IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI
NO. 2007-CA-01771

ECLECIUS L. FRANKLIN **APPELLANT**

V.

KIMBERLY MOORE AND DANA BISHOP **APPELLEES**

Appeal from the Circuit Court of
Hinds County, Mississippi
First Judicial District
No. 251-06-408CIV

BRIEF OF APPELLANT ECLECIUS L. FRANKLIN

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Eclecius L. Franklin hereby 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. Eclecius L. Franklin, Appellant.

2. Myles A. Parker, Jay Barbour and the law firm of Carroll Warren & Parker PLLC, attorneys for Eclecius L. Franklin.

3. Kimberly Moore and Dana Bishop, Appellees.

4. J. Howard Thigpen, Brian Clark and the law firm of Thigpen & Clark, attorneys for the Appellees.

5. The Honorable Winston L. Kidd, trial court judge.

SO CERTIFIED, this the 29th day of April 2008.

Jay Barbour
Attorney of record for Eclecius L. Franklin

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I. STATEMENT OF ISSUES

Whether the Circuit Court for the First Judicial District of Hinds County, Mississippi, the Honorable Winston L. Kidd, erred in denying Appellant Eclecius Franklin's Motion to Compel Arbitration.

II. STATEMENT OF THE CASE

A. Statement of the Facts

At issue in this litigation are alleged acts and omissions purportedly committed by Defendants Virginia College, L.L.C. ("Virginia College"), Richard Tuttle ("Tuttle") and Eclecius L. Franklin ("Franklin") in connection with massage therapy classes taken by Plaintiffs Kimberly Moore ("Moore") and Dana Bishop ("Bishop") at Virginia College's Jackson, Mississippi campus. Prior to, and as a prerequisite for taking those classes, Moore and Bishop individually entered into contractual Tuition Agreements with Virginia College ("Tuition Agreements"). Moore entered into her Tuition Agreement on or about November 13, 2002, and Bishop entered into her Tuition Agreement on our about January 9, 2003. R. at 53-56.

Paragraph twelve of the Tuition Agreements entered into by Moore and Bishop states as follows:

> **ARBITRATION:** Any dispute arising out of or with respect to this Agreement or any alleged breach of this Agreement (provided such dispute is not resolved by negotiation between the parties within thirty days after notice of such alleged or threatened breach of either party), shall, upon notice by either party to the other party, be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Such arbitration shall take place in Alabama. The arbitrator is authorized to fashion remedies, which make the prevailing party whole for the demonstrated losses incurred, including determining that the student should be enjoined from certain actions or be compelled to undertake certain actions. The arbitrator's decision and award shall be final, binding on the parties, and non-appealable, and may be entered in any court of competent jurisdiction to enforce it. The parties shall share equally any expenses incurred as American Arbitration Association fees, administrative fees, mediation fees, hearing fees, and postponement/cancellation fees. Each party will be responsible for the fees

> and costs of its own witnesses, expert witnesses and attorneys. Notwithstanding the provisions of this paragraph, in the event a breach of this Agreement is alleged, the College shall have the option to seek injunctive relief in any court of competent jurisdiction barring further breach of this Agreement pending arbitration. *Id.*

The Plaintiffs filed their Complaint against Virginia College, Tuttle and Franklin on May 1, 2006. R. at 57. The Plaintiffs' Complaint contains the following nine enumerated causes of action: (1) breach of contract (the Tuition Agreement) by all Defendants; (2) educational malpractice and educational negligence by all Defendants; (3) fraud by all Defendants; (4) conversion by all Defendants; (5) breach of duty of good faith and fair dealing by all Defendants; (6) negligent and intentional infliction of emotional distress by all Defendants; (7) negligence (in establishing an appropriate course curriculum) by all Defendants; (8) negligent and/or intentional assault by Franklin; and (9) negligent hiring and negligent retention by Virginia College. R. at 57. The Plaintiffs' claims can be classified into two general categories: (1) that all Defendants breached various contractual and non-contractual duties relating to the education being provided to the Plaintiffs, those duties having arisen from and been created by the Plaintiffs' Tuition Agreements ("Plaintiffs' education claims"); and (2) that Franklin negligently and/or intentionally assaulted the Plaintiffs while he was teaching them during massage therapy classes at Virginia College, with Virginia College being both directly and vicariously liable for same because Franklin was its agent and continued to be its agent notwithstanding its knowledge of Franklin's prior similar misconduct ("Plaintiffs' assault claims").

