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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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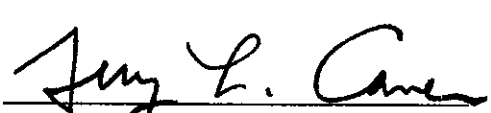
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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. William T. Harvey, Appellee;
2. Ellen Tanner Harvey, Appellee;
3. Honorable David Shoemake, Attorney for Appellee;
4. Honorable A. Regnal Blackledge, Attorney for Appellee;
5. Jay F. Swindle, Sr., Appellant;
6. Community Bank, Ellisville, Mississippi, Appellant;
7. Terry L. Caves, Attorney for Appellant;
8. Jerry Sharp, Attorney for Appellant; and
9. Judge Robert Evans, Trial Court Judge.

This the 26th day of September, 2008.

Respectfully submitted,



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STATEMENT OF THE ISSUES

The issues presented on appeal are the following:

A. The trial court erred in finding that the arbitration agreement is not a binding contract.

B. The trial court committed reversible error by finding that arbitration is not the appropriate forum to determine the issue of arbitrability.

C. The trial court committed reversible error in finding that the arbitration agreement was procedurally and substantively unconscionable.

D. The trial court committed reversible error in finding that the Harvey's were under economic duress when they signed the loan documents.

E. The trial court committed reversible error in finding that the claims alleged in the Complaint are outside the scope of the arbitration agreement.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

On April 5, 2007, William T. Harvey and Ellen Tanner Harvey filed their Complaint against Jay F. Swindle, Sr. and Community Bank, Ellisville, Mississippi, in the Circuit Court of Covington County, Mississippi. (CP 4)[1] The Harvey's causes of action include negligence, trespass, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of deed of trust, fraud, and unjust enrichment. (CP 4-8)

On June 4, 2007, Jay F. Swindle, Sr. and Community Bank filed their Motion to Compel Arbitration and Stay of Proceedings. (CP 37) The hearing on the Motion to Compel Arbitration was held before the Honorable Robert Evans on December 7, 2007. (CP 84) Judge Evans entered his order on March 24, 2008 denying the Bank's and Swindle's Motion to Compel Arbitration and Stay of Proceedings. (CP 97-98)

The Bank and Swindle timely filed their Notice of Appeal on March 31, 2008 from the trial court's denial of their Motion to Compel Arbitration and Stay Proceedings. (CP 99)

B. Statement of Facts

Ellen and Tony Harvey ("the Harveys") owned a house with three (3) acres, together with 36.52 acres containing poultry houses. The total acreage is 39.52 acres.

The Harveys initially borrowed Three Hundred Fifty-Five Thousand Dollars ($355,000.00) from Community Bank in 2001 to finance their poultry operations. (T. 3) Tyson was the producer for the Harveys. (T. 3) In 2003 Tyson required the Harveys to retrofit and upgrade their poultry houses. (T. 3, 4) The house and three (3) acres and the 36.52 acres are adjoining properties. In June, 2003, the Harveys went to Community Bank to borrow additional money to

[1] Reference to (T.__) are references to pages within the transcribed testimony prepared by the court reporter; references to (R.E.__) are references within the record excerpts; references to (Ex.__) are references to exhibits within the records; references to (CP) are references to the clerk's papers.

retro-fit their houses. The Harveys met with Dennis Upchurch and Carolyn Bryant with Community Bank and filled out a loan application. (T. 4) The Harveys intended to borrow $120,000.00 to be guaranteed by the U.S. Small Business Administration. (T. 5) The Bank agreed to make the additional loan of $120,000.00 and the Harveys came to the Bank on July 18, 2003 to sign the loan documents. Dennis Upchurch was Senior Vice-President and Carolyn Bryant was the Loan Assistant for Community Bank. Both Upchurch and Bryant met with the Harveys on July 18, 2003 to explain the loan documents. (Ex. 9, 10) However, the house and 3 acres was inadvertently omitted from the Deed of Trust. This is the crux of this entire lawsuit.

