Builders agreed to construct a new, single-family residence. The Oswalds and Smith sued Meyer Builders alleging negligent construction and breach of warranty, among other causes of action, and seeking, alternatively, money damages or rescission. (T d 2) The Oswalds and Smith’s claims all arise from the Agreement of Sale which they and Meyer Builders executed. The Agreement of Sale includes an arbitration clause, whereby the parties expressly agreed that:

*Any controversy, claim or other matter arising out of or relating to this agreement, or breach thereof, other than a claim by Seller for specific performance and related damage, shall be determined in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association and judgement [sic] upon the award rendered by the arbitrators may be entered in any Court having jurisdiction thereof. The parties agree that Seller shall have the right to add its subcontractors and/or suppliers as parties to the arbitration. The parties further agree that the arbitration hearing shall be conducted either at the subject residence or at the offices of the arbitrator, as determined by the arbitrator. Seller shall have the right, but not the obligation to enter the residence at reasonable times prior to the arbitration hearing for purposes of conducting inspections and tests of*

the residents. All such controversies, claims or other matters regarding construction shall be resolved in accordance with the Home Builders Association of Greater Cincinnati Industry Standards Manual which establishes the standard by which Seller's Performance in connection with construction matters shall be governed

(T.d 2, Ex A, at ¶21 )

The Oswalds and Smith all signed the signature page of the Agreement. They also initialed the specific page of the Agreement which contained the arbitration clause. The Agreement of Sale also included an integration clause, at paragraph 22, which stated in relevant part "the Agreement and Addendum(s) contains the entire agreement between the parties." (T.d.2, Ex. A, at ¶22.)

When problems allegedly arose with the Oswalds and Smith's home, Meyer Builders sent one of its executives, Brian Weichert, along with one of its field technicians to investigate. When Brian Oswald, who was apparently the point person Plaintiffs/Appellees in these negotiations, did not like the remediation recommendations which emerged from those negotiations, he, Angela Oswald and Smith filed suit with the Hamilton County, Ohio Common Pleas Court instead of demanding arbitration as required by the Agreement of Sale

### **III. ARGUMENT**

#### **FIRST ASSIGNMENT OF ERROR:**

The Trial Court erred by not granting Defendant/Appellant's Motion for Stay of Litigation Pending Arbitration

#### **Issues Presented for Review and Argument:**

1. The Trial Court erred in concluding that the arbitration clause contained in the parties Agreement of Sale was "one-sided" and therefore unenforceable

The Oswalds and Smith contest only the enforceability of the arbitration clause, not its existence. They do not claim to have been fraudulently induced into executing the Agreement of Sale or the accompanying arbitration clause. Instead, they urge the Court to declare the arbitration clause

unenforceable because it carved out an exception for specific performance in favor of Meyer Builders. Although the Trial Court accepted this reasoning, the argument is not well-taken. If the Trial Court's decision is permitted to stand, it will effectively nullify the decision this very Appellate Court handed down in *Peppers v. Meyer Builders*, 1<sup>st</sup> Dist. No. C-030894. To add insult to injury, the decision rendered by this Court in *Peppers* involved a virtually identical arbitration clause in a virtually identical Agreement of Sale to which the self-same Defendant/Appellant in this case was also a party. Surely, an appellate decision which has not subsequently been distinguished, rejected, reconsidered, or otherwise limited by this Court or by the Ohio Supreme Court should have a longer shelf life and greater presidential value than it has been accorded in the proceedings below. In short, if ever there was a proverbial case on all fours involving the same factual scenario, the same Court of last resort, the same legal issue and similarly situated Plaintiffs, *Peppers* is that case.

In *Peppers*, disgruntled home buyers sued Meyer Builders alleging construction defects. Meyer Builders moved for a Stay Pending Arbitration. When the Trial Court in that case granted the stay, the home buyers appealed. The Court of Appeals, with Judge Painter writing for the panel, upheld the Trial Court's decision. The *Peppers* decision considered and rejected the very case Plaintiffs/Appellees rely on here.