Contemporaneously with the filing of their Complaint, the Plaintiffs served Franklin with Interrogatories, Requests for Production of Documents and Requests for Admissions. Franklin's initial filing in this matter was his Answer to the Plaintiffs' Complaint, which he filed on June 23, 2006. R. at 14. Franklin asserted his right to arbitration of the Plaintiffs' claims against him in the Seventh Affirmative Defense in his Answer. R. at 27. Franklin's counsel wrote Plaintiffs'

counsel on February 20, 2007 requesting that his clients honor their contractual obligations to arbitrate their claims against Franklin, and advising that a refusal by the Plaintiffs to do so would result in the filing of a Motion to Compel Arbitration. R. at 200. After the Plaintiffs refused to honor those obligations, Franklin filed a Motion to Compel Arbitration on March 19, 2007. R at 32. The Circuit Court heard oral arguments on the Motion to Compel Arbitration on May 14, 2007. *See* Transcript of Hearing at Volume 4, pp. 1-17 of the Record.[1]

On June 29, 2007, the Circuit Court entered an Order Denying Franklin's Motion to Compel Arbitration. R. at 237. The basis for the Circuit Court's denial of Franklin's Motion was its conclusion that Franklin waived his right to arbitrate the claims asserted against him by actively participating in the underlying litigation prior to moving to compel arbitration. *Id.* In its Order, the Circuit Court further state that the Plaintiffs' assault claims fell outside of the scope of their arbitration agreements. R. at 238. This statement is contained in the Order notwithstanding that the Circuit Court did not address this issue at the hearing on Franklin's Motion to Compel Arbitration. *See* Volume 4, pp. 1-17 of the Record.

Like Franklin, Virginia College and Tuttle moved to compel arbitration of the claims asserted against them by Moore and Bishop. As it did with regard to Franklin's Motion to Compel Arbitration, the Circuit Court denied Virginia College's and Tuttle's Motion to Compel Arbitration by concluding that those Defendants waived their rights to arbitration by actively participating in the underlying litigation prior to moving to compel arbitration.[2] Virginia College and Tuttle appealed the denial of their Motion to Compel Arbitration, and in an opinion handed down on February 5, 2008, the Mississippi Court of Appeals held that the Circuit Court

[1] In preparing the record for appeal, the Circuit Clerk did not number the pages of the hearing transcript sequentially with the rest of the record. Rather, that transcript (totaling 17 pages) is simply designated as Volume 4 of 4 of the record for appeal.

[2] In fact, at the hearing on his Motion to Compel Arbitration, the Circuit Court stated that it was denying Franklin's motion for the same reasons that it denied Virgin College's and Tuttle's Motion to Compel Arbitration. *See* Record Volume 4, at p. 17.

committed reversible error in finding that Virginia College and Tuttle waived their arbitration rights. *See Virginia College, L.L.C. v. Moore*, 974 So. 2d 269 (Miss.Ct.App. 2008). The Court of Appeals reversed the Circuit Court's Order denying Virginia College's and Tuttle's Motion to Compel Arbitration, and remanded the matter as to those Defendants back to the trial court for further proceedings regarding their Motion to Compel Arbitration. *Id.* at 274.

B. Standard of Review

This Court applies a de novo standard of review regarding a decision to grant or deny a motion to compel arbitration. *Comm. Care Center of Vicksburg, LLC v. Mason*, 966 So. 2d 220, 223 (Miss. App. 2007) (citing *EquiFirst Corp. v. Jackson,* 920 So. 2d 458, 461 (Miss. 2006)).

III. SUMMARY OF THE ARGUMENT

The Circuit Court committed reversible error when it denied Franklin's Motion to Compel Arbitration. Franklin did not waive his right to arbitration of the Plaintiffs' claims because he did not substantially invoke the litigation process before filing his Motion to Compel Arbitration, and because the Plaintiffs neither suffered nor allege to have suffered any detriment or prejudice as a result of any act(s) undertaken by Franklin prior to the filing of his motion. The Plaintiffs entered into valid arbitration agreements, and Franklin is entitled to enforce the covenants contained therein notwithstanding that he was not a signatory to those agreements. All of the Plaintiffs' claims against Franklin fall within the scope of their arbitration agreements, and there exist no circumstances external to those agreements which preclude full enforcement of same.

IV. ARGUMENT

A. Legal Precedent Regarding Arbitration

The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1947 as amended) ("the Act") is a statement of congressional intent in upholding private parties' agreements for dispute resolution.

See People Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989). In *Mesa Operating Ltd. P'ship v. L.A. Interstate Gas Corp.*, 797 F.2d 238, 245 (5th Cir. 1986), the court observed:

> The legislative purpose of the FAA, consistently interpreted as such by the Supreme Court, is to enforce arbitration clauses as liberally and rigorously as possible. Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts.

(*citing Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984)).

Once a court determines that the Act applies pursuant to a written agreement to arbitrate, it "shall direct the parties to proceed to arbitration." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985).

> A party aggrieved by the alleged failure, neglect of or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (1947 as amended)

Mississippi statutory law allows parties to submit their disputes to arbitration. Miss. Code Ann. §§ 11-15-1 et seq. (1972 as amended) Not only is the resolution of disputes in arbitration allowed under Mississippi law, it is encouraged. *See Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002) (holding that arbitration clauses are presumed valid and are to be liberally construed so as to encourage the resolution of disputes through arbitration). The Mississippi Supreme Court has recognized that "arbitration is favored and firmly embedded in both our federal and state laws." *Mason*, 966 So. 2d at 223 (citing *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 513 (Miss. 2005)).

