

IN THE SUPREME COURT OF MISSISSIPPI  
No. 2006-CA-00728

THE ESTATE OF JETTIE DIXON, BY AND THROUGH  
CLARENCE SMITH, INDIVIDUALLY AND AS PERSONAL  
REPRESENTATIVE FOR THE USE AND BENEFIT OF THE  
ESTATE OF JETTIE DIXON, AND ON BEHALF OF AND FOR  
THE USE AND BENEFIT OF THE WRONGFUL DEATH  
BENEFICIARIES OF JETTIE DIXON

APPELLANT

VS.

BEDFORD HEALTH PROPERTIES, LLC; BEDFORD CARE CENTER  
OF MONROE HALL, LLC; HATTIESBURG MEDICAL PARK,  
INC.; HATTIESBURG MEDICAL PARK MANAGEMENT  
CORP.; M.E. MCELROY, INC.; MCELROY-YORK LIFE CARE  
FACILITIES, LLC; MCELROY-YORK LIFE CARE COMMUNITY,  
LLC; MICHAEL MCELROY, JR.; MICHAEL MCELROY, SR.;  
ROBERT PERRY; and GINA SIMONETTI

APPELLEES

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**BRIEF FOR APPELLEES**

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APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY

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ORAL ARGUMENT REQUESTED

**CERTIFICATE OF INTERESTED PERSONS**

THE ESTATE OF JETTIE DIXON, BY AND THROUGH  
CLARENCE SMITH, INDIVIDUALLY AND AS PERSONAL  
REPRESENTATIVE FOR THE USE AND BENEFIT OF THE  
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APPELLEES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Bedford Health Properties, LLC – Appellee
2. Bedford Care Center—Monroe Hall, LLC – Appellee
3. Hattiesburg Medical Park, Inc. – Appellee
4. Hattiesburg Medical Park Management Corporation – Appellee
5. M. E. McElroy, Inc. – Appellee
6. Michael McElroy, Jr. – Appellee
7. Michael McElroy, Sr. – Appellee
8. McElroy-York Life Care Facilities, LLC – Appellee
9. McElroy-York Life Care Community, LLC – Appellee
10. Robert Perry – Appellee
11. Gina Simonetti - Appellee

12. William R. Lancaster – Counsel for Appellees
13. Benjamin C. Heinz – Counsel for Appellees
14. Alford, Clausen & McDonald, LLC – Counsel for Appellees
15. S. Mark Wann – Counsel for Appellees
16. Heather M. Aby – Counsel for Appellees
17. Maxey Wann, PLLC – Counsel for Appellees
18. The Estate of Jettie Dixon – Appellant
19. Clarence Smith, Individually and as Administratrix of the Estate of Jettie Dixon –  
Appellant
20. Wrongful Death Beneficiaries of Jettie Dixon – Appellant
21. Susan Nichols Estes, Esq. – Counsel for Appellant
22. D. Bryant Chaffin, Esq. – Counsel for Appellant
23. Kenneth L. Connor, Esq. – Counsel for Appellant
24. Wilkes & McHugh, P.A. – Counsel for Appellant



HONORABLE WILLIAM R. LANCASTER  
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## **STATEMENT OF ISSUES**

- I. Whether the Durable Power of Attorney for Jettie Dixon gave Smith the authority to enter into the Admission Agreement and to accept the arbitration clause.**
- II. Whether the arbitration clause agreed to by Smith is valid and enforceable.**

## STATEMENT OF THE CASE

### **I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW**

The Estate of Jettie Dixon ("The Estate") has appealed the Circuit Court of Forrest County's ("Circuit Court") granting of the Motion to Compel Arbitration filed by Bedford Health Properties, LLC, Bedford Care Center--Monroe Hall, LLC; Hattiesburg Medical Park, Inc.; Hattiesburg Medical Park Management Corp.; M.E. McElroy, Inc.; McElroy-York Life Care Facilities, LLC; McElroy-York Life Care Community, LLC; Michael McElroy, Jr.; Michael McElroy, Sr.; Robert Perry; and Gina Simonetti (collectively referred to herein as "Defendants"). (C.P. at 8 384-388).

