

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2009-TS-00568

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

APPELLANTS

VERUS

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

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF
COPIAH COUNTY, MISSISSIPPI

**BRIEF OF APPELLANT
SOUTHERN ENERGY HOMES, INC.**

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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 Court of Appeals may evaluate possible disqualification or recusal:

A. Parties

Plaintiffs-Appellee: Roy A. Shelton and Kimberly Shelton, and Coleman Britt Shelton and Joshua Mason Shelton by and through Kimberly Shelton, their mother and next friend
1029 Case Road
Wesson, Mississippi 39191

Defendants-Appellants: Southern Energy Homes, Inc.
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Addison, Alabama 35540

Simmons Housing, Inc.
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B. Attorneys:

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This the 28 day of August, 2009.

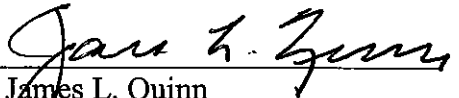

James L. Quinn
Attorney for Appellant,
Southern Energy Homes, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

The issue in this case is whether minor non-signatories to a contract executed by their parents are bound by an arbitration clause within that contract. This question has not been directly addressed by the Mississippi Supreme Court or the Mississippi Court of Appeals and oral argument may assist the court in analyzing this question. The Appellant Southern Energy Homes, Inc. requests oral argument.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The issue for review on appeal is whether minor non-signatories to a contract are bound by its arbitration provisions where the minors' parents signed the contract and sued on their behalf asserting claims including breach of contract and breach of warranty.

STATEMENT OF THE CASE

The claims in this action arise from purchase of a mobile home by Roy A. Shelton and Kimberly A. Shelton on December 21, 1998. The mobile home was purchased from dealer Simmons Housing, Inc. of Brookhaven, Mississippi. It was manufactured by Southern Energy Homes, Inc. Financing was provided by Green Tree Financial Servicing and American Bankers Insurance Company of Florida provided casualty insurance for the mobile home. The Plaintiffs have settled their claims against Green Tree Financial Servicing and American Bankers Insurance Company of Florida and those defendants are not parties to this appeal.

The complaint contains allegations that the Plaintiffs began experiencing problems with their mobile home within the first year following purchase. They primarily complain of mold and mildew which the Plaintiffs contend render the home unfit for habitation. The Plaintiffs alleged that mold within the mobile home has caused illness and injury to Coleman Britt Shelton and Joshua Mason Shelton. Claims under several theories are asserted including breach of warranty, breach of contract, negligence, misrepresentation, strict liability in tort, trespass and fraud. The Plaintiffs seek compensatory and punitive damages.

This action was filed in the Circuit Court of Copiah County, Mississippi on November 22, 2005. It was timely removed to federal court based on jurisdictional provisions of the Magnuson-Moss Warranty Act 15 U.S.C. § 2310. Following removal, the Plaintiffs agreed to dismiss claims under the Magnuson-Moss Warranty Act and U.S. District Judge William H. Barbour remanded the case with an order that the Plaintiffs' claims under 15 U.S.C. §§ 2301-2312 are dismissed. (Vol. 2, pp. 170-177)

Simmons Housing, Inc. filed its motion and supplemental motion to enforce arbitration, attaching a copy of the sales contract for the mobile home which contained an arbitration clause.

(Vol.1 pp. 77-88; R.E. Tab 3) Southern Energy Homes, Inc. also filed a motion to compel arbitration with affidavits of employee Don McNutt and a copy of a separate arbitration agreement signed by Roy A. Shelton and Kimberly Shelton (Vol. 1 pp.93-96, Vol.2, pp. 202-69; R.E. Tab 4).¹ Circuit Court Judge Lamar Pickard entered his “Order Granting Simmons Housing, Inc.’s Motion to Enforce Arbitration” on November 14, 2006. (Vol. 2, p.178; R.E. Tab 5)

The Plaintiffs then filed a motion asking the court to reconsider its order insofar as it would require binding arbitration of claims asserted on behalf of the minor plaintiffs. Both Southern Energy Homes, Inc. and Simmons Housing, Inc. responded in opposition to the Plaintiffs’ motion for reconsideration and Southern Energy moved the court to enter an order specifically providing that the Plaintiffs’ claims against Southern Energy Homes, Inc. (as well as those against Simmons Housing, Inc.) are subject to binding arbitration. (R. Vol. 2, pp.189-191; R.E. Tab 6).