Any doubts concerning the scope of the issues subject to arbitration under the terms of a valid agreement to arbitrate should be resolved in favor of arbitration. *Moses H. Cohen Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1982). "Due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Sanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989); *see also IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 107 (Miss. 1998) (holding that doubts as to the availability of arbitration must be resolved in favor of arbitration). "Arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998).

The Plaintiffs, as the parties resisting arbitration, bear the burden of proving that arbitration of their claims against Franklin is not appropriate. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000). The Plaintiffs' burden is a heavy one. *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 578 (5th Cir. 1991) (stating that "[a] party asserting waiver thus bears a heavy burden of proof in its quest to show that an opponent has waived a contractual right to arbitrate").

B. Franklin Has Not Waived His Right to Arbitration

Relying upon *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.*, 619 So. 2d 908, 914 (Miss. 1993), the Circuit Court denied Franklin's Motion to Compel Arbitration by concluding that Franklin "waived his right to arbitration when he actively participated in the lawsuit." R. at 237. The Circuit Court held that the following conduct by Franklin constituted waiver: requesting additional time to respond to the Plaintiffs' Complaint and discovery, answering that Complaint and discovery, propounding discovery upon the Plaintiffs (discovery to-which the

Plaintiffs have never responded), inquiring as to potential deposition dates, and being in attendance to observe a hearing on Virginia College's and Tuttle's Motion to Compel Arbitration. R. at 238.

> Waiver of arbitration is not a favored finding, and there is a presumption against it; this is particularly true when the party seeking arbitration has included a demand for arbitration in its answer,[3] and the burden of proof then falls even more heavily on the party seeking to prove waiver.

Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270, 1276 (Miss. 2003) (emphasis added). Waiver of the right to arbitrate shall not be found unless the party seeking to compel arbitration substantially invoked the judicial process prior to moving to compel arbitration and the party opposing arbitration suffered detriment or prejudice as a result thereof. *See Century 21 Maselle & Assocs., Inc. v. Smith*, 965 So. 2d 1031, 1036 (Miss. 2007) (stating that "active participation or substantial invocation of the litigation process which results in detriment or prejudice to the other party" can create waiver) (emphasis added); *Phillips,* 842 So. 2d at 1278 (stating that the right to arbitrate may be waived when a party "substantially invokes the judicial process to the detriment or prejudice of the other party") (emphasis added). The Mississippi Supreme Court has defined such detriment or prejudice as "the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Id.*

There cannot, as a matter of law, be waiver of the right to arbitrate without detriment or prejudice to the party opposing arbitration. *Century 21*, 965 So. 2d at 1036; *Phillips,* 842 So. 2d at 1278. Thus, Franklin could not have waived his right to arbitrate unless he, prior to moving to compel arbitration, did some act(s) which caused the Plaintiffs to suffer undue delay, expense or damage to their legal position. *Id.* As will be shown below, none of the acts by Franklin which

[3] Franklin asserted his right to arbitration as the Seventh Affirmative Defense in his Answer to the Plaintiffs' Complaint. R. at 27.

the Circuit Court relied upon in concluding waiver caused the Plaintiffs to suffer any detriment or prejudice.

1. Requesting additional time to respond to the Plaintiffs' Complaint and discovery; responding to the Plaintiffs' Complaint and discovery.

Upon receiving Franklin's Answer to their Complaint and his responses to their written discovery, the Plaintiffs did absolutely nothing in response thereto. They did not file any motions, submit any additional discovery requests, take any depositions, amend their Complaint, or take any other action in response to Franklin's Answer and discovery responses. Because they neither did nor were required to undertake any action in response to Franklin's Answer and discovery responses, the Plaintiffs could not have incurred detriment or prejudice as a result of Franklin having responded to their Complaint and discovery requests.[4] *See Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1162 (5th Cir. 1986); *Cox*, 619 So. 2d at 914 (both holding that a party opposing arbitration could suffer prejudice in the form of time and expense incurred if (i.e. only if) required to respond to a pleading filed by a party that subsequently seeks arbitration, thereby possibly leading to the waiver of the right to arbitrate). Because Franklin's Answer and discovery responses did not operate to stay or otherwise delay the litigation, and did not preclude the Plaintiffs from prosecuting their claims, those pleadings did not cause the Plaintiffs to suffer any undue delay.

