

2006 WL 6352259 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Mississippi.
Copiah County

Nicholas L. KIRBY, Jr., Administrator of the Estate of Travis C. Kirby, Deceased, and
Nicholas L. Kirby, Jr., Shirley S. Kirby and Nicholas L. Kirby, III, Individually, Plaintiffs,

v.

HOWARD WILSON CHRYSLER-PLYMOUTH, INC., Big 10
Tire Co., Inc., Kelly Springfield, Inc., Does 1-5, Defendants,
and

Riley D. Strickland, Plaintiff-Intervener;
Sidney Odom, Plaintiff,

v.

Howard Wilson Chrysler-Plymouth, Inc., Big 10 Tire Co., Inc., Kelly Springfield, Inc., and Does 1-5, Defendants.

Nos. 2002-0619, 2002-0620.
January 10, 2006.

**Kirby Plaintiffs' Memorandum in Opposition to Defendant Howard Wilson Chrysler-
Plymouth, Inc.'s Memorandum Brief in Support of Motion to Enforce Arbitration**

Respectfully submitted, [The Kirby Plaintiffs](#), [Margaret P. Ellis](#), MB #: 5110, Attorney for Kirby Plaintiffs.

COME NOW Kirby Plaintiffs and file this their Memorandum in opposition to the memorandum in support of motion to enforce arbitration filed by Howard Wilson Chrysler-Plymouth, Inc. (hereinafter Howard Wilson), and responds as follows:

Plaintiffs hereby incorporate in its entirety the Motion to Find Arbitration Agreement Unconscionable and Void as if fully copied herein, the Affidavit signed by Mrs. Shirley Kirby, and all other pleadings and matters which relate in any way to the issue before this Court.

INTRODUCTION AND PERTINENT FACTS

The Kirby Plaintiffs filed their suit on November 20, 2002, against Howard Wilson Chrysler-Plymouth, Inc. and Big 10 Tires of Hattiesburg, Inc., and Does 1-5. Shortly thereafter, suit was filed by Sidney Odom against the same Defendants. A motion to consolidate the two cases was filed, but prior to the entry of an order, the Kirby Plaintiffs filed their Amended Complaint naming Kelley Springfield, Inc., as an additional Defendant. Thereafter, Riley Strickland was allowed to intervene in the Kirby case by Order entered on August 1, 2003. The Order to consolidate was entered and Plaintiff Sidney Odom filed his Amended Complaint naming Kelley Springfield, Inc., as an additional Defendant. Although no order has been entered, it is Plaintiffs' understanding that Howard Wilson has now settled with the Strickland Plaintiff and the Kirby Plaintiff and Sidney Odom remain as Plaintiffs against this Defendant.

On April 18, 2003, Defendant Howard Wilson Chrysler-Plymouth, Inc. ("Defendant") filed its motion to dismiss or, in the alternative, to enforce arbitration against Plaintiffs Nicholas L. Kirby, Jr., Administrator of the Estate of Travis C. Kirby, Deceased, and Nicholas L. Kirby, Jr., Shirley S. Kirby, and Nicholas L. Kirby, III, Individually ("the Kirby Plaintiffs"). On August 29, 2003, Defendant filed the same motion against Plaintiff Riley D. Strickland ("Plaintiff Strickland") (collectively "Plaintiffs"). And, although no motion has been filed against Plaintiff Sidney Odom, Odom joined in the Motion to have the

arbitration clause declared unconscionable and void, however, this response is filed only on behalf of the Kirby Plaintiffs since to Plaintiffs' knowledge Howard Wilson does not seek to force Sidney Odom to arbitrate as its Motion to Dismiss and to Enforce Arbitration addresses the Kirby Plaintiffs alone ¹.

In addition to the arguments submitted below, Plaintiffs incorporate their arguments in support of their motion to declare the arbitration clause unconscionable and void.

This Defendant asks this Court to require that these Plaintiffs submit to an arbitral forum in which Defendant knows that it will have the upper hand, knows that its liability will be dramatically reduced, and knows that Plaintiffs will have to bear tremendous costs to prosecute their lawsuits. This Court should deny that outrageous and unconscionable request.

