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Supreme Court of Texas.
In re WEEKLEY HOMES, L.P.
No. 04-0119.

November 30, 2004

Appearances:

Raul A. Gonzalez (argued), Locke Liddell & Sapp, LLP, Austin, for relator.

Spencer P. Browne (argued), Heygood Orr & Reyes, L.L.P., Irving, for real party in interest.

Before:

Wallace B. Jefferson, Chief Justice, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

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JUSTICE: The Court is ready to hear the argument in 03-0309 In re Weekley Homes.

SPEAKER: May it please the Court. [inaudible] rebuttal [inaudible].

ORAL ARGUMENT OF RAUL A. GONAZALES ON BEHALF OF THE PETITIONER

MR. GONZALEZ: Good morning. May it please the Court.

This is a petition for a writ of mandamus to enforce a mandatory arbitration agreement on a person that did not sign the contract. Weekley constructed a new home for Vernon Forsting and his daughter, Patricia Von Barga. Mr. Forsting, the father, signed the real estate purchase agreement as a purchaser. [inaudible] signed numerous transactional documents as a purchaser; she did not sign the real estate agreement. The house was put on Mr. Forsting's name, the father. And after closing, he transferred the title to the Forsting's family trust. The daughter is a sole beneficiary of the trust.

The father, the daughter, and the trust fund sued Weekley Homes alleging construction defects. Only the daughter's claims [inaudible] is proceeding. The daughter sued Weekley for personal injuries allegedly caused by Weekley's negligent performance of warranty work done pursuant to the home purchase agreement. The trial court refused to send the daughter's claim to arbitration and only sent Mr. Forsting's and the trust claims to arbitration.

We believe, your Honors, that we are entitled to a writ of mandamus because the trial court abused its discretion. Here, we have a very broad arbitration provision. It provides that any claim or dispute or cause of action between the purchaser and the seller --

JUSTICE: But the breadth of the petition it says nothing about who's bound by it.

MR. GONZALEZ: Would you repeat your question, your Honor?

JUSTICE: The breadth of arbitration provision says nothing about who's bound by it.

MR. GONZALEZ: No, your Honor, we're dealing here with a scope. Nobody can testify that we have a very broad arbitration provision. It is relevant only in the sense that this is a claim for a construction defect and --

JUSTICE: I guess what I'm saying is the scope is really irrelevant to whether the daughter is bound by the provision because I think the daughter would probably agree that if the provision binds her, it would accomplish the claims here. But the question is whether she is bound by it, the scope is irrelevant to that determination.

MR. GONZALEZ: The question here, your Honor, is whether or not under existing Texas Law she is bound by that broad arbitration agreement. And under Texas Law, a party may be bound by an arbitration agreement even if she or he did not sign the agreement when the nonsignatory of the third-party beneficiary to the contract, and we submit to the Court that the evidence is complied, that she's a third-party beneficiary or when the nonsignatory sues on the contract, and we believe that the evidence is compelling again that she is suing under the contract.

I will discuss these two provisions to the Court. I will leave for the brief the policy, public policy which is why we think we ought to prevail. For example, in *Prudential v. Marshall*, this Court said that the policy in favoring [inaudible] arbitration agreements is so compelling that a court should not deny arbitration unless it could be said with positive assurance that an arbitration clause is not susceptible to an interpretation which will cover the dispute at issue.

Also *Hagen v. Tips*, the Court --

JUSTICE: But again, that goes to public policy to enforce what party has agreed to and doesn't answer the question of whether the party has agreed to this or [inaudible].

MR. GONZALEZ: That's correct, your Honor. Now, let's look at the third-party beneficiary because we believe that we prevail under any of those four theories. This Court has stated in *MCI v. Texas Utilities* that whether someone is a third-party beneficiary to a contract is a question of contract interpretation which is a question of law for the Court to decide. The Court went on to say a third-party beneficiary is one for whose benefit a contract is made and not one who is benefited only incidentally but performs the contract. And the Court stated that the intention of the parties was controlling.

In *Fort Worth IST v. The City of Fort Worth*, this Court held that to ascertain the party's intent, a court may read instruments pertaining to the same transaction together as if they were part of a single unified instrument. Now, let's look at the facts that gave rise to this particular dispute. Mr. Forsting is a 78-year-old widower at the time he decided to purchase a home for himself and for his daughter. He was a very sick man.

JUSTICE: What if there had been a nurse living in the home with Mr. Forsting and she had bought this claim, will she be bound by the arbitration clause?