The Harveys represented to Upchurch and Bryant that they owned a total of 39.52 acres, which included their home and two (2) poultry houses. (Ex. 9, p. 2) The Harveys signed a loan application and all loan documents clearly evidencing their intent to pledge their home and poultry houses as security for the loan. (Ex. 9) The Harveys agreed to maintain hazard insurance on their home and poultry houses. (Ex. 9) At the time of the closing, all of the loan documents were explained to the Harveys. They understood they were borrowing $120,000.00, and were pledging their home and poultry houses for a total of 39.52 acres as security to the Bank. Mr. Upchurch and Mrs. Bryant specifically explained the arbitration disclosure statement and the arbitration agreement. (Ex. 9, Ex. 3) The Harveys had no objections to signing any of the documents, including the arbitration disclosure, and arbitration agreement. (Ex. 10)

The Harveys both admitted that they represented to the Bank they intended to pledge their house with the poultry farm as security for the Bank's loan. (T. 11, 42) The Harveys claimed they did not read the loan documents. However, Ellen and Tony both admitted that they could have read the documents if they wanted to, (T. 12, 39) but because they were in a hurry to get back to their poultry farm, they chose not to read the documents. (T. 40) They both also

admitted taking copies of all the loan documents with them, including the arbitration disclosure and arbitration agreement, but they still chose to not read them. (T. 40)

The Harveys admitted the Bank did not misrepresent anything to them with regard to their loan. (T. 13, 39) They both have a 12th grade education and can read and write. (T. 43) They admitted they freely and voluntarily signed all the loan documents including the arbitration disclosure and the arbitration agreement. (T. 13, 14, 42) Tony Harvey admitted that his only complaint is that he did not read the loan documents. (T. 14)

After the loan was closed on July 18, 2003, the Harveys left the Bank and continued to operate their poultry farm. They never wrote the Bank a letter objecting to the arbitration disclosure or arbitration agreement. The Harveys never called the Bank complaining about the arbitration agreements or the loan documents. They never hired a lawyer prior to foreclosure to contact the Bank complaining about the loan documents. (T. 13, 41) On August 28, 2003, the Harveys borrowed an additional Eighteen Thousand, Forty Dollars ($18,040.00) from Community Bank to purchase a tractor. (Ex. 7) They also signed an arbitration disclosure and arbitration agreement on August 28, 2003 in connection with the tractor loan. (Ex. 7, T. 22, 23) The Harveys admitted they had an opportunity to read the August 28, 2003 documents. (T. 23)

The Harveys continued to make payments, but did not maintain hazard insurance on the house as promised. (T. 15, 16) They admitted they were notified that their insurance had expired and the Bank added insurance to their loan. (T. 16) They never objected to the Bank force-placing insurance to their loan. (T. 15, 16) They continued to make payments until they filed for bankruptcy in September, 2005. (T. 19) They were represented by Edwin Tullos, attorney at law, during their bankruptcy proceedings. (T. 19, Ex. 6)

On November 28, 2005, the Harveys signed an agreed order abandoning their home and poultry farm, as reflected by the Agreed Relinquishment of Security. (Ex. 6, T. 19-21) The

Harveys admitted they represented to the Bank, their attorney, the bankruptcy trustee, and bankruptcy judge that the Bank had a security interest in their home and poultry farm and they were releasing and abandoning this security to the Bank. (T. 19-21, Ex. 6) After they signed the abandonment order, they did not go back to the house. (T. 22, 42-43) Subsequent to the execution and filing of the bankruptcy order, Community Bank began foreclosure proceedings on the house and poultry farm. The Bank foreclosed their deed of trust and received a substitute trustee's deed on April 7, 2006. (Ex. 8, p. 111)

After the Bank received its substitution of trustee's deed, the Bank received a letter from Dan McIntosh on May 2, 2006 informing the Bank for the first time that the Bank did not have a lien on the house and three acres. (T. 25)

After receiving the letter from the Harvey's attorney on May 2, 2006, the Bank reviewed its deed of trust and realized for the first time that the house and three acres were not listed on the description of the deed of trust. Although the Harveys admitted they intended to pledge the house and three acres, together with the poultry houses as security, they now claim the Bank was not supposed to have a lien on the house. (T. 11) They also represented to the United States of America, Small Business Administration, that the Bank had a lien on their house and poultry farm. (T. 17) All of the loan documents clearly reflect that they pledged their house together with the poultry farm as security for the loan. (Ex. 8, p. 2) The following documents reflect that the Harveys intended to pledge their house as security for the loan:

1. Promissory note dated July 18, 2003 (Ex. 2, Bates 214);
2. Farm Bureau Insurance Company notices (Ex. 8, Bates 156);
3. Letters to the Harveys from Community Bank informing them that their insurance had expired on the house, and that the Bank was adding insurance to the loan (Ex. 8, Bates 203, 204);

4. Agreement to provide insurance (Ex. 8, Bates, 237);

5. Financial Statement (Ex. 1);

6. Statement of Personal History (U.S. SBA, Ex. 4); and

7. Commercial Security Agreement (Ex. 5).

The first time the Harveys discovered that the description for the house and three acres was omitted from the deed of trust was after the Bank foreclosed on the property on April 7, 2006. (T. 24, 43)

The Harveys filed suit April 5, 2007 claiming they never intended to pledge their house and three acres as security and requesting damages against Community Bank. (CP 4)

C. Summary of the Argument

The trial court erred in denying Community Bank's Motion to Compel Arbitration. The Harveys signed a valid and binding arbitration agreement pertaining to their transactions and disputes with Community Bank and Jay Swindle.