The Estate, by and through Clarence Smith, originally filed its Complaint in this action on August 24, 2004, for its own use and benefit and for the use and benefit of Jettie Dixon's wrongful death beneficiaries. (C.P. at 7, 10-43). Plaintiff based her eight separate counts on factual allegations regarding conduct, transactions, and occurrences involved in the care provided to Jettie Dixon by the named Defendants while she resided at the Defendants' nursing home in "Hattiesburg, Forrest County, Mississippi from 1997 until September 5, 2003." (C.P. at 10-43).

Defendants filed their Motion to Compel Arbitration in response to the Estate's Complaint. (C.P. at 7, 46-58). On March 31, 2006, the Circuit Court entered its Order on Defendants' Motion to Compel Arbitration and Final Judgment of Dismissal Without Prejudice. (C.P. at 8, 382-383). In this Order, the Circuit Court granted the Motion to Compel Arbitration. (C.P. at 382). On April 26, 2006, the Estate filed its Notice of Appeal. (C.P. at 8, 384-388) This appeal follows.

## II. STATEMENT OF FACTS

By way of a Durable Power of Attorney for Jettie Dixon, Clarence Smith, as Dixon's attorney-in-fact and fiduciary, had the power "to pay, compromise, contest, defend, settle, **arbitrate**, abandon or otherwise adjust any claims or demands in favor of or against" Dixon. (emphasis added)(C.P. at 195-198, R.E. at 4-7); see also Exhibit A, Complete Durable Power of Attorney for Jettie Dixon<sup>1</sup>. The Durable Power of Attorney also gave Smith the power to do anything with respect to the management of Dixon's property that Smith believed to be in Dixon's best interest. (See Exhibit A, Complete Copy of Durable Power of Attorney for Jettie Dixon, page 5, paragraph 3.n.). The Durable Power of Attorney was filed with the Chancery Clerk of Forrest County on July 5, 2001. (C.P. at 195, R.E. at 4).

On November 12, 2002, Smith, acting under this Durable Power of Attorney for Dixon, Smith entered into an Admission Agreement with Bedford Care Center-Monroe Hall, LLC, for the care and treatment of Dixon at Bedford Care Center-Monroe Hall. (C.P. at 254-260, R.E. at 8-14). This admission agreement contained an arbitration clause in Section E and beginning on page 5. (C.P. at 258-259, R.E. 12-13). Smith initialed page 5 at both the top and bottom. (C.P. at 258, R.E. at 12). The arbitration clause states that any claim arising out of or relating to the care of Dixon at Bedford Care Center-Monroe Hall would be resolved through binding arbitration. (C.P. at 258, R.E. at 12). The arbitration clause states that any arbitration would be conducted "**in accordance with**"—not by—the American Health Lawyers' Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. (C.P. at 258, R.E. at

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<sup>1</sup> The last page of the Durable Power of Attorney bearing Jettie Dixon's signature is not in the record. The Estate has not contested the validity of the Power of Attorney. Defendants have attached the complete Power of Attorney



12). The arbitration clause also acknowledged that Smith did not have to accept it and that, even after accepting it, he could rescind it within 30 days. (C.P. at 259, R.E. at 13). On the last page of the Admission Agreement directly above Smith's signature, the following sentence appears:

**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.**

(C.P. at 260, R.E. at 14) Wes Crider also signed the last page of the admission agreement on behalf of Bedford Care Center-Monroe Hall. (C.P. at 260, R.E. at 14).

Dixon remained a resident at Bedford Care Center-Monroe Hall through the time of her death on September 5, 2003. (C.P. at 10-43). At no time prior to Dixon's death did Smith or any other person attempt to have the admission agreement entered into by Smith on November 12, 2002, rescinded or otherwise revoked. See C.P. generally.

## **SUMMARY OF THE ARGUMENT**

The Circuit Court of Forrest County appropriately compelled arbitration. Smith had the authority to enter into the admission agreement on Dixon's behalf by way of the Durable Power of Attorney. The Durable Power of Attorney gave Smith the power to do whatever he determined was in the best interest of Dixon. Further, the Durable Power of Attorney gave Smith the right to resolve any claims for or against Dixon as he saw fit. This specifically included the power to arbitrate any claims in favor of Dixon. The Durable Power of Attorney gave Smith authority over all of Dixon's property. A cause of action is considered property. Thus, the Durable Power of Attorney gave Smith the right to enter into an agreement that called for the resolution of any claims for Dixon arising out of her care at Bedford Care Center-Monroe Hall via binding arbitration.

