STATE OF MICHIGAN

COURT OF APPEALS

TREVOR LE GERE and AMY LE GERE,

Plaintiffs-Appellants,

v

NEW MILLENNIUM HOMES, INC.,

Defendant-Appellee,

and

CONSECO FINANCE SERVICING CORPORATION,

Defendant.

UNPUBLISHED
December 23, 2003

No. 242473
Genesee Circuit Court
LC No. 02-072955-CP

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Plaintiff Trevor Le Gere signed a purchase agreement and a retail installment sales contract (RISC) governing his purchase of a mobile home from New Millennium Homes, Inc. (NMH). The RISC was assigned to defendant Conseco Finance Servicing Corporation (Conseco)[1]. Both contracts contained provisions that required disputes to be settled by binding arbitration. Trevor's wife, Amy Le Gere, did not sign either of these agreements, but both Trevor and Amy filed this action seeking revocation of acceptance of the mobile home under the Uniform Commercial Code and because of numerous alleged violations of the Michigan Consumer Protection Act. Plaintiffs also sought injunctive relief to prevent defendants from reporting derogatory credit information. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) "and/or" to compel arbitration. In response, plaintiffs argued that the

[1] Although Conseco was originally a party to this appeal, we entered an order on January 23, 2003, closing the case as to appellee Conseco only due to pending bankruptcy proceedings involving Conseco, which deprived us of the authority to continue our review of the case with respect to Conseco. Therefore, this opinion does not address or affect any issues pertaining to the dismissal of the Le Geres' complaint against appellee Conseco.

arbitration provisions in the contracts were unenforceable. The circuit court ultimately dismissed the claims in favor of binding arbitration and dismissed Amy's claims for lack of standing. Plaintiffs now appeal as of right. We affirm in part and reverse in part.

Plaintiffs argue that they established a genuine issue of material fact, to be resolved by a jury, with regard to whether an agreement to arbitrate existed in light of Trevor's affidavit indicating that the arbitration provision in the RISC was covered when he signed it.

Under Michigan law, the existence of an agreement to arbitrate is a judicial question that is not to be decided by an arbitrator. *Arrow Overall Supply Co v Peloquin*, 414 Mich 95, 99; 323 NW2d 1 (1982). MCR 3.602(B)(2) states that "[i]f the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the application." In *American Parts Co, Inc v American Arbitration Assoc*, 8 Mich App 156, 170; 154 NW2d 5 (1967), this Court, applying former GCR 1963, 769.2, the predecessor to MCR 3.602(B), explained the meaning of "summarily determine" as follows:

> [The rule] contemplates summary determination of a factual dispute as to the existence of an agreement to arbitrate. If there is a genuine issue of material fact as to whether there is such an agreement, that issue must be decided upon an evidentiary, albeit summary, hearing.

Contrary to plaintiffs' argument, Michigan law does not indicate that a factual dispute concerning the existence of an agreement to arbitrate must be resolved by a jury. At most, an evidentiary hearing before the court may be required, but only if there is a genuine issue of material fact.

Here, however, because the RISC indicates that arbitration would be governed by the Federal Arbitration Act (FAA), plaintiffs also rely on § 4 of the FAA, 9 USC 4, which provides, in pertinent part:

> If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Although this provision indicates that a jury trial may be necessary to resolve a dispute concerning the making of an arbitration agreement under the FAA, case law interpreting this

provision indicates that a party must meet an evidentiary threshold to be entitled to a jury trial. As explained by the Fifth Circuit Court of Appeals in *American Heritage Life Ins Co v Orr*, 294 F3d 702, 710 (CA 5, 2002):

> Although the FAA permits parties to demand a jury trial to resolve factual issues surrounding the making of an arbitration agreement, or the failure, neglect, or refusal to perform the agreement, it is well-established that "[a] party to an arbitration agreement cannot obtain a jury trial merely by demanding one." *Dillard v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 961 F2d 1148, 1154 (CA 5, 1992). Further, under the *Dillard* analysis, a party contesting the "making" of the arbitration agreement must "make at least some showing that under prevailing law, he would be relieved of his contractual obligations to arbitrate if his allegations proved to be true . . . [and] produce some evidence to substantiate his factual allegations." *Id.* at 1154.

See also *Andersons, Inc v Horton Farms, Inc*, 166 F3d 308, 327-328 (CA 6, 1998).