The court erred in not referring the issue of arbitrability to the arbitrator for decision. The arbitration agreement in this case mandates that any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator including whether the dispute is within the scope of the arbitration agreement. (Ex. 3) All of the claims of the Harveys in this case arise from the loan transaction and fall within the scope of the arbitration agreement.

The Harveys are bound by the loan documents even if they claim they did not read them. They freely and voluntarily entered into the loan transaction and the arbitration agreement is not substantively or procedurally unconscionable.

The Harveys have not pled economic duress and they have failed to prove the necessary elements of economic duress including specific conduct by the Bank that dispossessed them of

all volition in the execution of the loan documents. The trial court should have referred all of the issues in this case to arbitration.

D. Legal Argument

A. The trial court erred in finding that the arbitration agreement is not a binding contract.

The grant or denial of a Motion to Compel Arbitration is reviewed *de novo*. *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss. 2002). A contracting party is under a legal obligation to read a contract before signing. *Terminix v. Rice*, 904 So.2d 1051, 1056 (Miss. 2004). To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it, but did not read it or know its stipulations, would absolutely destroy the value of all contracts. *Busching v. Griffin,* 542 So.2d 860, 865 (Miss. 1990); *see also Long v. Allianz Life Insurance Company of North America,* 208 WL 2910579 (N.D. Miss. 2008) ("A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him.") *J.R. Watkins Company v. Runnells*, 252 Miss. 87, 172 So.2d 567, 571 (Miss. 1965).

The Federal Arbitration Act dictates that Federal Arbitration Agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". 9 U.S.C. § 2 (1947); *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney,* 950 So.2d 170 (Miss. 2007). The Act established a strong federal policy favoring arbitration. *East Ford*, 826 So.2d at 713.

The Mississippi Supreme Court has consistently recognized the existence of "a liberal federal policy favoring arbitration agreements," and has stated that, "We will respect the right of an individual or an entity to agree in advance of a dispute to arbitration...." *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 722 (Miss. 2002). This Court has further stated: Articles of Agreement to Arbitrate, and awards thereon are to be liberally construed so as to encourage the

settlement of a dispute, and the presumption will be indulged in favor of the validity of arbitration proceedings. *Terminix v. Rice,* 904 So.2d 1051, 1055 (Miss. 2004). In addition to establishing a strong presumption in favor of arbitration, the Act also limits the role of the court to determine whether an issue is arbitrable. *Id.* at 1054. The Court's sole function is to determine whether the claim is referable to arbitration. *Id.* at 1055. Once that determination is made, the court may not delve further into the dispute. *Id.* The courts have no business weighing the merits of a particular claim or determining whether there is particular language in the written instrument which will support the claim. *Id.*

In determining if arbitration agreements are enforceable and apply, the court must consider two (2) prongs. *East Ford,* 826 So.2d at 713. The first prong the court must examine is whether the parties agree to arbitrate the dispute. *Id.* Secondly, the court must determine whether legal constraints external to the parties' agreement bar arbitration of the claims. *Id.* The first prong is two-fold in that the court considers whether there is a valid arbitration agreement and then whether the parties dispute is within the scope of the arbitration agreement. *Id.*

The Harveys complained that they should not be subjected to the arbitration agreement because they did not read the documents. However they admitted they signed the arbitration disclosure and arbitration agreement. (T. 12, 14, Ex. 3, T. 39) They admitted the Bank did not misrepresent anything to them with regard to the arbitration documents and the other loan documents. (T. 13, 39) They do not dispute the validity of the arbitration agreement they signed with the bank. Their only complaint is that they did not read the documents. (T. 14) However, they both admitted they had an opportunity to read the documents and could have read the documents if they wanted to. (T. 12, 39, 40) The Harveys admitted they freely and voluntarily signed the arbitration disclosure and arbitration agreement. (T. 13, 14, 42) The law presumes that the Harveys read the arbitration agreement and loan documents they signed. Although the

Bank contends that the Harveys read and approved the arbitration agreement and arbitration disclosure statement, in Mississippi a person is charged with knowing the contents of any documents that he or she executes. *Terminix,* 904 So.2d at 1056. Therefore, not only did the Harveys have the loan documents, including the arbitration agreement, explained to them, the Harveys were on notice of the arbitration clause, whether they read it or not. The arbitration disclosures and the arbitration agreement are clear and unambiguous. Therefore, the arbitration agreement is valid and binding.