Additionally, the arbitration clause otherwise meets the requirements for enforceability under Mississippi law. The arbitration clause is contained in a valid written contract having a sufficient nexus with interstate commerce. The arbitration clause covers all the claims in the Estate's Complaint. No legal constraints exist that would prevent the enforcement of the arbitration clause.

Based on the above reasoning, the Circuit Court appropriately found the arbitration clause to be enforceable and compelled arbitration. Therefore, the Circuit Court's decision is due to be affirmed.

## **ARGUMENT**

The Circuit Court of Forrest County properly granted Defendants' Motion to Compel Arbitration as the evidence in this case and prevailing Mississippi law establish that a valid and enforceable arbitration clause covering the causes of action asserted by the Estate against Defendants in the Estate's Complaint exists. Similarly, this Court in its review of this appeal, should affirm the Circuit Court's decision and compel the Estate to resolve its causes of action in accordance with the arbitration clause at issue.

### **I. THIS COURT SHOULD APPLY A *DE NOVO* STANDARD OF REVIEW.**

The Estate seeks review of the granting of Defendants' Motion to Compel Arbitration. The Estate has appropriately noted that this Court should apply a *de novo* standard of review. See Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 513 (Miss. 2005).

### **II. SMITH POSSESSED THE POWER AND AUTHORITY TO ENTER INTO THE ADMISSION AGREEMENT CONTAINING THE ARBITRATION CLAUSE.**

Since no party contests that Dixon did not sign the Admission Agreement containing the arbitration clause, the initial issue for determination is whether or not Smith possessed the authority to enter into the Admission Agreement on Dixon's behalf. Additionally, the Estate has argued that Smith did not possess the power to enter into the arbitration clause contained in the Admission Agreement.

Smith held a Durable Power of Attorney for Dixon. (C.P. at 195-198, R.E. at 4-7); see also Exhibit A. The Estate has not contested the validity of this Durable Power of Attorney. In fact, the Estate relies upon it to argue that Smith did not have the power to agree to the arbitration clause. However, the specific terms of the Durable Power of Attorney prove that

Smith had the power to enter into the Admission Agreement and to agree to the arbitration clause.

The Durable Power of Attorney reads in pertinent part as follows:

I, Jettie Dixon,.....do hereby nominate, constitute, and appoint my son, Clarence L. Smith,....as my true and lawful agent and attorney in-fact (herein "Attorney") to act on my behalf and in my stead with respect to all property, real, personal and mixed, wherever located, now owned or hereafter acquired by me,....

...

2. This power of attorney...shall be construed as effective under Section 87-3-13(2) of the Mississippi Code of 1972 as amended.

3. The Attorney shall have and is hereby vested with the full and plenary power to do and perform, in his fiduciary capacity, any and all acts and deeds in connection with the management of my property which he in his discretion and consistent with his fiduciary duty deem to be in the best interests of the Principal.....Included in this power,...are all inherent, implied or statutory powers that attorneys-in-fact my now have or hereafter acquire, and the following additional specific powers:

...

d. To pay, compromise, contest, defend, settle, arbitrate, abandon or otherwise adjust any claims or demands in favor of or against me;

...

1. To execute....contracts and any and all other documents or instruments or writing which may be necessary, convenient or desirable in the exercise of any power herein granted;

...

These portions of the Durable Power of Attorney lay out the powers granted to Smith that make his entry into the Admission Agreement, including the arbitration clause, valid. Smith held the position of a fiduciary for Dixon. Smith also held the power to enter into contracts by way of Paragraph 3(1). Thus, Smith had the power to enter into the Admission Agreement on behalf of Dixon.

As to Smith's acceptance of the arbitration clause specifically, Paragraph 3(d) of the Durable Power of Attorney unequivocally states that Smith held the power "to...arbitrate...any

claims or demands in favor of or against” Dixon. This power to arbitrate implicitly includes the power to agree to and accept an arbitration clause because it would be impossible for Smith to arbitrate without Smith first agreeing to arbitrate.

To combat this grant of the power to agree to an arbitration clause, the Estate has argued that Smith did not possess the power to waive Dixon’s constitutional right to a trial by jury. The Estate has directed this Court’s attention to the specific language of the Durable Power of Attorney but has ignored the language in Paragraph 3(d). The Estate has also not included the page of the Durable Power of Attorney upon which Paragraph 3(d) can be found within its Record Excerpts (only pages 1,2 and 4 of Durable Power of Attorney are included).

