IN THE SUPREME COURT OF MISSISSIPPI

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,	PLAINTIFF/ APPELLANT
vs. CASE NO. 2006-CA-00728	
Bedford Health Properties, LLC.	DEFENDANTS/ APPELLEES

ON APPEAL FROM FORREST COUNTY, MISSISSIPPI
TWELFTH JUDICIAL DISTRICT
THE HONORABLE ROBERT B. HELFRICH

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Susan Nichols Estes (#[redacted]
D. Bryant Chaffin ([redacted]
Kenneth L. Connor (#[redacted]
Wilkes & McHugh, P.A.
16 Office Park Drive, Suite 8
P. O. Box 17107
Hattiesburg, MS 39404
Telephone: (601) 545-7363

Attorneys for Plaintiff/Appellant

CERTIFICATE OF INTERESTED PARTIES

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

Appellant:
Clarence Smith, Personal Representative of the Estate of Jettie Dixon
Clarence Smith Individually
The Wrongful-death beneficiaries of Jettie Dixon

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

Attorneys for Appellant

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; Gina Simonetti
Unidentified John Does 1 through 10
and Unidentified entities 1 through 10 (as to Bedford Care Center-Monroe Hall f/k/a Conva-Rest Northgate)

Ben Heinz
Andrew C. Clausen
William R. Lancaster
Christina May Bolin
E. Larkin Hatchett
Alford, Clausen & McDonald, LLC

One St. Louis Centre, Ste. 5000
Mobile, Alabama 36602

Mark Wann
Charles R. Saltzman
Maxey Wann PLLC
P.O. Box 3977
Jackson, Mississippi 39207

Attorneys for Appellees

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Statement of the Issues

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II. Whether fiduciaries may enforce an arbitration clause against the estate of a deceased resident when the clause was signed years after admission for the purpose of reducing liability and securing liability insurance, and when misleading and incomplete information was given to the person signing the clause.

III. Whether a pre-dispute arbitration clause is enforceable when a material term of the clause itself holds that the issues in the case are not arbitrable.

STATEMENT OF THE CASE

Nature of the Case

This case is a nursing-home abuse-and-neglect case. R. 10-45.[1] Plaintiff is the personal representative of the estate of Jettie Dixon representing the estate and Ms. Dixon's wrongful-death beneficiaries. Defendants are the owners and operators of the nursing home where Ms. Dixon resided and incurred her injuries.

This appeal does not involve the merits of the case. Rather, this appeal will decide whether the case will be heard by an arbitrator or by a Mississippi jury. At issue is the validity and enforceability of an arbitration clause contained in an updated admission agreement signed many years after Ms. Dixon became a resident of the nursing home. The agreement was signed by Ms. Dixon's son who held a power of attorney for property and financial matters.

Course of the Proceedings Below

Following the filing of the complaint, Defendants moved to compel arbitration. After discovery limited to issues surrounding the signing of the arbitration clause at issue, Plaintiff responded raising several arguments including that the person who signed the clause did not have the authority to waive Jettie Dixon's right to a trial by jury and that under the facts of this case, Defendants breached certain fiduciary duties owed to Ms. Dixon in the presentation and signing of the clause. R.E. 82-94; R. 109, 356, Hearing transcript, 19-32. The trial court disagreed and granted Defendants' motion.

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[1] References to the record are denoted as R.____. References to the excerpts of the record are denoted as E.R. ____. The record excerpts are numbered in the lower left hand corner.

The trial court's order compelling arbitration was entered pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure and the case was dismissed. R. 382. Plaintiff filed a timely notice of appeal. R.E. 75.

Statement of Facts

Jettie Dixon became a resident of Defendants' nursing home in 1997. R. 14. Ms. Dixon was a resident constantly from that time forward. The admission agreement signed upon her admission did not contain a clause waiving her right to a jury trial and sending any dispute she might have with the facility to arbitration.

In November of 2002, the nursing home changed its name and decided to draft a new admission agreement for all residents to sign. R.E. 46-48; R. 312-314. As testified by Robert Perry, Defendants' administrator, the new agreement was required by the nursing home's liability insurance carrier. R.E. 46-48; R. 312-314. The insurance carrier also required that the new agreement include an arbitration clause and exculpatory language. R.E. 46-48; R. 312-314. These terms were conditions of coverage. Ms. Dixon's son Clarence Smith signed the new admission agreement including the arbitration clause. R. 177.

Three important pieces of evidence exist in this case and are dispositive of the issues. The first is a power of attorney given by Ms. Dixon to her son Clarence Smith in 2001. R.E. 5; R. 195-198. The trial court relied on this power of attorney to conclude that a valid arbitration clause was executed in this case. R.E. 82, Hearing Transcript p. 26-27.