2. Propounding written discovery upon the Plaintiffs.

While Franklin did propound written discovery upon the Plaintiffs, they never responded to that discovery. As such, they could not have suffered any detriment or prejudice by virtue of that discovery having been propounded upon them. *See J.C. Bradford*, 938 F.2d at 578, n.3 (holding that the plaintiffs could not have been prejudiced by the defendant's discovery requests

[4] Having done nothing following their receipt of Franklin's responses to their Complaint and discovery requests, the Plaintiffs cannot claim that any request by Franklin for additional time in which to submit those responses caused them to suffer any detriment or prejudice.

because they never responded to that discovery). Furthermore, Franklin's discovery sought information directly related to the Plaintiffs' claims against him, whereby that discovery would be useful for the purposes of arbitration. *See Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 420-21 (5th Cir. 1985) (holding that when discovery propounded to and answered by a party opposing arbitration may be useful for the purpose of arbitration, the court will not infer waiver due to prejudice, "particularly when the defendant clearly stated the desire to arbitrate the matter in its original answer").

Because the Plaintiffs did nothing in response to Franklin's written discovery, they did not suffer any detriment or prejudice as a result of that discovery.

3. Inquiring as to potential deposition dates.

On one occasion prior to the filing of Franklin's Motion to Compel Arbitration, counsel for Franklin wrote Plaintiffs' counsel inquiring as to when the Plaintiffs might be available for deposition. That notwithstanding, neither the Plaintiffs' depositions, nor the depositions of any other individuals have been taken or even scheduled in the underlying litigation. In fact, a review of the record reveals no response to Franklin's request by Plaintiffs' counsel. Having done nothing in response to Franklin's inquiry regarding potential deposition dates, the Plaintiffs neither did, nor could have suffered any detriment or prejudice as a result of that request.

4. Attendance at the hearing on Virginia College's and Tuttle's Motion to Compel Arbitration.

Counsel for Franklin attended and observed the hearing on the Motion to Compel Arbitration filed by Virginia College and Tuttle. The motion being heard was neither filed nor responded to by Franklin, and his counsel did not actively participate in the hearing. The activities undertaken by the Plaintiffs in response to the motion (i.e. briefing, preparation for the hearing and attendance at the hearing) would have been same regardless of whether Franklin's

counsel attended the hearing. Thus, the presence of Franklin's counsel at the hearing did not cause the Plaintiffs to incur any detriment or prejudice.

Not only is it clear that the conduct of Franklin upon which the Circuit Court relied in concluding that he waived his right to arbitrate did not cause the Plaintiffs to suffer any detriment or prejudice, a review of the record reveals that the Plaintiffs have never made any such allegation. As the parties opposing arbitration, it is the Plaintiffs' burden to prove (1) that Franklin substantially invoked the judicial process prior to moving to compel arbitration; and (2) that same caused them to suffer detriment or prejudice. *See Century 21*, 965 So. 2d at 1036-37 (holding that "parties claiming waiver must offer sufficient evidence at a hearing to overcome the presumption in favor of arbitration"). This burden is made even heavier by the fact that Franklin asserted his right to arbitration as an affirmative defense in his Answer to the Plaintiffs' Complaint. *See J.C. Bradford*, 938 F.2d at 578 (holding that a party asserting waiver "bears a heavy burden of proof"); *Phillips*, 842 So. 2d at 1276 (holding that the presumption against a finding of waiver is particularly strong when the party seeking arbitration asserted its right to arbitration in its answer).

A review of the record makes clear that the Plaintiffs have failed to prove (or even allege) that they suffered detriment or prejudice as the result of any act(s) undertaken by Franklin prior to him moving to compel arbitration. As such, it is clear that the Circuit Court erred when it denied Franklin's Motion to Compel Arbitration on the basis of alleged waiver. *See Phillips*, 842 So. 2d at 1276 (rejecting Phillips' argument that UNA waived its right to arbitration because Phillips "made no showing of prejudice"); *J.C. Bradford*, 938 F.2d at 578 (rejecting waiver argument because "plaintiffs simply have not presented enough evidence that [the defendant's] delay materially prejudiced them"); *J&S Const. Co. v. Travelers Indem. Co.*, 520 F.2d 809, 809-10 (1st Cir. 1975) (holding that defendant's conduct did not constitute waiver of its right to

arbitrate because the plaintiff presented "no showing of prejudice"); *Am. Dairy Queen Corp. v. Tantillo*, 536 F. Supp. 718, 722 (M.D. La. 1982) (rejecting plaintiffs' claim of waiver because they "failed to show how they have been prejudiced").

Not only have the Plaintiffs not suffered any detriment or prejudice because of any act(s) by Franklin that occurred prior to the filing of his Motion to Compel Arbitration, but Franklin did not substantially invoke the judicial process before he filed that motion. The Plaintiffs served Franklin with their Complaint, Interrogatories, Requests for Production of Documents and Requests for Admissions on May 1, 2006. R. at 266. Franklin's initial filing in this matter was his Answer to the Complaint, which he filed on June 23, 2006. R. at 1-2. In the Seventh Affirmative Defense in his Answer, Franklin asserted his right to arbitration of the Plaintiffs' claims against him. R. at 27. Franklin once again asserted his right to arbitration by correspondence to Plaintiffs' counsel dated February 20, 2007 (R. at 200), and he filed his Motion to Compel Arbitration on March 19, 2007. R. at 32. In sum, Franklin first asserted his right to arbitration in his initial filing less than two months after being put on notice of the Plaintiffs' claims, and he affirmatively moved to compel arbitration less than ten months after his initial notice of those claims.