However, the existence of the language in Paragraph 3(d) proves that Smith did possess the power to resolve claims via an arbitral process and to waive the right to a jury trial. Additionally, the entirety of Paragraph 3(d) gives Smith the power to waive the right to a jury trial by resorting to many other options of dispute resolution. By giving Smith the power “To pay, compromise, contest, defend, settle, arbitrate, abandon or otherwise adjust any claims or demands in favor of or against” her, Dixon specifically gave Smith the power to resolve claims in her favor by means other than a jury trial. The abandoning or settling of a claim in Dixon’s favor equates to a waiver of a jury trial. Thus, the Estate’s contention that Smith did not possess the right to waive a jury trial to resolve claims in favor of Dixon lacks merit.

Lastly, the Estate goes on to argue that Smith’s power was limited to only being power over Dixon’s “property” and that Dixon’s “claims” did not come under this grant of power. Again, the plain language of Paragraph 3(d) of the Durable Power of Attorney shows that the Estate’s argument fails. Via Paragraph 3(d), Smith had power over “any claims or demands in favor of or against” Dixon. Thus, the Durable Power of Attorney itself considered Dixon’s

claims as part of her “property.” Further, the United States Supreme Court and the Mississippi Supreme Court have noted that a cause of action is a species of property. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 102 S. Ct. 1148, 1153-54, 71 L. Ed. 2d 265, 273 (1982); Pruitt v. Hancock Med. Ctr., 942 So.2d 797 (Miss. 2006).

Therefore, in sum, Smith in his fiduciary role over Dixon’s property had the power to enter into the Admission Agreement with the arbitration clause and to agree to resolve any claims in Dixon’s favor via an arbitral process. This leads to the issue of whether or not the arbitration clause is a valid and enforceable clause.

## **II. THE ARBITRATION CLAUSE SATISFIES THE REQUIREMENTS FOR ENFORCEMENT UNDER MISSISSIPPI LAW.**

In Vicksburg Partners v. Stephens, this Court addressed the enforceability of an arbitration clause contained within a patient’s admission agreement to a nursing home. 911 So.2d 507 (Miss. 2005). In sum, this Court found such a clause to be enforceable when it satisfies the general requirements for the enforcement of arbitration clauses in Mississippi. Id. This decision provides the guiding principles for the evaluation of the enforceability of the arbitration clause at issue in this case and details the series of requirements that an arbitration clause must satisfy to be found enforceable.

### **A. The Arbitration Clause Is Contained In a Contract Evidencing Interstate Commerce.**

The threshold requirement is whether the arbitration clause is contained in a contract evidencing interstate commerce. Id. at 514. In Vicksburg Partners, this Court held that “singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce” and found that nursing homes affect interstate commerce. Id. at 515.

There is no dispute that the clause at issue is contained in a nursing home admission agreement. Further, the Estate has not argued that this interstate commerce requirement is not satisfied. As such, the threshold requirement of “evidencing interstate commerce” is met.

**B. The Parties Entered Into a Valid Written Agreement to Arbitrate Covering the Claims Contained in the Estate’s Complaint.**

The next issue for consideration is whether the Estate and Defendants entered into a valid written agreement to arbitrate that covers the claims in the Estate’s Complaint. East Ford, Inc. v. Taylor, 826 So.2d 709, 713 (Miss. 2002). Whether or not a valid written agreement to arbitrate exists is proven by the application of simple contract law to the Admission Agreement. See Terminix Int’l, Inc. v. Rice, 904 So.2d 1051 1054-1055 (Miss. 2004). A valid contract exists when two or more contracting parties, with legal capacity to contract, give mutual assent to an exchange of consideration in an agreement that is sufficiently definite and not precluded by legal prohibitions to the formation of a contract. Rotenberry v. Hooker, 864 So.2d 266, 270 (Miss. 2003).