The power of attorney, however, is limited in its scope. It only granted Mr. Smith authority over Ms. Dixon's property and finances. In relevant part, it reads:

> 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 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 . . . .

R.E. 5; R. 195. Clearly, nothing in this language vests Mr. Smith with the authority to bind Ms. Dixon to mandatory arbitration.

The limitations on Mr. Smith's authority are then made more clear in paragraph 3 of the power of attorney as follows:

> 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 [Ms. Dixon].

R.E. 5. R. 195-196 (emphasis added). This paragraph then sets forth certain specific powers that are included within the general power, but all such powers are limited to "this power," which is to manage Ms. Dixon's property. Nothing in the power of attorney grants any authority to waive any right, including the right to a jury trial, outside of this discrete area of property management.

The next two important pieces of evidence are the depositions of Wesley Crider, the administrator in training who presented the arbitration clause to Mr. Smith, and Robert Perry, the administrator. In very telling and definitive terms, Mr. Crider testified that arbitration clauses are included in nursing home admission agreements to protect nursing homes from liability. R.E. 17-22; R. 225, 230. That fact was not communicated to Mr. Smith. It does, however explain Mr. Perry's equally-disturbing testimony that the clause was included in the admission agreement at the insistence of the nursing home's

liability insurance carrier, another fact not explained to Mr. Smith at the signing. R.E. 46-48; R. 312-314.

In short, Clarence Smith was asked to come to the facility where his mother had been a resident for many years and sign another admission agreement. She had not been discharged, so what was the purpose of the new signing? According to Defendants' administrator in training, the new admission agreement was presented as being needed because of the name change at the facility only. R.E. 15; R. 223. Yet, the administrator's testimony refutes this as the true purpose.

One final point is important. The arbitration clause at issue reads that any arbitration will be conducted according to the procedural rules of the American Health Lawyers Association (AHLA). R.E. 4; R. 49, 251. In fact, those Rules are incorporated into the agreement itself as a material term. *Ibid.* However, the Rules of Procedure of AHLA hold that AHLA will not administer a pre-dispute arbitration clause in the health-care context. R. 142-143. This clause is clearly a pre-dispute arbitration clause. Accordingly, by its own terms, the arbitration clause excepts Plaintiff's claims from arbitration.

SUMMARY OF THE ARGUMENT

The trial court erred in compelling arbitration in this case. Jettie Dixon did not sign the arbitration clause at issue. Her son Clarence Smith did. Mr. Smith, however, had no authority to bind Jettie Dixon to an arbitration clause. The only authority granted to him by a power of attorney extended only to managing Ms. Dixon's property. Because Clarence Smith lacked authority, no agreement to arbitrate exists.

Even if Mr. Smith did have such authority, the clause in this case cannot be enforced. The arbitration clause at issue was signed many years after Ms. Dixon became a resident of the facility. It was added to a new admission agreement as an attempt to limit liability for abuse and neglect and as a term of liability-insurance coverage imposed by Defendants' insurance carrier. The name of the facility changed at the same time that the new agreement was presented and this name change was the ostensible excuse for signing the new agreement. Mr. Smith and Ms. Dixon were never told the actual reasons for adding an arbitration clause to the admission agreement. Misleading Ms. Dixon and Mr. Smith into signing the new agreement, Defendants breached their fiduciary duties to Ms. Dixon. As a result, the arbitration clause was fraudulently induced and cannot be enforced.

Finally, this case is not arbitrable under the terms of the contract for arbitration. The Rules of Procedure of the American Health Lawyers Association are incorporated into the clause. Those Rules hold that a pre-dispute arbitration clause in this sort of case will not be enforced. This clause is a pre-dispute clause. Therefore, Plaintiff's claim is not arbitrable pursuant to the agreement's terms.

Each of these arguments independently requires reversal of the trial court's order and remand for trial on the merits.

ARGUMENT

This appeal is from a dismissal entered after Defendants' filed a motion to compel arbitration. This Court reviews motions to dismiss and motions to compel *de novo*. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 502 (Miss. 2005). Moreover, the issues presented in this case are questions of law, namely whether a valid arbitration clause exists. Thus, *de novo* review is appropriate.