MR. GONZALEZ: Only if Mr. Forsting evidenced an intent that she would be a third-party beneficiary. And we believe that here there is clear evidence that Mr. Forsting intended for his daughter to be a coowner. Mr. Forsting testify that he considers himself an owner of the house. He considered the daughter a coowner of the house. The daughter testified that she consider

JUSTICE: Could the daughter --

MR. GONZALES: -- herself an owner of the home.

JUSTICE: -- could she under our -- we've been fairly strict on determining who's constitute third-party beneficiaries of contracts. Could she have sued Weekley for a right of possession to the home, for example?

MR. GONZALEZ: Probably not.

JUSTICE: Well, then, how can she be a third- party beneficiary for some purposes but not for others? If she had no right to sue the home builder to enforce the contract, how can the arbitration provision be enforced on her?

MR. GONZALEZ: Because the evidence is compelling here that Mr. Forsting intended for her to be a third-party beneficiary. Let us look at her conduct and Mr. Forsting's conduct that had bought [inaudible]

JUSTICE: But I understand -- but I don't understand why that wouldn't work both ways. If she's a third-party beneficiary, why couldn't she sue for a right to possession?

MR. GONZALEZ: She may very well can, your Honor. I'm not saying definitive that she could not, but that's not the question here. The question is, is there evidence in the transactional documents that Mr. Forsting intended that the daughter to be a beneficiary? And we say, "Yes, there is."

JUSTICE: Well -- but again, which on the incidental beneficiary or natural third- party beneficiaries -- it sounds to me like by carving out beneficiary of just [inaudible] provision, that sounds more -- I mean, to me, you're third-party beneficiary for all purposes, not just for some. Or do you think you can just carve out pieces here?

MR. GONZALEZ: I do not know that, your Honor. I do not know the answer to that question. But I think if the Court looks at the evidence in this case, you will see that Mr. Forsting intended to the daughter to be a coowner and [inaudible]. If she is a co-owner, certainly she is a third-party beneficiary. She --

JUSTICE: So, why should her children had sued -- again, not limiting your -- you alleged more than one theory. What is the scope of your theories? Are her children included within this? Would a servant who works in the home daily or a nurse who lives in the home -- how far is the reach of any of your theories on who's bound by the arbitration [inaudible]?

MR. GONZALEZ: Your Honor, I believe that the Court can look to the cases dealing with [inaudible] discussion contracts like Orkan, Wanheil, and Nationwide, or the Court can look to what the Court of Appeals said in Merrill, Lynch v. Smith & Eddings, in contracts involving family residents, the law presumes that the signing family member clearly intended the agreement to confer a direct benefit on the household members who occupy the resident. That is the reach of what we're asking the Court to do.

JUSTICE: So would that include employees or not if they live in the home or work in the home?

MR. GONZALEZ: Only if there's an evidence -- under the writings of this Court in FirstMerit and in Prudential v. Marshall, if there is an evidence of intent for the purchaser to confer a benefit, they are

bound by the contract.

JUSTICE: So this is probably gonna be a one time only because after this, 78-year-old man will know not to testify deposition, "I intended her to be a beneficiary." So, this is a one time only ticket.

MR. GONZALEZ: No, your Honor. It is not. There are many contracts [inaudible] similar provision. So what the Court writes here particularly in light of some writings in the [inaudible] v. Gaskamp case of the Fifth Circuit, there is a tension there. So what this Court writes in this case would be of great benefit to the bench and the bar --

JUSTICE: Any evidence that your client intended her to be a beneficiary?

MR. GONZALEZ: Yes, your Honor.

JUSTICE: Which is?

MR. GONZALEZ: Your Honor, the -- if my client -- not my client, his client, the daughter paid the initial deposit to the purchased home, the daughter signed a letter of intent as a purchaser, the daughter signed numerous transactional documents like the custom charges where she selected the floor plan [inaudible] and signed as a purchaser. She handled as an owner all of the negotiation with Weekley before the construction and after the construction. After they moved in, she sent Weekley a list of items that needed to be fixed and - on, quote, our home. She demanded that the contract be enforced, that the warrant of provisions of the contract be enforced by asking Weekley to abide by it, those warranty provisions, and fix, and repair the home.

She accepted the benefits of the contract, your Honor, by accepting a reimbursement check when she moved out of the house for the repair to be made. She accepted the benefits of the contract and got a check for \$552, and she said, "This -- I acknowledge that this check is for reimbursement while my home is being repaired." So, there is ample evidence here, your Honor, that she consider herself an owner of the home. And I'm saying, if she considers herself an owner, a cut below that is third-party beneficiary.