Copiah County Circuit Judge Lamar Pickard heard oral arguments on the motion for reconsideration on August 13, 2007 (Tr. 3-12) and again on January 12, 2009 (Tr. 13-20).² On March 17, 2009 Judge Pickard entered an order that the claims of the adult Plaintiffs Roy A. Shelton and Kimberly A. Shelton are subject to binding arbitration; but the claims of the minor Plaintiffs Coleman Britt Shelton and Joshua Mason Shelton are not subject to mandatory arbitration. (Vol. 2 pp. 211-212; R.E. Tab 8) On April 7, 2009 Simmons Housing, Inc. filed its notice of appeal of the order denying arbitration of the minors’ claims and on April 20, 2009, Southern Energy Homes, Inc.

¹The record prepared by the clerk includes copies of the exhibits to Southern Energy’s motion for summary judgment, including affidavits of employee Don McNutt. The exhibits are recorded in volume 2 of the record, rather than appended to the motion as filed with the circuit clerk by Southern Energy Homes, Inc.

²The transcript incorrectly states that Michael D. Simmons appeared at that hearing on behalf of the Defendants. In fact, counsel for Southern Energy Homes, Inc. argued in opposition to the Plaintiffs’ motion.

joined by filing its notice of appeal of the same order. (Vol. 2, pp. 234-235; R.E. Tab 10)

STATEMENTS OF FACTS

On December 22, 1998, Roy Shelton and Kimberly Shelton purchased a new 1999 model double-wide mobile home manufactured by Southern Energy Homes, Inc. bearing serial number DSE2AL13175A-B. Retail sale of the mobile home was by Simmons Housing, Inc. of Brookhaven, Mississippi financed by Green Tree Financial Servicing Corporation (R. Vol. 1, pp 86-88; R.E. Tab 3). The sales contract contained in arbitration clause which provided:

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 a consent of Buyer(s). This agreement is made pursuant to a transaction of Interstate Commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. §1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead allegation 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) (Vol,1, pp. 87-88; R.E. Tab3)

In addition, and as part of closing of the purchase and sale of the mobile home, Roy Shelton and Kimberly Shelton executed a separate "Binding Arbitration Agreement" signed by the Sheltons, the dealer Simmons Housing, Inc. and the manufacturer Southern Energy Homes, Inc. (Vol. 2, p. 204; R.E. Tab 4).

The subject mobile home was delivered and set up at 1029 Case Road, Wesson, Mississippi. The Plaintiffs alleged that they experienced problems with the mobile home in the year after purchase, including growth of mold along the marriage line. The Plaintiffs alleged that they notified

their insurer American Bankers Insurance Co. of Florida and the office of the Fire Marshal of the State of Mississippi before filing suit in the Circuit Court of Copiah County, on November 22, 2005. (Vol. 1, pp -17; R.E. Tab 2).

The complaint contains allegations by Kimberly Shelton on behalf of their minor sons Coleman Britt Shelton and Joshua Mason Shelton as their natural mother and next friend. (Vol. 1, p 9; R.E. Tab 2). The complaint contains allegations that all of the Defendants were “acting as a principal and agent of each of the other defendants... in manufacturing , selling, disputing, and installing the subject mobile home.” (Vol.1, p. 11; R.E. Tab 2) The complaint contains allegations that at material times “there existed a special intertwined relationship between one or more of the defendants and plaintiffs...” (Vol.1, p. 17; R.E. Tab 2) The complaint contains allegations of breach of implied and express warranty, including breach of “ promises and affirmation... promotional materials, sales and marketing information, models or demonstrators, warranties or other information that was part of the basis of the bargain;...” (Vol. 1, p. 20; R.E. Tab 2). The complaint further contains allegations of breach of the contract between the Plaintiffs and the Defendants for “sale, construction and transport of the mobile home.” (Vol. 1, pp 23-24; R.E. Tab 2) The Plaintiffs also assert a variety of rights and remedies under the Uniform Commercial Code, including allegations of breach of warranty and that they have a security interest in the mobile home. (Vol. 1, p. 25; R.E. Tab 2) The Plaintiffs further assert claims sounding in negligence and strict liability in tort. (Vol. 1, pp 35-36;40-41; R.E. Tab 2)

