

**IN THE SUPREME COURT OF MISSISSIPPI**

DAVID MICHAEL ANDREWS

APPELLANT

v.

No. 2007-CA-00497

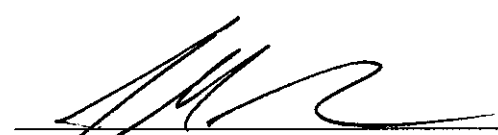
TINA FORD

APPELLEE

On Interlocutory Appeal from the Circuit Court of Rankin County, Mississippi

**BRIEF OF THE APPELLANT**

ORAL ARGUMENT REQUESTED



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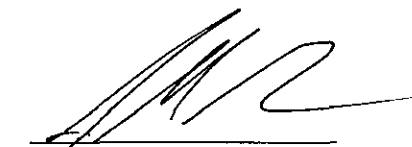
Appellee

**CERTIFICATE OF INTERESTED PARTIES**

The undersigned counsel of record for Petitioner David Michael Andrews certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. David Michael Andrews, Appellant
2. Tina Ford, Administratrix of the Estate of Robert Lee Ford, Deceased, Appellee
3. James G. McGee, Jr., Barnes, Broom, and McLeod, P.A., Attorney for Appellant
4. Andy Taggart, Legal & Strategic Counsel, PLLC, Attorney for Appellee
5. Robert Long, Herring, Long & Crews, P.C. – Attorney for Estate of Robert Lee Ford, Deceased;
6. Honorable Samac Richardson – Rankin County Circuit Court Judge

Respectfully submitted,

  
\_\_\_\_\_  
James G. McGee, Jr.  
Attorney for Appellant

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## **STATEMENT OF THE ISSUES**

Whether a substantial basis exists for a difference of opinion on the question of whether Appellee's claims are subject to arbitration and to resolve an issue of general importance in the administration of justice?

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is an interlocutory appeal from an order entered by the Circuit Court of Rankin County, Mississippi overruling Mike Andrews' ("Appellant") Motion to Compel Arbitration. The trial court's order overruled the Appellant's demand for arbitration and thereby held that the Operating Agreement and Buy/Sell Agreement executed by the Appellant and Robert Lee Ford, III ("Mr. Ford") were not part of the same overall transaction and were thus, not executed together. The trial court's ruling on the dispositive issues of law are in irreconcilable conflict with the previous opinions and holdings of the Rankin County Circuit Court, the Mississippi Supreme Court, and the Fifth Circuit Court of Appeals.

### **B. Course of Proceedings and Disposition in the Court Below**

On September 12, 2000, Appellant and Mr. Ford formed Sleep World, LLC ("Sleep World").

Mr. Ford died on November 7, 2005. Mr. Ford's wife, Tina Ford ("Appellee"), was appointed the Administratrix of Mr. Ford's estate on February 6, 2006.

Subsequently, a disagreement over the purchase price of Mr. Ford's membership interest developed between Appellant and Appellee. On April 6, 2006, Appellant requested submission of this matter to arbitration by way of letter dated April 6, 2006 from his counsel to Appellee's counsel. Despite the arbitration provision contained in Operating Agreement of Sleep World and Appellant's request for arbitration, Appellee refused to enter into arbitration proceedings.

On or about May 24, 2006, Appellee filed a complaint against Appellant, in the Rankin County Circuit Court, alleging breach of the Buy/Sell Agreement and requesting specific performance.<sup>1</sup>

On November 20, 2006, Appellant filed his Motion to Compel Arbitration. On March 8, 2007, the trial court entered its Order Overruling Defendant's Motion to Compel Arbitration.

### **C. Statement of the Facts**

When Appellant and Mr. Ford formed Sleep World on September 12, 2000, they executed a Buy/Sell Agreement, whereby Appellant and Mr. Ford agreed that each of them owned a fifty percent (50%) interest in Sleep World. (R. at 15-17.) On the same day, Appellant and Mr. Ford executed an Operating Agreement. (R. at 37-59.) Article IX of the Operating Agreement references the Buy/Sell Agreement no less than four (4) times, and, the Buy/Sell Agreement was attached to the Operating Agreement as an Exhibit. (R. at 48-50.)

The Operating Agreement contains an arbitration provision, which reads in pertinent part as follows:

If any Dispute arises between the Members and the Members cannot amicably resolve the Dispute between or among themselves, one or more of the Members may require resolution of the Dispute by arbitration in accordance with the rules set forth herein.

(R. at 52.)

Dispute is expressly defined as "any disagreement or deadlock among the Members relating to (i) this Operating Agreement, (ii) the Company or (iii) the rights and duties of the Members." (R. at 52.)