First, the only specific performance a seller could possibly seek to enforce would be the buyer's duty to close on a real property transfer. Far from being "one-sided," or otherwise objectionable in an arbitration clause, this provision forthrightly predicts the likely result in the event a seller exercises its legal remedies for a buyer's failure to close. An arbitral panel lacks power to order such specific performance of a realty transfer. Indeed, the Ohio Arbitration Act "expressly excludes from its operation controversies involving the title to and possession of real estate, unless such controversies involve" real estate boundary disputes or certain lease disputes not applicable here. *See* Ohio Rev. Code §2711.01(B).

Relatively few cases have arisen addressing this issue. Nevertheless, an Eight District appellate decision concluded the Ohio Legislature meant what it said in Chapter 2711. See *Kedzior v. CDC Development Corp*, (1997) 123 Ohio App 3d 301, 303 704 N.E 2d 54, 56. *Kedzior* held that a trial court erred by referring a plaintiff's specific performance claim with respect to transfer of real estate to arbitration. *Id.* As the *Kedzior* court held, "By raising a claim for specific performance, plaintiff necessarily asked the court to award him title to and possession of the property." *Id.* at 303, 704 N.E 2d at 55. This, in turn, takes a matter outside the authority of an arbitral panel, regardless of whether the arbitration clause or contract at issue expressly spells out that practical effect.

Plaintiffs can scarcely deny that the only grounds Meyer Builders would have had for seeking specific performance would have been with respect to the duty to close upon the purchase of the home and its lot, namely the real property it is situated on. The fact that the real property included a newly constructed home would not change the fact that this real estate closing—the *only* thing the seller could legally get the buyer to specifically perform—was not arbitrable under Ohio law.

If anything, far from being "one-sided," Meyer Builders' clause was more forthcoming than similar clauses which omit this provision, insofar as it put the purchaser on actual notice as to how the legislature and courts regarded arbitrability of claims for specific performance of realty transfers. Hence, the allegedly one-sided carve-out does nothing more than inform the buyer what the Courts of this state would be obligated to do under applicable statutory law. Even if a Court did refer a specific performance claim to an arbitral panel, any decision rendered thereby would logically be subject to collateral attack. There is little Ohio authority on this point, probably because, in many if not most instances, when buyers fail to perform, they have already proven unable to secure financing, making a specific performance action pointless. Nevertheless, a Pennsylvania court applying what the Ohio Court of Appeals deemed a statute "very similar" to Ohio Rev. Code § 2711.01 (B)(1) affirmed a trial court's refusal to apply *res judicata* to an arbitral decision involving transfer of real property. See *Kedzior*, 123

Ohio App 3d at 303, 704 N.E.2d at 55-56 (relying on *Barnes v. McKellar*, (1994) 434 Pa. Super. 597, 644 A.2d 770) The court reasoned that where arbitrators had no proper jurisdiction to decide a claim to real property in the first place, their decision could not have preclusive effect

Further underscoring this point, the Hamilton County Common Pleas Court's own local rules disallow court-ordered arbitration for disputes involving transfer of real property. *See* Ham. County Com. Pl. Loc. R. 24. Specifically, Rule 24 provides, in relevant part:

Any judge of the general division of the Court of Common Pleas may at any time by a general entry order any case to be heard and decided by a Board of Arbitration, consisting of not more than three members of the Bar of Hamilton County, Ohio, to be selected hereinafter provided in paragraph B, except those cases involving title to real estate, equitable relief and appeals . . . [omitted remainder cites conditions for compulsory judge ordered arbitration which are not applicable to "cases involving title to real estate."]

Ham Co. Com Pl. Loc R. 24(A)(1). The wording of this local rule implicitly recognizes the limits imposed by the Ohio Arbitration Act—namely, that an arbitral panel shall not have the power to resolve a dispute over transfer of title to real property. This offers further evidence, if any were needed, that Meyer Builders' arbitration provision does no more than track Ohio law. If anything, it errs on the side of full and frank disclosure of the fact that specific performance claims aimed at forcing the buyer to close on the real estate, if they are brought at all, could properly be brought only in a court of law.