In this case, these elements of a valid contract are satisfied. As shown above, the Durable Power of Attorney provided Smith with the legal capacity to enter into the Admission Agreement and to accept the arbitration clause. The mutual assent requirement is satisfied as Smith and the Defendants’ representative signed the Admission Agreement directly under a sentence that states: **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.** (C.P. at 260, R.E. at 14) (emphasis in original). In Vicksburg Partners, this Court

noted a similar consent paragraph as being indicative of the parties' voluntary consent to the arbitration clause. Id. at 520. Additionally, Smith initialed the arbitration clause in two spots. (C.P. at 258, R.E. at 12). In Bedford Care Center-Monroe Hall, LLC v. Lewis, 923 So.2d 998 (Miss. 2006) , this Court considered the exact same Admission Agreement and arbitration clause and found the lack of the signing party's initials or signature in one of the spots on the arbitration clause to be an indication of the signing party's "non-acceptance" of such clause. Thus, the Bedford decision, by implication, shows that since Smith has initialed in all of the appropriate spots, he has indicated his assent and acceptance of the arbitration clause.

The Admission Agreement satisfies the "exchange of consideration" element as it details an exchange of a variety of services provided by the Defendants to and for Dixon in exchange for the Defendants' receipt of monetary reimbursement from Dixon, Smith, or another source (i.e. private insurance, Medicare, Medicaid). (C.P. at 254-260, R.E. at 8-14). The Admission Agreement satisfies the "sufficiently definite" element as its explanation of the services to be rendered, payments for services, and various other matters involved in the care of Dixon can be easily ascertained. (C.P. at 254-260, R.E. at 8-14); see also In re Estate of Fitzner, 881 So.2d 164, 170 (Miss. 2003). Lastly, no legal prohibition exists precluding the formation of the Admission Agreement. See Vicksburg Partners v. Stephens, 911 So.2d 507 (Miss. 2005)(a nursing home admission agreement is found to be a valid contract). Therefore, the Admission Agreement has the essential elements of a valid contract.

The arbitration clause in the Admission Agreement also covers the Estate's claims against all of the Defendants. The arbitration clause in the Admission Agreement states that the agreement to arbitrate applies to "any legal dispute, controversy, demand, or claim...that arises out of or relates to the Admission Agreement or any service or health care provided by the



Facility to the Resident.” (C.P. at 258, R.E. at 12). This scope language is similar to the scope language of the arbitration clause at issue in the Vicksburg Partners decision. See Vicksburg Partners at 511. Likewise, the Estate’s Complaint contains a similar set of counts for negligence, medical malpractice, malice and/or gross negligence, fraud, breach of fiduciary duty, statutory survival, and statutory wrongful death as the plaintiff’s complaint in Vicksburg Partners contained. (C.P. at 10-43); see Vicksburg Partners at 512. In Vicksburg Partners, this Court did not cut any of the plaintiff’s claims out from the coverage of the arbitration clause and directed the trial court to compel arbitration. Id. at 526. This Court should likewise do the same here as there is no basis for finding that any of the Estate’s claims fall outside the scope of the arbitration clause in the Admission Agreement.

Additionally, in Cleveland v. Mann, this Court was asked to consider the issue of whether an arbitration clause entered into by a decedent is binding on the decedent’s wrongful death beneficiaries. 942 So.2d 108 (Miss. 2006). This Court held that the arbitration clause applied to the wrongful death beneficiaries since wrongful death beneficiaries can only bring claims that the decedent could have brought had he not died. Id. at 117-119. This Court also noted that the arbitration clause at issue specifically stated that it would be applicable to the claims of “heirs-at-law or personal representatives” of the decedent. Id. This decision applies directly to this case as all the Estate’s claims are those that Dixon could have either asserted when she was alive or could have asserted had she not died. Further, the arbitration clause at issue specifically states that it “shall inure to the benefit of and bind the parties, their successors and assigns,...and all persons who [sic] claim is derived through or on behalf of [Dixon], including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of [Dixon].” (C.P. at 258, R.E. at 12).

Thus, the facts of this case show that a valid written agreement to arbitrate the claims filed by the Estate exists.

**C. There Are No Legal Constraints that Prevent the Enforcement of the Valid Agreements to Arbitrate.**

The analysis of whether or not a valid and enforceable arbitration agreement exists now turns to whether any defenses available under Mississippi contract law “may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act.” East Ford at 713. Only the existence of “legal constraints external to the parties’ agreement” can prevent such claims from being resolved via the agreed-to arbitration clauses. Id. These “legal constraints” are “the usual defenses to a contract such as fraud, unconscionability, duress, and lack of consideration.” Id. at 714. The Estate carries the burden of proving a defense to the enforcement of the arbitration clause. See Norwest Financial Mississippi, Inc., v. McDonald, 905 So.2d 1187 (Miss. 2005) (¶11).