The Circuit Court's reliance upon *Cox* in denying Franklin's Motion to Compel Arbitration is misplaced. In that case, the defendant did not file a motion to compel arbitration until eighteen months after the complaint was filed against him, and not until after he had filed an original and amended counterclaim, taken part in depositions and filed a motion for summary judgment. *Cox*, 619 So. 2d at 913. Further, the defendant in *Cox* moved to compel arbitration without first giving notice to the plaintiff as he was required to do pursuant to the arbitration agreement. *Id.* None of the factors upon which the court in *Cox* relied in finding waiver are present in the instant matter. Franklin filed his Motion to Compel Arbitration only ten months

after the Plaintiffs filed their Complaint, and after having given the Plaintiffs notice of his intent to do so as called for by their arbitration clauses. R. at 54, 56 and 200. Moreover, unlike the defendant in *Cox*, Franklin has not filed any counterclaims or dispositive motions, nor has he participated in any depositions.

Unlike *Cox*, the *J.C. Bradford* decision is instructive in this matter. In *J.C. Bradford*, the defendant filed its motion to compel arbitration thirteen months after the plaintiffs filed their complaint. *J.C. Bradford*, 938 F.2d at 576. Prior to the filing of the defendant's motion to compel arbitration, an original and three amended scheduling orders were entered; and the defendant propounded discovery upon the plaintiffs, answered the complaint and participated in an initial pretrial conference. *Id.* Notwithstanding the defendants' affirmative conduct and delay in filing its motion to compel arbitration, the court concluded that the defendant had not waived its right to arbitration. *Id.* at 578-79. The circumstances presented in *J.C. Bradford* are substantially similar to those presented in the case *sub judice*, except that the filing of Franklin's Motion to Compel Arbitration occurred only ten months after the Plaintiffs filed their Complaint, not thirteen months after as was the case in *J.C. Bradford.* One point focused on by the court in *J.C. Bradford* is that the defendant in that case did not file any dispositive motions that would have required a judicial determination by the court. *Id.* at 577-78. In contrast, numerous courts have held that a party waives its right to arbitration by filing dispositive motions because the party opposing arbitration suffers prejudice in the form of time and expense incurred in responding to the motion. *Price*, 791 F.2d at 1162; *Cox*, 619 So. 2d at 914. As the record illustrates, Franklin has not filed any dispositive motions in the underlying litigation.

Tenneco is also instructive in this matter. In that case, the defendants filed a motion to compel arbitration eight months after the plaintiffs filed their complaint, and did so after they had answered the complaint, served discovery, moved for a protective order and moved for an

extension of the discovery period. *Tenneco*, 770 F.2d at 420-21. The court in *Tenneco* held that the defendants' affirmative conduct, which was more extensive than Franklin's, was not extensive enough to constitute a waiver of their right to arbitrate. *Id*

The record in this matter makes clear that the Plaintiffs did not suffer any detriment or prejudice because of any act(s) undertaken by Franklin prior to the filing of his Motion to Compel Arbitration. The record makes equally as clear that Franklin did not substantially invoke the judicial process before he moved to compel arbitration. For these reasons, and because the material facts present with respect to Virginia College's and Tuttle's Motion to Compel Arbitration are also present with respect to Franklin's Motion to Compel Arbitration, this Court should, as did the Court of Appeals in *Moore*, conclude that the Circuit Court committed reversible error in holding that Franklin waived his right to arbitration and denying his Motion to Compel Arbitration.

C. The Plaintiffs' Claims Against Franklin Can Only Be Resolved Through Binding Arbitration

When evaluating the propriety of a motion to compel arbitration, courts are to conduct a two-pronged inquiry. *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). The first prong has the following two considerations: (1) whether a valid agreement to arbitrate exists; and (2) whether the claims for which arbitration is sought fall within the scope of the arbitration agreement. *Id.* The question presented by the second prong is whether there exist any "legal constraints external to the parties' [arbitration] agreement" such as fraud, duress or unconscionability which would foreclose arbitration of the claims. *Id.*

With the exception of stating that the Plaintiffs' assault claims against Franklin did not fall within the scope of their arbitration agreements, the Circuit Court did not perform the requisite two-pronged inquiry prior to denying Franklin's Motion to Compel Arbitration. A

performance of that inquiry makes clear that all of the Plaintiffs' claims against Franklin must be finally resolved through binding arbitration.