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<sup>1</sup> Mrs. Ford also filed suit against Sleep World in the Rankin County Chancery Court on May 30, 2006. Arbitration has been ordered in that case. [Findings of Facts and Conclusions of Law, attached to Petition as Exhibit "D"].

The arbitration provision also establishes the following method for appointing arbitrators:

Any member or Members may give notice to the Members that a Dispute shall be resolved by arbitration. Promptly after this notice is received, the Company shall request that the American Arbitration Association (the "AAA") a list containing the names of six (6) arbitrators to AAA and residing in the State of Mississippi. Promptly after receiving this list, Members shall agree upon a single person from this list as the person who shall serve as arbitrator (the "Arbitrator") to resolve this Dispute, and the Company shall engage this person as Arbitrator. The Company shall formalize this engagement in a written agreement whose provisions shall be consistent with the provisions of this Section, and which shall provide for any indemnification reasonably requested by the Arbitrator.

(R. at 52.)

Clearly, the Appellant and Mr. Ford executed the Buy/Sell Agreement and the Operating Agreement as integral and interrelated parts of the same overall transaction.



## **SUMMARY OF THE ARGUMENT**

On March 8, 2007, the trial court entered its Order Overruling Defendant's Motion to Compel Arbitration. (R. at 213.) Appellant submits that the trial court's ruling on the dispositive issues of law are in irreconcilable conflict with the previous opinions and holdings of the Rankin County Circuit Court, the Mississippi Supreme Court, and the Fifth Circuit Court of Appeals. Each of these courts has consistently held that when the same parties execute different contracts at the same time and for the same purpose, the contracts are to be construed together such that the arbitration provision of one contract is integrated into the other contract. Accordingly, Appellant respectfully requests that this Court grant his Appeal and vacate the trial court's March 8, 2007 Order.

## ARGUMENT

The trial court's holding is in irreconcilable conflict with the previous opinions and holdings of the Rankin County Circuit Court, the Mississippi Supreme Court, and the Fifth Circuit Court of Appeals. Accordingly, this Court should vacate the trial court's order because a substantial basis exists for a difference of opinion on this question of whether Appellee's claims are subject to arbitration and to resolve an issue of general importance in the administration of justice. Miss. R. App. P. 5(a).

In the case of *Sullivan v. Protex Weatherproofing, Inc.*, 913 So. 2d 256, 257 (Miss. 2005), the buyer and seller of a business signed an asset purchase agreement. On the same day, the parties also executed an employment contract, whereby the seller would continue to work for the business as an employee. *Id.* The employment contract contained an arbitration clause, but the asset purchase agreement did not contain an arbitration clause. *Id.* Later, the seller asserted claims against the buyer under the asset purchase agreement. *Id.* The seller sought to compel arbitration pursuant to the terms of the employment contract. *Id.*

In *Sullivan*, the Mississippi Supreme Court upheld the decision of the Circuit Court of Rankin County, and found that the asset purchase agreement integrated the terms and the provisions of the employment contract, including the arbitration provision. *Id.* at 260-61. The Court found that the employment contract and the asset purchase agreement were not only part of the same transaction, they were in fact part of the same agreement. *Id.* Therefore, the seller's claims were subject to arbitration. *Id.*

Similarly, in the case of *Sullivan v. Mounger*, 882 So. 2d 129, 131 (Miss. 2004), the parties signed a settlement agreement and a series of other documents called the "Transaction Documents." One of the parties later sued over disputes arising out of two

of the Transaction Documents, neither of which contained an arbitration provision. *Id.* The defendant sought to compel arbitration based on an arbitration provision contained in one of the Transaction Documents which was not complained of in the plaintiff's lawsuit. *Id.* The Mississippi Supreme Court held that the plaintiff's claims were subject to arbitration agreement. *Id.* at 135. "[W]hen documents are 'executed contemporaneously by the same parties, for the same purposes, and as part of the same transaction' they are to be construed together." *Id.* at 135 (¶33).

In the case of *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34 (5th Cir. 1990), the plaintiff entered into a purchase agreement with a fast-food franchisor. The purchase agreement provided that the parties would contemporaneously execute a license agreement. *Id.* at 34-36. The license agreement contained an arbitration clause, but the purchase agreement did not. *Id.* The plaintiff later sued the franchisor for claims arising out of the purchase agreement. *Id.* The Fifth Circuit held that the "agreements were integral and interrelated parts of one deal." *Id.* The separate agreements were, therefore, to be construed together such that the plaintiff's claims were subject to arbitration. *Id.*

In the case of *Personal Security & Safety Systems, Inc. v. Motorola Inc.*, 297 F.3d 388 (5th Cir. 1990), the parties executed three agreements in connection with their investment. One of the contracts contained an arbitration provision, but the other two contracts did not contain an arbitration provision. *Id.* at 388-390. The Fifth Circuit held that claims arising out of one of the contracts that did not contain an arbitration provision were governed by the arbitration provision of the other contract "because the agreements were executed together as part of the same overall transaction and therefore are properly construed together." *Id.* at 390.