Decedent Travis C. Kirby ("the Decedent"), never signed the arbitration clause, and now neither the Decedent's estate nor any other Plaintiff is bound by the arbitration clause. Further, regardless of who did or did not sign the arbitration clause, the clause is unconscionable and not enforceable. There simply is no basis upon which to grant Defendant's motion, and it should be denied. Further, the arbitration clause should be declared unconscionable and therefore, void.

On April 18, 2003, Defendant Howard Wilson Chrysler-Plymouth, Inc. ("Defendant") filed its motion to dismiss or, in the alternative, to enforce arbitration against Plaintiffs Nicholas L. Kirby, Jr., Administrator of the Estate of Travis C. Kirby, Deceased, and Nicholas L. Kirby, Jr., Shirley S. Kirby, and Nicholas L. Kirby, II, Individually ("the Kirby Plaintiffs"). Defendant Howard Wilson continues to incorrectly claim that "Travis C. Kirby and Shirley S. Kirby entered into a binding Arbitration Agreement." As previously pointed out to this Court, the document which is attached to Howard Wilson's memorandum does not contain Travis Kirby's signature on the "Arbitration Agreement," as alleged by Defendant.

ARGUMENT AND AUTHORITIES

I. THIS ARBITRATION AGREEMENT IS NOT ENFORCEABLE

The Defendant seeks to kick Plaintiffs out of court and into an arbitral forum in which Defendant knows that it will have the upper hand, knows that its liability will be dramatically reduced, and knows that Plaintiffs will have to bear tremendous costs to prosecute their lawsuits. Defendant should not be allowed to succeed. The arbitration clause was not signed by Decedent Travis C. Kirby ("the Decedent") or any other Plaintiff. Therefore, the Decedent's estate, and certainly not Plaintiff Odom, are bound by the arbitration clause. Further, regardless of who did or did not sign the arbitration clause, the clause is unconscionable and not enforceable. There is no basis upon which to grant Defendant's motions, and they should be denied. Further, the arbitration clause should be declared unconscionable and therefore, void.

Defendant argues that the Court lacks jurisdiction to hear this case because the parties supposedly entered into an arbitration agreement. This argument is wholly without merit. Assuming *arguendo* that Plaintiffs entered into a valid arbitration agreement, the arbitration agreement would not divest this Court of jurisdiction. Arbitration agreements are merely creatures of contract, while this Court's jurisdiction is established by statute. The parties are not at liberty to vest the Court with, or divest the Court of, jurisdiction. The arbitration clause in question does not, and indeed cannot, divest this Court of jurisdiction and Defendant's motion should be denied.

Even though the Mississippi Supreme Court may enforce or favor parties who are bound by valid arbitration agreements, they will not bind parties who made no such agreement, and to submit to arbitration any agreement he has not agreed to submit. Parties to arbitration agreements are not bound by such agreements. See, *B. C. Rogers and Bank of Morton v. Wedgeworth*, 911 So.2d 483 (Miss. 1985).

II. TRAVIS C. KIRBY WAS NOT A PARTY TO THE ARBITRATION CLAUSE

This lawsuit is, in part, brought on behalf of the estate of Travis C. Kirby pursuant to Mississippi's Wrongful Death Statute. As such, it is a representative action. The estate stands in the same shoes as the Decedent. See *Estate of Portney v. Cessna Aircraft Co.*, 730 F.2d 286, 289 (5th Cir. 1984) (finding that plaintiff in action brought pursuant to wrongful death statute stands in same shoes as decedent) (citing *Rainey v. Horn*, 72 So. 2d 434, 436-38 (Miss. 1954)).

Travis Kirby did not sign, and therefore could not have been bound by, the arbitration clause. Thus, the estate cannot be bound by the arbitration clause. It is axiomatic that non-signatories cannot be bound by an arbitration clause that they did not sign. See generally, *Bridas v. Government of Turkmenistan*, No. 02-20929, 2003 WL 22077651 (5th Cir. Sept. 9, 2003).