In determining whether parties should be compelled to arbitrate a dispute, courts perform a two-step inquiry. *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992). "First, the court must determine whether the parties agreed to arbitrate the dispute in question. This determination involves considerations: (1) Whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Am. Heritage Life Ins. Co. v. Beasley,* 174 F. Supp. 2d 450, 454 (N.D. Miss. 2001) (citing 9 U.S.C. § 4). See also *Pre-Paid Legal Services, Inc. v. Battle,* 873 So. 2d 79, 83 (Miss. 2004). If the Court finds that the parties agreed to arbitrate, "it must then consider whether a federal statute or policy renders the claims nonarbitrable." *Ibid.* "A party seeking to avoid arbitration must allege and prove that the arbitration provision itself was a product of fraud or coercion; alternatively, that party can allege and prove that another ground exists at law or in equity that would allow the parties' contract or agreement to be revoked." *Ibid.* (citing *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976)).

Federal District Courts in Mississippi have noted that the policy of favoring arbitration applies *only* after a valid arbitration agreement has been found. See *Mariner*

Health Care et al v. Kay and Lawrence Guthrie, Jr., et al, Civil Action No. 5:04CV218-DCB-JCS, p. 6, fn 4 (S.D. Miss. 2005) (citing *Fleetwood Enters., Inc. v. Garkamp,* 280 F. 3d 1069, 1070 & 1070 n.5 (5th Cir. 2002)) (emphasis in original). An agreement to arbitrate is treated like any other contract. *Kresock v. Bankers Trust Co.,* 21 F.3d 176, 178 (7th Cir.1994). A party cannot be forced to submit to arbitration if he has not agreed to arbitrate his dispute. *May v. Higbee, Co.,* 372 F. 3d 757, 763 (5th Cir. 2004). In determining whether a valid arbitration agreement arose between the parties, a court should look to the state law that ordinarily governs the formation of contracts. 9 U.S.C. § 2; *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995).

As set forth below, it was error to compel arbitration for three separate and distinct reasons. First, no contract for arbitration exists because the person who signed the arbitration clause lacked authority to bind Jettie Dixon to arbitrate her claims. Second, under the peculiar facts of this case, the arbitration clause itself was fraudulently induced by breaches in Defendants' fiduciary duties owed to Jettie Dixon. Finally, under the material terms of this contract, arbitration is not available because the clause is a pre-dispute arbitration clause not arbitrable by its very terms. Each point will be addressed in turn below.

I. No Valid Arbitration Agreement Exists.

The first and most fundamental error in the trial court's decision is its finding that Clarence Smith had authority to bind Jettie Dixon to arbitrate her claims. Under Mississippi law, the elements of a valid contract are "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, and (5) no legal prohibition precluding contract formation."

Rotenberry v. Hooker, 864 So. 2d 266, 270 (Miss. 2003). "It goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House*, 534 U.S. 279, 294 (2002).

Capacity is an issue Defendants cannot overcome in this case because Mr. Smith simply did not have the capacity to enter into a binding arbitration agreement on behalf of his mother. In Mississippi as elsewhere, before a third party can bind a person to a contract, that third party must have some authority to do so. According to the Mississippi Supreme Court:

> It is the rule at common law that persons dealing with an agent must inquire as to his authority, and if the agent has no authority, the principal is not bound by his agreements, unless the principal either ratifies them, or so acts with reference to them as to constitute a waiver or an estoppel.

Aetna Ins. Co. v. Singleton, 164 So. 13, 16 (Miss. 1935).

What is absent in this case is any evidence whatsoever of any authority Jettie Dixon's son had to bind Ms. Dixon to an arbitration clause. While it is true that Mr. Smith held a power of attorney, that document only granted him authority over his mother's property. It simply was not sufficient to grant him the power to waive his mother's constitutional right to a jury trial.

This point becomes clear through an examination of the statutes and precedents. Section 87-3-7 of the Mississippi Code holds that a power of attorney should "express plainly the authority conferred." The power of attorney in this case does just that. It "expresses plainly" that Mr. Smith has full authority to manage Ms. Dixon's property. It does not confer any greater authority. He therefore had no other authority and could not bind Ms. Dixon to arbitrate her claims.

This point is merely the application of general principles of agency law to an attorney-in-fact. A principal "is bound by the actions of [her] agent within the scope of the

agent's real or apparent authority."[2] *Ford v. Lamar Life Ins. Co.*, 513 So.2d 880, 888 (Miss. 1987) (citing *Baxter Porter & Sons Well Servicing Co. v. Venture Oil Corp.*, 488 So.2d 793 (Miss. 1986)). "Express authority is derived from specific instructions from the principal setting out the agent's duties, and exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal's behalf." *Mariner Health Care Inc. v. Rhodes*, No. 5:04-CV-217 slip op. at 8 (DCB) (JCS) (S.D. Miss. 2005) (quoting 2A C.J.S. Agency § 389). Once again, the "specific instructions" given to Mr. Smith involved property management, not the waiver of important rights. He simply had no authority to agree to the arbitration clause.