JUSTICE: But, my question was whether Weekley consider her the owner? Your evidence that they intended her to be the owner is simply that they never objected.

MR. GONZALEZ: They dealt with her as a coowner, your Honor. Because she represented herself as a coowner and signed numerous transactional documents.

Now, in the remaining time, your Honor, I'd like to move on to the other theory under [inaudible] prevail sued under the contract.

JUSTICE: I'm -- like Justice Owen, concerned about the scope of the rule that you asserted. In your brief, you say, [inaudible] this is based on a contract subjects him or herself to the contracts terms. What's the boundary there? What if a niece comes over and visits for the afternoon, and that some injury related to improper warranty work, under that theory solely, would the niece's claims be subject to arbitration?

MR. GONZALEZ: I don't believe so, your Honor.

JUSTICE: Why not?

MR. GONZALEZ: She's a guest. But she would have other claim to [inaudible]. She could sue the owner of the home but

JUSTICE: But what's --

MR. GONZALES: -- not Weekley.

JUSTICE: I'm positing a suit against Weekley Homes. And what if she constructs a theory based on contract to sue Weekley, could her claim be subject to arbitration --

MR. GONZALEZ: Perhaps.

JUSTICE: -- if it's based upon the contract?

MR. GONZALEZ: Yes, your Honor. This Court can look at Valero and Associated Glass case and say if the tort that is [inaudible] is so interwoven with the contract that it cannot stand alone, it falls within the scope of the agreement to arbitrate. If, on the other hand, the tort is completely independent of the contract and can be maintained without reference to the contract, it falls outside the scope. Here --

JUSTICE: And I'm -- In my question, I'm assuming that the claim is a contract claim. Okay. So, you don't have to argue the points about intertwining tort contract in [inaudible] tort issues. Assume that is a contract claim, can anybody who comes into the home and believes they were injured based upon faulty warranty work or faulty construction work [inaudible] a breach of contract claim that is then subject to arbitration? Put standing issues to the side. Assume they can assert such a claim, what's the limits of your theory?

MR. GONZALEZ: Your Honor, all we're asking this Court to do is do what other courts in this state have done with regard to termine inspection contract. When you deal with a family residence, the signer of the contract is presumed to confer benefits to the members that live in that residence. Now, that's all we're asking this Court to do. Now, if you look --

JUSTICE: Are you suggesting that a theory that says any litigant who sues based on a contract subjects him or herself to the contract's terms including arbitration is too broad just stated that way?

MR. GONZALEZ: Your Honor, we're asking this Court to follow what the Court wrote in FirstMerit and in Prudential, and that is if the tort cannot exist but for the contract and the party that is suing is trying to enforce the contract, that person is [inaudible]. Here Ms --

JUSTICE: Even if it say a pipe fitter who comes in and fix a faucet or a yardman who's working in a yard and wants to drink of water and comes in [inaudible] theory based on the contract?

MR. GONZALEZ: No, your Honor. I think that cause of action by the pipe fitter or the contractor has a suit against the home owner not against Weekley Homes.

JUSTICE: Well, you're changing the facts of my question. Assume they can fashion a breach of contract claim, would they be subject to arbitration just because they sue based on the contract?

MR. GONZALEZ: If they're trying to enforce the contract provision, they sue under the contract and they are subject arbitration. They cannot have it both ways.

JUSTICE: Without limits. Yardman? The plumber?

MR. GONZALEZ: Your Honor, if they're trying to enforce the contract and get benefits on the contract, they subject themselves to the contract provision.

JUSTICE: So, you're answer to my question is, "Yes." The yardman; the plumber; the niece.

MR. GONZALEZ: The Court doesn't have to write that that broadly, your Honor.

JUSTICE: So, you agree that a statement that -- of law that says if you sue based on a contract; you're subject to the contract's terms, that alone, without limitations is too broad.

MR. GONZALEZ: I would agree that that's too broad, your Honor. We would ask you to confine your holding to family members, family residents like the Court has done in numerous cases involving termites.

Your Honor, my time is up and unless there are other question.

JUSTICE: No further questions. Thank you, Counsel.
The Court is ready to hear argument from the respondent.

ORAL ARGUMENT OF SPENCER P. BROWNE ON BEHALF OF THE RESPONDENT

MR. BROWNE: [inaudible] May it please the Court. My name is Spencer Browne, I represent the [inaudible] interest for Patricia Von Barga.

