

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2009-TS-00568

**SIMMONS HOUSING, INC., AND
SOUTHERN ENERGY HOMES, INC.**

APPELLANTS

v.

**COLEMAN BRITT SHELTON AND JOSHUA
MASON SHELTON, BY AND THROUGH THEIR
MOTHER AND NEXT FRIEND, KIMBERLY SHELTON**

APPELLEES

Appeal from the Circuit Court of
Copiah County, Mississippi

REPLY BRIEF OF APPELLANT SIMMONS HOUSING, INC.

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

As previously stated in the Brief of Appellant, Simmons Housing, Inc., this cause of action arises from the purchase of a mobile home by Roy Shelton and Kimberly Shelton on December 22, 1998. Simmons Housing, Inc. hereby incorporates its Appellant Brief as if set forth fully herein. Simmons Housing, Inc. files this, its Reply to the Brief of Appellees Coleman Britt Shelton and Joshua Mason Shelton (the "Minors").

REPLY ARGUMENT

I. THE MINORS SEEK THE BENEFIT OF THE CONTRACT AND ARE, THEREFORE, BOUND BY THE ARBITRATION CLAUSE WITHIN THAT CONTRACT

The Plaintiffs argue that they “have openly acknowledged that the minor children do not have claims based on breach of contract (both in Plaintiffs’ Motion for Reconsideration and Plaintiffs’ Supplemental Memorandum in Support Thereof)” and should, therefore, not be estopped from litigating their remaining non-contractual claims.

However, in the Plaintiffs’ original Complaint, the Minors seek damages for breach of contract, breach of express warranty, revocation of acceptance, and breach of certain provisions of Mississippi’s version of the Uniform Commercial Code, Miss. Code Ann. §75-2-101 et seq. (1972). (R. vol. 1, 10-13, 16-17, and 33-34; R.E. Tab 2.) The Plaintiffs have never sought to amend their Complaint to withdraw the Minors’ clearly asserted contracts claims. On November 21, 2006, the Plaintiffs merely quote *Fleetwood Enterprises v. Gaskamp* stating that the Minors “are not suing on the basis of contract [and] are not bound by the arbitration agreement signed by their parents.” 280 F. 3d 1069 (5th Cir. 2002).

It was not until January 1, 2009, that the Plaintiffs openly argue as part of a memorandum brief to avoid arbitration, that the Minors’ claims are not for breach of contract. Four years of written discovery, depositions, inspections, expert designations and various other arbitration preparation and/or trial preparation have been conducted based on the allegations set forth in the Plaintiffs’ Complaint. Once again, the Plaintiffs have never sought to amend their Complaint to withdraw the Minors’ clearly asserted contract claims.

In *Community Bank of Mississippi v. Stuckey*, the Mississippi Court of Appeals partially relied on the initial pleading filed by Defendant Donna Stuckey. 2009 WL 4263567 (Miss. App. Dec. 1, 2009). In an attempt to avoid arbitration, Defendant Stuckey argued that she had no

interest in the subject cattle operation and, therefore, was not a third-party beneficiary to the cattle loans. However, within Defendant Stuckey's initial pleadings and deposition, she asserted an interest in Stuckey Farms and claimed damages therefrom. The Court of Appeals highlighted Defendant Stuckey's assertions in her initial pleading and ultimately ruled that Defendant Stuckey did have an interest in the subject cattle operation and was ultimately bound to the subject arbitration provision. *Id.*

Likewise, in this matter, it was not until the Minors were faced with the possibility of arbitration that the Minors' claimed to have no contract causes of action against this Appellant. In the Brief of the Appellees, the Plaintiffs argue that the Minors have no "cognizable claims" based on contract and can "only sue on legal theories that exist independently of the contract." In reality, the Minors can and did sue on various breach of contract claims. Whether or not the Plaintiffs and/or their counsel have the ability to prove the elements of the clearly asserted contract claims is not an issue presented to this Court.

