

**IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI**

**ANDRIA SAWYERS**

**APPELLANT**

**VS.**

**CASE NO. 2008-IA-01370-SCT 7**

**HERRIN-GEAR CHEVROLET COMPANY, INC. &  
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA**

**APPELLEES**

**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 representation 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. Andria Sawyers (Appellant)
2. Timothy J. Matusheski (Attorney for Appellant)
3. Eric Tiebauer (Attorney for Appellant)
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6. Breda B. Bethany (Attorney for Herrin-Gear Chevrolet Company, Inc.)
7. Daniel Coker Horton & Bell, P.A. (Attorneys for Herrin-Gear Chevrolet Company, Inc.)
8. American Bankers Insurance Company of Florida (Appellee)
9. Walter D. Wilson (Attorney for American Bankers Insurance Company of Florida)
10. Randy Dean (Attorney for American Bankers Insurance Company of Florida )
11. Rosemary G. Durfey (Attorney for American Bankers Insurance Company of Florida )
12. Kevin A. Rogers (Attorney for American Bankers Insurance Company of Florida )

13. Wells Marble & Hurst, PLLC (Attorneys for American Bankers Insurance Company of Florida )
14. Judge Robert Bailey (Wayne County Circuit Court Judge)

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## STATEMENT OF THE ISSUES

1. The arbitration agreement between Sawyers and Herrin cannot be enforced because it is substantively unconscionable.
2. The arbitration agreement between Sawyers and Herrin cannot be enforced because its general purpose is to aid and protect Herrin-Gear and American's illegal enterprise of selling and administering unregistered insurance products.
3. The arbitration agreement between Sawyers and Herrin does not apply to Sawyers' claims against American because the arbitration agreement clearly limits the parties who can enforce the arbitration agreement to Sawyers and Herrin.
4. Sawyers is not equitably estopped from pursuing her claims against American, notwithstanding the arbitration agreement Sawyers entered with Herrin.
5. Sawyers is not precluded from pursuing her claims against American based on American's allegation that it is Herrin's agent.

## STATEMENT OF THE CASE

On August 18, 2003, Sawyers financed a 2002 Ford Explorer from Gregory Walker, a salesman and agent of Herrin-Gear Chevrolet Co., Inc. ("Herrin"), at Herrin's dealership in Jackson, Mississippi. In addition to selling Sawyers a 2002 Ford Explorer, Gregory Walker sold Sawyers a GAP Asset Protection Deficiency Waiver Addendum ("Addendum"). A specimen copy of this Addendum can be found at Record - 128 and Appellant's R.E. Tab 3.<sup>1</sup> Apparently, Sawyers signed an arbitration agreement with Herrin on the same date. A copy of this arbitration agreement can be found at Record - 38 and Appellant's R.E. Tab 5.

On August 18, 2003, at Herrin's dealership in Jackson, Mississippi, Gregory Walker promised Sawyers that the Addendum insured Sawyers for the difference between the amount her primary insurer pays the automobile financier for a total loss to her vehicle and the total amount Sawyers owes the financier of the vehicle at the time of the total loss, with no exceptions. Presumably Gregory Walker received a commission for each consumer that bought an Addendum. In December 2007, Sawyers' financed vehicle sustained a total loss. Sawyers made a claim under the Addendum and Appellee American Bankers Insurance Company of Florida ("American"), allegedly Herrin's third party administrator for its Addendum insurance policies, refused to pay Sawyers' claim. On March 26, 2008, Sawyers's attorney asked Gregory Walker to produce a copy of all documents Sawyers signed when she financed the covered vehicle from Herrin in August of 2003. Gregory Walker refused to comply.

On April 24, 2008, Sawyers filed her Complaint against Appellees in the Circuit Court of

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<sup>1</sup> A "specimen" copy of this Addendum is attached because Respondents did not provide Sawyers with a legible copy of the signed Addendum at issue in this litigation. An illegible copy of the signed Addendum can be found at Record - 13 and Appellant's R.E. Tab 4.

Wayne County, Mississippi. A copy of the Complaint can be found at Record - 4 and Appellant's R.E. Tab 6. In the Complaint, Sawyers alleged Herrin committed actual fraud in the sale of the Addendum to Sawyers. Under the belief that Herrin sold her an insurance policy issued by American, Sawyers sued American in the same Complaint for breach of contract and bad faith. Herrin and American filed motions to compel arbitration. Sawyers argued that the arbitration agreement with Herrin was unenforceable as to both Appellees because it is substantively unconscionable and the principal purpose of the contract is to directly furnish aid and protection to appellees' illegal enterprise. Sawyers argued that the arbitration agreement was unenforceable as to American because it was a non-signatory and Mississippi law on equitable estoppel did not prevent Sawyers from pursuing her claims against American in Mississippi Court. On July 30, 2008, the Circuit Court of Wayne County granted both Respondents' Motion to Compel Arbitration. The Order of the Circuit Court of Wayne County can be found at Record 152 and Appellant's R.E. Tab 2. Since, the lower court's ruling was in error, the Petitioner filed a petition pursuant to Mississippi Rule of Appellate Procedure 5, which a three judge panel of this Court granted on September 17, 2008.

## SUMMARY OF THE ARGUMENT

The Wayne County Circuit Court should be reversed because the arbitration agreement between Sawyers and Herrin is substantively unconscionable, and American has not established that Sawyers is equitably estopped from pursuing her claims against American in a court of law. The agreement between Sawyers and Herrin is substantively unconscionable because only Sawyers is required to arbitrate her disputes while Herrin is free to seek a remedy against Sawyers in court before a judge and jury. Moreover, the arbitration agreement unlawfully restricts Sawyers' ability to recover damages other than her special damages and requires Sawyers to arbitrate her claims in Jackson, rather than in Wayne County, where the cause of action accrued and where Plaintiff filed her complaint.

Assuming *arguendo*, this Court finds that Sawyers' arbitration agreement with Herrin is not substantively unconscionable, then this Court still cannot enforce it because the arbitration agreement's purpose is to directly furnish aid and protection to Herrin and American's illegal enterprise of administering unregistered insurance in Mississippi.

Assuming *arguendo* this Court finds that Sawyers arbitration agreement with Herrin-Gear is not substantively unconscionable, and does not directly furnish aid and protection to Herrin and American's illegal enterprise of administering unregistered insurance in Mississippi, since the arbitration agreement is clear that it was only intended to apply to disputes between Herrin and Sawyers, American cannot compel Sawyers to arbitrate her dispute with American based on the agreement with Herrin.

Finally, assuming *arguendo* this Court rejects all of Sawyers' other arguments, since American failed to prove facts in support of (1) a belief or reliance on some representation of



Sawyers, (2) a change of position by American as a result thereof, and (3) determent or prejudice caused to American by Sawyers by the change in position, equitable estoppel does not apply to permit American to force Sawyers to arbitrate her disputes with American pursuant to Sawyers' agreement with Herrin.

### **ARGUMENT**

A trial court's grant of a motion to compel arbitration is a question of law; therefore the Mississippi Supreme Court applies a *de novo* standard of review on appeal. *Smith ex rel. Smith v. Captain D's, LLC*, 963 So.2d 1116, 1119 (Miss. 2007).

In this case, the lower court held: (1) that the arbitration agreement was enforceable even though the agreement required only Sawyers to arbitrate all claims and allowed Herrin to sue Sawyers for repossession and replevin of the financed vehicle before a judge and jury, (2) the limitation of Herrin's and American's liability to Sawyers' actual damages was not unconscionable, (3) the Addendum was not insurance under Mississippi law, and therefore, the arbitration agreement could be enforced, (4) American could enforce Sawyers agreement with Herrin because American was Herrin's agent, and (5) American could enforce Sawyers agreement with Herrin because Petitioner's claims against Appellees were intertwined and it is much more expedient and reasonable to resolve the claims together in arbitration. Since the lower court was in error, its Order granting Respondents' Motion to Compel Arbitration must be reversed.

**1. The Lower Court Erred in Enforcing the Arbitration Agreement Because it is Substantively Unconscionable**

The arbitration agreement is substantively unconscionable because it only requires

Sawyers to arbitrate disputes with Herrin, while allowing Herrin to pursue its claims against Sawyer before a judge and jury. Before the Circuit Court of Wayne County, Sawyer argued the following terms of the arbitration agreement rendered it substantively unconscionable under Mississippi law:

- A. The arbitration agreement provides an avenue for Herrin Gear to pursue its claims in a court of law, while requiring Plaintiff to arbitrate all claims. See first sentence of third paragraph on arbitration agreement which states, "Except for an action by [Herrin Gear] to obtain possession and/or replevin of the vehicle, any controversy or claim between [Plaintiff] and Herrin Gear ... shall be resolved by binding arbitration ...."
- B. The arbitration agreement requires the arbitration be held in the city where Herrin Gear is located. See last sentence of third paragraph on arbitration agreement which states, "Any arbitration proceeding shall be conducted in the city where [Herrin Gear's] dealership is located."
- C. The arbitrator cannot award Plaintiff damages for attorney's fees, lost wages, mental anguish, costs, interest or punitive damages. See second sentence of fourth paragraph on arbitration agreement which states, "To the extent permitted by law, the arbitrator shall have no authority to award punitive damages or other damages not measured by the prevailing party's actual damages and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Agreements."
- D. Plaintiff is required to give up her right to a judge and jury, while Herrin Gear is not. See paragraph six of arbitration agreement which states, "[Plaintiff] acknowledge[s] and agrees that by agreeing to arbitrate as set forth herein, [Plaintiff] give[s] up the right to go to court and the right to a jury trial." No such provision exists for Herrin Gear, who is free to seek a bench or jury trial.

The lower court rejected Sawyer's claims that the arbitration agreement was substantively unconscionable. Regarding the provision in the arbitration agreement that permits Herrin to use the courts to obtain possession and/or replevin of the vehicle while requiring Sawyer to arbitrate her disputes against Herrin, the lower court referred to this as "an extremely narrow exception" to the arbitration agreement. This is not an extremely narrow exception to the arbitration agreement as the lower court held. Other than an action to obtain possession or replevin of Sawyer's

vehicle, what other type of actions would Herrin ever file against Sawyers? All disputes between Herrin and Sawyers could be litigated by Herrin in Court seeking return of the vehicle for any alleged failure to pay. Thus, Herrin's promise to arbitrate claims against Sawyers is illusory.

The lower court then held that "[e]ven if an arbitration agreement creates difference [sic] obligations of the parties, mutuality of obligations is not required under Mississippi law; therefore, the arbitration agreement is enforceable." In support of this contention, the lower court cited *McKenzie Check Advance of Mississippi, LLC v. Hardy*, 866 So.2d 446, 452 (Miss. 2004). In *Hardy*, the Circuit Court of Jasper County held that the arbitration agreement at issue was unenforceable under Mississippi law because, *inter alia*, it lacked mutuality of obligation. The Supreme Court of Mississippi reversed holding that mutuality of obligation was not an issue because the agreement in fact required both parties to arbitrate all claims, except those within the jurisdiction of small claims court, wherein either party could pursue judicial remedy in Court. The *Hardy* Court then held in *dicta* that "[p]ursuant to Mississippi law, mutuality of obligation is not required for a contract to be enforceable as long as there is consideration." *Id.* at 453.