Mr. Gonzalez is correct that the two major issues before the Court today are: Number one, whether Ms. Von Barga is a third-party beneficiary to the contract, and number two, whether she had sued under contract.

JUSTICE: What precisely is her cause of action?

MR. BROWNE: Number one, her cause of action is a strict personal injury claim. It's grounded in negligence. It's a common law claim. It's a common law claim for damages. In [inaudible] --

JUSTICE: And the source of the -- you're negligent in repairing?

MR. BROWNE: It was negligent in the workers' repairing or attempting to repair the alleged defects within the house.

JUSTICE: Yes, remind me they -- their -- what did they fail to do that caused her personal injury?

MR. BROWNE: I believe it was a failure to collect some sort of insulation maybe or the actual some sort of contaminants that was used in their attempted repair that caused her to develop an asthmatic condition.

JUSTICE: And where did the duty to perform the repairs come from?

MR. BROWNE: Well, I think that duty is related to common law. I think that duty comes about of how you have a duty to --

JUSTICE: So, if I call up Weekley Homes even though they have nothing to do with my house, tell them to come out to repair, they have to do it because it's common law?

MR. BROWNE: Well, that's not true, your Honor. But, of course, this is not --

JUSTICE: Clearly, their only duty repair comes from the contract?

MR. BROWNE: It does come from the -- I mean, I will agree with you that it does come from the -- the actual duty for them to show up to the house for them to do it does come from the contract. Although she is not herself suing based on the contract. She is not a party to the contract. She is suing --

JUSTICE: But there is no negligence of duty -- I mean, for negligence, you gotta have a duty.

MR. BROWNE: Absolutely.

JUSTICE: And the duty's gotta come from the contract.

MR. BROWNE: No. The duty can also come as being an individual who -- I mean, yes, they do show up as per the contract but as she is not party to the contract, she cannot possibly sue on behalf of the contract.

Now, I mean, I agree in number one that we need to look at the contract itself to figure out whether or not she is a beneficiary to the contract. If we look at the contract itself, there are some specific provision that is laid on the dispute resolution clause. Within that, it says two words: "This agreement is between the purchaser and the seller." "Purchaser" is defined numerous places throughout the contract.

At the very top of the first page of the real estate contract, it labels "purchaser" as Vernon Forsting, who is actually the father of Patricia Von Bargen. At the end, it gives many spaces for the purchaser of [inaudible]. The only person who signs this document is Vernon Forsting. On the bottom of every single page of that contract, it says "purchaser's initials". The only initials present there are Vernon Forsting's.

JUSTICE: If you were the home builder, and you wanted to be sure a claim like this was arbitrated, could you do it?

MR. BROWNE: I don't think so, your Honor. And the reason I don't think that you can actually arbitrate this clause is number one, you have to have an agreement that -- number one, the home builders are the one who addressed the contract.

JUSTICE: No, I'm saying starting at the beginning.

MR. BROWNE: Okay.

JUSTICE: So, the home builder is saying, "You know, there might be some other people living there and I don't know, I want them bound by this arbitration agreement. So, you're the lawyer, bring back [inaudible] or something that binds it. How would you do it?"

MR. BROWNE: Very simply. I put in one sentence within that dispute resolution arbitration that says that this purchase agreement is bound by all occupants. And bound --

JUSTICE: So the owner whoever signs that has waived the constitutional rights for everybody else?

MR. BROWNE: Well, I would see that where your argument is going. Where the direction waiving on behalf of someone else and make that some unconscionable type of argument. But is it an almost more unconscionable to come look at it and say, "By implication that those rights exist for the home owner."

JUSTICE: Well, all I'm saying is, I think the thrust of your argument is this can't be done. A situation like this where the owner is the trust or some corporation or some other entity, you just -- you can't have an arbitration agreement that covers the kind of claims that the home builders wants to cover.

MR. BROWNE: I mean, if we're dealing with a situation such as this where there is a father, a husband, and wife who are all adults. And if the home builders simply believes that the father, the husband, and the wife are gonna be the residents, that they are all gonna be coowners, as Mr. Gonzalez stated, then why would they not simply put in the provision within the contract itself where they all can sign.

JUSTICE: Children?

MR. BROWNE: Children is another difficult issue. That is a difficult issue because --

JUSTICE: Well, you don't think it is difficult because you don't think it could be. You think [inaudible] is right and therefore, it can't be done.

MR. BROWNE: Absolutely. I believe the Court [inaudible] did have it correct. Yes, your Honor.

JUSTICE: What about the termite cases, how do you distinguish those?