B. The trial court committed reversible error by finding that arbitration is not the appropriate forum to determine the issue of arbitrability.

Community Bank requested that the trial court refer this entire case to arbitration, and allow the arbitrator to determine if the Harveys' claims are arbitrable.

The trial court should have first determined the proper interpreter of the arbitration agreement. In *Greater Canton-Ford Mercury*, this court addressed for the first time whether a court or an arbitrator should interpret the arbitration agreement. *Greater Canton-Ford Mercury v. Ables*, 948 So.2d 417 (Miss. 2007).

Whether a party is bound by an arbitration agreement is generally considered an issue for the courts, not the arbitrator, unless the parties clearly and unmistakably provide otherwise. *AT&T Technologies, v. Communications Workers of America,* 475 U.S. 643, 649 (1986). (emphasis added). In other words, when the parties have explicitly agreed that the question of arbitrability is to be decided by an arbitrator rather than the court, that agreement must be interpreted by an arbitrator. *Greater Canton-Ford Mercury, Inc. v. Ables*, 948 So2d 417, 422 (Miss. 2007).

The United States Supreme Court has mandated that general contract principles apply. *Id.* The general practice of allowing courts to determine the issue of arbitrability is superceded by the contractual terms of an arbitration provision which provides that arbitrability will be decided by an arbitrator. *Id.* Therefore arbitration of the issue of arbitrability is a mandatory result if

those are the terms to which the parties have validly agreed. The parties may agree on the scope of arbitration in any way they desire. *B.C. Rogers Poultry, Inc. v. Wedgworth*, 911 So.2d 483, 491 (Miss. 2005). Contracts are obligations, and the court must give them effect as written. *B. C. Rogers*, 911 So.2d at 491.

The question becomes whether the agreement clearly and unmistakably states that an interpretation of the agreement will be arbitrated. The pertinent part of the arbitration provision reads:

Arbitration Agreement Paragraph 4

> **A.** Any claim shall, at the request of the customer, bank, or any covered person, whether made before or after institution of legal proceedings, be determined by binding arbitration. The transaction involves interstate commerce and the arbitration is subject to and shall be conducted in accordance with the United States Arbitration Act 9 U.S.C. § 1, *et seq.*, as amended, notwithstanding any choice of law provision in this agreement or any other documents executed in connection with the transaction, and under the rules of N.A.F. The arbitrator shall have authority to award damages and grant such other relief he deems appropriate. The arbitrator shall give effect to applicable law, including statute of limitations in determining the claim. Any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator....

This clear and unmistakable language requires this court to find that the appropriate forum for interpretation is arbitration. The trial court erred in proceeding to determine whether the arbitration agreement encompassed the dispute. The court should not have taken any testimony or considered the dispute. (T. 1-2) The trial court specifically found that arbitration was not the appropriate forum to determine if the issues in this case are arbitrable. The trial court distinguished *Greater Canton* by stating that the parties in this case did not agree to the validity of the arbitration agreement. The court confuses the issue of whether there was an agreement to arbitrate with the issue of whether there are legal constraints external to the parties' agreement, foreclosing arbitration of the claim, even if the claim was found to be within the arbitration provision in question.

The trial court should have never delved into the claims of the Harveys that the agreement was unconscionable. The trial court stated, "In this case, the parties have not so agreed; indeed, Plaintiffs have challenged both procedural and substantive conscionability of the arbitration clause and charged that it constituted a contract of adhesion." (CP 97, 98)

The decision by this Court in *Greater Canton-Ford* is directly on point, and the issue of whether the claims by the Harveys are subject to the arbitration agreement should be properly decided by an arbitrator rather than a court. Mr. Upchurch and Mrs. Bryant explained the arbitration disclosure and arbitration agreement to the Harveys. (Ex. 9, 10) The Harveys cannot say they did not agree to the arbitration agreement because they testified under oath they never read any of the loan documents. In addition, the trial court should never have decided the issue of whether the Harveys claims are outside the scope of the arbitration agreement. This issue should have been referred to arbitration.