In support of this *dicta*, the *Hardy* court cited *Clinton Serv. Co. v. Thornton*, 100 So.2d 863, 866 (Miss. 1958), *Prigden v. Green Tree Financial Servicing Corp.*, 88 F.Supp.2d 655 (S.D. Miss. 2000), *First Family Financial Services, Inc. V. Fairley*, 173 So.2d 565, 572 (S.D. Miss. 2001), *Murphy v. AmSouth Bank*, 269 F.Supp.2d 749 (S.D. Miss. 2003), and *Raesy v. Grand Housing, Inc.*, 105 F.Supp.2d 562, 570 (S.D. Miss. 2000). However, *Thornton*, the Mississippi case each of these United States district court opinions relied upon to state that a lack of mutuality of obligations to arbitrate between parties to an arbitration agreement is not required, did not hold that mutuality of obligation is not required for a contract to be enforceable.

In *Thornton*, the Mississippi Supreme Court held that an option contract was enforceable because while “[t]he requirement of mutuality of obligation may be a prerequisite of the formation of a valid bilateral contract, [] there is neither mutuality of obligation or of remedy in a unilateral contract.” *Id.* (Emphasis added). Thus, the arbitration agreement in the case *sub judice* requires mutuality of obligation because it is a bilateral contract. What is more one-sided than a bilateral contract requiring only one party to perform? Moreover, a statement that qualifies as *dicta*, such as the statement regarding mutuality of obligations in *Hardy*, does not have a binding effect on subsequent Mississippi decisions. *Collins by Smith v. McMurry*, 539 So.2d 127, 130 (Miss. 1989).

Now, *Hardy* was decided in 2004. In 2005, the Mississippi Supreme Court decided *Pitts v. Watkins*, 905 So.2d 553 (Miss. 2005). The *Pitts* court reversed the circuit court of Lowndes County’s and held that the arbitration agreement at issue was substantively unconscionable because it provided an avenue for the drafter of the arbitration agreement, a home inspector, to pursue his claims in a court of law, while requiring the homeowners to arbitrate their claims. The *Pitts* court also held that the limitation of liability clause in the arbitration agreement which limited the home inspector’s liability to \$265 made the arbitration agreement substantively unconscionable because it left the homeowners with no adequate remedy. As in *Pitts*, the arbitration agreement limits the Respondents’ liability to Sawyers’ actual damages, only requires Sawyers to arbitrate her claims, and requires Sawyers only to give up her right to a judge and jury.

Before the Circuit Court of Wayne County, Sawyers argued that the agreement was unconscionable, not void due to lack of mutuality of obligations. The Mississippi legislature

passed Miss. Code Ann. § 75-2-302 which allows the court to choose between refusing to enforce any unconscionable agreement or striking provisions of the agreement to avoid an unconscionable result. Thus, Mississippi law recognizes unconscionability as a contract defense separate and apart from a mutuality of obligations defense. In this case, even were this Court to strike the limitation of liability portion of the arbitration agreement, the arbitration agreement does not survive if the court strikes the provisions of the arbitration agreement that require only Sawyers to arbitrate her claims. Striking these provisions of arbitration agreement would remove all language requiring Sawyers to arbitrate her claims. Moreover, this Court is not authorized under Mississippi law to rewrite the arbitration agreement to pass muster against a claim that the arbitration agreement is unconscionable. As such, under *Pitts* and Mississippi statutory law on unconscionability, the arbitration agreement at issue in this case cannot be enforced by Herrin or American. The Court erred by enforcing the arbitration agreement due to its one-sidedness and substantive unconscionability.

← Blue line  
note

**2. The Lower Court Erred in Enforcing the Arbitration Agreement Because its Principal Purpose is to Directly Furnish Aid and Protection to Appellees' Illegal Enterprise of Administering Unregistered Insurance**

The subject arbitration agreement is also unenforceable because the principal purpose of the arbitration agreement is to directly furnish aid and protection to an illegal enterprise, namely, as discussed below, American and Herrin's agreement to sell and administrate unregistered insurance while keeping the Courts and the Mississippi Insurance Commissioner from regulating this illegal insurance by hiding behind the unconscionable arbitration agreement at issue in this litigation.