MR. BROWNE: Well, number one, those termite cases are dealing with, I think, the majority of the Orkan cases dealing with a husband who contracts also -- who is only the person who signs the contract. There's a wife who they're both elderly as well and he signs that contract for a termite, subterranean termite inspection on behalf of for him and his wife. That is distinguishable for the sole reason is, that's a service contract. And number one, number two, that is actually

a [inaudible] based on the contract. The contract itself is existing there for termite inspection and for termite repellent or protection from termites. In this case, we're dealing with --

JUSTICE: But in the termite case, I don't recall, did they assert personal injury actions?

MR. BROWNE: The personal injury actions, as what I remembered, your Honor, were not alleged because all the, and I believe the plaintiffs agreed in that actual trial court, that the suit itself with based on the contract. And that whole party of the whole argument within the termites cases were that they were not actually parties of the contract. In our case --

JUSTICE: If Mr. Forsting had, say, would he be bailed out of the arbitration clause?

MR. BROWNE: Yes, your Honor. And that's already been held by the trial court.

JUSTICE: So, this is -- and you don't [inaudible], you don't dispute that?

MR. BROWNE: No, we do not.

JUSTICE: So, this really is about whether this is an independent tort claim or not, it's who's bound by this arbitration clause?

MR. BROWNE: Number one, is who's bound. But as a court lawyer to that argument we're also saying that this is a tort argument.

JUSTICE: Well, if Mr. Forsting brought his exact same tort claim, will he be bound with the arbitration clause or not?

MR. BROWNE: I think that he would be bound, your Honor, because he is a party to the arbitration agreement.

JUSTICE: What if he'd sign the contract as a husband without purchasing separate property, would his wife be then bound?

MR. BROWNE: Now, if the wife had not signed the contract. If this is just himself as a husband and a wife, he just signed it on his own, his wife is actually in the background who's gonna live with him. That's a difficult question because it kinda goes to how it, I believe was a -- what we already talked about in Gaskamp and now the fact that if there's a contracting on behalf of people as a sole trust of Gaskamp, the father contracted on behalf of his wife --

JUSTICE: No, he decides he wants to use separate property to buy the house for him and his wife. I mean, their both gonna live there but he says he wants to use a separate funds. So, he's the only person that enters into the contract with Weekley homes and the wife brings a personal injury claim just like this one, is she bound by the arbitration clause?

MR. BROWNE: I would not think so, your Honor. Number one, it's the husband's separate property that purchased the claim, and number two, it's the husband's only name on the signature on the contract. He is the only one of interest in the contract.

Now, if was community property or the if wife did enter into the contract with him and she had to bring the personal injury or tort claim, I would believe that she is bound by it.

JUSTICE: Now, what difference would it make over community property that the husband was the only signatory?

MR. BROWNE: Why? I think if -- excuse me -- if it is -- if the husband's the only signatory, he's signing on behalf of his wife as well. --

JUSTICE: He just signs. It turns out he used community funds to buy the home.

MR. BROWNE: Well, think that's a difficult issue, number one. And number two, I think that we have to always be governed by what the

contract says and what the four corners of the contract said. If the contract says that this is the sole purchaser of the actual home, then we must be bound by the people that construe the documents to begin with and hopefully this scenario because in this one would be the home owner himself.

JUSTICE: Do you agree that it would be inefficient to have two separate proceedings to determine the same dispute?

MR. BROWNE: Your Honor, I mean, I do understand --

JUSTICE: As a general proposition?

MR. BROWNE: As a general proposition, yes. It's always inefficient to have two different tribunals decide the same issue. But here we don't have to be in the same issue.

JUSTICE: But do you think it's a good idea to try to resolve the disputes in one proceeding instead of two?

MR. BROWNE: I will always, for me, that's in the best interest of judicial [inaudible], yes.

JUSTICE: You know --

JUSTICE: And in this case, has the father asserted only a contract claim or does he able to claim to?

MR. BROWNE: His claims should only be based on the contract and the daughter's the only one [inaudible], your Honor.

JUSTICE: Do you think our decision in New York Bank was correctly decided or not? You don't try to distinguish.

MR. BROWNE: I don't distinguish that is correct or not. Although, I do distinguish that it's different from the case of Barsday and from the case of Gaskamp as well. And your decision in FirstMerit, the claims were so intertwined with each other. The claims were actually all based on the father's claims [inaudible] the parent's claims, and children's claims were basically identical. They were exactly the same. Whereas in this case here today, we have a father that trust having a separate contract claim, the daughter has the separate tort claim. So, --

JUSTICE: Let's us say the whole the family brought personal injury claim for asthma, the father, the husband, and the wife, and the grandchildren.