Further, there are only six exceptions to this principle: (1) incorporation by reference (2) assumption (3) agency (4) veil-piercing/alter ego (5) estoppel and (6) third-party beneficiary. Exception (1) does not apply because the Decedent did not enter into any other agreement with Defendant, much less one that incorporated the arbitration clause. Exception (2) does not apply because the Decedent did not assume any obligations beyond the contract that he did sign. Exception (3) does not apply because the only person to sign the arbitration clause- Plaintiff Shirley S. Kirby - was not acting as the Decedent's agent when she signed the arbitration clause. Plaintiff Shirley S. Kirby and the Decedent were co-signers on the note. They were not agents for each other. Exception (4) does not apply for obvious reasons. Exception (5) does not apply because estoppel only arises when a non-signatory, who by conduct after entry of the agreement in question, **exploits** the agreement and receives direct benefit from the agreement. *Bridas*, 2003 WL 22077651, at *10. In the case at bar, the Decedent received no benefit from the arbitration clause. It certainly cannot be said that the Decedent **exploited** the arbitration clause to his benefit. Therefore, estoppel does not apply. Exception (6) does not apply because the Decedent was not a third-party beneficiary to the agreement.

Because none of the exceptions to the rule regarding non-signatories applies, the Decedent's estate cannot be bound by the arbitration clause, which the Decedent did not sign.² Contrary to the allegations of Defendant, Plaintiffs are not attempting to “side-step” a valid agreement. The agreement which Defendant attempts to enforce was not signed by the decedent, Travis Kirby, or by any of the other Plaintiffs. The only person who signed the agreement, assuming *arguendo* that it was a valid agreement, was Shirley Kirby, one of three Kirby wrongful death beneficiaries, and is not enforceable against other Plaintiffs.

III³. REGARDLESS OF WHO SIGNED THE ARBITRATION CLAUSE, IT IS UNCONSCIONABLE AND UNENFORCEABLE, and ITS TERMS ARE OPPRESSIVE

It is clear that the arbitration clause was a separate and distinct portion of the contract and required a signature in order to be binding on anyone. And, it is clear that Plaintiff Shirley S. Kirby (“Mrs. Kirby”) is the only Plaintiff to have signed the arbitration clause. However, the law regarding the Federal Arbitration Act (“FAA”) has not yet reached the point that all a movant has to show to enforce an arbitration agreement is that it was able to procure the other party's signature on the dotted line. The law is still clear that arbitration agreements must be interpreted according to ordinary state contract principles.⁴ And ordinary contract principles provide the parties with contract defenses, namely fraud, duress, unconscionability, and consideration.

In the present case, once the facts and terms at issue are considered, it becomes plain that the arbitration clause is unconscionable, is not supported by consideration, and, therefore, is unenforceable.

A. The Arbitration Clause Is Procedurally Unconscionable

To determine whether a contract is procedurally unconscionable, the court looks to the formation of the contract:

The indicators of procedural unconscionability generally fall into two areas: (1) lack of knowledge, and (2) lack of voluntariness. A lack of knowledge is demonstrated by a lack of understanding of the contract terms

arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and lack of opportunity to study the contract and inquire about contract terms.

Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1207 (Miss. 1998). The *Entergy* Court instructed further: A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.

Id. (citation omitted).

Procedural unconscionability "is most strongly shown in contracts of adhesion presented to a party on a 'take it or leave it basis.'" *Id.* at 1208 (citation omitted). The subject arbitration clause constitutes a contract of adhesion, *i.e.*, a preprinted form contract drafted by one of the contracting parties, Defendant Howard Wilson, that was presented to Mrs. Kirby on a "take it or leave it" basis.⁵