Southern Energy Homes, Inc. is a Delaware corporation domiciled and with a principal place of business in the state of Alabama. It manufactures homes at multiple facilities in Alabama and other states. The funds used to conduct its business operations are, in part, from banking institutions in several different states. Its products, including the mobile home purchase by the Sheltons,

incorporate materials purchased and acquired by Southern Energy Homes, Inc. from manufacturers, sellers and suppliers outside the state of Alabama and from various states throughout the United States. The subject mobile home was manufactured in the state of Alabama and sold and transported to Simmons Housing, Inc., a Mississippi corporation domiciled in Brookhaven, Mississippi. The manufacture, transportation and sale of the subject mobile home involve transactions in interstate commerce. (Vol. 2, pp 205-210; R.E. Tab 4)

SUMMARY OF THE ARGUMENT

Miss. R. Civ. P. 17 (c) allows a minor for whom no guardian has been duly appointed to sue by his next friend. In this case Kimberly Shelton asserts claims on behalf of her minor sons for breach of contract, breach of warranty (and other claims arising under the Uniform Commercial Code), fraud, negligence and strict liability in tort. The allegations are specifically made by the Plaintiffs, against all of the Defendants, without distinction and with allegations that the Defendants are each agents of all other Defendants. Southern Energy, a non-signatory to the sales agreement, can enforce the arbitration provisions therein against the Sheltons. In part, this is because the claims of the Sheltons against the dealer Simmons “intertwine” with their claims against Southern Energy with allegations of concerted and interdependent misconduct. Since claims are specifically asserted for breach of contract and breach of warranty on behalf of Coleman and Joshua Shelton, they are also bound by the arbitration clause within that contract.

A signatory to a contract with an arbitration clause can compel arbitration against a non-signatory if that non-signatory is a third party beneficiary or if equitable estoppel applies. Both theories independently operate in this case to require arbitration of the claims of Coleman and Joshua Shelton.

Having invoked rights under the contract, and having specifically alleged breach and damages as a result, equitable estoppel precludes denial of the arbitration provisions in the same contract. In cases governed by the Federal Arbitration Act, equitable estoppel prevents a party from seeking the benefits of a contract and, at the same time, repudiating its burdens.

Also, the minor Plaintiffs are third party beneficiaries of the sales contract. An arbitration clause can be enforced by non-signatories against a third party beneficiary of the contract containing arbitration provisions. The minors are direct beneficiaries of purchase of family residence. Kimberly

and Roy Shelton have a legal duty to shelter and support them. In order for third party beneficiary status to attach, the contract between the parties must have been entered for the third party's benefit or such benefit must be the direct result of performance. Further, there must have been a legal obligation on the part of the promisor to such third party beneficiary who must be a direct, as opposed to incidental, beneficiary.

Coleman Britt Shelton and Joshua Mason Shelton are equitably estopped to deny provisions of the contract since they seek to enforce other provisions of the agreement. They are third party beneficiaries of the sales contract between Kimberly and Roy Shelton and Simmons Housing, Inc. because they are direct rather than incidental beneficiaries of the agreement and because Roy and Kimberly Shelton have a legal duty to support and shelter them. The Court should therefore compel arbitration of all claims in this case.

State law generally applies to issues of the formation of the agreement containing arbitration provisions. However, courts faced with the question of to what extent a non-signatory is bound by an arbitration provision contained in a contract that a non-signatory is suing under have applied the substantive law of arbitrability to resolve the issue. *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004); *Terminix International, Inc. v. Rice*, 904 So. 2d 1051, 1058 (Miss. 2004). Federal law and Mississippi law recognize application of equitable estoppel when a non-signatory sues on a contract containing arbitration provisions. *Id.*

**JOSHUA AND COLEMAN SHELTON SEEK DAMAGES FOR
BREACH OF CONTRACT AND ARE BOUND BY THE
ARBITRATION CLAUSE WITHIN THAT CONTRACT.**