The Estate has only raised two arguments on this issue. First, the Estate argues that the Smith was fraudulently induced to accept the arbitration clause. In support of this, the Estate does not direct this Court to any statements by any of the Defendants or their representatives and does not rely on any evidence in the record. This is wholly insufficient to prove fraudulent inducement. See Greater Canton Ford Mercury, Inc. v. Ables, 2005-CA-01316-SCT (¶19)(Miss. 2007) (“This Court is limited to consideration of the facts in the record, while reliance on facts only disclosed in the briefs is prohibited.”) The Estate also argues that the Defendants were Dixon’s fiduciary. The Estate again does not provide any support for this argument from the record and also ignores the clear language noted above from the Durable Power of Attorney appointing Smith as Dixon’s fiduciary. (C.P. at 195-198, R.E. at 4-7); see also Exhibit A. Lastly,

the Estate's argument fails to take into account Smith's sworn statement in his affidavit that "[t]he nursing home staff did not explain the Admission Agreement to me at the time I signed it." (C.P. at 185-186). This proves that none of the Defendants made any statements to Smith that in any way, fraudulent or otherwise, induced him to sign the Admission Agreement and initial the arbitration clause. As such, the Estate's argument of fraudulent inducement fails.

The Estate's other asserted legal constraint that would prevent enforcement is that the American Health Lawyers Association will only administer consumer health care liability claims if the agreement to arbitrate is reached after the injury. Again, the Estate's argument fails to note the specific language from the record and the arbitration clause regarding the AHLA's role in the arbitration. The arbitration clause states that that any arbitration would be conducted "**in accordance with**"—not by—the AHLA's Alternative Dispute Resolution Service Rules of Procedure for Arbitration. (C.P. at 258, R.E. at 12). Thus, the Estate's argument that the arbitration clause cannot be enforced because the AHLA would not conduct the arbitration is of no consequence as that is not even a requisite of the arbitration clause.

Lastly, no other contract defenses would apply to the arbitration clause at issue. The arbitration clause compares favorably to the clause approved by this Court in Vicksburg Partners. In fact, it cannot be considered a contract of adhesion as the arbitration clause itself was voluntary. (C.P. at 259, R.E. at 13); see also Bedford Care Center-Monroe Hall, LLC v. Lewis, 923 So. 2d 998 (Miss. 2006).

As such, no legal constraints exist to prevent the enforcement of the valid written agreement to arbitrate that covers the Estate's claims in this case. The result is that Defendants have shown that all the requirements for a valid and enforceable arbitration clause have been

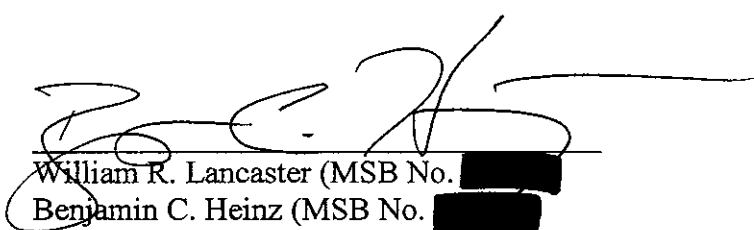
satisfied. Therefore, the Circuit Court of Forrest County appropriately found the arbitration clause at issue enforceable and compelled arbitration of all claims in the Estate's Complaint.

## CONCLUSION

For the reasons foregoing, and on the basis of the authorities cited, Defendants respectfully request that this Court affirm the Circuit Court's granting of Defendants' Motion to Compel Arbitration.

Respectfully submitted,

Appellees Bedford Health Properties, LLC; Bedford Care Center of Monroe Hall, LLC; Hattiesburg Medical Park, Inc.; Hattiesburg Medical Park Management Corp.; M.E. McElroy, Inc.; McElroy-York Life Care Facilities, LLC; McElroy-York Life Care Community, LLC; Michael McElroy, Jr.; Michael McElroy, Sr.; Robert Perry; and Gina Simonetti



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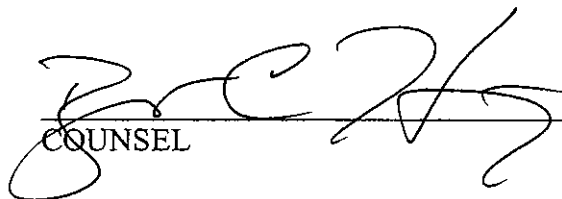
**CERTIFICATE OF SERVICE**

