

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

BRIEF OF APPELLANT SIMMONS HOUSING, INC.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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. Simmons Housing, Inc., Appellant;
2. Southern Energy Homes, Inc., Appellant;
3. Coleman Britt Shelton and Joshua Mason Shelton, By and Through Their Mother and Next Friend, Kimberly Shelton, Appellees;
4. Roy A. Shelton and Kimberly Shelton, Plaintiffs in lower court action;
5. Judge Lamar Pickard, Circuit Court Judge of Copiah County, Mississippi;
6. Honorable Jeffrey A. Varas and Honorable Donna J. Hodges, Attorneys for Appellees;
7. Honorable James L. Quinn, Attorney for Southern Energy Homes, Inc.; and
8. Honorable Joe S. Deaton, III, Honorable Muncelle Mitchell, Honorable Alan Goodman, and Honorable Barbara Meeks Attorneys for Appellant Simmons Housing, Inc.

RESPECTFULLY SUBMITTED, this the 1st day of October, 2009.

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STATEMENT OF THE ISSUES

The trial court granted the Plaintiffs' Motion for Reconsideration ruling that the claims of the minor plaintiffs were not subject to binding arbitration. The issue before this Court is whether the trial court erred in failing to compel to arbitration the claims of the minors, Coleman Britt Shelton and Joshua Mason Shelton, by and through their mother and next friend, Kimberly Shelton. In particular, this Court should consider whether minor non-signatories to a contract are bound by the arbitration provision within the contract executed by the parents, the natural guardians of the minors, when the minors assert rights and seek damages based, in part, on various contract causes of action.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The subject action arises from the purchase of a mobile home by Roy Shelton and Kimberly Shelton on December 22, 1998. The mobile home was purchased from Simmons Housing, Inc., a mobile home dealer. The mobile home was manufactured by Southern Energy Homes, Inc., financed by Green Tree Financial Servicing, and insured by American Bankers Insurance Company of Florida. The Plaintiffs have settled their claims with Green Tree Financial Servicing and American Bankers Insurance Company of Florida.

On November 22, 2005, Roy Shelton, Kimberly Shelton, Coleman Britt Shelton and Joshua Mason Shelton (the "Sheltons") filed the subject lawsuit against this Appellant and other parties in the Circuit Court of Copiah County, Mississippi. The Sheltons primarily allege that the mobile home is unfit for human habitation due to mold and mildew. The Sheltons, as a whole, assert numerous causes of action including breach of warranty, breach of contract, revocation of acceptance, negligence, misrepresentation, strict liability in tort, trespass and fraud.

This action was timely removed to federal court based on the jurisdictional provisions of the Magnuson-Moss Warranty Act 15 U.S.C. § 2310 on December 22, 2005. The Plaintiffs subsequently dismissed their claims under the Magnuson-Moss Warranty Act and the action was remanded to the Circuit Court of Copiah County, Mississippi. (R. vol. 2, 170-177; R.E. Tab 7.)

On January 6, 2006, Simmons Housing, Inc. filed its Answer and Affirmative Defenses including its request to compel this matter to arbitration. On May 4, 2006, Simmons Housing, Inc. filed its Motion to Enforce Arbitration. (R. vol. 1, 77-79; R.E. Tab 3.) On June 2, 2006, Simmons Housing, Inc. filed its Supplemental Motion to Enforce Arbitration due to Plaintiffs execution of a contract on December 22, 1998 with Simmons Housing, Inc., agreeing to waive any right to a jury trial and to settle any disputes by binding arbitration. (R. vol. 1, 83-88; R.E.

Tab 4.) Southern Energy Homes, Inc. also filed a motion to compel arbitration including a copy of a separate arbitration agreement executed by Roy Shelton and Kimberly Shelton. (R. vol. 1, 93-96 and vol. 2, 202-210.; R.E. Tab 6.) Copiah County Circuit Court Judge Lamar Pickard entered his Order granting Simmons Housing, Inc.'s Motion to Enforce Arbitration on November 14, 2006. (R. vol. 2, 178; R.E. Tab 8.).

The Plaintiffs subsequently filed a Motion for Reconsideration on November 21, 2006 asserting that the claims of Coleman Britt Shelton and Joshua Mason Shelton (the "Minors") are "separate and distinct" and should not be subject to arbitration. (R. vol. 2, 179-181; R.E. Tab 9.) Simmons Housing, Inc. and Southern Energy Homes, Inc. responded in opposition to the Plaintiffs' Motion for Reconsideration requesting the Court to once again compel all of the Plaintiffs' claims to binding arbitration. (R. vol. 2, 182-194; R.E. Tab 10.)