In this case allegations are made on behalf of the minor Plaintiffs that they were damaged as a result of breach of the sales contract. (Vol. 1. p. 23; R.E. Tab 2) Additional allegations are made on behalf of Coleman and Joshua of breach of warranty and the Plaintiffs seek damages as a result, invoking the provisions and remedies in Mississippi's version of the Uniform Commercial Code, Miss. Code Ann. §75-2-101 et seq. (1972). (Vol. 1. p. 19; R.E. Tab 2) Kimberly A. Shelton, mother and next friend of the minor Plaintiffs, makes such allegations and invokes such rights and remedies on behalf of the minors pursuant to Miss. R. Civ. P. 17 (c) which specifically authorizes the Sheltons to file suit on behalf of their children as next friend. *Taylor v. Taylor*, 835 So. 2d 60, 65 (Miss. 2003). [see also *Graves v. Gulf & S. I. R. Co.*, 146 Miss. 130, 110 So. 234 (1926) where the court found a jury question of whether a prior suit on behalf of a minor by his father and next friend was prosecuted in good faith so to bar a subsequent suit]. In this case, there has been no effort to separate allegations on behalf of the minors and there is no evidence that the complaint on their behalf is brought without authority or in bad faith.

In the case below, the Plaintiffs sought reconsideration of the order compelling arbitration

based on *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002). There, the Gaskamps sued the manufacturer and dealer of a mobile home alleging injury resulting from exposure to formaldehyde. The defendants moved to compel arbitration based on provisions in the purchase and sale documents signed by the Gaskamps.

The court held that Texas state law governed matters not addressed by the Federal Arbitration Act. It found that Texas's courts have determined that non-signatories are bound to arbitration agreements in only two situations: first, where the non-signatory sued on the contract containing arbitration provisions; and second where the non-signatory was a third party beneficiary of the contract. *Gaskamp*, 280 F.3d at 1073. The court found that at no point did the Gaskamp children attempt to enforce the contract or sue on the basis of any warranties in the contract. Neither were the children third party beneficiaries since Texas law requires a clear provision in the contract evidencing an intent to make someone a third party beneficiary. Accordingly, the Fifth Circuit Court of Appeals held that the Gaskamp children were not bound by the arbitration provision, stating:

At no point have the Gaskamp children attempted to enforce the contract, or sue on the basis of warranties contained in the contract; the Gaskamps' complaint in state court does not rely at all on the terms of any agreement with the state court defendants. Thus, it can not be said that the children sued on the contract thereby subjecting themselves to the arbitration agreement.

Gaskamp, 280 F.3d at 1075. In contrast, the Shelton minors have sued under sales contract and for breach of warranty.

Six theories for binding a non-signatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; (f) third-party beneficiary. *Qualcomm, Inc. v. American Wireless License Group, LLC*, 980 So. 2d 261, 269 (Miss. 2007) (internal citations omitted). In *Washington Mutual Finance Group, LLC v.*

Bailey, 364 F.3d 260 (5th Cir. 2004), the court rejected an argument by one plaintiff who insisted she could not be compelled to arbitrate her claims because her husband signed the agreement containing the arbitration clause, but she had not. The court held that the non-signatory plaintiff was bound to the arbitration agreement under ordinary principals of contract law, including equitable estoppel:

In the arbitration context, the doctrine (of estoppel) recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow (a plaintiff) to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purpose underlying enactment of the Arbitration Act.

Id. at 268.

The same rational was adopted by the Mississippi Supreme Court in *Terminix Intern., Inc. v. Rice*, 904 So. 2d 1051 (Miss. 2004) where Mrs. Rice denied that she was bound under the contract signed by her husband for pest control since she didn't sign the agreement. Citing *Bailey*, supra, the Mississippi Supreme Court held that Ms. Rice was estopped to deny her obligation to arbitrate her claim since she had invoked rights and claimed benefits under the pest control contract signed by her husband. *Id.*, 1058.

In addition to claims on behalf of Coleman and Joshua for breach of contract, their next friend has alleged breach of provisions of the Mississippi Uniform Commercial Code and seeks various remedies thereunder, including damages for breach of express and implied warranty. (Vol. 1, pp. 10-13, 16-17, 33-34; R.E. Tab 2) A contract for the sale of goods is governed by the Uniform Commercial Code as adopted in Miss. Code Ann. §75-2-101-725 (1972), as amended. *Huff v. Hobgood*, 549 So. 2d 951 (Miss. 1989). Mobile homes at time of retail sale are "goods" within the meaning of the UCC. *Guerdon Industries, Inc. v. Gentry*, 531 So. 2d 1202 (Miss. 1988). The UCC

specifically provides for the application of equitable principals to claims governed by it. Miss. Code Ann. §75-1-103 (1972) provides:

Unless displaced by the particular principals of this code, the principal of law and equity, including the law merchant and the law relevant to capacity to contract, principal and agent, *estoppel*, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions. (emphasis added)

Miss. Code Ann. §75-1-201 (11) defines “contract” as “the total legal obligation which results from the parties’ agreement as affected by this code and any other applicable rules of law.”

