IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIAM T. HARVEY AND
ELLEN TANNER HARVEY — APPELLEES

VS. — NO. 2008-CA-00560

JAY F. SWINDLE, SR. AND
COMMUNITY BANK, ELLISVILLE, MISSISSIPPI — APPELLANT

APPEAL FROM CIRCUIT COURT OF COVINGTON COUNTY, MISSISSIPPI
CAUSE NO. 2007-64C

THE HONORABLE ROBERT G. EVANS, PRESIDING

# REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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## STATEMENT OF FACTS

The Harveys have made many misstatements of facts and unsupported assertions in an attempt to overcome their agreement for arbitration of their dispute. The Harveys claim "the Appellants' allege that at that time (2001) the home and three acres were placed on the Deed of Trust as security for a total of 39.52 acres in which the bank had a security interest. However, this is simply not the case." (P. 1-2 Appellant Brief) Nowhere in the Bank's brief did the Bank make this statement.

The Deed of Trust and loan documents that are in issue arise from the loan transaction that occurred in 2003. (P. 2, Appellee Brief) The Harveys continue to misstate facts when they said "the Bank at the hearing refers to the 'loan documents' and proceeds to enter as evidence all but the 2001 and 2003 Deeds of Trust, which are certainly part of, if not the most important 'loan document' when conducting a real estate loan." (P. 2, Appellee Brief) This statement is not true. The 2003 Deed of Trust which is the only Deed of Trust in issue in this case was admitted into evidence by the Bank. (Exhibit 8B)

The Harveys continue to make misstatements by saying "perhaps this is why the Bank has continually refused to reference the Deeds of Trust." (P. 3, Appellee Brief) The Bank has referenced the Deed of Trust upon which it foreclosed no less than eleven (11) separate times in the Bank's brief. (P. 2, 4, 5, 16, 17, and 18 Appellant Brief) The Harveys claim the Bank evicted them from the home. (P. 3, Appellee Brief) This is not true. The Harveys themselves admit that they abandoned the house and three acres of land. (Exhibit 6, T. 19-21)

The Bank and the Harveys intended for the Harveys to pledge the house and three acres of land together with the 36.52 acre parcel of property. (T. 11) The Harveys were the first to admit that the Bank did not mislead them or misrepresent anything to them in this loan

transaction. (T. 13, 39) The Harveys only complaint is that they did not read the loan documents. (T. 14)

Somehow, the Harveys imply the Bank is responsible for their loan default because Tyson required them to retrofit or upgrade their poultry houses or "lose their contract." They claim they were in a "do-or-die" situation. (P. 2, Appellee Brief) Their statements that they had no choice but to go to Community Bank to obtain the loan is absolutely contradicted by Ellen Harvey's own testimony. Ellen testified that she and her husband could have gone to another bank to get the loan. (T. 44)

## ARGUMENT

**ISSUE 1: Did the Circuit Court of Covington County err in finding that the acts alleged in the Complaint fell outside the arbitration agreement?**

The Circuit Court of Covington County committed reversible error in finding that the acts alleged in the Complaint fell outside the arbitration agreement.

The Harveys continue to make misstatements and mischaracterizations by stating "the Bank has throughout this litigation intentionally denied the truth regarding the three (3) acres or it has been under the mistaken belief that it perfected its security interest in the three (3) acres upon which the house is located." (P. 8, Appellee Brief) The Bank has stated time and again that the house and three acres were inadvertently omitted from the Deed of Trust. (P. 2, Appellant Brief)

The Harveys claim the arbitration agreement covers only the property which was described in the Deed of Trust. (P. 8, Appellee Brief) The arbitration agreement focuses on "any claim, dispute, or controversy between customer and Bank..." The question becomes, what are the claims, disputes, and controversies between the customer and the Bank? The Harvey filed the complaint and an examination of the complaint reveals that the Harveys did not limit

this lawsuit to the home and three acres that were inadvertently omitted from the Deed of Trust. They claim the Bank breached the contract in the Deed of Trust and breached their duty of good faith and fair dealing. They claim the Defendants knowingly made false material misrepresentations during the loan transaction. (CP, p.7) The Harveys prepared a complaint not thinking about arbitration. However, when they wrote their brief, their position contradicts the allegations they made in their complaint. The Harveys further claim in their Complaint that the Bank had been unjustly enriched in receiving and retaining insurance proceeds. (CP 8) The Exhibits entered into evidence reflected that the Harveys listed the Bank as loss payee.