Thus, plaintiffs' entitlement to an evidentiary (but summary) hearing under MCR 3.602(B), or a jury trial under the FAA, requires that they first make a threshold evidentiary showing. We conclude that plaintiffs failed to make the necessary showing.

In his affidavit, Trevor averred that when he was shown the page containing the arbitration provision, the upper portion of the page "was hidden from my view so that I signed my name as requested." Plaintiffs compare this case to *Matthews v Aluminum Acceptance Corp*, 1 Mich App 570; 137 NW2d 280 (1965), wherein the plaintiffs signed a mortgage with no intention or knowledge of doing so.

Although *Matthews* indicates that a party may be relieved from a contract if he had no intent to sign it, other cases indicate that a party is not relieved from a contract if he knowingly signed an agreement, but failed to read or understand its terms. See *Sponseller v Kimball*, 246 Mich 255, 260; 224 NW 359 (1929); *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000); *Horn v Cooke*, 118 Mich App 740, 746-748; 325 NW2d 558 (1982). This is consistent with the approach taken by the federal courts under the FAA. See *Andersons, Inc, supra*. Plaintiffs have not alleged or presented evidence that Trevor was unaware that he was signing a retail installment sales contract, but only that he allegedly was not aware of the arbitration provision because a portion of the page was covered. This does not create an issue of fact requiring an evidentiary hearing under MCR 3.602(B), or a jury determination under 9 USC 4.

Plaintiffs also raise several challenges to the enforceability of the arbitration provision in the RISC. As recognized by plaintiffs, the federal Supremacy Clause limits their ability to challenge on state law grounds the enforceability of an arbitration agreement governed by the FAA. US Const, art VI, cl 2. See *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 498; 591 NW2d 364 (1998); *Abela v General Motors Corp*, 257 Mich App 513, 524-525; 669 NW2d 271 (2003).

Here, plaintiffs rely on three Michigan statutes as their bases for arguing that the arbitration provision is unenforceable: (1) the Michigan Consumer Protection Act (MCPA), specifically MCL 445.903(1)(t); (2) the Retail Installment Sales Act (RISA), specifically MCL

445.864(1)(d) and (f), and MCL 445.866; and (3) the Michigan Mobile Home Warranty Act, (MMHWA), specifically MCL 125.995.

However, we reject plaintiffs' argument that these statutes invalidate the arbitration provision in the RISC in light of this Court's holding in *Abela, supra.* In *Abela*, the plaintiffs argued that an arbitration provision was unenforceable with respect to the plaintiffs' claims under Michigan's "lemon law," MCL 257.1401 *et seq.* Like the statutes cited by plaintiffs in the present case, the lemon law contains an anti-waiver provision, MCL 257.1407(1). The trial court in *Abela* ruled that the lemon law precluded enforcement of an arbitration agreement. This Court disagreed, explaining, "The case law is clear that the FAA surmounts any state law that invalidates agreements to submit claims to binding arbitration." *Abela, supra*, at 525. The Court noted that its holding "essentially relegates MCL 257.1407(1) . . . to a nullity." *Id*. at 525, n 7. Nevertheless, the Court held that the FAA "surmounts any state law that invalidates arbitration agreements. . ." *Id*. The Court's reasoning with respect to the anti-waiver provision in the lemon law equally applies to plaintiffs' arguments here, which are based on similar provisions in the MCPA, the RISA, and the MMHWA. To the extent these laws can be read to prohibit a binding arbitration agreement, the FAA preempts them.

Plaintiffs attempt to evade the preemptive effect of the FAA by arguing that where a statute precludes an arbitration agreement, violation of the statute renders the agreement unenforceable as being in violation of public policy. According to plaintiffs, even if the statutory provisions themselves may not invalidate the arbitration provision, the FAA does not preempt a public policy argument based on violations of statutory provisions. We disagree.

As a general matter, binding arbitration is not contrary to public policy in Michigan. This Court has stated, "[W]e wish to reemphasize that our decision intends to reinforce Michigan's strong and unequivocal public policy to encourage arbitration 'as an inexpensive and expeditious alternative to litigation.'" *Madison Dist Public Schools v Myers*, 247 Mich App 583, 600; 637 NW2d 526 (2001), quoting *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 123; 596 NW2d 208 (1999). Plaintiffs invite this Court to recognize a public policy exception to the preemption of the FAA based on alleged violations of state statutes that are preempted by the FAA. If accepted, this position would create a significant loophole to the preemptive effect of the FAA that has been recognized by both Michigan and federal courts. Plaintiffs cite no authority in which a court has accepted a similar argument. This Court declines plaintiffs' invitation to create such a loophole.