In the present case, Appellant and Mr. Ford executed the Buy/Sell Agreement and the Operating Agreement, including the arbitration provision, on the same day. The parties attached a copy of the Buy/Sell Agreement to the Operating Agreement as an exhibit, implying that the parties would not have executed either agreement without simultaneously executing the other agreement. The Buy/Sell Agreement and the Operating Agreement were clearly executed simultaneously as integral parts of the same transaction.

Pursuant to the terms of the arbitration provision, the parties expressly agreed to arbitrate any dispute relating to Sleep World or its members. (R. at 48-52.) Mr. Ford never revoked the arbitration provision. Appellee's claims relate to disputes regarding Sleep World and its members. Appellant properly requested that Appellee's claims be submitted to arbitration.

## **CONCLUSION**


Therefore, based on the applicable case law, Appellate prays that this Court will overturn the trial court's order and stay all proceedings in the trial court in this action.

Such action by the Court is proper because: (1) The rules of law conclude that the two documents were part of the same overall transaction and should be construed together as the documents were executed (i) at the same time, (ii) by the same parties, and (iii) as part of the same transaction; and (2) Because the Operating Agreement and Buy/Sell Agreement of Sleep World, LLC are integral documents, the arbitration clause contained in the Operating Agreement should govern the terms Buy/Sell Agreement as well.

Respectfully submitted this 18<sup>th</sup> day of September, 2007.

BARNES, BROOM, and MCLEOD, P.A.

By: 

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Attorney for Appellant,  
David Michael Andrews

**CERTIFICATE OF SERVICE**

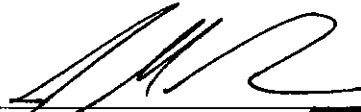
I, James G. McGee, Jr. of the firm of BARNES, BROOM, and MCLEOD, P.A., Attorneys at Law, do hereby certify that I have this day served an original and three (3) true and correct copies of the above and foregoing Brief for the Appellant, by first class mail, postage prepaid to the to the Clerk of the Mississippi Supreme Court and a true and correct copy of the above and foregoing Brief for the Appellant to the following counsel at the address below:

Hon. Samac S. Richardson  
P.O. Box 1599  
Brandon, Mississippi 39043

R. Andrew Taggart, Jr. (MSB 7422)  
Andy Taggart, Legal & Strategic Counsel, PLLC  
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Robert W. Long (MSB 1410)  
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SO CERTIFIED this 18<sup>th</sup> Day of September 2007.

  
\_\_\_\_\_  
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Attorney for Appellant,  
David Michael Andrews

**Miss. R. App. P. 5(a)**

(a) Petition for Permission to Appeal. An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

- (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or
- (2) Protect a party from substantial and irreparable injury; or
- (3) Resolve an issue of general importance in the administration of justice.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 21 days after the entry of such order in the trial court with proof of service on the trial judge and all other parties to the action in the trial court.

(b) Content of Petition; Answer. The petition shall contain: a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; a statement of the current status of the case; and a statement as to why the petition for interlocutory appeal is timely. The petition shall further identify all other cases or petitions for interlocutory appeal pending before the appellate court and known to the petitioner which are related to the matter for which interlocutory review is sought. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of law or opinion. Within 14 days after service of the petition, the trial judge may file a statement informing the appellate court of any reasons why that judge believes that the petition should or should not be granted, and any adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on the trial judge and all other parties to the action in the trial court. The petition with any statement by the trial judge and answers of all parties responding shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) Grant of Permission; Prepayment of Costs; Filing of Record. If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed.

(e) Expedited Proceedings. The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases. If the Court determines that the issues presented can be



fairly decided on the petition, response and exhibits presented, the Court may decide those issues simultaneously with the granting of the petition, without awaiting preparation of a record or further briefing.

(f) Effect on Trial Court Proceedings. The petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order.

[Amended effective July 29, 2004 to add paragraph (e) regarding expedited proceedings when the petition is granted. Effective December 9, 2004, as to trial court orders entered from and after March 1, 2005, paragraph (a) and (b) are amended to eliminate provision for seeking certification of the issue by the trial judge and provide the trial judge an opportunity to file a statement regarding the issue.]