2. An arbitration clause is not rendered unconscionable by its mere failure to impose identical obligations on each party.

Oswald wrongly assumes an arbitration clause becomes fatally one-sided by mere failure to impose identical obligations on each party. Modern contract law imposes no such hard and fast requirement that parties be identically bound. A thoroughly researched opinion handed down by the United States Court of Appeals for the Third Circuit makes this abundantly clear *Harris v. Green Tree Financial Corp.*, (3<sup>rd</sup> Cir 1999) 183 F.3d 173, 180-181 (collecting and analyzing cases) In *Harris*, homeowners allegedly victimized in a home improvement fraud scheme persuaded the district court to

deny the defendant's motion to stay pending arbitration, largely on grounds of lack of mutuality of obligation. In *Harris*, as here, the arbitration clause reserved a right of judicial remedy to the holder of a secondary mortgage resulting from the home improvement scheme. The district court voided the arbitration agreement as unconscionably one-sided. The Third Circuit reversed. The appellate court pointed out neither federal caselaw governing arbitration clauses, nor contract law generally required the parties to an arbitration clause to be bound in identical terms. *Id.* at 180. The Third Circuit also canvassed some state decisional law, including an Ohio decision from the Fifth District Court of Appeals. *Id.* at 181 (citing *Ishmael v. Dutch Housing, Inc.*, (Aug. 13, 1997) 5<sup>th</sup> Dist No. 96Ap100084, 1997 Ohio App. Lexis 3974). The Third Circuit concluded, without dissent or concurrence, that, "It is of no legal consequence that the arbitration clause gives Green Tree the option to litigate arbitrable issues in court, while requiring the [homeowner] to invoke arbitration." *Id.*

Furthermore, the *Green Tree* court swiftly dispensed with the appellees' claims of procedural and substantive unconscionability, based on the printing of the arbitration clause in "fine print" on the reverse side of the loan agreement in dispute. *Id.* at 183. Here, by contrast, Meyer Builders put its arbitration clause in the same typeface, and right in the heart of the parties' written agreement. Further, the Oswalds and Smith initialed the very page this arbitration provision appeared, indicating that they specifically read and understood the rights and responsibilities contained thereon.

The appellate court similarly rejected the homeowners' substantive unconscionability arguments, grounded on much the same operant facts discussed above. Accordingly, based on well-wrought federal decisional law, grounded in modern contract doctrine, there is absolutely nothing in the parties' arbitration contract to justify branding it unconscionably "one-sided." Rather, it amounts to a freely entered written contract, enforceable as such.

## SECOND ASSIGNMENT OF ERROR:

*Stare decisis* applies here, because the First District previously held that the selfsame arbitration clause, involving the same Defendant was enforceable.

The Trial Court erred in not adhering to the *Stare decisis* here “The doctrine of *stare decisis* is designed to provide continuity and predictability in our legal system.” *Westfield Ins. Co. v. Galats*, 96 Ohio St.3d 1446, 2002-Ohio-0932, ¶¶43. Under that doctrine, lower courts are obliged to follow decisions of courts of last resort when the same questions are raised anew in a later case. Here, just 16 months ago, the First District Court of Appeals upheld a virtually identical arbitration clause used by the very same defendant, rejecting a homeowner’s claim that it was “one-sided” because it reserved a seller’s right to sue for specific performance. *Peppers v. Meyer*, (Sept. 24, 2004) 1<sup>st</sup> Dist. 2004-Ohio-5057, ¶¶ 7-10. Indeed, *Peppers* expressly declined to follow the case Appellee’s cited in their Memorandum in Opposition to Meyer Builders’ Motion for Stay. The *Peppers* Court reasoned that *Harlamert v. Fishcer Attached Homes*, (Feb. 14, 2003) 1<sup>st</sup> Dist. No. C-02046 2003 WL 328025 involved a much broader carve-out in favor of the builder allowing the builder to litigate or arbitrate as it chose, while limiting the buyer to arbitration. (*See id.*, holding *Harlamert v. Fishcer Attached Homes*, Ham. Co. Mun. Ct. No. A-0200341 had “no bearing on the present case, because the clause at issue there “reserved the builder’s right to litigate *all* disputes, not just claims for specific performance) Hence, the carve-out for the seller to seek specific performance in the *Peppers* case and the present appeal is much narrower than the one the trial court declared offensively one-sided in *Harlamert*.