Therefore, the Bank requests that this court reverse the trial court's order and refer the question of arbitrability and all issues to arbitration in accordance with the parties' arbitration agreement.

C. The trial court committed reversible error in finding that the arbitration agreement was procedurally and substantively unconscionable

Although the Bank submits that this court should refer all issues to arbitration, the Bank will address the trial court's finding that the arbitration agreement was procedurally and substantively unconscionable.

The trial court found that the arbitration agreement contained a clause that the parties' agreed for an arbitrator to determine if the dispute between the parties is arbitrable. (CP 97) However, the trial court found that the arbitration agreement placed the Harveys in a "heads-I-win-tails-you-lose" situation calculated to circumvent judicial review or resolution of all disputes. (CP 98)

(emphasis added) The trial court applied an improper standard in determining whether the arbitration agreement was procedurally unconscionable. The trial court stated the following:

> If not unconscionable in and of itself, such a clause certainly has a color of unconscionability and appears unfair, especially when the Plaintiffs' 0economic circumstances are considered. (See Plaintiffs' testimony affidavits) (CP 98) (emphasis added)

The court did not perform an analysis of the second prong as mandated by *East Ford, Inc. v. Taylor*, 826 So.2d. 709 (Miss. 2002). The trial court found that because the arbitration agreement had a "color" of unconscionability and "appeared" unfair that the agreement is unenforceable. This finding is not supported by Mississippi or Federal Law.

This court has made it clear and unmistakable that under the second prong, in order to determine whether external legal constraints exist which would preclude arbitration, courts should apply ordinary state-law principals that govern contract formation. *Community Care Center of Vicksburg, LLC v. Mason*, 966 So.2d 220, 225 (Miss. Ct. App. 2007). Only the usual contract defenses such as fraud, duress, or unconscionability, can be used to void the arbitration provisions. *Id.* at 226.

Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, use of complex legalistic language, disparity and sophisticated bargaining by the parties and/or a lack of opportunity to study the contract and inquire about the contract terms. *Id.* at 229. Procedural unconscionability looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding the contract's formation. *Vicksburg Partners*, 911 So.2d 507 (Miss. 2005).

When reviewing a contract for substantive unconscionability, the court looks within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, contracting parties. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 521 (Miss. 2005). Substantive unconscionability may

be proven by showing the terms of the arbitration agreement to be oppressive. Substantive unconscionability is present when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement and are left without a remedy for another party's nonperformance or breach. *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss. 2002). The arbitration clause in this case is not oppressive. This agreement provides the Harveys with a fair process in which to pursue their claims. Both the Harveys and the bank have the same rights and obligations with regard to the terms of the arbitration agreement. This agreement is not one-sided.

The basis of the Harveys' claim is that they did not read the arbitration disclosure and arbitration agreement; that they had never heard of the term arbitration before this transaction; that the Bank did not explain its terms; and that it was presented on a take-it-or-leave-it basis.

An unconscionable contract is one such as no man in his senses, and not under a delusion would make on the one hand, and no honest and fair man would accept on the other. *American Heritage Life Ins., Co. v. Beasley*, 174 F.Supp.2d 450, 456 (N.D. Miss. 2001); quoting *Entergy Mississippi v. Burdette Gin Co.*, 726 So.2d 1202, 1207 (Miss. 1998). An agreement to arbitrate claims against a provider of a substantial loan is certainly not "one such as no man in his senses...would make".... *Smith v. Equity First Corp.*, 117 F.Supp.2d 557, 564 (S.D. Miss. 2000).

Assertions that the defendant did not voluntarily enter into arbitration agreement, did not have a chance to read the agreement, was not given a chance to negotiate, an agreement contained complex legal terms, has been held insufficient to establish procedural unconscionability. *American Heritage Life Insurance Company v. Beasley*, 174 F.Supp.2d 450 (N.D. Miss. 2001). In *Russell,* this court held that a consumer could not complain about bargaining power or lack of sophistication when he could have walked away from the contract and that he would be held to the document executed. *Russell v. Performance Toyota, Inc.*, 826

So.2d 719 (Miss. 2002). Allegations by a plaintiff have been held to be insufficient to establish unconscionability. *Prigon v. Greentree Financial Servicing Corp.*, 88 F.Supp.2d 655 (S.D. Miss. 2000). In this case, Ellen and Tony Harvey both admitted that they freely and voluntarily signed the arbitration disclosure and arbitration agreement. (T. 13, 14, 42) They both admitted that they could have read the documents if they wanted to. (T. 40) They both had the opportunity to read the documents. (T. 12) However, they chose not to read them. They admitted the Bank did not misrepresent anything to them during this loan transaction. (T. 13, 39) They both admitted they carried the documents home with them and never called the Bank, wrote the Bank, or complained in any manner about the documents they had signed. (T. 40, 41, 13, 14)

The only time they complained was after they hired a lawyer to file a suit.

