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

BRIEF OF APPELLANTS

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ATTORNEYS FOR 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. Ray Turner, Esquire, Attorney for Appellee

Honorable Richard A. Smith, Washington County Circuit Court Judge

Heather M. Aby

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STATEMENT REGARDING ORAL ARGUMENT

Appellants Mississippi Care Center of Greenville, LLC, Oxford Management Company, Inc., Michael Overstreet and Tessa Cooper, believe oral argument may assist in resolution of this appeal. The fifty-six (56) paragraph Order appealed from extends far beyond the necessary determination regarding enforceability of an arbitration agreement. This Court's analysis will provide better direction for the lower court's interpretation of similar motions.

STATEMENT OF THE ISSUES

Whether the lower court erred in failing to enforce an arbitration provision contained within a nursing home admission agreement entered into between the resident's daughter, operating under a power of attorney and as her father's responsible party, and the nursing home.

STATEMENT OF THE CASE

Don Wyse (hereinafter referred to as "Mr. Wyse") was initially admitted to Mississippi Care Center of Greenville, LLC (hereinafter referred to as "Mississippi Care Center" or "the Facility") for the first time on January 28, 1997. Six months prior to, he executed a power of attorney in favor of his Daughter, Nancy Hinyub (hereinafter referred to as "Ms. Hinyub"). On or about February 13, 2004, following a lengthy hospital stay, Mr. Wyse was again admitted to Mississippi Care Center. Ms. Hinyub, on her Father's behalf, possessing a durable power of attorney for healthcare, executed an Admission Agreement containing an arbitration provision. This provision - - the subject of this appeal - - provided in part, any ". . . controversy, dispute or disagreement arising out of or relating to this agreement. . . shall be settled exclusively by binding arbitration. . . ." (1 R. 133-140).[1] Mr. Wyse passed away the following day. (1 R. 243).

Thereafter, Ms. Hinyub, on behalf of herself and others, filed suit alleging medical negligence. (1 R. 3-74). Ms. Hinyub subsequently amended her Complaint, adding treating physicians Nino Bologna, M.D., and Philip Doolittle, M.D. Both

[1]Citations to the record will be denoted as ___ R.___ and citations to the transcript will be Tr.___.

physicians have since been dismissed by this Court due to Ms. Hinyub's failure to provide notice pursuant Mississippi Code Annotated §15-1-36(15).

Rather than submit to binding arbitration, Ms Hinyub asserted neither Mr. Wyse nor herself were bound to the terms and conditions of the Admission Agreement because he did not sign the contract. This argument is without merit. In executing the contract, Ms. Hinyub acted as her Father's attorney-in-fact, based upon the previously executed conferral of such authority. (1 R. 113). Following briefing and argument on the issue, the lower court entered a fifty-six (56) paragraph order finding, as a matter of fact, the arbitration provision was unconscionable; the admission agreement was illegal or improper, in violation of both state and federal law, and; the Defendants were in violation of Mississippi's Vulnerable Adults Act.

STATEMENT OF THE FACTS

Mr. Wyse was admitted to Mississippi Care Center on January 28, 1997, remaining a resident up until his discharge and death on February 14, 2004. Mr. Wyse became ill in January 2004 and was admitted to an acute care hospital on January 31, 2004. On or about February 13, 2004, he was discharged from the hospital and readmitted to Mississippi Care Center by his Daughter, Ms. Hinyub.[2] Ms. Hinyub executed all admission papers on this date. Her actions were consistent with the 1996 durable power of attorney for healthcare establishing his Daughter, Ms. Hinyub as his agent/attorney-in-fact.[3]

Following her Father's death and in complete disregard for the agreement to

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[2]At the time of his first admission, both Mr. Wyse and his Daughter executed various documents related to admission.

[3]Said power of attorney was submitted to the Court as part of the April 26, 2005 hearing. However, it does not appear in the record. The document was discussed at the hearing:

> BY MS. BUSCHING: One thing that was not brought out, and may I approach, Your Honor?
> BY THE COURT: Yes.
> BY MS. BUSCHING: In order to clear up whether or not she can bind –
> BY MR. TURNER: What are you looking at?
> BY MS. BUSCHING: The power of attorney. Do you have a copy?
> BY MR. TURNER: I haven't seen it.
> BY MS. BUSCHING: Ms. Hinyub executed a power of attorney for healthcare the year before her dad went into the facility, and I know I've got another one.
> MR. TURNER: That's okay. You can give him this one. I've read it.

(Tr. 58-59).

arbitrate, Ms. Hinyub filed suit on or about August 24, 2004 in the Circuit Court of Washington County, Mississippi. (1 R. 1-74). In an effort to avoid the arbitrable forum, she argued the arbitration provision was unconscionable and the entire Admission Agreement was void and/or illegal. The lower court found her arguments persuasive. This appeal ensued.

ARGUMENT

I. Standard of Review.

"The decision to grant or deny a motion to compel arbitration is reviewed by this Court *de novo*." *Equifirst Corp. v. Jackson*, 920 So. 2d 458, 461 (Miss. 2006). "This Court has consistently recognized the existence of a 'liberal federal policy favoring arbitration agreements.'" *Terminix International, Inc. v. Rice*, 904 So. 2d 1051, 1054-55 (Miss. 2004) (quoting *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002)).

II. Nancy Hinyub (Wyse) had authority to bind her Father in health care matters, including the agreement to arbitrate.

A. The June 1, 1996 power of attorney executed by Don Wyse provided his daughter full authority to act on his behalf with regard to health care decisions.

The lower court erred in finding neither the durable power of attorney for healthcare nor Mississippi's Healthcare Surrogate Statute bound Ms. Hinyub to

arbitrate. (2 R. 261-62). "Generally speaking, our law regards as valid and enforceable as a power of attorney any written instrument signed by the principal and 'expressing plainly the authority conferred.'" *Kountouris v. Varvaris*, 476 So. 2d 599 (Miss. 1985) (quoting Mississippi Code Annotated, § 87-3-7)). "A designated power of attorney is nothing more than one form of a principal-agency relationship." *Clark v. Ritchey*, 759 So. 2d 516, 518 (Miss. Ct. App. 2000) (citing *McKinney v. King*, 498 So. 2d 387, 388-89 (Miss. 1986)). Nancy Hinyub, acting under the guise of the durable power of attorney for health care, possessed the authority to make healthcare decisions for her Father, which necessarily entailed entering into contracts for said healthcare services from the provider. There is no evidence Mr. Wyse ever revoked this authority. On February 13, 2004, Mr. Wyse was critically ill. As a result thereof, Ms. Hinyub acting in accord with the power of attorney, executed the Admission Agreement on his behalf. (1 R. 133-140).

Although no case law is on point in Mississippi, courts in other jurisdictions have upheld arbitration provisions contained within admission agreements executed by a family member, acting as a resident's attorney-in-fact. In *Hogan v. Country Villa Health Services*, a California appellate court found a resident's designation of her daughter in a durable power of attorney for healthcare authorized the daughter to

enter into a binding arbitration agreement with a nursing home. 148 Cal. App. 4th 259 (2007). The *Hogan* court held the lower court erred in denying the facility's motion to compel arbitration:

> The decedent had signed a Probate Code section 4701 health care power of attorney that authorized her daughter to make health care decisions for her, including the selection of health care providers. This authorization impliedly included the power to execute contracts of admission when having the decedent admitted to a long-term health care facility. Inasmuch as the decedent had not elected to restrict the powers of the daughter as her agent so as to exclude the power to enter into arbitration agreements, the daughter had the power to executed arbitration agreements when presented to her by the long-term health care facility as part of the package of admissions documents.

Id. at 262.

Likewise, in *Owens v. National Health Corp.*, the Tennessee court of appeals reviewed a trial court's denial of arbitration:

> The circuit court found that a patient's attorney-in-fact for health care decisions could not validly execute a nursing home admission contract containing an agreement to arbitrate on behalf of the patient. On appeal, the appellants contend that the attorney-in-fact could validly execute the language of the durable power of attorney. The patient's conservator argues that signing a waiver of a jury trial is beyond the scope of the attorney-in-fact's authority.