1. The Plaintiffs entered into valid arbitration agreements.

Moore entered into her Tuition Agreement on or about November 13, 2002. R. at 53-54. Bishop entered into her Tuition Agreement on or about January 9, 2003. R. at 55-56. There is no dispute that Moore and Bishop executed, and thereafter delivered their respective Tuition Agreements to Virginia College. In paragraph twelve of each of the Plaintiffs' Tuition Agreements, it is clearly and unequivocally stated that "[a]ny dispute arising out of or with respect to this Agreement . . . shall, upon notice by either party to the other party, be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." R. at 54, 56.

It is undisputed that Moore and Bishop each entered into valid agreements to arbitrate any claims or disputes "arising out of or with respect to" their Tuition Agreements. Had Moore and Bishop not entered into valid arbitration agreements, Franklin would not have had any arbitration rights to allegedly waive. By concluding waiver by Franklin, the Circuit Court necessarily first concluded that Moore and Bishop in fact entered into valid arbitration agreements.

2. All of the Plaintiffs' claims against Franklin fall within the scope of their arbitration agreements.

Based upon its terms, an arbitration clause is classified as either "broad" or "narrow." *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167, 175 (Miss. 2006) Narrow arbitration clauses are those which only require arbitration of disputes literally "arising out of" a particular written agreement. *Pennzoil*, 139 F.3d at 1067. To the contrary, broad arbitration clauses are those which require arbitration of disputes that not only "arise out of" specified written agreements,

but also of disputes that "relate to" or are in any way "connected with" those written agreements and their subject matter. *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 726 (Miss. 2001).

The arbitration clauses contained in the Plaintiffs' respective Tuition Agreements require arbitration of "any dispute arising out of or with respect to this Agreement or any alleged breach of this Agreement." R. at 53-56. This is a broad arbitration clause which requires arbitration of any disputes that merely "touch matters covered by the [Tuition Agreements]." *Pennzoil*, 139 F.3d at 1067-68. All claims asserted against Franklin in this cause relate to his alleged failure to satisfactorily provide the services for which the Plaintiffs contracted through the Tuition Agreements, or his alleged wrongful acts that accompanied his conduct in providing those contracted-for services. R. at 57. Put another way, all of the Plaintiffs' claims against Franklin charge him with engaging in misconduct while providing the services called for by the Tuition Agreements containing the arbitration provisions. Thus, at a bare minimum, all of the Plaintiffs' claims clearly "touch matters covered by the [Tuition Agreements]" whereby those claims must be arbitrated pursuant to the express terms of the arbitration clauses contained in the Plaintiffs' Tuition Agreements. *Pennzoil*, 139 F.3d at 1067-68; *see also Ford Motor Co. v. Ables*, 207 Fed.App'x 443, 447 (5th Cir. 2006) (holding that an arbitration clause requiring arbitration of any disputes "arising out of or relating to" an automobile retail installment contract required arbitration of plaintiff-purchasers' claims against the non-signatory automobile manufacturer for fraud, conspiracy, negligent training and negligent infliction of emotional distress).

The Plaintiffs became eligible to take the massage therapy classes during which Franklin's alleged misconduct occurred only after, and as a result of entering into their respective Tuition Agreements. The subject of those Tuition Agreements is the massage therapy classes during which Franklin's alleged misconduct occurred. Accordingly, all claims asserted by the Plaintiffs against Franklin "arise out of or with respect to" the Tuition Agreements entered into

by each of them, whereby those claims must be finally resolved through arbitration pursuant to the terms of the arbitration clauses contained in those Tuition Agreements.

In its Order denying Franklin's Motion to Compel Arbitration, the Circuit Court relied upon *Smith v. Captain D's, L.L.C.*, 963 So. 2d 1116 (Miss. 2007), in stating that the Plaintiffs' assault claims did not fall within the scope of their arbitration agreements.[5] R. at 238. In so doing, the Circuit Court stated that court in *Smith* held that "unquestionably a claim of assault neither pertains to nor has a connection with an employment contract [i.e. an employment contract containing an arbitration agreement]." *Id.* The Circuit Court's reliance upon *Smith* is misplaced in at least two material ways. One, the contract in *Smith* was a contract regarding employment at a restaurant, while the Tuition Agreements at issue in this matter involve educational instruction that requires physical contact between the instructors and students. Two, the Circuit Court erroneously applied *Smith* for the proposition that claims for assault could never fall within the scope of any arbitration agreement. *Id.* The court in *Smith* simply held that the particular assault claims at issue in that case did not fall within the scope of the particular arbitration agreement at issue in that case. *Smith*, 963 So. 2d at 1121.

The Circuit Court committed reversible error when it held, that the Plaintiffs' assault claims fall outside of the scope of their arbitration agreements.

3. There are no legal constraints external to the Plaintiffs' arbitration agreements which would foreclose arbitration of their claims against Franklin.