Plaintiffs also argue that the arbitration provision is "unconscionable" because it would prevent them from effectively vindicating their claims under the MCPA. In the federal cases on which plaintiffs rely, courts deemed arbitration agreements unenforceable because enforcement would defeat a statute's remedial purpose by preventing a prevailing plaintiff from recovering statutorily-authorized attorney fees. The federal cases cited by plaintiffs have been vacated. *McCaskill v SCI Management Corp*, 285 F3d 623 (CA 7, 2002), vacated 294 F3d 879 (CA 7, 2002), on rehearing 298 F3d 677 (CA 7, 2002); *Perez v Globe Airport Services, Inc*, 253 F3d 1280 (CA 11, 2001), vacated per stipulation 294 F3d 1275 (CA 11, 2002). *McCaskill* concerned an arbitration provision stating that each party would bear its own costs and attorney fees, whereas *Perez* concerned a provision stating that costs and fees would be shared equally by the parties. The courts determined that these provisions precluded the plaintiffs from effectively vindicating their claims under Title VII, which authorizes an award of attorney fees to a

prevailing plaintiff. 42 USC 2000e-5(k). Although the specific cases cited by plaintiffs have been vacated, the legal proposition that they support, that an arbitration provision may not waive remedies available under a statute, is valid. See *Rembert, supra*; *Morrison v Circuit City Stores,* 317 F3d 646, 670-671 (CA 6, 2003).

Contrary to plaintiffs' assertions, however, the arbitration provision in the RISC does not limit the remedies available to plaintiffs by foreclosing the possibility of an award of attorney fees available under the MCPA. Like the statutes discussed in the preceding cases, the MCPA allows a prevailing party to recover attorney fees. MCL 445.911(2). Unlike the federal authorities cited by plaintiffs, the arbitration provision in the RISC does not limit plaintiffs' ability to recover attorney fees. The arbitration provision does not state that the parties must pay their own costs and attorney fees, as in *McCaskill, supra,* nor does it state that the parties will share the costs of arbitration, as in *Perez* or *Morrison, supra.* To the contrary, the provision in the RISC states that the arbitrator "shall have all powers provided by law and the Agreement. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Thus, the provision does not preclude plaintiffs from obtaining a remedy that would be available if the claims were litigated in a judicial, rather than arbitral, forum. See *Large v Conseco Finance Servicing Corp,* 292 F3d 49 (CA 1, 2002) (analyzing a nearly identical arbitration provision).[2]

Plaintiffs mention that they will "be forced to absorb significant arbitration costs and fees *prior* to vindicating their rights under the [MCPA]." Their discussion of the matter is limited to a portion of a single sentence. We conclude that this issue has not been properly presented for review "because [plaintiffs have] given cursory treatment to the issue with little or no citation to relevant supporting authority for [their] argument." *Silver Creek Twp v Corso,* 246 Mich App 94, 99; 631 NW2d 346 (2001). The argument may also be rejected because plaintiffs have not made an adequate evidentiary showing to support it. The United States Supreme Court has recognized that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Financial Corp v Randolph,* 531 US 79; 121 S Ct 513; 148 L Ed 2d 373 (2000). However, bare assertions that arbitration would be prohibitively expensive are inadequate to invalidate the agreement. *Id.* at 92. The party seeking to avoid arbitration on that basis must present evidence. *Id.* Here, plaintiffs have not presented evidence that the expense would be prohibitive. Therefore, plaintiffs have not demonstrated that the arbitration provision is unenforceable on this basis.

Plaintiffs also argue that the arbitration provision is unenforceable because Congress intended that claims under the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq.*, would not be subject to predispute agreements to arbitrate. Plaintiffs' complaint does not allege

---

[2] Although our resolution of the issues raised by plaintiffs concerning the arbitrability of the claims in the complaint does not require us to resolve whether the arbitration provision in the purchase agreement is also enforceable, we note that that provision states, in part, "Purchaser shall be liable to Seller for all of Seller's costs and actual attorney's fees incurred in any arbitration proceeding commenced by Purchaser pursuant to this provision." Under the authorities previously cited, this provision appears to be unenforceable.

a claim under the MMWA, and, although plaintiffs filed a motion to amend their complaint, that motion was dismissed after the trial court granted defendants' motion for summary disposition. In any event, plaintiffs' position was rejected by this Court in *Abela, supra*, at 519-524, which, following the decisions of several federal circuit courts, concluded that the MMWA permits agreements for binding arbitration. *Abela* is controlling and, therefore, we reject plaintiffs' argument that a claim under the MMWA would not be subject to arbitration.