MR. BROWNE: That's a very difficult issue, because now we're dealing with the fact that --

JUSTICE: How's that different from the FirstMerit?

MR. BROWNE: Because number one, we're dealing with the fact that the FirstMerit, I believe, that the general rule that we get on that is a suit based on the contract. And there if the father is bringing the claim as the only signatory, or as the trustee is bringing the claim as also the signatory to the contract, then he himself and the trust itself would be bound by the contract and bound to arbitration.

Now, if they also made a claim for personal injury which simply what was stated then, I believe that that claim becomes independent contract and they would have a different recourse in the regular district trial --

JUSTICE: But not if you gain the suit and not the [inaudible] party doesn't matter if it's for personal injury or not. He's bound.

MR. BROWNE: I'm sorry, I miss your point.

JUSTICE: I'm sorry. You only draw -- you don't draw that distinction with respect to the signatory party. If it's personal injury, they're still bound.

MR. BROWNE: If it's personal injury, I do believe that the signatories to the contract are bound. If it's not personal injury -- I mean, if it is personal injury and they're not the signatories to the

contract, I think it's gonna have to come down to, I mean, as I just said, still signatories will be bound to the contract in some way, in some fashion or they're suing based on the contract. And as you guys, excuse me, as this Court has said in the FirstMerit, suit based on the contract has gotta come out from the contract itself.

JUSTICE: What is into the fact that your client accepted certain benefits such as a \$550 check or so and signed as an owner, elevate her status to a third-party beneficiary?

MR. BROWNE: I think that the fact that she accepted the benefits in behalf of her family or I believe they stayed on the hotel while they're [inaudible] these repairs has no bearing on her part, her status is a third-party beneficiary.

JUSTICE: Why not?

MR. BROWNE: I believe that because number one, she is acting as a resident of the house and not as a purchaser of the house. I still have -- I still go home to my parents' house in Kansas for Thanksgiving. And I know when they're out I will go out and I try to do things on behalf of their house. I don't believe -- I don't call myself a purchaser or an owner of the house. Although I would still accept even if it's on their behalf for the house. Additionally, I think that the documents asserted that say that she intended to be an actual owner of the house was only one document that was entitled a letter of intent which was signed long before the actual purchase agreement was signed. This letter of intent even specifically states to the bottom that this note is only to be construed as mutual interest which [inaudible] both parties has to work in full, nothing more. There itself is saying, "This is not a purchase agreement, there is no agreement in place. All this is, is a letter or intent."

JUSTICE: But she don't contend that she was a resident.

MR. BROWNE: No, she -- I do contend that she is a resident of the house.

JUSTICE: You would agree she is a resident?

MR. BROWNE: I do agree that she is a resident.

JUSTICE: She said this is her residence.

MR. BROWNE: Right. This is her residence. I do conceive that, yes.

JUSTICE: The plaintiff's first amended the original petition as the [inaudible] pleading, is that correct?

MR. BROWNE: Yes, your Honor. I very well believe it's on index [inaudible].

JUSTICE: I'm looking at now paragraph 15 says, "As a result of defendant's negligent actions and/or omissions, plaintiffs has suffered damages consequently the plaintiffs [inaudible] damages." Under economic damages it says, "Plaintiffs' secret cover of all economic damages caused by the defendant's wrongful conduct." It doesn't specify that that negligence claim is limited to Patricia Von Barga. It says "plaintiffs." That seems to indicate that the father has asserted tort claim also, doesn't it?

MR. BROWNE: I think by the actual strict reading of that pleading, it would. But --

JUSTICE: So we will have the issue of negligence, duty, breach, causation, perhaps separate damages though, but the first three elements decided or disputed in two separate proceedings. Same facts, same issues, different damages.

MR. BROWNE: I would agree that there's different damages, yes, number one. Number two, I would argue that there's different facts. And why I'm saying there's different facts is because we ought to have to figure out what the actual injuries and the facts that led to Patricia

Von Bargen's injuries which are very separate from the injuries and damages that were done to forth and forth --

JUSTICE: The duty issue is gonna be entirely the same.

MR. BROWNE: Excuse me?

JUSTICE: The duty issue is gonna be entirely the same.

MR. BROWNE: The duty issue will be the same, your Honor.

JUSTICE: If Mr. Forsting had sold his home to someone else shortly after it was built, and that person had brought personal injury, these same claims, would they be bound by the arbitration clause?