Mrs. Kirby received no consideration for signing the arbitration agreement. Consideration and a meeting of the minds between competent contracting parties are the essential elements of a valid, binding agreement. *In re Estate of Davis*, 832 So.2d 534, 537, 2001 WL 1497176, *2 (Miss.App.2001) (citing *Viverette v. Stale Highway Comm'n of Mississippi*, 656 So.2d 102, 102 (Miss.1995); *Brooks v. Brooks*, 145 Miss. 845, 850, 111 So. 376, 377 (1927)). Ms. Kirby received nothing from the defendant in exchange for signing away her legal right to seek redress in a court of law. Forbearance of a legal right to sue in court is a valid right and must be supported by sufficient consideration in order to be enforced. *See Dedeaux v. Young*, 170 So.2d 561 (Miss. 1965) (holding that a request to forbear exercise of a legal right is sufficient consideration to support a contract). Thus, the arbitration agreement is an unenforceable part of the contract. Moreover, "[i]f an agreement is to be held supported by consideration, that consideration must come from the parties to the agreement." *Daniel v. Snowdoun Ass'n*, 513 So.2d 946, 949 (Miss. 1987) (citing 17 C.J.S. *Contracts* §§ 71). As has already been discussed in this memorandum, Travis Kirby did not sign the arbitration agreement, and thus, neither he, nor his estate, can be bound by an agreement which he never signed and for which he, like his mother, received no consideration.

The arbitration clause, which is part of a lengthy legal document, consists largely of legalistic jargon that is plainly beyond Mrs. Kirby's comprehension. Under these circumstances, the notion that such terms were bargained for and the result of a knowing and voluntary choice on Mrs. Kirby's part is - in a word - absurd. *See Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992) (finding procedural unconscionability such as to invalidate arbitration agreement where "Plaintiff was under a great deal of emotional stress, had only a high school education, was not experienced in commercial matters, and is still not sure 'what arbitration is'"). The only argument Defendant can raise in support of arbitration is that it was able to get Mrs. Kirby's signature on the dotted line. Thankfully, the law requires more than this to overcome the defense of unconscionability and Defendant cannot meet this burden.

Although Defendant relies on the affidavit of Avery Collins in support of its arguments that this provision was discussed with the decedent and his mother, his affidavit merely states that he prepared this document, that he handled the transaction, that he made it his practice to discuss these matters, and that he realizes and understands the importance of explaining the provisions in the contract. This affidavit does state that he has any recollection of having done so or that he did. In fact, the affidavit of Mrs. Kirby affirmatively states that this provision was not explained to her or to her son at the time of the sale. The purchase of this vehicle took place under circumstances other than normal practice circumstances, as it took place at a fairground sale.

B. The Arbitration Clause Is Substantively Unconscionable

Unlike procedural unconscionability, which concerns the circumstances under which a contract was formed, substantive unconscionability concerns the actual terms of the contract and whether those terms are oppressive.

Substantive unconscionability is found when the terms of the contract are of such an oppressive character as to be unconscionable. It is present when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach, ... a large disparity between the cost and price or a price far in excess of that prevailing in the market price, ... or terms which bear no reasonable relationship to business risks assumed by the parties.

Bank of Ind, Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 110 (S.D. Miss. 1979).

Not only is the subject arbitration clause, which Defendant drafted, procedurally unconscionable, it is substantively unconscionable.

1. Per the arbitration clause, Mrs. Kirby's common law remedies are unlawfully limited

The arbitration clause packs a one-two punch that limits the compensatory damages Mrs. Kirby may receive in arbitration and that forecloses the possibility of an award of punitive damages. Specifically, the arbitration clause states:

The Arbitrator(s) will 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.

The limitation on compensatory damages and the preclusion of punitive damages are simply unlawful. The Mississippi Supreme Court has consistently held that “[c]lauses limiting liability are given rigid scrutiny by the courts, and will not be enforced unless the limitation is honestly negotiated and understandingly entered into.” *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 729 (Miss. 2002) (Diaz dissent) (citing *Farragut v. Massey*, 612 So. 2d 325, 330 (Miss. 1992)). See also *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2002) (“Substantively unconscionable clauses have been held to include waiver of choice of forum and waiver of certain remedies.”) (emphasis added); *Quinn v. Miss. State Univ.*, 720 So. 2d 843, 851 (Miss. 1998). See also *Bob Schultz Motors*, 334 F.3d at 727 (arbitration clause limiting amount of punitive damages declared void on public policy grounds); *Ingle*, 328 F.3d at 1178-79 (finding substantively unconscionable arbitration term that “fails to provide for all the types of relief that would otherwise be available in court”) (quoting *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895) (citing *Paladino v. Avnet Computer Techs., Inc.* 134 F.3d 1054 1059 (11th Cir. 1998) (finding arbitration clause that limited remedies otherwise available in court as unenforceable).