The arbitration agreement is not only clear, conspicuous, with non-legalistic language, but the Harveys also signed arbitration disclosures. (Ex. 3) The arbitration disclosure clearly explains to the Harveys they are waiving their right to a jury trial and waiving their right to present their claims in a court of law. (Ex. 3)

The argument that the Harveys did not know or understand what they were signing at the time is untenable. The law is well settled that a contracting party has a legal duty to read a contract before signing it. In *Terminix International, Inc.*, the Mississippi Supreme Court found the arbitration agreement valid even when presented to Dr. Rice on his lunch break at home, despite the Rices' arguments that he did not have the opportunity to read the contract and was not specifically told of the arbitration agreement. *Terminix International, Inc.*, 904 So.2d at 1056. Further, contrary to the Harvey's assertions, the arbitration agreements in issue are stated in plain language as opposed to complex legal terminology and should be easy for any ordinary consumer to understand. These agreements clearly explain that the parties are giving up their

rights to a jury trial. As knowledge of the documents is imputed to the Harveys regardless of their choice not to read them, then there is no argument that the Harveys knowingly waived their right to a jury trial.

Although the affidavits of Dennis Upchurch and Carolyn Bryant clearly reveal that the Bank explained the arbitration agreements to them, the Harveys have presented no evidence that the Bank treated them unfairly or misrepresented anything to them. The Harveys admitted they chose not to read the documents. After having financial trouble, due to no fault of the Bank, they want to escape responsibility for the very contracts that they signed to receive $120,000.00.

In addition, the trial court's finding that the Harveys could not have gone to another bank contradicts the Harveys' own sworn testimony. Ellen Harvey testified that she and her husband could have gone to another bank to get the loan. (T. 44) The Harveys had the freedom to contact other banks to obtain a loan. Finally, the trial court found that the Harveys' execution of the arbitration agreement was somehow involuntary. This also contradicts the sworn testimony of both Harveys that they freely and voluntarily signed the arbitration agreement. Their only complaint was that they did not read the documents. (T. 13, 14, 42)

D. The trial Court committed reversible error in finding that the Harveys were under economic duress when they signed the loan documents.

The trial court found that the Harveys were under economic duress at the time the loan documents were executed and therefore the arbitration agreement is unenforceable due to a lack of voluntariness on the part of the Harveys.

Economic duress was not an affirmative defense presented by the Harveys in opposition to the Motion to Compel Arbitration. In *Kelso,* the Mississippi Supreme Court stated that in order to invalidate a contract on grounds of economic duress, the complaining party must establish:

(1) That the dominant party threatened to do something which he had no legal right to do; and

(2) That the wrongful threat overrode the volition of the victim and caused him to enter an agreement against his free will. *Kelso v. McGowan*, 604 So.2d 726 (Miss. 1992).

There is absolutely no evidence in this record that the Harveys were threatened by Community Bank in any manner whatsoever. The Harveys requested a loan, the Bank accommodated them with $120,000.00 and only expected them to sign the loan documents, including the arbitration agreement to repay the loan. The Harveys admitted the Bank did not misrepresent anything to them. (T. 13) They admitted they freely and voluntarily entered into the arbitration agreement. (T. 14, 40) The affidavits of Dennis Upchurch and Carolyn Bryant revealed the Bank went over and beyond the call of duty to explain these documents to the Harveys. (Ex. 8, 9, 10) When a court is presented with a claim of economic duress, it must ultimately determine whether the specific conduct by the dominant party dispossessed the complaining party of all volition. It is not sufficient that one party insisted upon a legal right and the other party yielded to such insistence. Economic duress cannot be predicated upon a demand which a party has a legal right to do. *In re Estate of Davis,* 832 So. 2d 534, 538 (Miss. Ct. App. 2001).

Before loaning the Harveys $120,000.00 the Bank had the legal right to request the Harveys to sign the loan documents including an arbitration disclosure and arbitration agreement. The Harveys signed these documents freely and voluntarily and should be held responsible. Therefore, the arbitration agreement and disclosures in this case are enforceable against the Harveys.