Judge Pickard heard oral arguments on the Motion for Reconsideration on August 13, 2007 (Hrg. Transcr. 3-12; R.E. Tab 17) and on January 12, 2009. (Hrg. Transcr. 13-20; R.E. Tab 18.) The Trial Court granted the Plaintiffs' Motion for Reconsideration, ruling that the claims of the Minors are not subject to mandatory arbitration. (R. vol. 2, 211-212; R.E. Tab 14.) Judge Pickard entered said Order on March 17, 2009. (R. vol. 2, 211-212; R.E. Tab 14.) On April 7, 2009, Simmons Housing, Inc. filed its Notice of Appeal of the order denying arbitration of the Minors' claims. (R. vol. 2, 213-217; R.E. Tab 15.) On April 20, 2009, Southern Energy Homes, Inc. filed its Notice of Appeal regarding the same order. (R. vol. 2, 234-237; R.E. Tab 16.)

B. Statement of Facts

On December 22, 1998, Roy Shelton and Kimberly Shelton purchased a mobile home (the "Mobile Home") from Appellant Simmons Housing, Inc. via a contract containing the subject arbitration agreement. (R., vol. 1, 11; R.E. Tab 2.). The Mobile Home is a 1999 Southern Energy Mobile Home, serial number DSE2SL13175A/B. (R. vol. 1, 12; R.E. Tab 2.) "The

[M]obile [H]ome was installed at the Plaintiffs' home site" (R. vol. 1, 12; R.E. Tab 2.) Roy Shelton, Kimberly Shelton, Coleman Britt Shelton and Joshua Mason Shelton lived in the Mobile Home as a family for approximately five (5) years. (R. vol. 1, 11-14; R.E. Tab 2.)

Roy Shelton and Kimberly Shelton executed a Manufactured Homes Retail Installment Contract (the "Contract") for the purchase of the Mobile Home. (R. vol. 1, 23; R.E. Tab 2.)

The sales contract contained an arbitration clause which provided:

ARBITRATION: All disputes, claims or controversies arising from or relating to this Contract or the parties thereto shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This agreement is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right to litigate disputes in court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN)

(R. vol. 1, 87-88; R.E. Tab 5.) (emphasis original) Roy Shelton and Kimberly Shelton also executed a separate "Binding Arbitration Agreement" at the closing for the Mobile Home. (R. vol. 2, 204; R.E. Tab 6.) Coleman Britt Shelton and Joshua Mason Shelton are the children of Roy and Kimberly Shelton and third-party beneficiaries to the Manufactured Homes Retail Installment Contract and binding arbitration agreement.

As stated above, Roy Shelton, Kimberly Shelton, Coleman Britt Shelton and Joshua Mason Shelton filed the subject lawsuit on November 22, 2005. The Plaintiffs' Complaint is over one hundred eighty-seven paragraphs with ten causes of action. (R. vol. 1, 9-76; R.E. Tab 2.) In addition to other claims, the complaint alleges that the minors are entitled to damages based on breach of contract, breach of warranty and revocation of acceptance. (R. vol. 1, 18-21, 23-27; R.E. Tab 2.) The Complaint also alleges that at material times "there existed a special

intertwined relationship between one or more of the defendants and plaintiffs” (R. vol. 1, 17; R.E. Tab 2.)

SUMMARY OF THE ARGUMENT

Coleman Britt Shelton and Joshua Mason Shelton (the “Minors”) seek damages for breach of contract, breach of express warranty, revocation of acceptance, and breach of certain provisions of the Mississippi version of the Uniform Commercial Code. The contract from which the Minors seek to benefit is the same contract containing the subject arbitration agreement. By filing the subject action, the Minors seek the benefit of a contract executed between their natural parents and guardians and Simmons Housing, Inc., and now wish to evade the arbitration agreement contained in that contract. The Minors should, therefore, be bound by the terms of the arbitration clause of the contract.