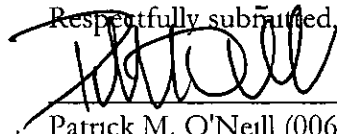
While *stare decisis* is not absolute, courts ordinarily look for some compelling policy interest before choosing to discard a previous decision. Litigants, after all, have an abiding interest in consistency of adjudication. This is all the more true when it is precisely the same Defendant being haled into court. Here, the policy interests cut the opposite way. Ohio recognizes an extremely strong interest in alternative dispute resolution, as discussed above. At the same time, the Ohio Arbitration

Act expressly notes that traditional equitable relief such as specific performance of a real estate contract is not arbitrable. Accordingly, there is absolutely nothing unconscionable, unfair, untoward, adhesive, or otherwise deceptive about an arbitration clause which simply spells out just how the law should properly operate, according to both statutory authority and common law precedent. Accordingly, there is no reason why the Hamilton County Common Pleas Court should not follow *Peppers*.

#### IV. CONCLUSION

For the reasons stated above, the Trial Court's decision and entry clause should be overruled.

Respectfully submitted,



Patrick M. O'Neill (0062519)

Edward P. Akin (0074357)

ARONOFF, ROSEN & HUNT

2200 U.S. Bank Tower

425 Walnut Street

Cincinnati, Ohio 45202

Telephone (513) 241-0400

Facsimile (513) 241-2877

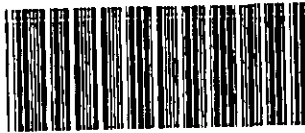
*Trial Attorney for Defendants/Appellants*

#### V. CERTIFICATE OF SERVICE

I hereby certify that a true copy of the following has been served upon Courtney A. Caparella, Esq., *Attorney for Plaintiffs/Appellees*, 8310 Princeton Glendale Road, West Chester, Ohio 45069 via U.S. Ordinary Mail on this 19<sup>th</sup> day of April, 2006.



Edward P. Akin



D66757717

**ENTERED**  
JAN 11 2006

IN THE COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

**ENTER**

JAN 10 2006  
*Dennis S. Helmick*  
DENNIS S. HELMICK, Judge  
1/10/06

Brian L. Oswald, et. al.,

Case No. A0508601

Plaintiffs,

JUDGE: HELMICK

vs.

**ENTRY DENYING DEFENDANT'S  
MOTION TO STAY LITIGATION  
PENDING ARBITRATION**

Meyer Builders-Douglas Homes Ltd., et. al.

Defendants.

Defendant Meyer Builders/Douglas Homes, LTD, ET AL. has moved this Court for an order dismissing and/or staying this action pending commencement of arbitration proceedings. For good cause shown, Defendant's Motion to dismiss and/or Stay these proceedings pending the commencement of arbitration is denied.

COURT OF COMMON PLEAS  
ENTER  
*Dennis S. Helmick* 1/10/06  
HON. DENNIS S. HELMICK  
THE CLERK SHALL SERVE NOTICE  
TO PARTIES PRESENT TO CIVIL  
RULE 59 WHICH SHALL BE TAXED  
AS COSTS HEREIN

**JUDGE HELMICK**

TO THE CLERK: Please send Copies of the following to:

Edward P. Akin, Attorney for Defendant, 2200 U.S. Bank Tower, 425 Walnut Street,  
Cincinnati, Ohio 45202

Courtney N. Caparella, Attorney for Plaintiffs, 8310 Princeton Glendale Road, West Chester,  
Ohio 45069