E. The trial court committed reversible error in finding that the claims alleged in the Complaint are outside the scope of the arbitration agreement.

The trial court made a one-sentence finding as follows:

> The court finds that the acts alleged in the Complaint fall outside the arbitration agreement and squarely within the principals of *Rogers-Dabbs Chevrolet-Hummer v. Blakeney*, 957 So.2d 170 (Miss. 2007).

The trial court gave no analysis as to how the allegations in the complaint fall outside the arbitration agreement. (CP 97)

The arbitration agreement provides the following:

Dispute resolution: Any claim, dispute, or controversy between Customer and Bank, including Bank's employees, officers, directors, agents, parent companies, subsidiary companies, sister companies, successors, assigns, other affiliated entities or persons (collectively, covered "covered persons"), (whether in contract, tort, or otherwise, whether pre-existing, present, or future, including statutory, common law, intentional tort, or equitable claims) arising from or relating to any matter including, but not limited to, the transaction, any past or future interactions, business or dealings between the parties, between Customer and the covered persons or any application, advertisement, promotions, or oral or written statements relating to the transaction, any goods or services furnished in connection with the transaction or the terms of financing, the relationship with respect to the transaction (including to the full extent permitted by applicable law, relationships and dealings with third parties who are not signatories to the transaction or this agreement) or the validity, enforceability, or scope of this agreement (collectively "claim") shall be resolved upon the unilateral or joint election of Customer or Bank or said covered persons respectfully by binding arbitration as hereinafter provided, pursuant to the rules of the National Arbitration Forum ("NAF") in effect at the time the claim is asserted.

Arbitration: Any claim shall, at the request of the Customer, Bank, or any covered persons, whether made before or after institution of legal proceedings, be determined by binding arbitration....

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. It noted:

In *Smith-Barney*, Justice Mills...found that the broad phrase, "Any controversy arising out of or relating to" contained in an account management agreement encompassed a claim of breach of fiduciary duty because the funds which were the subject of the breach of fiduciary claim were "derived directly from...accounts and transactions with Smith-Barney." The *Performance Toyota* Court went on the hold that the claims of the Plaintiffs stemmed from his trade-in and purchase of an automobile, even though he tried to argue that they arose from the "willful and wanton disregard of his property rights..." *Id.* at 722. 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 omitted from the description on the Deed of Trust. All

parties believed that the Bank had a lien on the home and three acres, together with the poultry farm. The Harveys intended to pledge their house and farm as security for the loan. (T. 8, 9, Ex. 2)

The loan documents signed by the Harveys clearly reveal they intended to pledge their house and poultry farm as security. (T. 11, 42, 43) The security agreement, loan application, promissory note, insurance documents, the United States Small Business Administration loan application all reveal that the Harveys pledged their home and three acres as security for the loan. (Ex. 1, 2, 4, 5, 6, 8)

There is no stronger evidence of the Harveys' belief and intent to pledge their house and three acres as security for this loan, than the Agreed Order they signed abandoning their home and three acres and releasing their interest to the Bank so the Bank could foreclose on the house and poultry farm. (T. 18, 19, 20, 21, 22, 42, 43)

All of the claims of the Plaintiffs arise from the loan transaction with the Bank. (CP 7, ¶15) This case involves a mutual mistake in the description on the Deed of Trust, or the Harveys intentionally misrepresented to the Bank that they were pledging their home as security, when in fact they never intended to do so. If the Harveys did not intend to pledge their house as security, they intentionally misrepresented to the Bankruptcy Trustee, the Bankruptcy Judge, the Bank, and their own lawyer that they intended to release their interest in their house to the Bank. The Harveys' claim of trespass is based solely on the Bank entering the house after the foreclosure sale to clean up the property they believed they owned by virtue of the Deed of Trust and the loan transaction documents with the Harveys. The Harveys claimed in their Complaint that the Bank breached the contract in the Deed of Trust. (CP 7, ¶ 15)

The Harveys' Complaint alleges that the Bank trespassed on their home and three acres after the Bank received its substituted trustee's deed, and they claim the Bank wrongfully collected

insurance proceeds on the house as a result of Hurricane Katrina which occurred on August 29, 2005. The Harveys claim these actions constitute negligence, trespass, intentional infliction of emotional distress, breach of the Deed of Trust, fraud, and unjust enrichment. (CP 4-8)