Clearly, the Minors are third-party beneficiaries to the subject contract executed by their parents and natural guardians and, therefore, the arbitration agreement is enforceable as to the Minors. The subject contract provided the Minors with a home, directly benefiting them. In addition, the purchase of the mobile home allowed Roy and Kimberly Shelton to meet their parental and legal obligation to provide shelter for the Minors thereby forming a nexus between the Minors and the subject contract. In addition, the Minors had no capacity to execute the contract themselves. Thus, the parties who would have been legally obligated to execute the contract to bind the Minors, i.e. the parents, did, in fact, execute the contract. The Court should, therefore, compel arbitration of the Minors’ claims in this case.

STANDARD OF REVIEW

Simmons Housing, Inc. seeks this Court's review of the trial court's grant of Roy Shelton, Kimberly Shelton, Coleman Britt Shelton and Joshua Mason Shelton's Motion for Reconsideration of the Order granting Simmons Housing, Inc.'s Motion to Enforce Arbitration. When considering the grant or denial of a motion to compel arbitration, this Court's standard of review is de novo. *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002).

ARGUMENT

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

On March 17, 2009, the trial court erred in entering its order granting the Plaintiffs' Motion for Reconsideration, ostensibly accepting the arguments that the adult Plaintiffs did not accept the terms of the subject arbitration provision on behalf of Coleman Britt Shelton and Joshua Mason Shelton (the "Minors") and/or that the Minors were not third-party beneficiaries of the subject Contract.

Kimberly Shelton, as mother and next friend of the Minors, makes certain allegations on behalf of the Minors pursuant to Miss. R. Civ. P. 17(c). Rule 17 authorizes Kimberly Shelton to file suit on behalf of the Minors, and said Minors are consequently bound by the actions of their representative. *Taylor v. Taylor*, 835 So. 2d 60 (Miss. 2003); *see also, Graves v. Gulf & S.I.R. Co.*, 110 So. 234 (Miss. 1926). In the Plaintiffs' 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 Minors' claims arise directly from the Manufactured Home Retail Installment Contract (the "Contract") that was executed between Roy Shelton, Kimberly Shelton and Simmons Housing, Inc. (R. vol. 1, 86-88; R.E. Tab 5.) The Minors seek the benefit of the contract executed by their parents and Simmons Housing, Inc. in filing a civil action, yet they now wish to evade the arbitration agreement contained in that contract. The Minors seek the benefit of the contract and are, therefore, bound by the arbitration clause within that contract.

The lower court initially compelled this matter to arbitration without distinction between the claims of the adult plaintiffs and those of the minor plaintiffs. The Plaintiffs sought

reconsideration of the order compelling arbitration based almost solely upon the 5th Circuit case of Fleetwood Enterprises, Inc. v. Gaskamp 280 F.3d 1069 (2002). The fact pattern of *Gaskamp* is similar to the case at hand; the parents purchased a mobile home via a contract containing an arbitration agreement and then the parents and children filed suit regarding defects in the mobile home. *Id.* at 1073.

However, there are several important distinctions between the case *sub judice* and the *Gaskamp* case. The 5th Circuit's interpretation of the arbitration agreement in *Gaskamp* relied heavily on the fact that the parties agreed that Texas state law would govern matters that are not addressed by the Federal Arbitration Act. *Fleetwood*, 280 F.3d. 1069. Unlike Mississippi law, Texas law provides that non-signatories are bound by arbitration agreements in only two situations: (1) when the non-signatory sues on the contract containing arbitration provisions; or (2) when the non-signatory was a third-party beneficiary of the contract. *Id.* The 5th Circuit found that the Gaskamp children never attempted to enforce the purchase contract provisions, "or sue on any basis of warranties contained in the contract" *Id.* at 1075. The 5th Circuit found that the minors did not sue on the contract, and, therefore, were not subject to the arbitration agreement. *Fleetwood*, 280 F.3d. 1069.

In contrast, Coleman Britt Shelton and Joshua Mason Shelton, both minors without legal capacity to contract, have clearly asserted various causes of action based directly upon the Contract containing the arbitration agreement. The Minors seek the benefit of the Contract and should not be allowed to evade their obligations under the same Contract. The Minors should, therefore, be bound by the terms of the arbitration clause of that Contract.

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 Mississippi Supreme Court has made “clear that a non-signatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.” *Terminix International, Inc. v. Rice*, 904 So. 2d 1051; *see also, Cleveland v. Mann*, 942 So. 2d 108 (Miss. 2006). Additionally, in *Smith Barney, Inc. v. Henry*, the Mississippi Supreme Court also held that parties may be compelled to arbitrate regardless of whether they are signatories to the arbitration agreement. 775 So. 2d 722, 727 (Miss. 2001).