MR. BROWNE: It's a very interesting question and it would be definitely something that would have be [inaudible] at the contract. If the contract is binding on all future successors of the actual contract itself and if it's still covered under the warranty of which is expressed within the contract itself. I would think that if a purchase agreement is in place, which mean Mr. Forsting and a future successor to the interest in the home, then that person would not to be bound by the arbitration clause. The person that signs the purchase agreement from Mr. Forsting. The reason because that -- I mean, because of that is if the contract itself says this is bound on the successor's interest.

Now, as we talk about for a few seconds, I think that the most important case -- sorry.

JUSTICE: It's confusing to me, but as I thought in response to Justice Hecht's question, he said the home builder really could not impose an arbitration clause other than the immediate signatory. There will be no way to do it. But are you saying that all you'd have to do is put in the contract and heir successors in the [inaudible] and that would do?

MR. BROWNE: I would argue that although Justice Hecht as he pointed out to me would be somehow laid in the constitutional rights of these citizens that would not [inaudible] freely and on their own will enter into the contract. It's difficult, it's a very, very difficult question and I think it's a question that must be answered and must be dictated by the action of [inaudible] over contract and with --

JUSTICE: But if you don't think that could happen which is one of the rationales of the [inaudible] then it seems to me you're lack of the position that you can't be enforced against anybody but [inaudible].

MR. BROWNE: That's number one, I would like [inaudible] argue that. I would definitely argue that the only person that a contract can be enforced against is the signatory. Now, if the signatory can somehow waive his own rights in the contract or waive his rights to future a successor of interest, I would think that there would also have to be a provision of when the person who entered the contract with the first signatory would have to agree to as well. So, I think that it would have to be a provision within the contract itself that Weekley Homes or another home builder would have to come with that would say if this warranty still exists at the time, or if a duty still exists at the time on behalf of the home builder and this home is sold or is future will be assigned, then a new contract must be entered, or this contract must be expressly agreed to on behalf of the successor of the [inaudible].

JUSTICE: Why should we treat this personal injury claims differently from property claims? For example, let's suppose that I have a boundary dispute with my next door neighbor and we enter into an argument, say, if we get into a dispute in the future, we're gonna arbitrate this and it's finding on our [inaudible]. And then Chief

Justice Jefferson buys my home from me, is he bound by my agreement with the neighbor to arbitrate this boundary dispute?

MR. BROWNE: That's, again, a difficult question.

JUSTICE: Should we treat that one differently from a personal injury claim when you've either given or buy the home with this clause in it?

MR. BROWNE: Well, I mean, if the contract itself expressly as agreed to by Chief Justice Jefferson, and if he expressly agrees to --

JUSTICE: He just buys the house. He's got the documentation. It's part of the record.

MR. BROWNE: But then, again, I'm gonna have to agree in defer to the Gaskamp court. And the Gaskamp court says that the contract is only binding on the signatories to the contract. In that case, I would believe that his claims that he will have to bring, in that case, would have to be based in negligence of the common law and not on the contract itself.

JUSTICE: So even in the case of a third-party beneficiary who is named in the contract, you don't think because that person is not a signatory that that person would be bound to arbitrate?

MR. BROWNE: Again, that's a difficult question, because there are names in the contract leads me to believe that we always have to look at the intent of the parties [inaudible]. And if they can get away with -- if the parties can agree that the third-party beneficiary knew that this contract would be ended on their behalf and -- and if they were aware of the fact that this contract would be drafted on behalf of their benefits, then that's something maybe contracted around. Although, in this case, there is nothing to that extent. There is nothing at all that signifies that Ms. Von Barga was supposed to be a third-party beneficiary. No language within the contract. In fact, they had ample opportunity if they did have so many conversations and so many discussions with Ms. Von Barga when they could have included her as a purchaser.

JUSTICE: I'm not clear. So you can or cannot conceive of a situation where a third-party beneficiary is bound?

MR. BROWNE: I think you can conceive only if that third-party beneficiary has the intent to be a third-party beneficiary, that is evidenced to the contract. I do not believe that you can have a third party-beneficiary be bound to a contract that is not anywhere evidenced within the contract itself.

JUSTICE: So, you had substituted the signature requirement in this situation of a third-party beneficiary with evidence that the third-party beneficiary agreed to the terms of the contract?

MR. BROWNE: I would believe that --

JUSTICE: Which goes beyond a typical third-party beneficiary jurisprudence, doesn't it?

MR. BROWNE: Yes, it does. But, I mean, fortunately for us in this case, there is the contract itself.