Mrs. Kirby had no ability to negotiate the terms of the agreement. It certainly cannot be said that the limitation of damages provisions were “honestly negotiated and understandingly entered into.” Therefore, the arbitration clause is unconscionable.

2. Defendant reserves to itself the right to litigate the one matter it is most likely to litigate

The arbitration clause states:

[Mrs. Kirby] and [Defendant] agree that the only claim not subject to this Arbitration Agreement is a claim by [Defendant], or its assignee, that an [sic] event of default by [Mrs. Kirby], identified in the Agreements, has occurred, which shall include but is not limited to situations where [Mrs. Kirby] ha[s] failed to make payments on a timely basis in compliance with the Agreements. Such a claim may be pursued in any court of competent jurisdiction.

However, Plaintiff is ostensibly excluded from bringing any claims arising out of Defendant's conduct towards her. In other words, Defendant reserves to itself the right to resort to judicial process, while requiring Mrs. Kirby to resort solely to an arbitral forum. Put another way, all of the claims that Plaintiff is most likely to bring must be arbitrated. However, the claim that Defendant is most likely to bring - a collection action - is not subject to arbitration. One state court, in the context of an employment dispute, has found such a provision to be unconscionable. In *Mercurio v. Superior Court*, 96 Cal. App. 4th 167, 175-76 (Cal. App. 2002), the court stated, “[The employer] requires the weaker parties - its employee - to arbitrate their most common claims while choosing to litigate in the courts its own claims against the employees.” The court found that such an agreement “lacks basic fairness.” *Mercurio*, 96 Cal. App. 4th at 176-77 (citation omitted). Simply put, the arbitration terms are obviously one-sided and oppressive to Mrs. Kirby.

The case of *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998), is instructive. In *Arnold*, a sophisticated corporate lender sought to enforce an arbitration agreement against **elderly**, unsophisticated borrowers, specifically, a husband and wife who were, respectively, 69 years old with a fifth grade education, and 63 years old with an eighth grade education. *See id.* at 861 n.7. The *Arnold* court noted an earlier decision in which it had said:

If arbitration is ever to have a useful place in our jurisprudence, it is essential that we address the problem which we caricature as the contract between the rabbits and foxes, in which the foxes impose the clause that all disputes will be resolved by a panel of foxes, or by a panel of wolves. In real life we can envisage arbitration provisions being imposed upon consumers in contract situations where consumers are totally ignorant of the implications of what they are signing, and where consumers bargain away many of the protections which have been secured for them with such difficulty at common law.

Id. at 861 (quoting *Board of Educ. of Berkeley County v. W. Harley Miller, Inc.*, 236 S.E.2d 439, 447 (W. Va. 1977)).

The *Arnold* court continued:

The scenario envisioned in *Miller* is now before us. The relative positions of the parties, a national corporate lender on one side and **elderly**, unsophisticated consumers ... on the other, were ... grossly unequal In addition, there is no evidence that the loan broker made any other loan option available to the Arnolds. In fact, the record does not indicate that the Arnolds were seeking a loan, but rather were solicited [by the loan broker]. Thus, .. a comparable, meaningful alternative .. to the loan from United Lending is lacking Because the Arnolds had no meaningful alternative to obtaining the loan from United Lending, and also did not have the benefit of legal counsel during the transaction, their bargaining position was clearly inadequate when compared to that of United Lending.