The Harveys accused the Bank of breach of the Deed of Trust and breach of contract. The arbitration agreement clearly includes these claims as those that should be submitted to arbitration.

The Harveys admit that the Bank's defenses that they intended to pledge the property as collateral and that they represented to the Bankruptcy Court that they had abandoned the property to the Bank are relevant in this case. Again, these are issues in dispute involving loan documents entered into between the Harveys and the Bank. (P. 10, Appellee Brief)

The Harveys contend that because the arbitration clause was not in the Deed of Trust that they are not bound by arbitration. Interestingly enough, they cite no authority for this position. They conveniently omit to mention that the arbitration agreement provides the following:

**"1. part of transaction. This agreement is incorporated into each document executed in connection with the transaction. In the event of a conflict between the provisions of this agreement and other documents executed in connection with the transaction, the provisions of this agreement shall control." (Ex. 3)**

The trial court gave no analysis of how the allegations in the Complaint fall outside the arbitration agreement. (CP 97) In *Russell v. Performance Toyota, Inc.*, 826 So.2d 719 (Miss. 2002), the Mississippi Supreme Court noted that when an arbitration agreement is broadly

worded, any claims the Plaintiff may have against the Defendant will be covered by the agreement.

This dispute between the Harveys and Community Bank is a result of a mutual mistake of fact that occurred because the description of the home and three acres of land were inadvertently omitted from the description on the Deed of Trust. The Bank is not in possession of the home and three acres of the land. The Harveys filed their complaint for money damages for breach of the Deed of Trust and the loan documents.

This Court has addressed similar arguments made by the Harveys that the arbitration agreement is not enforceable because the arbitration agreement was not contained in all of the documents in issue. In *Doleac v. Real Estate Professionals, LLC*, 911 So.2d 496 (Miss. 2005), the Court found that all of the instruments were integral and interrelated parts of a single transaction. The Court cited *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 36 (5th Cir. 1990), that under general principles of contract law, separate agreements executed contemporaneously by the same parties for the same purposes, and as part of the same transaction, are to be construed together.

In *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 723 (Miss. 2002), the Court found that a retail buyer's order specifically stated: the attached purchaser's agreement concerning trade in hereby is incorporated into this contract. Our Supreme Court again held in *Sullivan v. Mounger*, 882 So.2d 129, 134-35 (Miss. 2004), that all of the individual agreements entered into were integral and interrelated parts of a single global settlement transaction and as such, all three documents were construed together.

This case is in line with previous cases addressed by the Supreme Court in that the arbitration agreement in this case incorporated the arbitration agreement into each document executed in connection with the transaction. Therefore, the Deed of Trust executed by the

Harveys contains the arbitration agreement. (Exhibit 3) It should be noted that the Harveys cited no authority for their position on this issue.

The addendum to the deed of trust states: "any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument." This clause has no application in this case.

The uncontradicted Affidavit submitted by Jay F. Swindle, Sr. supports the fact that SBA has never been the holder of the notes secured by the Deed of Trust dated July 18, 2003. (Exhibit 11) This fact was not disputed by the Harveys. Mr. Swindle further testified that the SBA has not sought to enforce the Deed of Trust dated July 18, 2003. (Exhibit 11)

**ISSUE 2: Did the Circuit Court of Covington County err in finding that arbitration was not the appropriate forum to determine if the issues in this case were arbitrable?**

The Harveys claim that the test set forth in *East Ford* regarding the scope of the arbitration clause must be performed by a court of competent jurisdiction. However, the Harveys cite no authority for this proposition. In *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So.2d 417 (Miss. 2007), the Supreme Court made it clear that the trial courts must honor an arbitration agreement that provides that the issue of arbitrability must be determined by an arbitrator. The arbitration agreement in this case unambiguously provides that the arbitrator will decide all issues of arbitrability. The arbitration agreement in this case states: "....any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator...." (Ex. 3, paragraph 4 Arbitration)