Miss. R. Civ. P. 17 (c) authorizes Kimberly Shelton to file suit on behalf of her sons Coleman and Joshua. When a minor files suit through a competent representative and legal counsel he is bound by the action of his representative. *Graves v. Gulf & S.I.R. Co.*, supra. Having invoked the provisions of the contract for sale of the mobile home, as well as rights and remedies under the Uniform Commercial Code, the Plaintiffs should not now be heard to repudiate the provisions of the contract and statutes that they may find repugnant.

The Appellant Southern Energy is a party to the separate “Binding Arbitration Agreement” signed by Roy and Kimberly Shelton. (Vol. 2, p.204; R.E. Tab 4) Southern Energy may also enforce the arbitration clause (paragraph 14) within the purchase and sale contract between Roy and Kimberly Shelton and Simmons Housing, Inc. *Grigson v. Creative Artist Agency, LLC*, 210 F.3d 524 (5th Cir. 2000) holds that the doctrine of equitable estoppel also applies when a signatory to an arbitration provisions (Sheltons) makes allegations of interdependent and concerted misconduct by a signatory to the contract (Simmons Housing, Inc.) and by another or other who did not sign the arbitration provision (Southern Energy Homes, Inc.) In that case the Fifth Circuit Court of Appeals stated:

Application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract. Otherwise, the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted. *Id.* at 527.

The claims of all of the Plaintiffs against all of the Defendants in this case are intertwined as in *Grigson*. The complaint in over 180 paragraphs under 10 separate counts contain allegations against all Defendants without distinction alleging agency among them with deceit and misrepresentation as well as breach of contract and breach of warranty. Paragraph 12 of the complaint states:

12. Upon information and belief, and at all relevant times in to this cause of action, each and every Defendant was acting as a principal and agent of each of the other Defendants and more specifically of Southern Energy Homes, Inc. in Defendants' actions and manufacturing, advertising, selling, distributing, installing, delivering, contracting and/or subcontracting the product into the United States' residential home market. (Vol. 1, p. 11; R.E. Tab 1)

In addition, the Plaintiffs have further alleged:

45. At all times material in the mobile home's sale, installation and setup there existed a special intertwined relationship between one or more of the Defendants and Plaintiffs that gave rise to the duty of good faith and fair dealing because of the Plaintiffs' shared trust in them or because of the imbalance and bargaining power between the Plaintiffs and Defendants in Defendants' dealings with the Plaintiffs before and after the sale. The Defendants' acts and action indicated their intent not to act in good faith and deal fairly with the Plaintiffs. (Vol. 1, p. 17; R.E. Tab 1)

Southern Energy has standing to compel arbitration of the Plaintiffs' claims against it because of the claims asserted in this case and under the plain provisions of the purchase and sale agreement between Roy and Kimberly Shelton and Simmons Housing, Inc.

**JOSHUA AND COLEMAN SHELTON ARE THIRD-PARTY
BENEFICIARIES OF A CONTRACT CONTAINING AN
ARBITRATION CLAUSE.**

Another independent basis exists for requiring arbitration of the minor's claims. Southern Energy can enforce the arbitration agreement in the sales contract against Plaintiffs Coleman Britt Shelton and Joshua Mason Shelton if those parties are third-party beneficiaries of the contract. *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006). There, the court set forth the factors to determine whether one is a third-party beneficiary:

The contracts between the original parties must have been entered for his benefit, or at least such benefit must be the direct result from the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promisee to such third person beneficiary. The obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the right of the third-party beneficiary to maintain an action on the contract must spring from the terms of the contract itself. 17A C.J.S. Contracts 519 (4) (1963)

Id. at 708-709.

