

IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2005-CA-01239

MISSISSIPPI CARE CENTER OF GREENVILLE, LLC
OXFORD MANAGEMENT COMPANY, INC.,
MICHAEL OVERSTREET and TESSA COOPER

APPELLANTS

V.

NANCY HINYUB, Individually and as
Personal Representative of the Estate of DON WYSE

APPELLEE

REPLY BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons
have an interest in the outcome of this case:

Mississippi Care Center of Greenville, LLC, Oxford Management Company,
Inc., Michael Overstreet and Tessa Cooper, Appellants

Nancy Hinyub, Appellee

S. Mark Wann, Esquire, Marjorie S. Busching, Esquire, Heather M. Aby,
Esquire, Attorneys for Appellants

F.M. Turner, Esquire, Attorney for Appellee

Honorable Richard A. Smith, Washington County Circuit Court Judge



Heather M. Aby

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ARGUMENT

I. The February 14, 2004 Admission Agreement is a valid contract and should be enforced as written.

As this is an issue of contract construction, basic contract principles apply. Mississippi has long followed the four-corners rule when interpreting a contract. The goal of a court is to give effect to the intent of the parties. *Heartsouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105. ““The general rule is the intention of the parties must be drawn from the words of the whole contract, and if, viewing the language used, it is clear and explicit, then the court must give effect to this contract unless it contravenes public policy.” *Id.* (quoting *Jones v. Miss. Farms Co.*, 116 Miss. 295, 76 So. 880, 884 (1917)).

In looking to the four-corners to interpret a contract, ““the court’s concern is not nearly so much with what the parties may have intended but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning the meaning with fairness and accuracy.”” *Id.* (quoting *Warwick v. Gautier Utility District*, 738 so. 2d 212, 214 (Miss. 1999)). “Contracts must be interpreted by objective, not subjective standards, therefore ‘[c]ourts must ascertain the meaning of the language actually used, and not some possible and unexpressed intent of the parties.’” *Id.* (quoting *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 105 (Miss. 1998)).

On February 13, 2004 Nancy Hinyub executed an Admission Agreement containing a binding arbitration provision. 1 R. 133-140. She executed this contract as her Father's Responsible Party and in conjunction with the Durable Power of Attorney she held on his behalf. This contract was executed following a lengthy hospitalization and upon Mr. Wyse's return to Mississippi Care Center of Greenville. Mr. Wyse had been a resident of Mississippi Care Center of Greenville since February 1997. The arbitration agreement, properly initialed by Ms. Hinyub, provided, in part:

E. ARBITRATION – PLEASE READ CAREFULLY

It is understood and agreed by the Facility and Resident and/or Responsible Party that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to the Admission Agreement or any service or health care provided by the Facility to the Resident, shall be resolved by binding arbitration pursuant to the Federal Arbitration Act, to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration which are hereby incorporated into this agreement, and not by a resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any rights granted to the Resident by law or by the Admission

Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

The parties understand and agree that by entering into this Arbitration Agreement they are giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and a jury.

1 R. 137-38. (Emphasis in original).

In *MS Credit Center, Inc. v. Horton*, this Court aptly held, “[u]nder Mississippi law. . . parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it.” 926 So. 2d 167, 177 (Miss. 2006). (Emphasis supplied). The claims asserted by Ms. Hinyub were not differentiated between his discharge from the Facility to an acute care facility and his return to Mississippi Care Center of Greenville, LLC. In fact, in the Complaint Ms. Hinyub alleged: “Don Wyse was a resident of Mississippi Care Center of Greenville f/k/a MS Extended Care of

Greenville, a skilled nursing facility located at 1221 East Union Street, Greenville, Washington County, Mississippi from 1997 until February 14, 2004, and suffered personal injuries and damages while a resident there. Mr. Wyse died on February 14, 2004.” 1 R. 3. These allegations of long-standing breaches to Mr. Wyse and “his family” are made throughout the Complaint. 1 R. 3-31.

Thus, pursuant to the clear language of the Complaint, Ms. Hynub intends to seek recovery against Mississippi Care Center for the time-frame of her Father’s residency – not just the pre-arbitration agreement time-frame. Accordingly, the claims asserted by Nancy Hynub relate directly to the services rendered to Mr. Wyse and are subject to consideration by an arbitrator, not a judge or jury. Thus, the lower court erred in not ordering the Parties to binding arbitration pursuant to the terms and conditions of the February 13, 2004 Admission Agreement.

II. Don Wyse was a Third-Party Beneficiary to the Contract.

It is undisputed that Don Wyse received services from Mississippi Care Center based upon the terms and conditions of the Admission Agreement and, therefore, benefitted from the agreement. It has been recognized to allow a plaintiff to claim the benefit of a contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying the enactment of the Federal Arbitration Act. *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp.2d 894, 902 (S.D. Miss.