Given the nature of this arbitration agreement, combined with the great disparity in bargaining power, one can safely infer that the terms were not bargained for and that allowing such a one-sided agreement to stand would unfairly defeat the Arnolds' legitimate expectations.

Finally, the terms of the agreement are ... unreasonably favorable ... to United Lending United Lending's acts or omissions could seriously damage the Arnolds, yet the Arnolds' only recourse would be to submit the matter to binding arbitration. At the same time, United Lending's access to the courts is wholly preserved in every conceivable situation where United Lending would want to secure judicial relief against the Arnolds. Like the “rabbits and foxes situation,” discussed in *Miller, supra*, the wholesale waiver of the Arnolds' rights together with the complete preservation of United Lending's rights ... is inherently inequitable and unconscionable because in a way it nullifies all the other provisions of the contract.

Accordingly, under the circumstances of this action, we hold that where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law.

Arnold, 511 S.E.2d at 861-62.

As in *Arnold*, this is a contract between a rabbit and a fox. See *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376, 378, 382 (Cal. Ct. App. 2001) (refusing to enforce arbitration agreement against couple who were, respectively, 76 and 80 years old: “Here, we agree with the trial court's conclusion that the arbitration provisions do not display a modicum of bilaterality. Under the loan agreement plaintiffs' principal obligation is to repay the sums advanced with interest. Plaintiffs' indebtedness is non-recourse, secured solely by the deed of trust. In the event of a breach by plaintiffs, HomeFirst's remedy is mandatory prepayment, and if plaintiffs do not repay the loan, then HomeFirst is allowed to sell the property [W]hile plaintiffs are required to arbitrate ‘[a]ny controversy’ arising out of the loan agreement or deed of trust, HomeFirst is allowed to proceed by judicial or non-judicial foreclosure, by self-help remedies such as set-off, and by injunctive relief to obtain appointment of a receiver”); *Aetna Fin. Co. v. McGhee*, No. 246287, 1993 WL 944559, at *2 (Ohio Corn. Pl. Aug. 26, 1993) (finding arbitration clause unconscionable and void where borrowers, who were 76 and 70 years old and in bad health, did not understand arbitration clause, did not receive copies of National Arbitration Forum's Code of Procedure, were not on equal footing with lender, did not negotiate for arbitration clause, and did not understand that arbitration clause required arbitration to proceed in Minnesota). See also *E-Z Cash Advance, Inc. v. Harris*, 60 S.W.3d 436, 442 (Ark. 2001) (arbitration provision of “payday loan” contract was unenforceable against debtor in debtor's putative class action alleging such loans were illegal or unenforceable; in contract provision regarding collection of debts, creditor retained right to pursue all civil remedies if debtor's check was returned by debtor's financial institution); *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 366-67 (Ark. 2000) (refusing to enforce arbitration agreement in suit brought by borrowers against creditor claiming violations of state usury law, where creditor drafted agreement so that borrowers had to submit all disputes and controversies of every kind and nature to arbitration, while creditor could proceed immediately to court to collect amounts due it: “[arbitration] should not be used as a shield against litigation by one party while simultaneously reserving solely to itself the sword of a court action”).

3. Per the arbitration clause, Mrs. Kirby could be faced with having to pay all of Defendant's costs and attorney's fees

The arbitration clause states, “In any arbitration proceeding commenced pursuant to this Arbitration Agreement, the prevailing party shall be entitled to recover from the other any arbitration filing fee and other costs of arbitration including arbitrator fees, paid by the prevailing party.” This provision alone renders the arbitration clause unenforceable. See generally, *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 723-24 (8th Cir. 2003) (clause giving prevailing party right to recover all costs and attorneys' fees associated with arbitration from non-prevailing party found to be unconscionable).

In *Ingle v. Circuit City Stores, Inc.*, the Ninth Circuit Court of Appeals voided as substantively unconscionable an arbitration agreement that required the parties to split arbitration costs. *Ingle v. Circuit City Stores, Inc.* 328 F.3d 1165, 1177-78 (9th Cir. 2003). The present arbitration terms are more onerous than the terms in *Ingle* because in the case at bar, Mrs. Kirby is potentially required to pay all of Defendant's costs and attorney's fees. As the Ninth Circuit found, “Combined with the fact that Circuit City's fee-splitting scheme would sanction charging even a successful litigant for her share of arbitration costs, this scheme blatantly offends basic principle of fairness.” *Ingle*, 328 F.3d at 1178 (citations omitted).