The Addendum is a contract of insurance between Sawyers and Herrin. Herrin and

American have a contractual relationship whereby American either administers, reinsures the contractual responsibilities of Herrin under the Addendum, or does both. Herrin has never filed a registration statement with the Mississippi commissioner of insurance nor has it filed the Addendum with the Mississippi insurance commissioner. As discussed below, these are illegal acts, and the arbitration agreement cannot be enforced because “the principal purpose of the [arbitration agreement] directly furnishes aid and protection to an illegal enterprise.” *See Smith v. Simon*, 224 So.2d 565, 566 (Miss. 1969). The illegal enterprise is American and Herrin’s agreement to sell and administer insurance, i.e. the Addendum, without complying with Mississippi insurance law.

Miss. Code Ann. § 83-5-5 defines an insurance company as a person or corporation engaged as principals in the business of insurance or guaranteeing the obligations of others. It further defines an insurance contract as:

[a]n agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon destruction, loss, or injury of something in which the assured or other party has an interest as indemnity therefor.

A review of the Addendum clearly displays that it is an insurance contract pursuant to Mississippi law as it indemnifies Sawyers for the difference between what her primary insurer pays on a total loss to the vehicle she financed from Herrin, and Sawyers’ remaining balance on the vehicle she financed from Herrin. Therefore, Herrin is an insurance company as provided in Miss Code Ann. § 83-5-1 because it conducts the business of insurance in Mississippi.

Miss. Code Ann. § 83-6-3 states every insurance company authorized to do business in this state and which is a member of an insurance holding company system is required to register

with the Mississippi commissioner of insurance. Miss. Code Ann. § 83-6-1 defines an insurance holding company system as two or more affiliated persons, one or more of which is an insurer. It further defines an insurer as only those companies subject to the jurisdiction of the commissioner as provided in Miss. Code Ann. § 83-5-1. American and Herrin form an insurance company holding system pursuant to Mississippi law and both are subject to the jurisdiction of the commissioner.

Herrin has never filed a registration statement pursuant to Miss. Code Ann. § 83-6-3 and is therefore in “violation of sections 83-6-3 through 83-6-19.” Miss. Code Ann. § 83-6-19. Miss. Code Ann. § 83-6-35 provides that willful violations of the requirement to file a registration statement are criminal violations. Moreover, by failing to file all policy forms for the insurance policy it sold to Plaintiff with the commissioner of insurance, Herrin violated Miss. Code Ann. § 83-2-7, the violation of which gives rise to criminal penalties as a misdemeanor pursuant to Miss. Code Ann. § 83-5-85.

Notwithstanding these arguments, the Circuit Court of Wayne County held that the Addendum is not insurance because the Mississippi insurance commissioner, in a 2000 Bulletin, did not take a position as to whether a GAP Auto Protection Insurance Addendum contract that is sold to the consumer is insurance. The Mississippi Supreme Court has not had the opportunity to rule on whether a GAP auto insurance Addendum is insurance because the entities selling this type of insurance force consumers to sign arbitration clauses. This factor makes it difficult for an insured to find competent legal counsel to represent her interests and protects those selling illegal insurance from facing regulation. Moreover, the reason the Mississippi legislature has not amended any statutes in response to the Mississippi commissioner of insurance’s 2000 bulletin

and the unauthorized sale of insurance by enterprises, such as the one conducted by American and Herrin in the instant case, is because the statutes already unambiguously identify the Addendum as an insurance contract. Therefore, the lower court's holding that the arbitration agreement can be enforced because it is not insurance should be reversed.