2001). “[A]rbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary.” *Trinity Mission of Clinton, LLC v. Barber*, ___ So. 2d ___, 2007 WL 2421720, at *5 (Miss. Ct. App. Aug. 28, 2007) (quoting *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006)). This Court has held as follows with regard to a third-party beneficiary – such as Don Wyse – to a contract:

In order for the third person beneficiary to have a cause of action, the contracts between the original parties must have been entered into for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promise to such third person beneficiary. This obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the right of the third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself.

Burns v. Washington Savs., 171 So. 2d 322, 325 (Miss. 1965).

In *Barber*, the Mississippi Court of Appeals very recently held, in analyzing a resident’s admission to a nursing home:

The plain language of the admissions agreement indicates the clear intent of the parties to make Ms. Barber a third-party beneficiary. Ms. Barber’s care is the *sine qua non* of the contract. She is named in the contract as the resident to be placed in Trinity’s facility for care. It is beyond dispute that the benefits of receiving Trinity’s health care services outlined in the admissions agreement flowed to Ms. Barber as a “direct result of the performance within the

contemplation of the parties as shown by its terms.” *Burns*, 171 So. 2d at 324-25. The admissions agreement states that, *inter alia*, “the facility agrees to furnish room, board, linens and bedding, general duty nursing and nurse aide care, and certain personal services.” Trinity had a duty to provide these services to Ms. Barber and these rights “spring from the terms of the contract itself.” *Id.*

We find that the contract between Mr. Barber and Trinity was entered into for the benefit of Ms. Barber and that she is a third-party beneficiary under the contract. As such, she is bound by the arbitration provision contained in the admissions agreement, notwithstanding her status as a non-signatory to the agreement.

Barber, ___ So. 2d ___, 2007 WL 2421720 at *6. Likewise, in the instant matter, Ms. Hinyub executed the Admission Agreement on her Father’s behalf and for his benefit. Thus, any claims arising “. . . out of or relat[ing] to the Admission Agreement *or any service or health care provided by the Facility to the Resident, shall be resolved by binding arbitration. . . .*” 1 R. 37. Based upon the clear language of the Admission Agreement, all claims arising out of Mr. Wyse’s residency at Mississippi Care Center of Greenville are to be resolved in binding arbitration. The lower court erred in denying same.

III. Nancy Hinyub bound her Father and the Wrongful Death Beneficiaries to Arbitration on February 13, 2004.

On June 1, 1996, Nancy Hinyub became her Father’s Attorney-in-Fact with regard to his health care decisions:

Subject to my special instructions below, this gives my Attorney-in-Fact the full power to make health care decisions for me, before or after my death, to the same extent I could make decisions for myself and to the full extent permitted by law, including making a disposition under the state's anatomical gift act, authorizing an autopsy, and directing the disposition of remains. My Attorney-in-Fact also has the authority to talk to health care personnel, get information and sign forms necessary to carry out these decisions.

See Attachment to Appellee's Brief.

Such a decision occurred on February 13th, when Ms. Hinyub, acting as her Father's Attorney-in-Fact, executed the Admission Agreement containing the arbitration provision at issue before the Court. Ms. Hinyub's act of executing this document was in compliance with her authority to "... sign forms necessary to carry out [health care] decisions." A necessary part of the authority to make health care decisions is the power to perform the corresponding duties. Nancy Hinyub performed those duties in executing the Admission Agreement containing an agreement to arbitrate – an agreement erroneously denied by the lower court.

In making such a decision, she bound not only her Father, but herself and the Wrongful Death Beneficiaries of her Father to arbitration. "A wrongful death suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent." *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187, 1192 (Miss. 2003) (citing *Wickline v. U.S. Fid. & Guar. Co.*, 530 So. 2d 708, 715 (Miss.

1998)). The agreement to arbitrate, executed by Ms. Hinyub, is binding on “. . . the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons who[se] claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.” 1 R. 138. “Because [Mr. Wyse’s] claims would have been subject to arbitration, the claims of her wrongful death beneficiaries are likewise subject [to] the arbitration provision.” *Barber*, __ So. 2d __, 2007 WL 2421720, at *6.

CONCLUSION

As this Court is aware, “unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted.” *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979). Such cannot be said with regard to Nancy Hinyub’s arguments against enforcement. Thus, for the reasoning set forth *supra*, as well as in Appellants’ principle brief, the Court should reverse the lower court’s holding and order the matter to binding arbitration.

Respectfully Submitted,

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LLC, OXFORD MANAGEMENT COMPANY,
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CERTIFICATE OF SERVICE

I, Heather M. Aby, certify that I have this day served by United States mail with postage prepaid to the following:

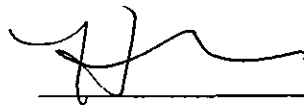
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Dated this the 19th day of September, 2007.



Heather M. Aby