2006 WL 1865009 (Ten. Ct. App. November 20, 2006) (unreported).

The *Owens* Court found, ". . . an attorney-in-fact's authority to execute any necessary waiver, release, or other document for implementing health care decisions includes executing an admission contract which includes an agreement to arbitrate." *Id.* at *5. The court went further to explain its logical conclusion:

> Necessarily, when attempting to receive health care, an individual must arrange for what services he or she will receive from the health care provider and how he or she will pay for those services. Further, it is not uncommon for those same parties to agree as to which forum they will use to resolve their disputes. Thus, Daniel had the authority to enter into an admission contract that included an agreement to arbitrate. Accordingly, we conclude that the circuit court erred when it found there was no agreement to arbitrate because Daniel lacked the authority to enter into an admission contract that included an arbitration agreement on behalf of King.

Id. at *4.

In the instant matter, Appellants urge the Court, in reliance upon the above-case law, to reverse the lower court's finding that Ms. Hinyub did not possess authority to agree to arbitrate any and all disputes with Mississippi Care Center.

B. Alternatively, Nancy Hinyub acted as Don Wyse's health care surrogate on February 14, 2004.

Should the Court determine Ms. Hinyub's authority, by virtue of the durable power of attorney for healthcare, to not include the ability to agree to an alternate

forum for resolution of disputes, authority can be found in Mississippi's Health Care Surrogate Statute.[4] The statute provides, in pertinent part:

> (1) A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.
>
> (2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:
>
> > (a) The spouse, unless legally separated; (b) an adult child; (c) A parent, or (d) An adult brother or sister.
>
> (7) A health-care decision made by a surrogate for a patient is effective without judicial approval.

Miss. Code Ann. §41-41-211.

In *Covenant Health Rehab of Picayune v. Brown*, this Court held, pursuant to Miss. Code Ann. §41-41-211, Sharon Goss had authority to bind her mother, Bernice

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[4]Contracts concerning the provision of health care are an integral part of the health care industry and the practice of medicine. In order to make decisions about the medical care a patient is to receive, a surrogate must be able to enter into binding agreements to bring those decisions to fruition. In *Consolidated Resources Health Care Fund I, Ltd. v. Fenelus*, a Florida Appellate Court held the resident's son as the resident's health care surrogate, "could execute the admission agreement, enforcing the arbitration provision contained therein. 853 So. 2d 500 (Fla. 4th DCA 2003).

Brown to contract. 949 So. 2d 732 (Miss. 2007). Likewise, by executing the Admission Agreement at issue, Ms. Hinyub gave effect to a health care decision.[5] Implicit in the Legislature's grant of authority to make decisions about a patient's care is a corresponding ability to enter into a contract concerning surrogate's said care. *See Allred v. Webb*, 641 So. 2d 1218, 1222 (Miss. 1995) (A law which imposes a duty implies necessary power to achieve those duties.).

Based upon the clear language of the Statute, as well as the Court's recent ruling in *Brown*, it is clear Ms. Hinyub acted as her Father's health care surrogate on February 14, 2004. She stepped into the role of her Father's surrogate and contractually bound him in matters of health care, including the agreement to arbitrate "any and all claims, disputes and/or controversies between them and the Facility. . . ." (1 R. 133-140). But for the Admission Agreement, Ms. Hinyub would have no cause of action against Mississippi Care Center. Thus, the lower court's ruling is erroneous.

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[5]Federal statutes conveyed similar authority to Nancy Hinyub. Pursuant to 42 C.F.R. 483.10(a)(4), "in the case of a resident who has not been adjudged incompetent by the State Court, any legal surrogate designated in accordance with State law may exercise the residents' rights. . . ." Accordingly, since Ms. Hinyub would qualify as Don Wyse's health care surrogate, as set forth by Mississippi law, she had authority to select a long-term care facility for her Father to return to following his lengthy hospitalization. The selection of Mississippi Care Center necessitated execution of an Admission Agreement, which is this instance, contained a valid and enforceable arbitration provision. Ms. Hinyub's authority was in line with both state and federal statutes and not violative of her Father's rights as a resident.

III. Pursuant to *Vicksburg Partners, L.P. v. Stephens* and *Covenant Health Rehab of Picayune, L.P. v. Brown,* the lower court erred in denying arbitration.

Following a finding Nancy Hinyub did in fact possess authority to execute the Admission Agreement, the remaining inquiry requires an analysis of conscionability.[6] "[T]he doctrine of 'unconcionability has been defined as an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 516-17 (Miss. 2005).

> *Procedural* unconcionability is applicable to the overall formation of the contract in which the subject clause (such as the arbitration clause) is contained, whereas *substantive* unconcionability is applicable only to the subject clause (such as the arbitration clause) itself. Thus, while procedural unconcionability must be discussed as to the formation of the overall contract, it must also be discussed as to the arbitration contract itself, since the arbitration clause is contained within the overall contract. On the other hand, when discussing and applying substantive unconsionability, we are looking only to a particular clause

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[6]The lower court found provisions of the Admission Agreement to be illegal, improper or in violation of state and federal regulations; thus, voiding the contract as a whole. Such a determination is for an arbitrator, and not probative in determining whether the arbitration provision is conscionable. As such, and in accord with *Holman Dealerships, Inc. v. Davis*, the Court should overrule the lower court's denial of arbitration, sending the matter to arbitration for a determination of the underlying dispute. 934 So. 2d 356, 358-59 (Miss. Ct. App. 2006); *see also Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) ("court's inquiry on a motion to compel arbitration is limited").

> within the contract, such as an arbitration clause. We are not looking at the overall contract.

Id. (Emphasis in original).

"In *Vicksburg Partners*, this [C]ourt considered an assertion of procedural unconcionability where the daughter, serving as the responsible party, admitted her father to a nursing home." *Brown*, 949 So. 2d at 737 (citing *Stephens*, 911 So. 2d at 510, 516-20 (Miss. 2005)). A court must take into account two considerations when determining whether a contract is procedurally unconscionable: "(1) lack of voluntariness and (2) lack of knowledge." *Id.* (citing *Stephens*, 911 So. 2d at 517-18 (citing *Entergy Miss., Inc.*, 726 So. 2d. at 1207)).

In *Brown*, the Court found contracts of adhesion not automatically void, but "the party seeking to avoid the contract generally must show that it is unconscionable." *Id.* (quoting *Stephens*, 911 So. 2d at 513). In both *Stephens* and *Brown*, the format of the arbitration provision was found to be procedurally conscionable:

> [T]here were no circumstances of exigency; the arbitration agreement appeared on the last page of a six-page agreement and was easily identifiable as it followed a clearly marked heading printed in all caps and bold-faced type clearly indicated that section "F" was about "Arbitration," the provision itself was printed in bold-faced type of equal size or greater then the print contained in the rest of the document; and, appearing between the

> arbitration clause and the signature lines was an all caps bold-faced consent paragraph drawing special attention to the parties' voluntary consent to the arbitration provision contained in the admission agreement. Under these facts, it can not be said that there was either a lack of knowledge that the arbitration provision was an important part of the contract or a lack of voluntariness in that [the resident and his responsible party] somehow had no choice but to sign.

Id. Likewise, in the instant matter, the arbitration provision contained font of equal size; the provision was highlighted by all caps, bold faced type and a line to initial; the language was simple and non-legalistic and an acknowledgment paragraph was set forth above Ms. Hinyub's signature. Accordingly, the lower court erred in finding the agreement procedurally unconscionable.[7]

In order to determine whether a contract is substantially unconscionable, this Court looks to ". . . the four corners of an agreement." *Brown*, 949 So.2d at 733. "Substantive unconcionability 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." *Stephens*, 911 So. 2d at 521

[7]Additionally, any argument regarding unenforceability due to a lack of an arbitrable forum is also moot. Defendants presented an affidavit to the lower court from Peter Leibold, Vice President of the American Health Lawyers Association. Said affidavit clearly negated argument that the AHLA refuses to arbitrate matters without a post-contractual agreement. The AHLA will arbitrate any matter a court of competent jurisdiction orders it to arbitrate. Additionally, the arbitration agreement states only that the Rules of Procedure will be utilized, not the service. If the parties agree, however, the agreement places no restrictions on utilizing procedural rules of any association or organization, including Mississippi State or Federal rules.

(citing *Bank of Indiana v. Holyfield*, 476 F. Supp. 104-110 (S.D. Miss. 1979.) In *Stephens*, this Court found "arbitration agreements merely submit the question of liability to another forum – generally speaking, they do not waive liability." *Id.* at 522.

In the case-at-bar, the contract is facially valid, containing none of the limiting language stricken in *Stephens* and *Brown*. This agreement does not limit recovery in any way and further set forth *both* a right to legal advice and a right to rescind:

> The Resident and/or Responsible Party understand that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this arbitration is not a precondition of the furnishing of services to the Resident by Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within 30 days of signature. If not rescinded within 30 days, this Arbitration Agreement shall remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

2 R. 183.

In addition to the conscionability arguments, the lower court erred in refusing to enforce arbitration due waiver of a jury trial. The waiver provision was in bold font, clearly setting forth "the parties" limitation as to a jury trial:

> **The parties understand and agree that by entering 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 jury.**

(2 R. 182). (Emphasis in original).

In *Brown*, this Court addressed the argument head-on:

> ***The provision has the same effect as signing an arbitration agreement.*** It is well established that this Court respects the ability of parties to agree to the means of a dispute resolution prior to a dispute and enforces the plain meaning of a contract as it represents the intent of the parties.

Brown, 949 So. 2d at 740. (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 922 (Miss. 2002); *I.P. Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 108 (Miss. 1998)). (Emphasis supplied). The rationale is the same in the instant matter, waiving the right of a jury trial to both Mississippi Care Center and Don Wyse.

The contract provided clearly set forth the terms of the agreement, including:

> 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 agree that damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to comparable civil action, including any prerequisites to, credit against or limitations on, such damages.
>
> It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons who 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.
>
> All claims based in whole or in part on the same incident, transaction, or related course of care services provided by the Facility to the Resident, shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or received by the Resident, and is not presented in the arbitration proceeding.

2 R. 182.

In *Brown*, this Court reiterating Mississippi jurisprudence favoring arbitration, stated, "[s]eeing that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,' one factor negating an assertion of unconcionability was that the provision was typical of those endorsed by the Federal Arbitration Act." *Brown*, 949 So. 2d at 741. (quoting *Stephens*, 911 So. 2d at 513,

521). The Court further found the "provision contained another characteristic of a conscionable provision in that it was found to bear "some reasonable relationships to the risks and needs of this business." *Id.* (quoting *Entergy Miss., Inc. v. Burdette Gin, Co.*, 726 So. 2d 1202, 1207)(Miss. 1998)).

In this matter, as in *Stephens* and *Brown*, the arbitration provision contained within the Admission Agreement bears a reasonable relationship to the risks and needs of Mississippi Care Center of Greenville. The business of custodial care, includes daily medical treatment and care, all pursuant to doctor's prescriptions and orders, professional care plans drawn up specifically for the resident by a team of trained care givers and a highly regulated and inspected environment. There is an undisputed relationship to the risks and needs of the nursing home industry and the need to keep their costs down in order to continue operating. To resolve disputes through arbitration rather than litigation is one step that is being taken. Avoiding the expense of litigation through the use of arbitration still preserves the rights of an individual to recover damages where appropriate. The arbitration provision is not oppressive or unconscionable, but rather, provided Nancy Hinyub, as Don Wyse's Responsible Party, and Don Wyse a ". . . fair process through which to pursue. . . claims." *Brown* 949 So. 2d at 741. Thus, the lower court erred in denying the Motion to Compel Arbitration.

"Contracts are solemn obligations, and the court must give them effect as written."[8] *Id.* (citing *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 487 (Miss. 2005). "Parties may agree the means of dispute resolution, in any way they desire." *Id.* On February 14, 2004, Ms. Hinyub met with Marie Bennett of Mississippi Care Center for the purpose of her father's readmission to the Facility. These facts were set forth in Ms. Bennett's sworn affidavit which was provided to the lower court:

> I do remember the re-admission of Don Wyse following his hospitalization.
>
> Mr. Wyse was re-admitted on February 13, 2004. Nancy Hinyub acting as Mr. Wyse's responsible party executed all of the admission papers.
>
> I am required to go through all of the papers with the responsible party or patient. As to the Arbitration Agreement, I explain to the family that if there is a complaint by the patient with the facility and an attorney was involved, then the parties are agreeing that an arbitrator will act as a go between for the nursing home and the patient to settle the dispute rather than go to court.
>
> As permitted in the document, Ms. Hinyub did not express to me any need for legal counseling, nor did she rescind the Arbitration Agreement on behalf of Mr. Wyse within the

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[8]In *Mississippi 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 or written contract merely because he or she failed to read it or have someone read and explain it." 926 So. 2d 167, 177 (Miss. 2006).

> thirty days as allowed pursuant to the terms of the Admission Agreement.
>
> Ms. Hinyub did not alter or strike out any words, sentences or paragraphs, and in fact further initialed as to the arbitration clause under Section E of the Admission Agreement.
>
> The agreement clearly states that execution of the arbitration is not a precondition to the furnishing of services to the resident by the facility.
>
> At the time Ms. Hinyub signed the Admission Agreement, she did not make me aware of any circumstances that would affect her ability to read, comprehend or understand the entire Admission Agreement. Ms. Hinyub's only concern was getting her father back in the facility and going back to work.

2 R. 186-187.

The claims asserted by Ms. Hinyub relate directly to the services rendered to Don Wyse, falling within the purview of the valid and fully enforceable agreement to arbitrate. As such, the lower court erred in failing to enforce the contractual decision she made – a decision to arbitrate. Appellants urge this Court, in light of clear Mississippi jurisprudence, to reverse the lower court's order denying arbitration.

IV. Both Don Wyse's Estate, as well as Nancy Hinyub, are bound to arbitrate.

By executing the February 14, 2004 Admission Agreement, Nancy Hinyub bound herself, as well as Don Wyse's Estate, to binding arbitration. Directly above

Ms. Hinyub's signature in the Admission Agreement is the following acknowledgment:

> **THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS AGREEMENT, INCLUDING THE ARBITRATION PROVISION AND HAS RECEIVED A COPY OF THIS AGREEMENT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO AND ACCEPTS ALL OF ITS TERMS.**

(1 R. 139). (Emphasis in original). "The United States Supreme Court has held '[i]t is a presumption of law that the parties to a contract bind not only themselves but their personal representatives." *Brown,* 949 So. 2d at 738. "This Court has held that arbitration agreements, specifically are not invalidated by the death of a signatory and may be binding on successors and heirs if provided in the agreement." *Id.* (citing *Cleveland v. Mann,* 942 So. 2d 108, 118 (Miss. 2006)). In Section E of the Admission Agreement entitled "ARBITRATION - PLEASE READ CAREFULLY", initialed by Ms. Hinyub set forth in part:

> It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons who 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). Therefore, on February 14, 2004, Ms. Hinyub bound herself as well as Don Wyse's Estate, to arbitrate.[9]

CONCLUSION

The claims asserted by Nancy Hinyub, including wrongful death claims, are derivative, relate directly to the services rendered to Don Wyse and all fall within the purview of the Admission Agreements valid and fully enforceable arbitration provision. Thus, Ms. Hinyub is contractually bound to the decision she made on her Father's behalf - - a decision to arbitrate. Appellants respectfully request the Court honor that contract, reverse the lower court, and order the Parties to submit to arbitration.

This the 30th day of May, 2007.

Respectfully Submitted,

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

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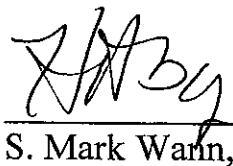
[9]Ms. Hinyub should be equitably estopped from arguing the contract is invalid. *See Heritage Cablevision v. New Albany Electric Power System*, 646 So. 2d 1305, 1310 (Miss. 1994) ("Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, or benefits from . . . a contact. . . which he might have rejected or contrasted. . . . such estoppel operates to prevent the party thus benefitted from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him, or, in other words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation.").



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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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Honorable Richard A. Smith
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Dated this the 30th day of May, 2007.

Heather M. Aby