**3. The Arbitration Agreement is Clear that it Only Applies to Claims Between Sawyers and Herrin.**

The subject arbitration agreement is between Andria Sawyers ("Buyer(s)/Lessee(s)") and Herrin Gear ("Dealer") and provides that only claims of Buyer against Dealer are to be arbitrated. In Mississippi, when the language of the contract is clear as to who can compel arbitration, and the party seeking to compel arbitration is not one of the persons who the contract identifies as having a right to compel arbitration, nor are they a signatory, it is proper to deny the party's Motion to Compel Arbitration. *Qualcomm, Inc. v. American Wireless License Group, LLC*, 980 So.2d 261, 269 (Miss. 2007). *See also Andrews v. Ford*, 990 So.2d 820 (Miss. Ct. App. 2008).

In *Andrews*, the Mississippi Court of Appeals affirmed a Rankin County Circuit Court order refusing to enforce an arbitration agreement that was entered into between the members of a limited liability company. One of the members of the limited liability company died and his estate sued the other member seeking to enforce a provision in an operating agreement that required the surviving member to purchase the decedent member's interest in the limited liability company from the decedent member's estate. The operating agreement was executed with a buy-sell agreement that contained an arbitration clause requiring the members to arbitrate any disputes. Although the Mississippi Court of Appeals held that an arbitration agreement was formed between the members, it held that the surviving member could not enforce the agreement



against the estate of the decedent member because the arbitration agreement's enforceability was limited to disputes between the members. Since the estate was excluded from the operating agreement's definition of member, the dispute between the surviving member and the decedent member's estate was held "not within the scope of the arbitration provision of the Operating Agreement." *Id.* at 824.

In the instant case, the arbitration agreement is clear that it only applies to the claims filed by Sawyers against Herrin. Thus, American cannot enforce the agreement between Sawyers and Herrin to its benefit and its Motion to Compel Arbitration should have been denied. By granting American's Motion to Compel Arbitration, the lower court erred and should be reversed.

**4. The Lower Court Erred in Finding that Sawyers is Equitably Estopped from Pursuing Her Claims Against American in Court.**

The Circuit Court of Wayne County's finding that American had the right to compel arbitration of Sawyers' claims is based upon a misapplication of Mississippi law on equitable estoppel. The lower court improperly relied upon the Fifth Circuit Court of Appeal's holding in *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 527 (5<sup>th</sup> Cir. 2000), to find Sawyers was equitably estopped from litigating her claims against American in Court. *Grigson* held a Plaintiff was equitably estopped from denying the application of an arbitration agreement only to the non-signatories of the contract, when the Plaintiff sought enforcement of the contract containing the arbitration provision as to both the signatories and non-signatories. The rule adopted in *Grigson* is not the Mississippi rule on equitable estoppel. See *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703, 709 (Miss. 2006)(If non-signatory fails to assert facts in support of (1) a belief or reliance on some representation, (2) a change of position as a result thereof, and (3) detriment or

prejudice caused by the change in position, it can not use equitable estoppel to compel arbitration.) Since American has failed to assert or prove any of the facts set forth in *Adams* in support of its equitable estoppel claim, its Motion to Compel Arbitration should have been denied, and the Circuit Court of Wayne County was in error by granting American's Motion to Compel Arbitration.<sup>2</sup>

*Grigson* has not been followed by the Mississippi Supreme Court. In *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 491 (Miss. 2005), the majority announced that it "is not bound to follow" *Grigson*, and instead defines equitable estoppel in the context of arbitration under Mississippi law as existing where there is a (1) belief and reliance on some representation, (2) a change of position as a result thereof, and (3) detriment or prejudice caused by the change of position. *Id.* Most recently, without a mention of *Grigson*, the Mississippi Supreme Court defined equitable estoppel in the context of arbitration as a

principle by which a party is precluded from denying any material fact, induced by his own words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion would be suffered if such denial or contrary assertion was allowed.

*Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So.2d 382, 384-385 (Miss. 2008). Those

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<sup>2</sup>*Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 527 (5<sup>th</sup> Cir. 2000), is a case cited by all non-signatory's seeking to enforce an arbitration agreement it is not a party to because it purports to authorize arbitration under an "equitable estoppel" theory requiring claims to be arbitrated if: (1) the Plaintiff must rely on the terms of the agreement containing the arbitration clause, or (2) a signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories of the contract. The Fifth Circuit admitted in *Grigson*, which is a Texas case, that it adopted this "test formulated by the Eleventh Circuit" from *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11<sup>th</sup> Cir. 1999). However, this Eleventh Circuit decision created its "test" by adopting the decision of a middle district of Alabama opinion in *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1432 (M.D. Ala. 1997).

seeking to apply the principle of equitable estoppel to their benefit must bear the burden of proof.

*Id.* (Emphasis added). Since 2000, *Grigson* has not been adopted by the Mississippi Supreme Court, and Sawyers believes it will never be adopted by the Mississippi Supreme Court. The reason for this is simple, *Grigson* does not apply Mississippi law on equitable estoppel. The enforceability of an arbitration agreement is a question of state law, as determined by the state's highest court, in this case the Mississippi Supreme Court. *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 431 (5<sup>th</sup> Cir. 2004); *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5<sup>th</sup> Cir. 2002). By applying the law on equitable estoppel in *Grigson* rather than Mississippi law, the lower court erred and should be reversed.

**5. The Lower Court Erred in Enforcing the Arbitration Agreement as to American Based on its Finding that American is Herrin's Agent.**

As to the court's finding of an agency relationship between Herrin and American, "the burden of proving an agency relationship rests squarely upon the party asserting it." *Forrest Hill Nursing Ctr., Inc. v. McFarland*, NO. 2007-CA-00327-COA (¶ 13) (Miss. Ct. App. 2008); *Highlands Insurance Co. v. McLaughlin*, 387 So.2d 118, 120 (Miss. 1980). Neither Herrin or American offered one shred of proof that American was Herrin's agent. Even if American was Herrin's agent, that is not grounds for American to enforce Herrin's arbitration agreement with Sawyers. The Fifth Circuit held:

... a nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories. An agent is not ordinarily liable under the contract he executes on behalf of his principal, so long as his agency is disclosed, but he is personally liable if his acts breach an independent duty. If he seeks to compel arbitration, he is subject to the same equitable estoppel framework left to other nonsignatories. It is to this framework that we now turn.

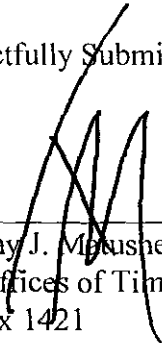
*Westmoreland v. Sadoux*, 299 F.3d 462, 466-467 (5<sup>th</sup> Cir. 2002). Accordingly, not only has

American failed to establish it is Herrin's agent, such a finding is immaterial as to whether American can compel Sawyers to arbitrate her claims.

### CONCLUSION

In conclusion, Sawyers prays that this Court reverse the Circuit Court of Wayne County's Order compelling Sawyers to arbitrate her claims against both Appellees. In the alternative, Sawyers prays that this Court reverse the Circuit Court of Wayne County's Order compelling Sawyers to arbitrate her claims against American. Sawyers prays that this Court Order the Circuit Court of Wayne County to reinstate her claims against both Appellees.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

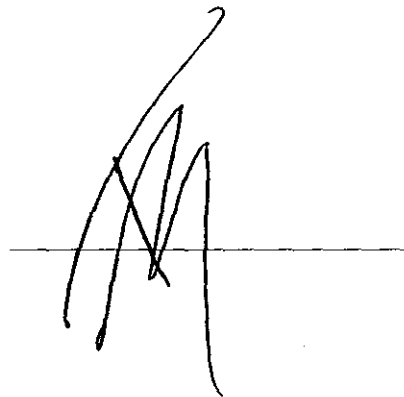
I hereby certify that I mailed a true and correct copy of the above and foregoing to the following, via U.S. mail, postage prepaid:

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This is the 7<sup>th</sup> day of January, 2009.

A handwritten signature, possibly reading "M", is written over a horizontal line.