JUSTICE: Suppose the contract says specifically "if there's this problem, we're gonna repair it exactly the way Weekley Homes did" and when your client bought the house he agreed to that. Your theory, even though the parties intended that the repair to be done is precisely as it was, your client could still sue.

MR. BROWNE: Absolutely, your Honor. I absolutely agree to that because her claim is based on a negligence report, all the employees [inaudible] based --

JUSTICE: I'm assuming her negligence claim is that they did it precisely the way her father, and Weekley said it would be done in

advance.

MR. BROWNE: That's still [inaudible].

JUSTICE: No further questions. Thank you, Counsel.

MR. BROWNE: Thank you, your Honor.

REBUTTAL ARGUMENT OF RAUL A. GONZALEZ ON BEHALF OF THE PETITIONER

MR. GONZALEZ: Your Honors, if the Court was to deny the petition for writ of mandamus. It would have disastrous consequences with the home building industry because you will allow artful pleadings to evade very broad arbitration provisions as they are in this case. Now, let's look at --

JUSTICE: Let me ask you this about this test or whether

MR. GONZALEZ: Yes.

JUSTICE: -- the suit is on a contract. The test, and this is the one of the amicus briefs, the test for determining whether a nonsignatory suit based on the contract, [inaudible] such an arbitration is whether based on an examination of the factual allegations, the nonsignatory's claims are capable of being maintained independently up and without reference to contract containing the arbitration clause. The nature of the underlying claims acquires the nonsignatory to [inaudible] the terms of an agreement containing the clause then a nonsignatory suit is based on the contract regardless of the labels assigned to the legal varies. If the nonsignatory need not [inaudible] the terms of the agreement, the claims are not on the contract and not send it to arbitration.

MR. GONZALEZ: Your Honor, we prevailed into that test.

JUSTICE: Well, but just the same, do you agree with that test?

MR. GONZALEZ: Yes, your Honor. That is a catastrophe, that other courts have used and we prevail under that test. If you look at the tort claim that that [inaudible], they say that Weekley was negligent in attempting to correct or repair the home. As Justice Brister inquired, where does that duty stem from? That duty stems from the contract. The tort claim is legally dependent upon the duty to build a habitable home without negligence and in good [inaudible] manner. That deed arises from the contract.

JUSTICE: [inaudible] repairs the back steps and they did it improperly, the dinner guest came over and stepped through the steps and broke their leg, would Weekley Homes [inaudible] independent duty [inaudible] from the contract to that guest?

MR. GONZALEZ: No, your Honor. I think the cause of action will rise against the home owner not against Weekley Homes. Now, your Honor --

JUSTICE: How about a product liability claim? Their visitor -- if the boulder blew up or something in the house, Mr. Wood have a claim because product liability is not entitled to contract by the standards whatever else. So, there would be personal injury claims that might not be covered by occupants or third parties, it depend on where the duty came from.

MR. GONZALEZ: That's correct, your Honor. Let's look in the remaining time, the Fleetwood v. Gaskamp case decided by the Fifth Circuit that has relied also heavily by my point. I think that the lines on Fleetwood v. Gaskamp case is misplaced. To be blunt, I believe that that panel blew it, they wrongly decided the case. I have great

[inaudible] the justice on the panel are friends of mine but I think they got it wrong. They ignored what this Court said in FirstMerit. In FirstMerit this Court said, "You don't have to look at the labels that the plaintiff attaches of the cause of action. You look at the factual allegations." The Court in Gaskamp did not look at the factual allegations. They looked at the labels.

Now, and even though I think that the Gaskamp court got it wrong, there is some language in the Gaskamp case, there is very good [inaudible] to Weekley Homes. This is what they said in Fleetwood v. Gaskamp, they said, "At no point, that the Gaskamp children attempt to enforce the contract or sue on the basis of any warranties contained in the contract. Here, the daughter did attempt to enforce the contract by insisting that Weekley Homes comply with the warranty provisions. So, she sued to enforce the contract. Not only that, but to pick up on Justice Medina's question, not only did she sue to enforce the contract but she accepted the benefits of the contract by cashing the \$500-check which she says, "For our home." Now, your Honor, the doctrine of equitable estoppel, I think she applies to it. She cannot have it both ways. She cannot be suing to enforce the warranty provision of the contract and accept the benefits of the contract and then say, however, I'm not bound by the broad provisions of the contract.

With these reasons, your Honor, we pray that [inaudible].

JUSTICE: Thank you, Counsel.

That concludes the argument in Weekley Homes and the Court will take another brief recess.

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