The Harveys gave the Bank permission to enter the home and three acres by signing an agreed order abandoning their interest in the home and three acres and releasing the interest to the Bank. (Ex. 6) They represented to the Bankruptcy Trustee, the Bankruptcy Judge, the Bank, and their own lawyer that they were relinquishing the property to the creditor (the Bank) because they did not wish to retain the secured property. (Ex. 6) As part of the loan documents, the Harveys agreed to provide insurance on the house and poultry houses. (Ex. 8, Bates 237)

The Harveys initially purchased insurance through Farm Bureau and Community Bank was listed as loss-payee. (Ex. 8, Bates 254) They allowed the insurance to lapse and the Bank, pursuant to the loan documents, force-placed insurance on the house and poultry houses to protect its interest. (Ex. 8) They were notified by Farm Bureau of their failure to pay premiums. (T. 15) They knew the Bank was listed as loss-payee on the house and the poultry farms. (T. 15) The Bank contacted them about cancellation of their insurance. (T. 15) They knew that the Bank force-placed insurance because they did not maintain insurance on the house, and the farm. (T. 16) The Harveys never complained about the Bank taking out insurance on their house and being added as loss-payee because the Harveys believed at all times before the foreclosure sale that the Bank had a lien on their house. (T. 16, 17) Ms. Harvey concurred with Mr. Harvey's testimony in this regard. (T. 43)

The two claims of trespass and collection of insurance proceeds clearly fall within the scope of the arbitration agreement. In fact, the Harveys' claim stems solely from a mutual mistake in the description on the Deed of Trust. That is why the Harveys claimed that the Bank breached the Deed of Trust. (CP 1-8)

The Court cited *Rogers-Dabbs* as support for finding that the acts alleged in the Complaint fall outside the arbitration agreement. However, *Rogers-Dabbs* is clearly distinguishable from this case. The Supreme Court in *Rogers-Dabbs* found "no reasonable person would agree to submit to arbitration any claims concerning a Hummer, to which he would never receive a title, a scheme of using his name to forge vehicle titles and bills of sale of stolen vehicles, and the commission of civil fraud against him by misappropriating his title to the Hummer...." *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney,* 950 So.2d 170, 177 (Miss. 2007).

To the contrary, the Harveys admit that Community Bank did not misrepresent anything to them. The Harveys believed at all times the Bank had the right to carry insurance on the house and collect the proceeds and to go on its property after the foreclosure sale to prepare the house for resale. Any contrary finding placed the Harveys in the position of intentionally misrepresenting to the Bank, the United States Government, (SBA), and the federal Bankruptcy Court that they owned no interest in the house. In this case the Harveys own loan documents and their sworn testimony reveal that they intended to pledge the house as security, and the Bank intended to accept the house as security for the loan. This dispute centers around the written loan documents, including the written bankruptcy documents.

Why did the Harveys list the Bank as loss-payee on their homeowners insurance policy? Why did they abandon their homestead at the bankruptcy hearing when they represented to the Trustee under oath that they claimed no interest in the home? Why didn't they object when the Bank force-placed insurance on their home because they failed to continue to maintain hazard insurance on their home? Why did the Harveys vacate the home if they believed they still owned it and the Bank did not have a lien on the home? Why didn't they enjoin the foreclosure sale if they believed the Bank did not have a lien on their home? The truth is, the Harveys and the Bank believed the Bank had the home as security for this loan. The dispute in this case arises

directly from the loan documents and all claims by the Harveys fall within the scope of the arbitration agreement.

E. Conclusion

The Harveys signed the arbitration agreement in connection with the loan with Community Bank. The arbitration provisions are valid and enforceable. Arbitration is the proper forum to determine the arbitrability of the dispute between Swindle, the Bank and the Harveys.

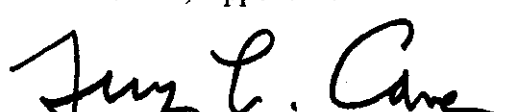
The dispute between the Harveys, the Bank, and Swindle all arise from the loan documents and the loan transaction and squarely fall within the scope of the arbitration agreement.

The Harveys' claims of procedural and substantive unconscionability fail because they freely and voluntarily signed the arbitration agreement that was in clear and unmistakable language. The Harveys' claims of economic duress fail because the Harveys did not plead economic duress and they have failed to prove the Bank misrepresented anything to them during the entire loan transaction.

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

Respectfully submitted,

JAY F. SWINDLE, SR. and
COMMUNITY BANK, ELLISVILLE,
MISSISSIPPI, Appellants

BY: 
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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
Circuit Court Judge
P.O. Box 545
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This the 26th day of September, 2008.

Terry L. Caves, Esq.

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