I certify that I have served a copy of **Brief for Appellees** on counsel for all parties by depositing a copy of **Brief for Appellees** in the United States mail, properly addressed and first class postage prepaid:

Susan Nichols Estes, Esq.  
D. Bryant Chaffin, Esq.  
Kenneth L. Connor, Esq.  
Wilkes & McHugh, P.A.  
16 Office Park Drive, Suite 8  
Post Office Box 17107  
Hattiesburg, Mississippi 39404-7107

Hon. Robert B. Helfrich  
Circuit Court of Forrest County, Mississippi  
Post Office Box 309  
Hattiesburg, Mississippi 39403

Done this 6<sup>th</sup> day of February, 2007.

  
\_\_\_\_\_  
COUNSEL

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B&P SI

STATE OF MISSISSIPPI  
FORREST COUNTY  
I CERTIFY THIS INSTRUMENT  
WAS FILED AND RECORDED

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IN REC. BK. AND PAGE OR U.C.C.  
FILE NO. AS SHOWN  
WITNESS MY HAND AND SEAL

*W. C. Howard*  
CLERK

STATE OF MISSISSIPPI

COUNTY OF FORREST

DURABLE POWER OF ATTORNEY

I, Jettie Dixon, of Hattiesburg, Forrest County, Mississippi (herein "Principal"), being over the age of twenty-one (21) years, acting freely and without duress or compulsion, do hereby nominate, constitute and appoint my son, Clarence L. Smith, of 2821 St. Ives, Columbia, South Carolina, as my true and lawful agent and attorney in-fact (herein "Attorney") to act on my behalf and in my place and stead with respect to all property, real, personal and mixed, wherever located, now owned or hereafter acquired by me, held solely by me or jointly or in common with another, until this power of attorney shall be revoked by me in writing or terminates by operation of law.

1. Any powers of attorney heretofore executed by me are hereby revoked.

2. This power of attorney shall not be affected by the subsequent disability of the principal, Jettie Dixon, but shall be construed as effective under Section 87-3-13(2) of the Mississippi Code of 1972 as amended.

3. The Attorney shall have and is hereby vested with the full and plenary power to do and perform, in his fiduciary capacity, any and all acts and deeds in connection with the management of my

Exhibit A

property which he in his discretion and consistent with his fiduciary duty deem to be in the best interests of the Principal, and the Attorney may perform any act or deed and exercise this or any other power without resort to any person or court for further authority. Included in this power, but without limiting its generality, are all inherent, implied or statutory powers that attorneys-in-fact may now have or hereafter acquire, and the following additional specific powers:

a. To make loans, secured or unsecured, in such amounts, upon such terms, with or without interest, as he may deem advisable.

b. To hold, exchange, sell and convey stocks in any domestic or foreign corporations, including shares or interests in investment trusts and in common trust funds, with the power to vote in person or by proxy at any corporate meetings any shares of stock held by me; to exercise conversion, subscription, purchase or other options or powers; to participate in or consent to the sale, lease, mortgage or other disposition of any property by or to any such corporation; to cause, consent to, and participate in total or partial stock redemptions, including stock redemptions pursuant to 5303 of the U.S. Internal Revenue Code; and to do any and all things deemed by the Attorney necessary, desirable or convenient in connection with any shares of stock owned or held by the attorney in his fiduciary capacity;



c. To determine and fix the consideration, terms, conditions and other provision relating to the sale or lease of any property owned or held by me;

d. To pay, compromise, contest, defend, settle, arbitrate, abandon or otherwise adjust any claims or demands in favor of or against me;

e. To borrow money at one or more times for such rates of interest, for such periods of time and upon such terms, conditions and security as the Attorney deems advisable and to secure the repayment of such loan or loans by mortgaging, pledging, or otherwise encumbering any part of the property of me, and to repay such loan or loans either out of corpus, income or both; to renew or agree to the extension of any such loan or loans; and, with respect to the purchase of any property, as a part of the consideration therefor, to assume the liability of the transferor or to acquire such property subject to a liability and an encumbrance;