In order to avoid their contractual obligations to arbitrate their claims against Franklin, the Plaintiffs would have to prove that they entered into their arbitration agreements because of fraud or duress, or that those agreements are unconscionable. *East Ford*, 826 So. 2d at 713. The

[5] The absence of such a holding with respect to the Plaintiffs' education claims against Franklin represents an implicit finding by the Circuit Court that those claims fall within the scope of the Plaintiffs' valid arbitration agreements.

record plainly lacks any proof, or even allegations of such fraud or duress, whereby the only inquiry is whether the Plaintiffs' arbitration agreements are unconscionable. It is well established under Mississippi law that unconscionability can fall into two categories—procedural and substantive. *Id.* at 714. Neither is present in the case *sub judice*.

An arbitration agreement may be procedurally unconscionable if a party to that agreement entered into it because of a lack of knowledge or a lack of voluntariness. *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998). The Plaintiffs cannot persuasively claim that they were unaware of the arbitration agreements contained in their respective Tuition Agreements when they entered into those agreements. Each Plaintiffs' Tuition Agreement is only two pages long, whereby every word therein could be read in a matter of a few minutes. R. at 53-56. The first numbered item on page one of each Tuition Agreement expressly warned the Plaintiffs, in bold text, not to sign the agreement before reading it. R. at 53, 55. The third numbered item on page one of each Tuition Agreement expressly warned the Plaintiffs, in all capitalized text, that the agreement would become a legally binding agreement once it was signed and delivered to Virginia College. *Id.* The arbitration provisions are obvious to anyone reading the Tuition Agreements, as they are denoted by the bold heading "ARBITRATION." R. at 54, 56. The Plaintiffs signed each page of their respective Tuition Agreements acknowledging that they were aware of the terms and conditions contained therein. R. at 53-56. Thus, each Plaintiff twice certified their knowledge of the arbitration provisions to-which they agreed to be bound. Clearly, the Plaintiffs cannot claim with any cogency that their arbitration agreements are procedurally unconscionable due to a lack of knowledge.

Virginia College was but one of three schools in Jackson, Mississippi, licensed by the Mississippi State Board of Massage Therapy ("MSBMT") at which the Plaintiffs could have taken massage therapy classes. R. at 198-199. There are five additional schools located within

the State of Mississippi, but outside of Jackson that are licensed by the MSBMT to teach massage therapy classes. *Id.* Had they not wished to voluntarily agree to the terms of the Virginia College Tuition Agreements, including specifically the arbitration provisions, there were other licensed schools at which the Plaintiffs could have enrolled to take massage therapy classes. Therefore, there is no dispute that the Plaintiffs voluntarily entered into the Tuition Agreements containing the arbitration provisions.

An arbitration agreement may be substantively unconscionable if its terms are oppressive. *East Ford*, 826 So. 2d at 713. The arbitration provisions to-which the Plaintiffs agreed to be bound cannot be said to be oppressive, as pursuant to the terms of those provisions, all parties have equal rights available to them through the arbitration proceedings. For example, the arbitration provisions authorize the arbitrator to make any aggrieved party whole for all of their demonstrated losses. R. at 54, 56. Thus, the Plaintiffs have the exact same rights to be made completely whole through the arbitration process as does any other party. The arbitration provisions further provide that all parties are to equally share all fees assessed by the American Arbitration Association, and that all parties are solely responsible for their respective attorneys' and witness' fees. *Id.* Thus, the Plaintiffs' responsibilities for costs associated with arbitration are exactly the same as any other party. That the Plaintiffs' rights and obligations in arbitration are equal to those of any other party makes clear that the terms of their respective arbitration agreements are not oppressive.

D. Franklin's Status as a Non-Signatory Does Not Prevent Him from Compelling Arbitration

The Plaintiffs are required to arbitrate all of their claims against Franklin notwithstanding that he was not a signatory to the Tuition Agreements containing the arbitration clauses. The Mississippi Supreme Court has expressly held that a non-signatory to a contract containing an arbitration clause has standing to compel arbitration when it has a close legal relationship, such

as an agency relationship, with a signatory to the contract containing the arbitration clause. *See Cleveland v. Mann*, 942 So. 2d 108, 118 (Miss. 2006); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 492 (Miss. 2005) (both citing *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 266-67 (5th Cir. 2004)). The Plaintiffs have specifically pled that all of the alleged acts and omissions with which they charge Franklin occurred while he was acting as an agent for Virginia College, a signatory to the Tuition Agreements containing the arbitration clauses. R. at 57, ¶¶ 8, 36 and 81. By so pleading, the Plaintiffs have bound themselves to arbitrate the claims they assert against Franklin in this litigation. *See Sullivan v. Protex Weatherproofing, Inc.*, 913 So. 2d 256, 259 (Miss. 2005) (holding that when the plaintiff pleads his allegations in such a way that brings the claims within the scope of an agreement to arbitrate, he "bound himself to arbitrate the claims").

There are two additional circumstances in which a non-signatory to a contract containing an arbitration clause can compel arbitration: (1) when the signatory to a contract containing an arbitration clause relies upon the terms of the contract in asserting their claims against a non-signatory, or (2) when the signatory to a contract containing an arbitration clause makes claims of substantially interdependent and concerted misconduct by both a non-signatory and at least one signatory to the contract. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000). As pled by the Plaintiffs in their Complaint, both of these circumstances are present in the case *sub judice*.