The subject arbitration terms are even more egregious than those in *Ingle*. Accordingly, the arbitration terms are unconscionable.

4. The costs associated with arbitrating Mrs. Kirby's claims render the arbitration terms unconscionable

In addition to the absence of voluntariness and the general unfairness of the agreement, the cost to Mrs. Kirby of arbitrating her claims is so excessive that it renders the agreement unconscionable. In *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), the United States Supreme Court recognized that prohibitively high costs of arbitration could be grounds for refusing to enforce an arbitration agreement. The Court stated, “It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum.” *Id.* at 90. The Supreme Court of Mississippi recently addressed this issue in *Parkerson v. Smith*, 817 So. 2d 529, 536 (Miss. 2002):

The arbitration provision in the present case requires Parkerson to pay the attorney's fees and costs should she lose. Furthermore, Rule 51 of the Commercial Rules of the American Arbitration Association, requires that the party initiating the dispute to pay a minimum filing fee of five hundred dollars. Parkerson submitted an affidavit stating that she could not afford to pay the fees required to arbitrate her dispute. The United States Supreme Court has held that large arbitration costs could preclude a litigant from effectively vindicating her statutory rights in arbitration [The arbitration clause in the present case is unconscionable because the high costs involved in starting arbitration could have effectively prevented Parkerson from pursuing her dispute. (Diaz, J., concurring) (citing *Green Tree*, 531 U.S. 79).

In this case, as in *Parkerson*, the arbitration terms require Mrs. Kirby to seek relief in the American Arbitration Association (“AAA”) pursuant to its Commercial Arbitration Rules - rather than its cheaper Consumer Rules. As is shown by the attached fee schedules of the AAA, Mrs. Kirby faces costs that are well beyond her ability to pay.⁶ Hearing fees alone can cost between \$150 and \$250. One AAA study shows that the average commercial arbitrator compensation per hearing day is \$1,899. *Ting v. A T&T*, 192 F. Supp. 2d 902, 917 (N.D. Cal. 2002).

Further, the AAA fee guidelines show that, inexplicably, the higher the amount of the claim, the greater the amount of fees that must be paid to the arbitrator. However, a higher monetary demand does not mean that the arbitrator must work harder, longer, or smarter. The claims presented for resolution must be resolved according to common law without regard to what the amount of the damages is. Defendant is either liable or it isn't and this determination does not turn on how much Mrs. Kirby claims the case is worth.

The inescapable conclusion for this escalation in fees is that it is meant to keep the amount of the claims down on the front end. If a claimant sees that the more he claims, the more he pays, then he is less likely to claim a greater amount for damages, despite the fact that his claim may be worth a large sum. Such a fee schedule bears no relationship to the actual amount of work the arbitrator will have to perform. Thus, the escalated fee schedule is further evidence that the arbitration terms are skewed against Mrs. Kirby.

Mrs. Kirby should not be forced into a forum that she cannot afford to participate in. As one court stated:

Avoiding the public court system to save time and money is a laudable societal goal. But avoiding the public court system in a way that effectively denies citizens access to resolving every day societal disputes is unconscionable. Goals favoring arbitration of civil disputes must not be used to work oppression. When the goals given in support of contract clauses like this are used as a sword to strike down access to justice instead of as a shield against prohibitive costs, we must defer to the overriding principle of access to justice.

Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 605 (Wash. App. 2002).

5. The arbitration agreement, when considered in conjunction with other aspects of the sales contract, is ambiguous, and therefore, unenforceable.