f. To carry, maintain and pay premiums for insurance of all types against such risks and for such amounts and upon such terms and conditions as the Attorney deems advisable, either in stock or mutual companies, including liability insurance protecting me and the Attorney;

g. To pay any and all taxes assessed against my property and business activities;

h. To incur and pay all ordinary, reasonable and necessary expenses in the administration of any business or business interest of mine;

i. To pay all debts, claims or charges which at any time may be due and owing by or which may exist against me;

j. To employ such attorneys, accountants, agents, brokers, banks, clerks, custodians, investment counsel, managers, realtors, rental agents, tax specialists, engineers and other persons as the Attorney deems necessary or advisable and to make such payments thereto as he may deem reasonable and proper, and to delegate to such persons any discretion or power which he may deem appropriate;

k. To hold any and all real or personal property in his own name without qualification or description or in his name as Attorney or in the name of any other person, partnership, firm, corporation as nominee, with or without disclosing the fiduciary relationship;

l. To execute deeds of conveyance, including warranty deeds, mortgages, deeds of trust, pledge contracts, promissory notes, bills of sale, conditional sales contracts, agreements, contracts and any and all other documents or instruments or writing which may be necessary, convenient or desirable in the exercise of any power herein granted;

m. To exercise any and all powers granted hereunder or otherwise held and possessed by him without the necessity of obtaining the consent or approval of any court or judge;

n. To do and to perform any and all other acts in the management, investment or disposition of my property that the Attorney, in his discretion, deems to be in my best interest, to the same extent as if he were the absolute owner in fee simple of the property held by him as Attorney hereunder;

o. To sign checks, drafts, or other orders for payment on any bank accounts standing in my name, either an individual account or an account held jointly with some other person, whether checking accounts, savings accounts or certificates of deposits;

p. To endorse checks, drafts, money orders or other documents payable to me and to receive the proceeds thereof;


q. To have access to and to enter any lock box or safety deposit box registered in my name individually or jointly with some other person located in and maintained by any bank, savings and loan association or trust company; and

r. To represent me because and deal with any office of the U. S. Internal Revenue Service, Mississippi, State Tax Commission, the U. S. Tax Court, or any other taxing agency relative to any tax matters in which I may be interested or involved regardless of the tax years or tax periods in question and to receive confidential information and perform any and all acts which I can or could perform with respect to such tax matters; to represent me in and before any Court, tribunal or judicial proceeding of every kind and character and to execute in my name and on my behalf and Caused to be docketed therein, any and all pleadings, appearances, waiver of process, consents, joinders and

any other instruments or documents deemed by him in the exercise of his sole discretion to be necessary, convenient and appropriate; and to represent and act for me before any office of the U. S. Social Security Administration with respect to any benefits to which I may be entitled, or which I may claim and to perform any and all acts that I can or could perform with respect to the application for and receive such benefits; and in general to represent and act for me before any and all governmental, judicial or administrative bodies, agencies, departments, administrations, commissions, services or political subdivisions with respect to any and all matters in which I may have an interest or be a party.

4. No person purchasing, renting or leasing any of my property, or in any manner dealing with the Attorney, shall be obligated to see to the application of any money, securities, or other property paid or delivered to the Attorney, or to inquire into the expediency or propriety of any transaction or the authority of the Attorney to enter into and consummate the same upon such terms as the Attorney may deem advisable.

IN WITNESS WHEREOF, I have executed and delivered this instrument on this day 3<sup>rd</sup> of July, A. D., 2001.

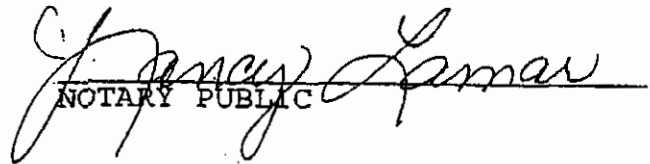
  
JETTIE DIXON

STATE OF MISSISSIPPI

COUNTY OF FORREST

This day personally came and appeared before me, the undersigned authority in and for the State and County aforesaid, JETTIE DIXON, who acknowledged that she executed and delivered the foregoing instrument of writing, being a Durable Power of Attorney, on the day and year therein written, as her own free and voluntary act and deed.

GIVEN under my hand and official seal of office, this 3<sup>rd</sup> day of July, A. D., 2001.

  
NOTARY PUBLIC

My Commission Expires:

April 25, 2002