In making their education claims, the Plaintiffs allege that they contracted to receive an adequate education in the field of massage therapy, and that all Defendants failed to provide them with such an education, thereby representing breaches of various contractual and non-contractual duties. R. at 57. As alleged by the Plaintiffs, all of those duties were created by, or otherwise arose from their Tuition Agreements. *Id.* Because the Plaintiffs rely upon the Tuition

Agreements in asserting their education claims against Franklin, and because those Tuition Agreements contain the arbitration clauses upon which Franklin relies in seeking arbitration in this matter, Franklin, as a non-signatory to the Tuition Agreements, can compel arbitration. *Grigson*, 210 F.3d at 527; *Amstar Mortgage Corp. v. Indian Gold, L.L.C.*, 517 F. Supp. 2d 889, 895-96 (S.D. Miss. 2007); *Sullivan*, 913 So. 2d at 259; *Terminix Int'l, Inc. v. Rice*, 904 So. 2d 1051, 1055 (Miss. 2004) (all holding that in cases where plaintiffs claimed breaches of contracts or duties created by contracts that contained arbitration clauses, the plaintiffs' claims were required to be arbitrated notwithstanding that at least some of the litigants were not signatories to those contracts).

Save their assault claims, all factual allegations asserted by the Plaintiffs in their Complaint are asserted collectively against all Defendants. R. at 57. Thus, the Plaintiffs, as signatories to the Tuition Agreements containing the arbitration clauses, have made claims of substantially interdependent and concerted misconduct by both a non-signatory to those Tuition Agreements (Franklin) and at least one signatory to the Tuition Agreements (Virginia College). As such, Franklin can compel arbitration. *See Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 399 (5th Cir. 2006); *Ables*, 2006 WL 3431602, at *5; *Jureczki v. Bank One Texas, N.A.*, 75 Fed.App'x 272, 275 (5th. Cir. 2003); *Grigson*, 210 F.3d at 527 (all holding that when plaintiffs' factual allegations were asserted collectively against both signatories and non-signatories to contracts containing arbitration clauses, plaintiffs made claims of substantially interdependent and concerted misconduct, whereby non-signatories to the contracts could compel arbitration).

With regard to their assault claims, the Plaintiffs charge that Virginia College facilitated, acquiesced to and allowed Franklin's alleged acts of assault to occur when it "continued to willfully, wantonly, egregiously, carelessly, and in a grossly negligent manner retain" Franklin notwithstanding its knowledge of Franklin's alleged wrongful conduct. R. at 57, ¶79. The

Plaintiffs further assert that the damages they suffered as a result of Franklin's alleged assault were proximately caused by "Defendants, and each of them." R. at 57, ¶80. As such, Plaintiffs' assault claims charge substantially interdependent and concerted misconduct by both Franklin and Virginia College, whereby Franklin, as a non-signatory to the Plaintiffs' Tuition Agreements, can compel arbitration of those claims. *See Brown,* 462 F.3d at 399; *Ables*, 2006 WL 3431602, at *5; *Jureczki*, 75 Fed.App'x at 275; *Grigson*, 210 F.3d at 527. By holding (albeit erroneously) that Franklin waived his right to arbitration of the Plaintiffs' claims, the Circuit Court necessarily concluded that Franklin, as a non-signatory to the Plaintiffs' Tuition Agreements, at least initially had the right to compel arbitration based upon the Plaintiffs' Tuition Agreements.

V. CONCLUSION

For the reasons stated herein, Defendant Eclecius L. Franklin respectfully submits that the Circuit Court committed reversible error when it denied his Motion to Compel Arbitration. Franklin respectfully requests that this Court reverse and vacate the Circuit Court's Order denying his Motion to Compel Arbitration, and find as a matter of law that the Plaintiffs are required to finally resolve all claims they did or could have asserted against him in the underlying action in binding arbitration. Franklin further requests that this Court order that the underlying action be stayed until the Plaintiffs' claims have been fully and finally resolved through arbitration, and that he be awarded all other appropriate relief.

RESPECTFULLY SUBMITTED, this the 29th day of April 2008.

By: ECLECIUS L. FRANKLIN

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CERTIFICATE OF SERVICE

I, Jay Barbour, counsel for the Appellant, Eclecius L. Franklin, do hereby certify that on the 29th day of April, 2008, I have delivered copies of the foregoing Brief of the Appellant, Eclecius L. Franklin as follows:

(1) An original and three (3) copies of the Brief have been filed with The Mississippi Supreme Court by hand delivery of the same to:

Supreme Court of Mississippi
The Honorable Betty W. Sephton
Office of the Clerk
450 High Street
Jackson, Mississippi 39201-1082

(2) A copy of the Brief has been served by United States Mail, first class postage prepaid to the following:

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