The Harveys seem to think that because the Bank had the right to file a Motion to Compel Arbitration and appeal the trial court's decision, this somehow re-writes the contract between the parties so that the arbitrator should not determine the issue of arbitrability. (P. 14, Appellee Brief) The Harveys cite no authority for this proposition. They simply want to re-

write the agreement in this case. The Harveys agreed that an arbitrator would determine if an issue was arbitrable. Now they want this court to modify the contract because it does not suit them. The Harveys should remember they should have never filed this lawsuit in court to begin with. Had they abided by their agreement, this case should have been initially filed in arbitration.

The Harveys attempt to raise for the first time on appeal that there was no consideration for the arbitration agreement. As this court has stated, time and again, an issue not raised before the lower court is deemed waived and is procedurally barred. *Gale v. Thomas*, 759 So.2d 1150 (Miss. 1999), *Whitefoot v. Bancorpsouth Bank,* 856 So.2d 639 (Miss. Ct. App. 2003). This Court should not even consider their objection that there was no consideration since they never raised this issue before the trial court and therefore, the Bank had no opportunity to present evidence on its behalf. Notwithstanding, the arbitration agreement itself provides in paragraph 2 the following:

> **"2. Consideration**
> **The consideration for this agreement is the consideration given and received in the transaction, and the mutual benefits to be derived by Bank and customer from the convenient, expeditious, economical, and private procedures for resolving disputes between them and other entities or persons covered by this agreement."**

Once again, the Harveys want this court to re-write an agreement that they admittedly freely and voluntarily entered into with the Bank. (Ex. 3) Although the trial court found that the Harveys were presented with these loan documents on a take it or leave it basis, the evidence presented at the hearing completely contradicts this finding.

**ISSUE 3: Did the Circuit Court of Covington County err in finding that the arbitration clause was unconscionable?**

The trial court applied an improper standard in determining whether this arbitration agreement was procedurally unconscionable. The trial court and the Harveys completely ignore

Ellen Harvey's own testimony that she and her husband freely and voluntarily entered into the arbitration agreement. (T. 13, 14, and 42) The trial court and the Harveys completely ignored Ellen Harvey's testimony that she and her husband could have gone to another bank to obtain the loan. The arbitration agreement is not procedurally or substantively unconscionable.

The Harvey's make the following statement in their brief:

"The Court also considered the fact that the Harveys were left with no choice and as such the decision by the Bank to force the arbitration clause upon them resulted in a lack of voluntariness as they were under economic duress." There is no evidence in the record that remotely supports this statement. They testified that they freely and voluntarily entered into the agreement and that they could have gone to another bank to obtain the loan if they chose to do so. (T. 13, 14, 42, 44)

## CONCLUSION

The trial court should have referred this entire case to arbitration. Arbitration is the appropriate forum according to the parties contract to determine the issue of arbitrability.

The arbitration agreement is not procedurally and substantively unconscionable. The Harveys own testimony and the documents they signed, overwhelmingly support the Bank's position that the arbitration agreement is not procedurally or substantively unconscionable. There was absolutely no evidence in the record that the Harveys were under economic duress when they signed the loan documents. This Court is limited to consideration of the facts in the record, while reliance on facts only disclosed in the briefs is prohibited. *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So.2d 417, 423 (Miss. 2007). The fact that Tyson Foods required that the Harveys upgrade their poultry facility does not somehow translate into economic duress.

The complaint filed by the Harveys clearly falls within the scope of the arbitration agreement in this case. The focal point of the dispute between the parties is the claim by the

Harveys that the Bank breached the Deed of Trust and breached the covenant of good faith and fair dealing. These claims fall within the scope of the arbitration agreement.

Therefore, this Court should reverse the decision of the trial court and refer the entire case to arbitration.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Terry L. Caves, Attorney for Appellants, do hereby certify that I have this date sent via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document, to the following:

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Honorable Robert G. Evans
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This the 18th day of December, 2008.

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