The Plaintiffs have never sought to amend their Complaint to remove any contractual claims asserted by the Minors. The Plaintiffs should not be allowed to strike their claims based on contract as a last ditch effort to avoid arbitration. Four years ago, the Minors sought the benefit of the contract executed by their parents and Simmons Housing, Inc. in filing a civil action. The Plaintiffs have failed to amend their Complaint after four years and countless hours of discovery based on that Complaint. Therefore, the Minors should, for the purposes of this appeal be deemed to be seeking the benefit of the subject contract (the "Contract") and are bound by the arbitration clause within that contract.

Waiver

II. THE MINORS ARE THIRD-PARTY BENEFICIARIES OF THE CONTRACT CONTAINING AN ARBITRATION CLAUSE, AND, THEREFORE, THE CLAIMS OF THE MINORS SHOULD BE COMPELLED TO ARBITRATION

The Plaintiffs argue that the Minors were non-signatories and were merely incidental beneficiaries to the subject contract. It is undisputed that the Minors need not be named in the subject contract to achieve third-party beneficiary status. In order for a third-party beneficiary claim to succeed, [1] “the contract between the original parties must have been entered into for [their] benefit; [2] there must have been a legal obligation or duty on the part of the promisee to such third person beneficiary; and [3] this obligation must have a legal duty which connects the beneficiary with the contract.” *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703 (Miss. 2006); *see also Stewart ex. Rel Womack v. City of Jackson*, 804 So. 2d 1041 (Miss. 2002) (quoting, *Hanberry Corp. v. State Building Commission*, 390 So. 2d 277, 279 (Miss. 1980)).

As previously stated, the Minors directly benefited from the Contract and were not mere incidental beneficiaries. The Contract was for the purchase and sale of the family residence. The Minors admittedly lived in the home that was purchased for their benefit and the benefit of their parents. Furthermore, the Minors are persons for whom Roy Shelton and Kimberly Shelton, the promisees under the Contract, have a legal obligation under Mississippi law to provide shelter. The purchase of the home allowed Roy Shelton and Kimberly Shelton to meet their legal obligation to the Minors which formed the nexus between the Minors and the Contract.

Also, the Minors had no legal capacity to execute the contract. At the time the home was purchased, the Minors were approximately one and five years of age. Under Mississippi law, the Minors could not have executed a contract themselves. Miss. Code Ann. §93-19-13 (1972); *see also, Shemper v. Hancock Bank*, 40 So. 2d 742 (Miss. 1949). Any such contract must be executed on their behalf by their legal guardians, in this instance their parents. The parents, Roy

and Kimberly Shelton did, in fact, execute the Contract to purchase a home for the Minors. Thus the Contract was executed by the only parties who could have bound the Minors absent the court appointing a fiduciary on their behalf.

III. JUDICIAL ECONOMY, EFFICIENCY, AND THE ADVANTAGE OF LITIGATING IN ONE FORUM

The doctrine of judicial economy mandates that all claims be compelled to arbitration. The claims of the adult and minor Plaintiffs are obviously intertwined as all claims arise from the purchase of the subject mobile home. Should all claims not be compelled to arbitration, these intertwined claims would be litigated in separate forums which would effectuate the need for two trials, duplicate witness testimony, and duplication of all trial and/or arbitration efforts. Litigation of these intertwined claims may also produce inconsistent results and will essentially litigate the same or similar claims twice.

CONCLUSION

The Minors claim damages and assert rights under the Contract executed by Roy Shelton, Kimberly Shelton, and Simmons Housing, Inc. The Minors seek the benefit of the Contract and should not be allowed to evade the obligations of that same Contract. The Minors should not be allowed to strike their claims based on contract as a last ditch effort to avoid arbitration. Moreover, the Minors are third-party beneficiaries of the Contract containing an arbitration clause, and, therefore, the claims of the Minors should clearly be compelled to arbitration. For the above and foregoing reasons, Appellant Simmons Housing, Inc. respectfully requests that this Court reverse the judgment of the trial court and compel the claims of Coleman Britt Shelton and Joshua Mason Shelton to binding arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Muncelle Mitchell, attorney for the Appellant, Simmons Housing, Inc., certify that I have served, via U.S. Mail, postage prepaid, a copy of the forgoing Appellant's Reply Brief to the following:

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