Finally, plaintiffs challenge the trial court's ruling that Amy La Gere lacked standing to bring the claims alleged in the complaint because she did not sign the purchase agreement or the RISC. We conclude that the absence of her signature on these agreements does not exempt her from arbitration and that the merits of her claims must be evaluated by the arbitrator.

The issue raised in NMH's motion (as well as Conseco's) concerned whether the claims asserted in the plaintiffs' complaint were subject to arbitration. In order to ascertain the arbitrability of the claims, the trial court was required to "consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Madison Dist Public Schools, supra,* at 595. NMH and plaintiffs' briefs noted that Amy had not signed either the purchase agreement or the RISC, but neither party briefed the legal ramifications of the absence of her signature. Plaintiffs merely stated that it was "obvious" Amy would not be bound.

Contrary to plaintiffs' position, the absence of Amy's signature is not determinative of whether she is bound by the agreements to arbitrate. "[A] party cannot be required to arbitrate when it is not legally or factually a party to the agreement." *Hetrick v David A Friedman, DPM, PC,* 237 Mich App 264, 267; 602 NW2d 603 (1999), quoting *St Clair Prosecutor v AFSCME,* 425 Mich 204, 223; 388 NW2d 231 (1986). However, "where mutuality of assent is established, written arbitration agreements do not have to be signed in order for the agreement to be binding." *Ehresman v Bultynck & Co, PC,* 203 Mich App 350, 354; 511 NW2d 724 (1994), citing *Green v Gallucci,* 169 Mich App 533; 426 NW2d 693 (1988).

In the present case, the complaint, as well as Trevor's affidavit, indicates that Amy and Trevor acted jointly and that Amy assented to the agreements. The complaint refers to plaintiffs jointly, without differentiation between the claims or actions of the two plaintiffs. The allegations are phrased in a manner indicating that both plaintiffs were parties to the purchase agreement and the RISC. Specifically, the complaint alleges that "[p]laintiffs negotiated for the purchase" of the mobile home, and that "[t]here is an alleged arbitration [sic] purportedly signed by Plaintiffs included in the RISC." It also alleges that the arbitration agreement "is not contained in the initial purchase agreement signed by Plaintiffs." It further states that "Plaintiffs are 'Buyer(s)'" under the Michigan Uniform Commercial Code, and that NMH has refused to refund "Plaintiffs' purchase price, payments made, insurance fees, lot rent, and other payments . . . ." Trevor's affidavit states that both he and Amy told NMH that they were purchasing the home for use as a personal residence and that Trevor was informed by NMH "that my wife did not have to sign any of the paperwork." The allegations in plaintiffs' complaint and Trevor's affidavit indicate that Amy assented to the agreements, even though she did not actually sign them. Pursuant to *Ehresman, supra,* the absence of her signature does not allow her to avoid arbitration. Because the absence of her signature was the only basis advanced by plaintiffs for avoiding arbitration of her claims, both her claims and Trevor's were subject to binding

arbitration. The portion of the trial court's order that dismissed "all claims in this case . . . with prejudice and without costs to any party, in favor of binding arbitration" is correct and, therefore, affirmed. But we reverse those portions of the trial court's order stating that Amy "lacks standing to bring her claims against Defendants as set forth in Plaintiffs' Complaint . . ." and dismissing those claims with prejudice.

Because Amy's claims were subject to arbitration, the trial court erred in ruling upon the merits of her claims. A court's analysis of the arbitrability of an issue does not involve an assessment of the merits of the claim. *American Fidelity Fire Ins Co v Barry*, 80 Mich App 670, 674-676; 264 NW2d 92 (1978). By holding that Amy lacked standing to bring her claims, the trial court improperly decided an issue that should be decided by the arbitrator.

Thus, the trial court's order is reversed to the extent that it dismissed Amy La Gere's claims for lack of standing, but affirmed in all other respects.

Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio