IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI
APPEAL NO. 2006-CA-00439

LEGACY CARE, INC., LEGACY HEALTH CARE SERVICES, INC., AMERICAN LEGACY PROPERTIES, LLC F/K/A/ GREENVILLE CONVALESCENT HOME D/B/A LEGACY MANOR NURSING & REHABILITIATION CENTER, H. KEN BEEBE, JR., NANCY A. PRYOR, EVA ANN BOSCHERT, VERNA BALL COOK, BONNIE HATTEN, MOLLIE ROGERS COPELAND, THE EXECUTRIX OF THE ESTATE OF DORIS R. BARIOLA, AND GREENVILLE CONVALESCENT HOME, INC.

DEFENDANTS/APPELLANTS

V.

SUSIE GREEN, BY AND THROUGH TRESSIE GREEN, NEXT FRIEND FOR THE USE AND BENEFIT OF SUSIE GREEN

PLAINTIFF/APPELLEE

On Appeal from the Circuit Court of Washington County, Mississippi;
The Honorable Richard A. Smith, Circuit Judge, in *Susie Green, by and through Tressie Green, Next Friend, for the use and benefit of Susie Green v. Greenville Convalescent Home, Inc., et al.*, Civil Action No. CI-2004-198

REPLY BRIEF OF APPELLANTS LEGACY CARE, INC., LEGACY HEALTH CARE SERVICES, INC., AMERICAN LEGACY PROPERTIES, LLC F/K/A GREENVILLE CONVALESCENT HOME D/B/A LEGACY MANOR NURSING & REHABILITATION CENTER, AND H. KEN BEEBE, JR.

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT 1

INTRODUCTION 1

STATEMENT OF CORRECTED FACTS 1

ARGUMENT IN REPLY 3

I. There Was A Valid Arbitration Agreement by an Authorized Signatory 3

A. Signatory Had Capacity to Bind to Arbitration Under Miss. Code §41-41-211 3

1. Evidence shows resident's lack of capacity; thus, surrogate had authority under Miss. Code §41-41-211 3

2. This Court has refused to adopt Appellee's position that nursing home admission agreement is not a health care decision 7

B. Arbitration Provision Is Enforceable After Susie Green's Discharge 8

C. Arbitration Provision is Binding on Third-Party Beneficiary 10

D. Equitable Estoppel Was Not Raised as A Separate Issue in this Case 11

II. The Claims Are Subject to Arbitration 12

A. The Claims Are Arbitrable Under the 2006 Amendment to AHLA Arbitration Rules of Procedure 12

B. No Violation of Fiduciary Duty in Having Arbitration Provision in a Contract Because of the Uniform Health-Care Decisions Act, Mississippi Code §§41-41-201 to -229 16

C. Arbitration Provision Retroactivity is Addressed by GCH Defendants 20

D. No Discovery Is Necessary Before Enforcement of Arbitration 20

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases

Adams v. Greenpoint Credit, LLC, 943 So. 2d 703 (Miss. 2006) 10

Birrages v. Ill. Cent. R.R., 950 So. 2d 188 (Miss. App. 2006) 8

Compere's Nursing Home, Inc. v. Estate of Farish ex rel. Lewis, 982 So. 2d 382 (Miss. May 22, 2008) 4, 5, 6, 10

Covenant Health & Rehabilitation of Picayune v. Lumpkin, No. 2007-CA-00449-COA, 2008 WL 306008 (Miss. App. Feb. 5, 2008) 3, 7

Covenant Health & Rehabilitation of Picayune, L.P. v. Brown, 949 So. 2d 732 (Miss. 2007) 1, 3, 6, 7, 9, 18, 19, 20

Covenant Health & Rehabilitation of Picayune, L.P. v. Moulds ex rel. Braddock, No. 2007-CA-01250-COA, -- So. 2d -- , 2008 WL 3843820 (Miss. App. Aug. 19, 2008) 1, 3, 14, 18

Forest Hill Nursing Center v. McFarlan, No. 2007-CA-00327-COA, 2008 WL 852582 (Miss. App. April 1, 2008) 10

Grenada Living Ctr., LLC v. Coleman, 961 So. 2d 33 (Miss. 2007) 5, 6, 10

Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, Case No. 2006-CA-00427-SCT, 2008 WL 3101737 (Miss. Aug. 7, 2008) 7, 8, 11, 12, 14

Mississippi Care Center of Greenville, LLC v. Hinyub, 975 So. 2d 211 (Miss. Jan. 3, 2008) 7, 10

Smith Barney, Inc. v. Henry, 775 So. 2d 722 (Miss. 2001) 10

Smithson v. Integrated Health Services of Lester, Inc. d/b/a Integrated Health Services at Mayfield Manor, 1999 WL 33523121 (E.D. Ky. Aug. 13, 1999), after remand 2000 WL 33918841 (E.D. Ky. Dec. 4, 2000) 15

Sorey v. Crosby, No. 2007-CA-00950-COA, 2008 WL 3905893 (Miss. App. Aug. 26, 2008) 8

Terminix Intern., Inc. v. Rice, 904 So. 2d 1051 (Miss. 2004) 10

Trinity Mission of Clinton, LLC v. Barber, No. 2005-CA-02199-COA, 2007 WL 2421720 (Miss. App. 2007) 10

Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005) 9, 16, 17, 18

Statutes and Rules

Miss. Code §§41-41-201 to 229 (Rev. 2005) 1, 4, 16

Miss. Code §41-41-203 8

Miss. Code §§41-41-211 ..... 4, 5, 7, 8, 16, 20

Miss. R. App. P. 28 ..... 8, 9

Other Authorities

AHLA ADR Services Guide of Procedure for Arbitration http://www.healthlawyers.org/Template.cfm?Section=About_Arbitration_and_Mediation_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049 ..... 12, 13, 14

The Estate of Susie H. Green, by and through Tressie Green v. Mariner Health Care Inc., et al., Circuit Court of LeFlore County, Case No. 2004-0091-CICI 2

STATEMENT REGARDING ORAL ARGUMENT

Although the dispositive issue has been authoritatively decided by *Covenant Health & Rehabilitation of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007), Appellants believe that oral argument would benefit the Court should it have questions concerning the factual record that supports a holding under *Brown*.

INTRODUCTION

Legacy Care, *et al.*'s principal brief demonstrated that the trial court incorrectly denied the motion to compel arbitration. The trial court erred in failing to enforce an arbitration provision contained within a nursing home Admission Agreement entered into between the nursing home and the resident's daughter on behalf of the resident as authorized under the Uniform Health-Care Decisions Act, Mississippi Code §§41-41-201 to -229 (Rev. 2005).

Since the time of Appellant's initial brief, neither the Mississippi Supreme Court nor the Mississippi Court of Appeals has overruled *Covenant Health & Rehabilitation of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007). Instead they continue to apply *Brown* and hold that a plaintiff in the same position as Tressie Green, an adult child acting on behalf of an incompetent parent, had the capacity to bind his or her patient to arbitration, and that the arbitration clause did not fail for lack of consideration. *See Covenant Health & Rehabilitation of Picayune, L.P. v. Moulds ex rel. Braddock,* No. 2007-CA-01250-COA, -- So. 2d --, 2008 WL 3843820 ¶¶ 10-22 (Miss. App. Aug. 19, 2008). This Court is well within the law in reversing the trial court's order and enforcing arbitration.

STATEMENT OF CORRECTED FACTS

Appellee's Statement of the Case and Statement of the Facts contain some misleading assertions, which bear correcting here. Appellee states that "*While a resident at Greenville Convalescent,* Susie Green suffered catastrophic injuries . . . *and eventual death.*" (Appellee's

Brief at 2-3). Susie Green did not die while a resident at Greenville Convalescent; instead she left the Greenville Convalescent Home facility on November 7, 2002 (R. 88) and died nearly a year later on August 13, 2003[1].

Appellee also contends a physician's determination of Susie Green's mental capacity was lacking. Yet, the record is replete with evidence that Susie Green's physician diagnosed her in 1992 as having "advance senile dementia" and that Susie had dementia throughout her residency at the nursing home facility. (R. 243; Supp. R. 112, 118, 166-176, 185, 191-96; R.E. 87). Further, Susie Green's attending physician in 2002 determined she was unable to attend to her affairs, noting in 2002 "cognitive loss," "is unable to be assessed due to poor cognitive state," severely impaired decision making skills," and "never makes own decisions." (Supp. R. 243; R.E. 87). Appellee herself had admitted in pleadings and argument to the trial court that "Susie Green was 'not of sound mind' in 2002." (Supp. R. 216, 219, Tr. 9-10, 17; R.E. 60, 63, 115-116, 123).

No discovery is or was necessary because Appellee has acknowledged this case turns on a question of law. Appellee's Brief at 9 ("the issues presented in this case are questions of law, namely whether a valid arbitration clause exists.") The record contains the pertinent information to resolve this issue on appeal, and no further discovery is necessary.

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[1] The date of death was stated by Appellee in an April 2007 Motion to Substitute Party Plaintiff, after the appeal record was being compiled. Appellee's separate lawsuit against another nursing home, styled *The Estate of Susie H. Green, by and through Tressie Green v. Mariner Health Care Inc., et al.*, Circuit Court of LeFlore County, Case No. 2004-0091-CICI, reveals that after her discharge from Greenville Convalescent Home on November 7, 2002, Susie Green resided at another nursing home facility -- Greenwood Health & Rehabilitation Center -- until her death in August 2003.

ARGUMENT IN REPLY

I. There Was a Valid Arbitration Agreement by an Authorized Signatory

The Mississippi Supreme Court and the Court of Appeals have upheld arbitration provisions in the context of nursing home admission agreements when there is an authorized signatory. *E.g.*, *Covenant Health & Rehabilitation of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007) (reversed denial of nursing home's motion to compel arbitration; compelled arbitration); *Covenant Health & Rehabilitation of Picayune, L.P. v. Moulds ex rel. Braddock,* No. 2007-CA-01250-COA (¶12), -- So. 2d --, 2008 WL 3843820 *2 (Miss. App. Aug. 19, 2008)("health-care surrogate, acting under the provisions of the Uniform Health-Care Decisions Act, is capable of binding his or her patient to arbitration"); *Covenant Health & Rehabilitation of Picayune v. Lumpkin*, No. 2007-CA-00449-COA (¶¶3, 10), 2008 WL 306008 *1, 2 (Miss. App. Feb. 5, 2008). There was a valid arbitration provision contained within a nursing home Admission Agreement in this case, and the trial court erred in finding the resident's daughter Tressie Green was not authorized to act on behalf of the resident Susie Green, when Susie Green was not of sound mind at the time of the Admission Agreement.

A. Signatory Had Capacity to Bind to Arbitration Under Miss. Code §41-41-211

1. Evidence shows resident's lack of capacity; thus, surrogate had authority under Miss. Code §41-41-211.

Appellee focuses only on the statement that "Tressie Green did not have a power of attorney over her mother at that time [of the July 18, 2002 Admission Agreement.]" (Appellee's Brief at 5, 11). Or, that the daughter "had no authority to bind Ms. Green to an arbitration clause." (Appellee's Brief at 7). Appellee contends the nursing home resident took no action to hold the signatory out as her agent. (*Id.* at 12). Yet, the resident was incompetent long before the nursing home admission, and the signatory has acknowledged that

incompetency in the pleadings. Furthermore, contrary to Appellee's assertions that there is "no evidence" that Susie Green's physician made a determination in 2002 as to her lack of capacity (Appellee's Brief at 5, 15), the Record shows Ms. Green's physician found her to lack capacity by the statements in 2002 of "cognitive loss," "is unable to be assessed due to poor cognitive state," "severely impaired decision making skills," and "never makes own decisions." (Supp. R. 243; R.E. 87). This is one of the very circumstances in which the Uniform Health-Care Decisions Act, Mississippi Code §§41-41-201 to -229 (Rev. 2005), was intended to apply. As Section 41-41-211(1) provides, "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." Tressie Green was an adult daughter of Susie Green and thus within the statutory categories of authorized health-care surrogates. Miss. Code §41-41-211(2). Thus, any procedural "due process" requirements were met.

Susie Green was incompetent long before the July 2002 admission agreement, as acknowledged by her doctors and by Tressie Green herself in the pleadings. The uncontradicted evidence shows:

- Susie Green's physician diagnosed her in 1992 as having "advance senile dementia" and that Susie had dementia throughout her residency at the nursing home facility. (Supp. R. 112, 118, 166-168).
- "As far back as 1992, Ms. Green had to have her son sign documents for her because she was 'not mentally competent to sign." (Supp. R. 112, 163).
- Susie Green was "not of sound mind" in 2002. (Supp. R. 216, 219, Tr. 9-10, 17; R.E. 60, 63, 115-116, 123).

Contrary to Appellee's assertions, there is ample evidence in the record that Susie Green lacked capacity in 2002, and her physician so found. The present case is thus easily

distinguishable from *Compere's Nursing Home, Inc. v. Estate of Farish ex rel. Lewis*, 982 So. 2d 382 (Miss. May 22, 2008), in which the court noted "there is no evidence that Ms. Farish had 'been determined by [her] primary physician to lack capacity.'" 982 So. 2d at 384 (¶7)[2]. This case is also distinguishable from *Grenada Living Ctr., LLC v. Coleman*, 961 So. 2d 33, 37 (Miss. 2007), in which the resident was competent at the time of admission, so §41-41-211 was not applicable. 961 So. 2d at 37 (¶13) (parties stipulated that Mr. Coleman was competent, and no physician had declared him incompetent; "[b]ecause Mr. Coleman was not incapacitated, the statutes governing health care surrogates do not apply."). In the present case, however, Appellee introduced evidence into the record that Susie Green lacked capacity in 2002 and that her primary physician found her to be incompetent in 2002 at the time of the admission agreement. *See* Plaintiff's Response to Defendants' Motion to Stay Proceedings and Compel Mediation and/or Arbitration. (Supp. R. 215-220, 243; R.E. 59-64, 87). This evidence caused the trial court to so find that "Susie Green was not of sound mind at the time of the 2002 Agreement. (R. 188; R.E. 9).

For example, Appellee conceded her mother ". . . was not of sound mind at the time the 2002 Agreement was executed to make any such decision. See Patient Care Plan for the period June 2002-Sept. 2002 attached hereto as Exhibit A." (Supp. R. 60). The Patient Care Plan relied on by Appellee is found in the Record at Supp. R. 243; R.E. 87, and notes that in June 2002 Susie Green was assessed with "Cognitive loss; Short term & long term memory is unable to be assessed due to poor cognitive state; Severely impaired decision making skills, rarely/never makes own decisions; Rarely/never verbalizes, never understood, never

[2] The controlling point for the *Farish* decision was that the *nephew* did not fall under the statute's enumerated categories for health-care surrogate because there was evidence in the record that the resident had an adult child who would have priority to serve as her surrogate. 982 So. 2d at 384 (¶7). In this case, Tressie Green as the adult daughter of Susie Green is clearly within the statutorily enumerated categories to be a health-care surrogate. *See* Miss. Code §41-41-211(2).

understands." (R. 243; R.E. 87.) The entry for June 18, 2002 notes no changes and that her status is "ongoing." *Id.* Again, on September 11, 2002, the Patient Care Plan indicated "no changes noted." *Id.*[3]

This is similar to other record evidence demonstrating the decline and inability of Susie Green to make her own decisions since 1992. The Physician's Orders and Progress Notes dated 1992 -- introduced into the Record by Appellee -- notes Susie Green's physician diagnosed her in March 1992 with "advanced senile dementia" (Supp. R. 166, 171); her exam the following year in 1993 by her physician continued to note her "senile dementia" and cognitive loss (Supp. R. 168-169). The senile dementia diagnosis -- signed by her attending physician(s) and introduced into the Record by Appellee -- continued in 1995 (Supp. R. 172-73), 1996 (Supp. R. 175-76), and 1997 (Supp. R. 185). Appellee also offered medical records called "Trigger worksheets" signed by Susie Green's healthcare provider documenting her cognitive loss/dementia and that her cognitive skills and ability to understand others was significantly impaired and she "cannot make decisions." (Supp. R. 191-96).

The case of *Covenant Health Rehab of Picayune, L.P. v. Brown* is thus controlling in this circumstance, rather then *Farish* or *Coleman*. In *Brown* an adult daughter of the nursing home resident signed the admissions agreement as "responsible party" for her mother upon admission to the nursing home facility. 949 So. 2d at 735-36. The court held that the adult daughter of the patient, as a surrogate, had the authority to contractually bind her mother in health care matters under §41-41-211, because the patient in *Brown* was found to be incapacitated within the meaning of §41-41-211(1). 949 So. 2d at 737. The court reasoned that

[3] In light of this continuing assessment of Susie Green's lack of ability to understand and poor cognitive state, Appellee's suggestion in her Brief at 15 -- that an affirmance should be granted if the record doesn't indicate the health care decision was communicated to Susie Green -- is meritless.

"[b]y virtue of admission by her representatives and corroboration by her admitting physician, she was capable legally of having her decisions made by a surrogate." *Id.*

Where it is undisputed that the patient was incompetent or mentally incapacitated, the patient/resident's healthcare decisions can be made by a surrogate under Miss. Code §41-41-211. *Brown*, 949 So. 2d at 737; *see also Covenant Health & Rehabilitation of Picayune v. Lumpkin*, No. 2007-CA-000449-COA (¶¶3, 10), 2008 WL 306008 *1, 2 (Miss. Ct. App. Feb. 5, 2008) (daughter was acting as healthcare surrogate where it was undisputed mother could not fully participate in nursing home admission process due to Parkinson's disease, psychosis and dementia). Under the holding of *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 736-37 (Miss. 2007), the signatory Tressie Green possessed the capacity to bind Susie Green to arbitration of her claims against Legacy Care, *et al.* for alleged negligent care in the nursing home.

2. <u>This Court has refused to adopt Appellee's position that nursing home admission agreement is not a health care decision.</u>

Further, the majority of the Mississippi Supreme Court, when given the opportunity in *Brown*, *Hinyub*[4] and, most recently, *Barnes ex rel. Grigsby*, refused to adopt the Appellee's position that a nursing home admission agreement containing an arbitration provision is not a health care decision to take it outside the application of Miss. Code §41-41-211. As the dissent recently noted in *Barnes ex rel. Grigsby*,

> **Even in light of the fact that the language of the statute specifically delineates what shall be considered "health-care decisions" this Court has found in that a health-care surrogate can bind a patient to arbitration.** When addressing whether a surrogate has the authority to bind an incompetent person to an arbitration agreement, this Court summarily stated, "[h]er adult daughter, Goss, was an appropriate member of the

[4] *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (¶16) (Miss. Jan. 3, 2008)(Dicta).

> classes from which a surrogate could be drawn, and thus, Goss could contractually bind Brown in matters of health care." *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 737 (Miss.2007).

Barnes ex rel. Grigsby, at *5 ¶20 (Graves, J., dissenting) (emphasis added). Appellee has not offered any differing reasons to alter the prior case law, and Appellants respectfully urge this Court to apply the same ruling of *Brown*.

Moreover, Miss. Code §41-41-201, *et seq.* allows a surrogate to make any health care decisions, and not merely "necessary" medical decisions. Under Miss. Code §41-41-203(h) (i) a "health care decision" includes the "selection and discharge of health-care providers and institutions," which would incorporate admission agreements into such health-care institution selections. The legislature delineated in the statute what they determined was not a health care decision, *i.e.*, anatomical gifts or organ donations. The ability to enter into an arbitration agreement was not listed. The legislature did not enact a restriction as to arbitration agreements in the selection of health-care providers and institutions, and this Court should not write such a restriction into the law.

The trial court erred in not finding that Tressie Green was a surrogate under §41-41-211 who could bind Susie Green to the admission agreement and the arbitration provision.

B. Arbitration Provision Is Enforceable After Susie Green's Discharge

Appellee does not cite any authority to support her argument that the arbitration provision terminated upon Susie Green's discharge. Rule 28(a)(6) of the Mississippi Rules of Appellate Procedure provides that an argument advanced on appeal "shall contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, *with citations to the authorities*, statutes, and parts of the record relied on." Miss. R. App. P. 28(a)(6) (emphasis added). This Court has held that the "[f]ailure to comply with

M.R.A.P. 28(a)(6) renders an argument procedurally barred." *Sorey v. Crosby*, No. 2007-CA-00950-COA, 2008 WL 3905893 (¶9) (Miss. App. Aug. 26, 2008); *Birrages v. Ill. Cent. R.R.*, 950 So. 2d 188, 194 (¶ 14) (Miss. App. 2006). Mississippi Rule of Appellate Procedure 28(b) renders Rule 28(a)(6) equally applicable to an appellee. *E.g.*, Miss. Rule App. P. 28(b)("The brief of the Appellee shall conform to the requirements of Rule 28(a)"). Appellee's failure to provide authority for her argument renders it procedurally barred.

Furthermore, even if this argument was supported by some authority, this Court is still compelled to find it lacking in merit. This Court has previously acknowledged in *Brown* and *Vicksburg Partners, L.P. v. Stephens,* 911 So. 2d 507 (Miss. 2005), that an arbitration provision in a nursing home admission agreement was enforceable for claims brought after the patient was no longer a resident in the nursing home. *See Brown,* 949 So. 2d at ¶¶4, 10, 24, 28-29 (negligence claim against nursing home brought after resident discharged and subsequently died was subject to arbitration provision in admission agreement); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d at 511, 525-26 (negligence claim against nursing home brought after resident died was subject to arbitration clause, and court compelled parties to submit to arbitration).

In the event that mediation as required by Paragraph F(6) fails, the Admission Agreement contains an arbitration clause in Paragraph "E," styled "ARBITRATION," which provides:

> **Any controversy, dispute or disagreement arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration**, which shall be conducted in (City, State) in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the arbitration, shall be binding not only on all parties to the Agreement, but on any other entity controlled by, in control of or under common control with the party to the extent that such affiliate joins in the

> arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Admission Agreement at ¶ E. (Supp. R. 80; R.E. 23) (emphasis added). The provision did not terminate upon the resident's discharge nor did it limit invocation to only the time during which Susie Green was a resident. Neither Susie Green nor Tressie Green brought the complaint during the time Susie was a resident, but rather waited over two years after her discharge before bringing claims arising out of or relating to her admission in the nursing home facility. The arbitration provision is thus applicable and enforceable after Susie Green's discharge.

C. Arbitration Provision is Binding on Third-Party Beneficiary

Appellants Legacy Care, *et al.* have argued in the alternative that Susie Green was a third-party beneficiary under the admissions agreement, and, thus, she was bound by the arbitration provision contained in the agreement, notwithstanding her status as a non-signatory to it. *Forest Hill Nursing Center v. McFarlan,* No. 2007-CA-00327-COA (¶¶18-25), 2008 WL 852582 *4-6 (Miss. App. April 1, 2008); *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA (¶¶ 20-27), 2007 WL 2421720 (Miss. App. 2007). This is in accord with Mississippi Supreme Court precedent[5], which has recognized that "arbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary." *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006) (*citing Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 727 (Miss. 2001)). In *McFarlan* the Court of Appeals found that

[5] The *Grenada Living Ctr., LLC v. Coleman* case confirmed that the third party beneficiary cases of *Smith Barney* and *Terminix Intern., Inc. v. Rice,* 904 So. 2d 1051, 1058 (Miss. 2004), "remain binding precedent, and this case does not stand for the proposition that non-signatories to a contract containing an arbitration clause can never be bound by arbitration." 961 So. 2d at 38 (¶17). In *Coleman*, the court simply found that since the resident Coleman was not incompetent and the signatory was not an authorized health-care surrogate, "there was no contract between Coleman and the nursing home in the first place, [and] no arbitration clause exists to be enforced." *Id.* Although Appellee misleadingly cites to *Hinyub* and *Farish* (Appellee's Brief at 19-20), these decisions did not discuss or rule on a third-party beneficiary status; thus, they are not "controlling" on this issue.

applying the third-party beneficiary factors of *Adams*, the resident McFarlan was an intended third-party beneficiary of the admissions agreement and thus bound by the arbitration provision.

The benefits of residing at Greenville Convalescent Home flowed directly to Susie Green as a result of the agreement. By the terms of the contract, Greenville Convalescent Home (now known as Legacy Manor) provided services directly to her including, among other things, "room, board, linens and bedding, nursing care, and certain personal services." (R. 78; R.E. 21). Susie Green's care was the essential purpose of the agreement. The claims asserted by Plaintiff do arise under the admissions agreement.

Susie Green was the intended third-party beneficiary under the Admissions Agreement with Legacy Care, *et al.*; thus, she was bound by the arbitration provision contained in the agreement.

D. Equitable Estoppel Was Not Raised as A Separate Issue in this Case

Although Appellee spent three pages of her brief on equitable estoppel, neither of the Appellants raised it as an independent issue in this appeal. Appellants Legacy Care, *et al.* simply urged that, in the alternative, Tressie Green had apparent authority as Susie Green's agent by representing to the nursing home that she was the Responsible Party for Susie and acted as her agent, as well as her health care surrogate, to make Susie's healthcare decisions. (Supp. R. 84). Legacy Care, *et al.* reasonably relied on Tressie Green's representations to the nursing home that she was the "Responsible Party" for Susie Green and detrimentally relied on that representation by obtaining the signature of only Tressie Green on the admissions agreement. Equitable estoppel is not dispositive of the issues before this Court; and that topic is unnecessary for a decision in this case.

II. The Claims Are Subject to Arbitration

A. The Claims Are Arbitrable Under the 2006 Amendment to AHLA Arbitration Rules of Procedure

Appellee contends the arbitral forum will not accept the dispute (Appellee's Brief at 23-24), **but Appellee relies on an out-of-date rule**. Appellants Legacy Care, *et al.* are aware of the Court's recent pronouncement in *Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, Case No. 2006-CA-00427-SCT, 2008 WL 3101737 at ¶¶7-10 (Miss. Aug. 7, 2008)(rehearing en banc)[6], in which the court withdrew its prior opinion and issued a new opinion based on a 2003 version of the American Health Lawyers Association Alternative Dispute Resolution Service Rule of Procedure (AHLA ADRS RP). 2008 WL 3101737 at ¶8. Appellants Legacy Care, *et al.* respectfully submit that the Rules of Procedures for Arbitration by the AHLA have changed from that cited by Appellee in her Response Brief and quoted by the Court's August 7, 2008 opinion in *Barnes ex rel. Grigsby*. **The current version of the AHLA ADRS RP, which was amended effective June 2006 for consumer health care liability claims filed with the Service after January 1, 2004, states as follows:**

1.01 Applicability of Rules

> The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" on or after January 1, 2004 only if (1) all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators **or (2) a judge orders that the Service administer an arbitration under the terms of a pre-injury arbitration agreement**. In limiting the circumstances under which the Service will

[6] A further motion for rehearing has recently been filed in that case and is still pending. Appellants respectfully refer to the "Appellant's Motion for Rehearing" filed on September 4, 2008 in 2006-CA-00427-SCT for an additional explanation of the current version of the AHLA Rules of Procedure.

> administer the arbitration of a consumer health care liability claim, the Service does not intend to affect the enforceability of an agreement to apply the Rules . . . .

See Appendix A, American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration (as revised through July 2008)(emphasis added).

When the amendment was discussed on the AHLA website[7], the AHLA made clear that

> Effective June 2006, the Service will administer a "consumer health care liability claim" on or after January 1, 2004 only if (1) all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators **or (2) a judge orders that the Service administer an arbitration under the terms of a pre-injury agreement.**

See Appendix B for Announcement of Important Rules Amendments from American Health Lawyers Association. The footnotes provide even further clarification:

> If the parties elect to proceed with arbitration (either *ad hoc* or pursuant to a third party determination that the parties' pre-injury arbitration agreement is valid and enforceable) the parties may mutually submit the Service's Request for a Dispute Resolver List. This mutual Request, by its express terms (see paragraph 13 of the Request List), submits the process to the Service pursuant to its Rules of Procedure and with agreement by the parties that the dispute is subject to resolution under the Rules. **Therefore, for purposes of the Service's rule modification, the mutual Request serves as the post-injury agreement in writing to arbitrate the claim.**

Footnote 1 contained within AHLA rule change (emphasis added); Appendix B at p. 2.

Further,

> **If a judge gives a written order that the AHLA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHLA ADR**

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[7] The Announcement of Important Rules Amendments of the AHLA is found at http://www.ahla.org/Template.cfm?Section=About_Arbitration_and_Mediation_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049, and at http://www.healthlawyers.org/Template.cfm?Section=About_Arbitration_and_Mediation_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049. A copy is attached as Appendix B.

> **Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter.**

Footnote 2 contained within AHLA rule change (emphasis added); see Appendix B at p. 2.

The Court of Appeals has subsequently noted this rule change in *Covenant Health & Rehabilitation of Picayune, L.P. v. Moulds ex rel. Braddock*, by stating:

> a related professional organization, the American Health Lawyers Association, made a similar policy statement [to the AAA], **which they later amended by saying that they would agree to participate in arbitrations where no post-dispute agreement had been made so long as a court of competent jurisdiction had ordered the parties to arbitrate.**

Moulds ex rel. Braddock, No. 2007-CA-01250-COA, -- So. 2d --, 2008 WL 3843820 ¶¶27-28 (Miss. App. Aug. 19, 2008). Therefore, a "post-injury" agreement is not necessary for this matter to be arbitrable. As the AHLA stated in regard to this amended rule, "If a judge gives a written order that the AHLA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHLA ADR Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter." *See* Appendix B. Appellants respectfully suggest the Court misapprehended the application of the current AHLA rules, and accordingly should not apply the decision of *Barnes ex rel. Grigsby.*

Further grounds for not applying the August 7, 2008 opinion of *Barnes ex rel. Grigsby* to this matter are that the facts of this case are different with regard to <u>when</u> the alleged injury occurred. The claimed injuries by Appellee Green largely occurred <u>before</u> the date of the arbitration provision, and thus the July 2002 arbitration agreement is "post-injury." The Amended Complaint simply states that while Susie Green was a resident -- which the complaint

identified as from January 1992 until November 7, 2002[8] -- she suffered injuries. The Admission Agreement was signed on July 18, 2002, thus it is post-injury and the arbitration provision is applicable and enforceable.

Further, the arbitration provision refers to the AHLA ADR Service Rules of Procedure for Arbitration as a reference of procedural rules to follow, but does not state the arbitration would be administered by the AHLA ADR Service or any of its arbitrators. (Supp. 80; R.E. 23). The arbitrator administrator is not named or designated in the agreement. Legacy Care, *et al.*'s position is further supported by the ruling of *Smithson v. Integrated Health Services of Lester, Inc. d/b/a Integrated Health Services at Mayfield Manor*, 1999 WL 33523121 (E.D. Ky. Aug. 13, 1999), after remand 2000 WL 33918841 (E.D. Ky. Dec. 4, 2000):

> [T]he essence of the arbitration provision was that the claims would be arbitrated, not that they would be arbitrated *by a specific entity.*
>
> Where there is no evidence that the plaintiff intended her choice of an arbitrator to be an essential term of the contract and there is only the inference that the parties agreed in general to submit their claims to arbitration, the arbitration provision does not fail. *See Ex parte Warren*, 718 So. 2d 45, 48-49 (Ala. 1998); *see also McGuire, Cornwell & Blakey v. Grider*, 771 F.Supp. 319 (D. Colo. 1991) (holding that the designated arbitrator's unwillingness to arbitrate the parties' dispute did not affect the enforceability of the arbitration agreement, absent a showing that the naming of the arbitrator was central to the parties' agreement to arbitrate) . . . .

1999 WL 33523121, at *6. The court ultimately upheld the enforceability of arbitration even though it permitted a substituted arbitrator. 2000 WL 33918841 at *1. Therefore, even if there is a perceived unwillingness of the AHLA to administer a "consumer health care liability

[8] This would include the dates that the facility was owned and operated by the GCH Defendants as well as the time after March 2002 when Legacy Care, et al. assumed ownership.

claim" arbitration -- which there is not following the 2006 amendment -- such does not affect the enforceability of the arbitration provision.

This Court should find, under the prior existing case law and statutory law, that Tressie Green was a surrogate under §41-41-211 who could bind Susie Green to the admission agreement and the arbitration provision. Such a finding will not contravene the AHLA Rules, and such an order of arbitration can and will be administered by the AHLA through its arbitration services or through another arbitrator under the amended rules which are applicable to this case.

B. No Violation of Fiduciary Duty in Having Arbitration Provision in a Contract Because of the Uniform Health-Care Decisions Act, Mississippi Code §§41-41-201 to -229

Appellee attempts to superimpose a "fiduciary duty" on a nursing home regarding its admission contracts, but fails to acknowledge that the Mississippi legislature has already enacted the Uniform Health-Care Decisions Act, Mississippi Code §§41-41-201 to -229 (Rev. 2005), which operates to protect residents who are impaired. There is, thus, no need for this Court to judicially enact a "fiduciary" role regarding admissions agreements because the Mississippi legislature has already spoken on this issue. Either the resident or an authorized surrogate, if the resident has been determined to lack capacity, makes the decision to enter and/or remain in a nursing home facility. Susie Green had a family member -- an adult daughter who stated[9] she is college educated and has a masters degree in elementary education -- who could well read and comprehend the admission agreement. The adult daughter was authorized under Miss. Code §41-41-211 to be Susie's surrogate for health care decisions; thus

[9] Legacy Care points out, however, that the "Affidavit of Tressie Green" purportedly filed on July 7, 2005, was not signed or verified until after the filing date. (Supp. R. 99-101). The authenticity of the Affidavit is thus questionable.

no "fiduciary relationship" arose with the nursing home facility regarding the admission contract.

As held in *Vicksburg Partners*, the arbitration provision "merely provides for a mutually agreed-upon forum for the parties to litigate their claims and is benign in its effect on the parties' ability to pursue potential actions." 911 So. 2d at 522. Appellee misleads the Court as to the fiduciary duty it contends is at issue by including in her Brief arguments as to the underlying care to be afforded a nursing home resident (Appellee Brief at 29-33). The issue before the Court is one of contract. As the Court has stated clearly in *Vicksburg Partners*,

> Today's case is clearly in line with our important holdings in *East Ford, Performance Toyota*, and *Burdette*. We have hopefully today driven home a point for the benefit of the bench and the bar, as well as those individuals or entities who find themselves involved with contracts containing arbitration clauses. **Arbitration is about choice of forum - period.**

911 So. 2d at 525. As in *Vicksburg Partners*, "The dispositive issue in today's case is whether the *arbitration provision* rendered the subject *admissions agreement* unenforceable." 911 So. 2d at 517.

Furthermore, under Mississippi law the arbitration provision does not fail because Susie Green was a resident before the provision was signed in 2002 or for lack of any "consideration." In *Vicksburg Partners, L.P. v. Stephens* there were two separately executed admissions agreements, and the court focused on the second admission agreement containing a more detailed arbitration provision. 911 So. 2d at 520. The fact that the resident signed an amended (second) admission agreement containing a more detailed arbitration provision after he had already been admitted to the facility did not render the arbitration provision unconscionable or unenforceable. *Id.* The Mississippi Court of Appeals has specifically spoken on the issue of consideration, finding that an arbitration clause in a nursing home

admission agreement does not fail for lack of consideration. In *Covenant Health & Rehabilitation of Picayune, L.P. v. Moulds ex rel. Braddock,* the court held:

> Simply because one party to a contract later admits that the other party could have successfully bargained for more beneficial terms at the time the contract was formed does not mean that the element of the contract not bargained for is void for lack of consideration. In any contract, "[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissory or a detriment to the promissee. If either of these requirements exist, there is sufficient consideration." *Theobold v. Nosser*, 752 So. 2d 1036, 1040 (¶15) Miss. 1999)
>
> * * * * *
>
> Here, there is clearly sufficient consideration to support the arbitration agreement. Both parties undertook duties toward one another under the admissions agreement. Covenant Health promised to provide care and assistance to Moulds. Braddock, on behalf of his mother, promised to pay Covenant Health for its service. The arbitration clause was one portion of that exchange, and it obligated both parties to arbitrate any dispute between them. The mutuality of exchange found throughout the admissions agreement provides ample evidence that there was sufficient consideration to support the arbitration clause; therefore, we find that the arbitration clause does not fail for lack of consideration.

Moulds, No. 2007-CA-01250-COA at ¶¶14, 17.

As noted in Appellants' initial brief, it is beyond dispute that the benefits of receiving the nursing home's health care services outlined in the admissions agreement flowed to Susie Green as a result of the Admission Agreement, and Tressie Green promised to pay basic room charges and be responsible for payment of all other services/charges in relation to the Resident's care. (Supp. R. 76-77, 79; R.E. 19-20, 22). Both parties undertook duties toward one another under the admissions agreement, and under *Moulds* "there is clearly sufficient consideration to support the arbitration agreement." Also, in both *Brown* and *Vicksburg Partners v. Stephens* this Court found that execution of the arbitration provision as part of the

admissions agreement was part of the "health-care decision," and the arbitration provision was an essential part of the consideration for the receipt of "health care."

The admission agreement was not "merely a formality" but instead involved a new party who was now the owner of the facility. In 2002 the ownership of the nursing home facility did change and all residents were required to sign new agreements with the new owners regarding the care to be received. Susie Green's family had other options for her care, as evidenced by the fact that after signing the admission agreement on July 18, 2002, Susie Green moved from the facility on November 7, 2002, and she lived elsewhere for nearly a year until her death on August 13, 2003.

Moreover, the contract was not one of adhesion. In this case Appellee Tressie Green signed the Admission Agreement without being under any timing pressures, and did so voluntarily. (Supp. R. 85 at ¶¶7, 8; R.E. 28). Appellee did not alter or strike out any words, sentences or paragraphs of the Admission Agreement after she read it, and Ms. Tice did not cover up or hide any portions of the Admission Agreement when it was presented to Ms. Green. (Supp. R. 85 at ¶¶9, 10; R.E. 28). In short, there were no circumstances that affected her ability to read, comprehend and understand the entire Admission Agreement. (Supp. R. 85 at ¶¶11, 12; R.E. 28). The arbitration clause was clearly denoted as such and headed "Arbitration." There is no inconspicuous print in the Admission Agreement; instead, all paragraphs are in the same size typeface with the headings in large capital letters, *i.e.*, "E. ARBITRATION." (Supp. R. 80.) In fact, the signatory Tressie Green was reminded again of the arbitration provision in the final unnumbered paragraph directly above her signature. (Supp. R. 81). Because of the foregoing reasons, the Appellants did not take advantage off the Appellee, and the Admission Agreement was not inequitable or procedurally unconscionable.

This Court did not find any "fiduciary relationship" in *Brown,* which involved the same circumstances as in present case, and the Court upheld the enforceability of the arbitration provision as signed by the resident's surrogate. It should uphold arbitration here.

C. Arbitration Provision Retroactivity is Addressed by GCH Defendants

The issue of retroactivity was raised by the GCH Defendants/Appellants, and Appellee's Brief at 25-29 is focused solely on the GCH Defendants and not directed to Legacy Care, *et al.* Appellants Legacy Care, *et al.* respectfully refer the Court to the Reply Brief of Appellant Greenville Convalescent Home, Inc. for further argument on this point.

D. No Discovery Is Necessary Before Enforcement of Arbitration

Appellee conceded at the beginning of her brief that "the issues presented in this case are questions of law." Appellee Brief at 9. No discovery is or was necessary because Appellee has acknowledged this case turns on a question of law, and the record already contains the pertinent information to resolve the issue on appeal that a valid arbitration provision exists. Appellee does not state how any other discovery information would alter this result.

CONCLUSION

Under *Covenant Health Rehab of Picayune, L.P. v. Brown,* Tressie Green had authority under Miss. Code §41-41-211 to sign on behalf of, and bind, Susie Green to the Admissions Agreement which included the arbitration provision. A valid contract exists and the dispute between the parties falls within the scope of the arbitration agreement. The trial court's failure to grant arbitration was reversible error, and requires a reversal and remand with directions to compel the parties to submit to arbitration.

Respectfully Submitted,

LEGACY CARE, INC., LEGACY HEALTH CARE SERVICES, INC., AMERICAN LEGACY PROPERTIES, LLC f/k/a GREENVILLE CONVALESCENT HOME d/b/a LEGACY MANOR NURSING & REHABILITATION CENTER, AND H. KEN BEEBE, JR.

By: _____

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CERTIFICATE OF SERVICE

I, Camille Henick Evans, do hereby certify that a true and correct copy of the above and foregoing Reply Brief of Appellants Legacy Care, Inc., Legacy Health Care Services, Inc., American Legacy Properties, LLC F/K/A Greenville Convalescent Home D/B/A Legacy Manor Nursing & Rehabilitation Center, and H. Ken Beebe, Jr. by depositing such copies with the United States Postal Service, first-class postage prepaid, addressed as follows:

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and

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DATED this, the 17th day of September, 2008.

CAMILLE HENICK EVANS

Appendix A

American Health Lawyers Association
Alternative Dispute Resolution Service

Rules of Procedure for Arbitration

American Health Lawyers Association
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E-mails: rbrinley@healthlawyers.org
adr@healthlawyers.org
Website: www.healthlawyers.org/adr

While the American Health Lawyers Association Alternative Dispute Resolution Service prints its Rules for the ease of resolvers and potential parties, the most up-to-date and binding version of the Rules should be downloaded from the American Health Lawyers Association's ADR Website at: www.healthlawyers.org/adr

The Rules of Procedure for Arbitration, Mediation, or Mediation/Arbitration that will be binding on the parties and the resolver will be the version of the Rules available from the ADR Website on the effective date of the ADR Request for Arbitration/Mediation Dispute Resolver List form.

Table of Contents

Introduction **A-5**

Rules of Procedure for Arbitration **A-6**

1.0 GENERAL RULES **A-6**
1.01 Applicability of Rules A-6
1.02 Existence of Agreement to Arbitrate A-7
1.03 Meaning of Arbitrator A-7
1.04 Number of Arbitrators A-7
1.05 Interpretation of Rules A-7

2.0 RULES ON SELECTION OF ARBITRATOR **A-7**
2.01 Procedures for Requesting Arbitrator Lists A-7
2.02 Appointment of Neutral Arbitrator A-8
2.03 Notice to the Arbitrator of Appointment A-9
2.04 Direct Appointment by a Party A-9
2.05 Disclosure and Withdrawal A-10

3.0 RULES ON TYPES OF PROCEDURES **A-10**

4.0 RULES ON REGULAR PROCEDURES **A-10**
4.01 Preliminary Hearing A-10
4.02 Discovery A-10
4.03 Fixing of Locale of Hearing A-11
4.04 Fixing the Date, Time and Place of Hearing A-11
4.05 Representation A-11
4.06 Record of Proceedings A-11
4.07 Attendance at Hearings A-12
4.08 Oaths A-12
4.09 Appointment of Panel of Arbitrators A-12
4.10 Order of Proceedings A-12
4.11 Failure to Appear A-13
4.12 Evidence A-13
4.13 Inspection or Investigation A-13
4.14 Interim Measures A-13
4.15 Closing of Hearing or Proceeding A-13

5.0 RULES ON EXPEDITED PROCEDURES A-14
5.01 Expedited Procedures A-14
5.02 Date, Time and Place of Hearing A-14
5.03 Hearing A-14

6.0 RULES ON AWARD AND ENFORCEMENT A-14
6.01 Communications A-14
6.02 Service A-15
6.03 Counting of Days A-15
6.04 Time of Award A-15
6.05 Publication and Form of Award A-15
6.06 Scope of Award A-15
6.07 Award Upon Settlement A-16
6.08 Reconsideration of Award A-16
6.09 Release of Documents for Judicial Proceedings A-16
6.10 Applications to Court and Exclusion of Liability A-16

7.0 RULES ON ADMINISTRATION A-17
7.01 Expenses A-17
7.02 Arbitrator's Fee A-17
7.03 Deposits A-17
7.04 Evaluation A-17
7.05 Replacement of Arbitrator A-17
7.06 Amendments and Interpretations A-18
7.07 Service Not Operating A-18

10. disputes among medical staff departments.

The efficiency of the Rules, like that of any arbitration rules, depends on applicable law.

These Rules emphasize flexibility. Subject to certain limited exceptions, parties may agree upon other rules or procedures, seeking only to draw upon the panel of arbitrators maintained by the Service. Alternatively, the parties may be seeking a set of rules to govern the alternative dispute resolution process, for which the Service has several options.

The Service assesses nonrefundable administration fees, the schedule for which is contained in Appendix I. The administration fees cover the administrative services provided by the Service, but do not include arbitrator compensation or expenses, court reporting services, or any other expenses or charges incurred by the parties in advance of or in connection with the hearing, or in enforcing any award.

By invoking these Rules of arbitration by the Service, all parties acknowledge that the Service does not verify the information submitted to the Service by prospective arbitrators nor does the Service certify or in any way attest to the abilities or competence of such persons.

All parties using these Rules or the Service indemnifies, holds harmless and releases the American Health Lawyers and the Service, their directors and members of their governing boards, and their officers, employees, agents, attorneys, consultants and representatives from any and all liability to the party or to a person or entity claiming through the party by reason of or in any way related to the Service, the arbitrator, the Rules, including the applicable Code of Ethics, or any action taken or not taken with respect thereto.

Rules of Procedure for Arbitration

1.0 GENERAL RULES

1.01 Applicability of Rules

The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a 'consumer health care liability claim' on or after January 1, 2004 only if (1) all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators or (2) a judge orders that the Service administer an arbitration under the terms of a pre-injury arbitration agreement. In limiting the circumstances under which the Service will administer the arbitration of a consumer health care liability claim, the Service does not intend to affect the enforceability of an agreement to apply the Rules—only that the Service will not administer the arbitration. For purposes of the Rules, a 'consumer health care liability claim' means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

Subject to the limits set forth herein, the parties may vary the procedures set forth in these Rules by written agreement. If there is a dispute between the parties regarding (a) the existence of an agreement creating an exception to these Rules or the meaning of the exception, or (b) the interpretation of these Rules, the arbitrator has the power to make the decision or the interpretation, and that decision or interpretation shall be final and binding. A party claiming an

exception to these Rules has the burden of proving the existence of the exception by a preponderance of the evidence.

Except as specifically provided by these Rules, the parties may not vary (a) the right of a party to be represented by counsel or other authorized representative of that party's choice; (b) the rules on communications, service, counting of days, publication and form of the award, release of documents for judicial proceedings and application to court and exclusions of liability; and (c) the rules on administration.

When parties agree to arbitrate under these Rules, they thereby accept the terms of these Rules and authorize the Service to assist in the process of selecting an arbitrator, to provide copies of these Rules to the parties and to perform such other functions as are specified herein.

1.02 Existence of Agreement to Arbitrate

Sample contractual provisions that are examples of language that may be used by the parties to provide for arbitration under these Rules are contained in Appendix II. Notwithstanding such provisions, however, any written agreement to arbitrate under or otherwise invoke an application of the Rules or submitting a claim for arbitration by the Service shall be binding on the parties to such agreement.

The provision by the Service of any services to the parties does not necessarily constitute a determination by the Service that an agreement to arbitrate exists.

1.03 Meaning of Arbitrator

The term "arbitrator" in these Rules refers to the arbitration panel, whether composed of one or more arbitrators and whether the arbitrators are neutral or directly appointed. The term "directly appointed arbitrator" means an arbitrator required to be selected by a party or the parties pursuant to the provisions of an arbitration agreement. The term "neutral arbitrator" means any arbitrator other than a "directly appointed arbitrator."

1.04 Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator.

1.05 Interpretation of Rules

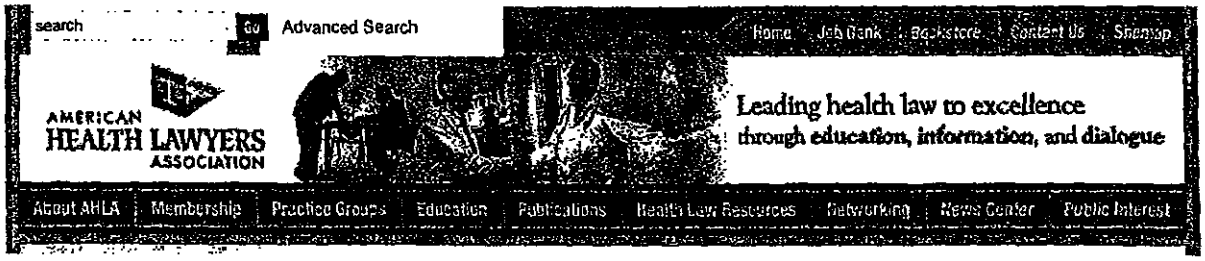
Except as provided in Section 1.01, the parties may vary or interpret these Rules as they see fit by written agreement between or among all of them. The provisions of these Rules and any exceptions thereto are subject to applicable law. Where there is a difference in interpretation among the parties, the arbitrator shall interpret and apply the Rules. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of the Rules, it shall be decided by a majority vote. If a majority vote is unobtainable, the arbitrator may refer the question to the Service for final decision in accordance with the procedures then used by the Service for deciding such questions.

2.0 RULES ON SELECTION OF ARBITRATOR

2.01 Procedures for Requesting Arbitrator Lists

If the parties have not provided in writing for any other method of selecting an arbitrator, the

Appendix B



Alternative Dispute Resolution

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- Code of Ethics & Rules of Procedure
- Request a Dispute Resolver List
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Important Rules Amendments

Effective July 2008, Appendix I – Schedule of Nonrefundable Administration Fees contained in the Rules of Procedures for Arbitration and Mediation, has been amended for requesting a list of Hearing Officers. The fee for a Hearing Officer list has been reduced from $2,500 to $1,500.

Code of Ethics, Section 3.02 Required Disclosures

The amended Code of Ethics for Arbitrators, Section 3.02 Required Disclosures, second paragraph, reads as follows:

> After appropriate disclosure of a direct and contemporaneous interest other than a directly adverse interest, the arbitrator may serve if all parties consent.

The amended Code of Ethics for Mediators, Section 3.02 Required Disclosures, second paragraph, reads as follows:

> After appropriate disclosure of a direct and contemporaneous interest other than a directly adverse interest, the mediator may serve if all parties consent.

The Rules of Procedures for Arbitration and Mediation have been amended, effective October 1, 2007, as shown below:

ADMINISTRATIVE FEE
Effective October 1, 2007, the Administrative Fee for the first panel of ten dispute resolvers is $2,500 (see Appendix I of the Rules of Procedure for Arbitration and Mediation). The administrative fee helps to defray some of the considerable expenses during the process of appointing an arbitrator or mediator.

OTHER RULES AMENDMENTS, EFFECTIVE OCTOBER 1, 2007:

1. Counting of Days.
The Rules of Procedure for Arbitration, Section 6.03 Counting of Days and Rules of Procedure for Mediation, Section 4.03 Counting of Days, have been amended in connection with the ten-day period for the appointment of an arbitrator or mediator. The revised Rules' Sections 6.03 and 4.03, respectively, read as follows:

> **Counting of Days**
> In instances in which the counting of days is required by these Rules, the day of the event shall count, but the day upon which a notice, process or other communication would otherwise be required sent shall not count. If the date on which some action is to be taken, a notice, process, or other communication would otherwise be required to be sent or a period would otherwise expire, falls on a holiday, a Saturday or a Sunday, such action shall be taken, such notice, process, or other communication sent or such period extended to the next succeeding Monday, Tuesday, Wednesday, Thursday or Friday, which is not a holiday. For purposes of the Rules, the term "holiday" means such days as are recognized as holidays by the United States Postal Service.
>
> "Days" for purposes of these Rules mean "business days." Thus, Saturdays and Sundays are not counted as a "day" under these Rules. When Saturdays and Sundays are to be counted, the Rules will indicate "calendar days."

2. Minor changes also have been made in the following Sections:

> Section 2.01(b) Procedures for Requesting Arbitrator Lists
> Section 4.09 Appointment of Panel of Arbitrators
> Section 5.01(a) Expedited Procedures

The Rules of Procedures for Arbitration was amended, effective June 2006, as shown below:

The American Health Lawyers Association's Alternative Dispute Resolution Service [the Service] has amended its rules for consumer health care liability claims filed with the Service after January 1, 2004.

Effective June 2006, the Service will administer a "consumer health care liability claim" on or after January 1, 2004 only if ([1]) all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the

agreement is received by the Service at the time the parties make a request for a list of arbitrators or ([2]) a judge orders that the Service administer an arbitration under the terms of a pre-injury agreement.

In limiting the circumstances under which the Service will administer the arbitration of a consumer health care liability claim, the Service does not intend to affect the enforceability of an agreement to apply the Rules—only that the Service will not administer the arbitration.

For purposes of the Rules, a consumer health care liability claim means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

The Service will continue to administer all other kinds of claims whether the agreement to arbitrate or mediate was entered into pre or post alleged injury.

The ADR Service is an important service offered by the Association, and we encourage attorneys to use this Service to resolve conflicts that may arise in interpreting agreements entered into by healthcare providers, professionals, plans, vendors, and service providers. The Service's Rules contain sample arbitration and mediation provisions to use in agreements in case of a dispute. Sample provisions may be found in Appendix II in each Rules of Procedure.

Health Lawyers' ADR Service is the only alternative dispute resolution service that handles health law-related disputes, exclusively, and distinguishes itself by having a diverse list of over 200 dispute resolvers throughout the United States.

---

[1]If the parties elect to proceed with arbitration (either *ad hoc* or pursuant to a third party determination that the parties' pre-injury arbitration agreement is valid and enforceable) the parties may mutually submit the Service's **Request for a Dispute Resolver List**. This mutual Request, by its express terms (see paragraph 13 of the Request List), submits the process to the Service pursuant to its Rules of Procedure and with agreement by the parties that the dispute is subject to resolution under the Rules. Therefore, for purposes of the Service's rule modification, the mutual Request serves as the post-injury agreement in writing to arbitrate the claim.

[2]If a judge gives a written order that the AHLA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHLA ADR Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter.

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