For third-party beneficiary's status to attach, it is not necessary that the third-party be named in the contract. In *Stewart ex. rel Womack v. City of Jackson*, 804 So. 2d 1041 (Miss. 2002) the Mississippi Supreme Court held that an elderly and disabled passenger was a third-party beneficiary of a contract to provide transportation between the city of Jackson and the Central Mississippi Planning and Development District/Area Agency on Aging. In *Algasm v. Capital City Hotel Investors*, 989 So. 2d 488 (Miss. App. 2008) the Mississippi Court of Appeals held that a hotel guest was a third-party beneficiary of a contract between the hotel and a security company. In neither case was the third-party beneficiary named in the contract. In both of those cases, the promisee (the agency in *Womack*, *supra*, and the hotel operator in *Algasm*, *supra*) were signatory to the contract and owed a separate duty of care to the plaintiff.

JOSHUA AND COLEMAN SHELTON ARE THIRD-PARTY BENEFICIARIES OF A CONTRACT CONTAINING AN ARBITRATION CLAUSE.

Another interdependent basis exists for requiring arbitration of the minor's claims. Southern Energy can enforce the arbitration agreement in the sales contract against Plaintiffs Coleman Britt Shelton and Joshua Mason Shelton if those parties are third-party beneficiaries of the contract. *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006). There, the court set forth the factors to determine whether one is a third-party beneficiary:

The contracts between the original parties must have been entered for his benefit, or at least such benefit must be the direct result from the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promisee to such third person beneficiary. The obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the right of the third-party beneficiary to maintain an action on the contract must spring from the terms of the contract itself. 17A C.J.S. Contracts 519 (4) (1963)

Id. at 708-709.

The court noted that the nursing home resident was named in the admission agreement, and that the contract referred specifically to benefits and responsibilities of the nursing home and resident.

For third-party beneficiary's status to attach, it is not necessary that the third-party be named in the contract. In *Stewart ex. rel Womack v. City of Jackson*, 804 So. 2d 1041 (Miss. 2002) the Mississippi Supreme Court held that an elderly and disabled passenger was a third-party beneficiary of a contract to provide transportation between the city of Jackson and the Central Mississippi Planning and Development District/Area Agency on Aging. In *Algasm v. Capital City Hotel Investors*, 989 So. 2d 488 (Miss. App. 2008) the Mississippi Court of Appeals held that a hotel guest was a third-party beneficiary of a contract between the hotel and a security company. In neither case was the third-party beneficiary named in the contract. In both of those cases, the promisee (the agency


in *Womack*, supra, and the hotel operator in *Algasm*, supra) were signatory to the contract and owed a separate duty of care to the plaintiff.


Even though the children of Roy Shelton and Kimberly Shelton are not named in the sales contract for purchase of the mobile home, they are direct beneficiaries of that agreement. The mobile home purchased by the Sheltons is a family residence where all four Plaintiffs lived from December 1998 until September 2004. (Vol.1, pp. 11-12, p. 14; R.E. Tab 2) The sales contract obligated the seller/promisor to provide a merchantable home and bound the seller to those obligations under Mississippi's version of the Uniform Commercial Code. Coleman and Joshua were direct, rather than incidental, beneficiaries of the purchase and installation of the subject mobile home. Roy and Kimberly Shelton have a legal duty to provide food and shelter to their minor children. This duty is a continuing duty on both parents and is a vested right of their children. *Lawrence v. Lawrence*, 574 So. 2d 1376, 1381 (Miss. 1991). Coleman and Britt Shelton are therefore third-party beneficiaries of their parents' contract to purchase a mobile home for the family residence.

CONCLUSION

Southern Energy Homes, Inc. has standing to seek enforcement of the arbitration provisions within the sales contract. Claims for breach of this contract are lawfully asserted on behalf of Coleman and Joshua Shelton. Because they seek benefits and assert rights under that contract as well as rights arising under the Uniform Commercial Code, they are also subject to provisions of the contract that they may regard as repugnant. Further, Coleman and Joshua Shelton are third-party beneficiaries of the sales contract and so are subject to the arbitration clause therein. Southern Energy respectfully urges the Court to reverse and render the lower court's order to the extent that it denies mandatory arbitration of the claims of Coleman Shelton and Joshua Shelton.

Respectfully submitted this the 28 day of Aug., 2009.


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CERTIFICATE OF SERVICE

I, James L. Quinn, attorney for Southern Energy Homes, Inc., do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the Brief of Appellant Southern Energy Homes, Inc. to the following:

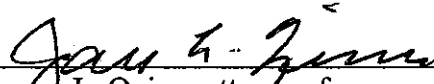
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