The arbitration agreement provides that all actions, except those brought by Defendant, must be brought in an arbitral forum. However, in the same document, Defendant attempts to invoke provisions of Mississippi law related to warranties of merchantability and fitness for a particular purpose. Clause number 5 states, in pertinent part, as follows:

[I]t is agreed and understood that if the vehicle is more than six (6) model years old or has been driven more than 75,000 miles, then under [Section 75-2-315\(1\) of the Mississippi Code of 1972](#), as amended, all warranties of merchantability and fitness for a particular purpose, regarding the vehicle are hereby excluded,

and upon acceptance of the offer, the resulting purchase and sale or lease of the vehicle shall be AS IS and WHERE IS.

Defendant cannot have it both ways. Either Mississippi law applies, or it does not. By attempting to invoke Mississippi law, and at the same time, provide that all disputes, except those brought by Defendant, must be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, Defendant creates an ambiguity which must be resolved against the drafter of the contract, which is, of course, the defendant. See *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 836 (Miss., 2003) (“any ambiguit[ies] ... are to be resolved in favor of [the plaintiff], since [the defendant] as the contracting party had the duty to make such terms unambiguous.”) (citing *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1085 (Miss.2000) (collecting authorities)); *Century 21 Deep South Properties, Ltd. v. Keys*, 652 So.2d 707, 719 (Miss. 1995) (“an ambiguity is to be construed more strongly against the party that prepared the contract”) (citing *Kight v. Sheppard Building Supply, Inc*, 537 So.2d 1355 (Miss. 1989)).

CONCLUSION

There is a place for arbitration. If parties want to enter into an arbitration agreement, fully understand what they are signing, and appreciate an arbitration agreement's ramifications, then so be it. They should be bound by their decision. However, there are instances of overreaching. There are situations in which a party should be released from its alleged obligation to arbitrate a claim. The law provides for such situations and Plaintiff's case is such a scenario. The law exists to protect people like Plaintiffs. The law certainly should not harm them.

For all of the reasons discussed herein, Defendant's motion should be denied and the arbitration clause be declared unconscionable and void and this matter should be allowed to proceed to a jury trial.

Respectfully submitted,

The Kirby Plaintiffs

BY: <<signature>>

Margaret P. Ellis, MB#: 5110

Attorney for Kirby Plaintiffs

Footnotes

- 1 However, if Plaintiffs are in error and Howard Wilson also seeks to enforce Sidney Odom to arbitrate then, respectfully, these arguments also include Odom.
- 2 Plaintiffs Nicholas L. Kirby, Jr., Nicholas L. Kirby, III, and Sidney Odom did not sign the subject arbitration clause. Therefore, for the same reasoning enunciated herein, they cannot be bound by the arbitration clause.
- 3 Defendant's memorandum mistakenly has this argument styled as number II, when it should be number III. Plaintiffs' response will combine Defendant's second designation number II and its number III.
- 4 “[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes - but only those disputes - that the parties have agreed to submit to arbitration.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). See also *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002) (“applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act.”) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996); *East Ford, Inc. v. Taylor*, 826 So.2d 709, 714 -714 (Miss. 2002) (“the usual defenses to a contract such as fraud, unconscionability, duress, and lack of consideration may be applied to

invalidate an arbitration agreement, so long as the law under which the provision is invalidated is not applicable only to arbitration provisions.”); *Tropical Cruise Lines, S.A. v. Vesta Ins. Co.*, 805 F. Supp. 409, 412 (S.D. Miss. 1992) (arbitration agreements “are essentially creatures of contract”). Because arbitration agreements are contracts, they are not to be given any greater treatment or weight than any other contract. See *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12. (1967) and *Southland Corp. v. Keating*, 465 U.S. 1, 19 (1984) (purpose of FAA was to make arbitration agreements “as enforceable as other contracts, but not more so”) (emphasis added).

- 5 A copy of the contract that contains the arbitration clause is attached to Defendant's motion.
- 6 The AAA's Commercial Rules, which includes its fee schedules, are attached hereto as Exhibit 1. Attached as Exhibit 2 is an Affidavit from Mrs. Kirby affirming that she cannot pay the thousands of dollars that it would cost to arbitrate this case.

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