The *Terminix* case is a clear example of a non-signatory party bound to arbitration. In *Terminix*, Dr. David Rice contracted with Terminix International, Inc. to provide protection from termites for the home he and his wife built in Laurel, Mississippi. The contract contained an arbitration clause. The Rices filed suit against Terminix alleging various negligence claims as well as breach of contract. The Court ruled that Mrs. Rice was bound by the arbitration clause, even though Mrs. Rice did not sign the contract with Terminix. *Terminix*, 904 So. 2d 1051.

Likewise, in this matter, Roy Shelton and Kimberly Shelton executed the Manufactured Home Retail Installment Contract which included an arbitration clause. The Minors were non-signatories to the Contract, but like Mrs. Rice, are beneficiaries to the contract and are legally bound by the arbitration clause in the Contract.

Mississippi recognizes six theories for binding a non-signatory to an arbitration agreement; (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing; (5) estoppel; and (6) third-party beneficiary. *Qualcomm, Inc. v. American Wireless License Group, LLC*, 980 So. 2d 261, 269 (Miss. 2007). “Arbitration agreements are enforceable to non-signatories to the contract when the non-signatory party is a third-party beneficiary.” *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)).

Although the Minors were non-signatories, the Minors were clearly third-party beneficiaries to the Contract and their claims should, therefore, be compelled to arbitration. The Minors need not be named in the subject contract to achieve third-party beneficiary status. *Stewart*, 804 So. 2d 1042. 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.” *Id.* (quoting *Hanberry*, 390 So. 2d 277, 279).

In *Stewart*, the Mississippi Supreme Court found that Ms. Stewart was a third-party beneficiary of a transportation contract between the City of Jackson and the Central Mississippi Planning and Development District/Area Agency on Aging (“Agency”). Ms. Stewart began attending an adult day care center. Ms. Stewart and other participants were driven to and from the care center in a vehicle owned and operated by the City of Jackson pursuant its senior transportation contract with the Agency. Ms. Stewart suffered two falls at the care center and was later diagnosed as having suffered a major stroke. In addition to certain negligence claims, Ms. Stewart claimed that she was a “third-party beneficiary of the transportation contract between the City and the Agency and that the City [was, therefore,] liable for breach of contract.” *Stewart*, 804 So. 2d 1042, 1046.

Ms. Stewart was not a signatory to the contract between the City and the Agency, nor did Ms. Stewart have an opportunity to negotiate and/or read the terms of the contract at its creation. However, the contract between the Agency and the City provided transportation to and from the adult day care center for seniors and, therefore, Ms. Stewart benefited from that contract.

Likewise, in this matter, the Minors directly benefited from the Contract entered into between Roy Shelton, Kimberly Shelton and Simmons Housing, Inc. The Contract was for the purchase and sale of the family residence. The Minors lived in the home that was purchased for their benefit and the benefit of their parents. The Contract provided the Minors with a home and, therefore, the Minors directly benefited from said Contract. Furthermore, because the adult plaintiffs filed claims for breach of contract, breach of warranty, revocation of acceptance and other claims on behalf of the Minors, they have effectively admitted that the Minors are third-party beneficiaries to the Contract.

In addition to a direct benefit, there must be a legal obligation on the part of the promisee to the beneficiary which connects the beneficiary to the contract. *Id.* 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 Contract was for the purchase and sale of a home for the Shelton family to reside, including the Minors. The purchase of the home allowed Roy Shelton and Kimberly Shelton to meet their legal obligation to the Minors which forms a nexus between the Minors and the Contract.

Furthermore, 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. Thus the Contract was executed by the only parties who could have bound the Minors absent the court appointing a fiduciary on their behalf. Finally, the doctrine of judicial economy mandates that all claims be compelled to arbitration. Otherwise, intertwined claims could be litigated in separate forums

potentially resulting in inconsistent results and obviously requiring the parties to essentially litigate the same or similar claims twice.

III. BRIEF OF APPELLANT SOUTHERN ENERGY HOMES, INC.

Appellant Simmons Housing, Inc. incorporates the brief of Southern Energy Homes, Inc. as if set forth fully herein to the extent that it is applicable to Simmons Housing, Inc.

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. 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 refer the claims of Coleman Britt Shelton and Joshua Mason Shelton to binding arbitration.

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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 Brief to the following:

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This, the 1st day of October, 2009.


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