In *Rhodes*, Judge Bramlette considered facts nearly identical to those in this case and concluded that the signatory to an arbitration clause lacked authority to bind a resident to arbitration. There, Sylvester Rhodes' daughter Katherine held power of attorney over her mother's financial affairs, but she signed an arbitration clause as Ms. Rhodes' "responsible party" at admission. After being notified of an impending suit, the nursing home owners and operators sued the estate and Ms. Rhodes' wrongful-death beneficiaries to enforce the arbitration clause. Citing the authority discussed above, Judge Bramlette rejected their claim, holding that "Mariner has not put forth any evidence that Sylvester Rhodes actually gave her daughter any express authority to act as her agent for the purpose of signing an arbitration agreement." *Rhodes*, slip op. at 8.

The same is true in this case. The power of attorney held by Mr. Smith grants very specific and limited authority. That authority does not include the ability to waive a jury trial

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[2] Apparent authority is not an issue in this case. The record is devoid of any act on the part of Jettie Dixon that would reasonably lead a third party to believe that Mr. Smith had the authority to waive her right to a jury trial. See, *e.g.*, *Rhodes*, slip op. at 9.

or enter into an agreement to arbitrate claims. Just as in *Rhodes*, the absence of that express authority precludes enforcement of the clause at issue. It was error for the trial court to compel arbitration in this case.

Presumably, Defendants will respond that the statutes that gave Mr. Smith the ability to admit his mother to the nursing home also gave him the authority to bind Jettie Dixon to an arbitration clause. They did not. It is true that "[a] surrogate may make a health-care decision for a patient . . . 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." Miss. Code Ann. § 41-41-211(1). However, this record is devoid of the necessary physician determination to give effect to the statute. Second, and more importantly, "health-care decision" is defined by the statute as being a decision regarding "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition." Miss. Code Ann. § 41-41-203. This definition does not include waiving the right to a jury trial any more than it includes the authority to sell real property, to commit the resident to a loan agreement or to waive the patient's right to counsel. It simply does not create any authority that can bind Jettie Dixon in this case. Notably, the federal district courts in Mississippi have uniformly reached this conclusion. See *Mariner Health Care et al v. Kay and Lawrence Guthrie, Jr., et al,* Civil Action No. 5:04CV218-DCB-JCS (S.D. Miss. 2005); *Mariner Health Care, Inc. v. Rhodes*, No. 5:04CV217 (S.D. Miss 2005); *Mariner v. Green*, No. 4:04-CV-00246-MPM-EMB (N.D. Miss. 2006). They have done so because it is legally obvious. This Court should follow suit and affirm those decisions.

The conclusion that a third party cannot bind a person to a contract for arbitration absent some authority is uniform in the precedents. For example, the Tennessee Court of Appeals held that arbitration agreements signed by the next of kin without the express or apparent authority of the nursing home resident are invalid in *Raiteri v. NHC Healthcare/Knoxville, Inc.*, No. 2-791-01, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003). There, a husband admitted his wife to the defendant's nursing home. *Id.* at *1. The husband met with the admissions coordinator of the nursing home to sign all of the admissions papers without his wife being present, during which time he signed an agreement to arbitrate any claims regarding his wife's care against the nursing home. *Ibid.* He signed the agreements as his wife's "legal representative," but he did not indicate to the admissions coordinator that he actually had any authority to enter into agreements on his wife's behalf. *Id.* at *2. The court determined that the arbitration agreement was not binding because the husband did not have any authority to waive his wife's right to a jury trial. *Id.* at *8. Specifically, the Court wrote, "We find persuasive the plaintiff's arguments that Mr. Cox [plaintiff] did not have the express or apparent authority to sign the admission agreement for his wife and that the alternative dispute resolution provisions are otherwise unenforceable." *Ibid.* See also *Pagarigan v. Libby Care Center, Inc.*, 120 Cal. Rptr.2d 892 (Cal. Ct. App. 2002); *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. Ct. App. 2005).

Ample authority holds that where an agent does not have authority to bind a party to an arbitration agreement, or where the party otherwise does not sign the agreement, the party cannot be bound by its terms. See *Volt Info. Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 478, 109 S.Ct. 1248, 1255 (1989); *Goldberg v. Bear,*

Stearns & Co., 912 F.2d 1418, 1419 (11th Cir.1990) (per curiam); *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1000 (11th Cir.1986) (per curiam); *Three Valleys Municipal Water District v. E.F. Hutton & Company, Inc.*, 925 F.2d 1136 (9th Cir. 1991); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51 (3d Cir.1980); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir.1976); *Smith Wilson Co. v. Trading & Dev. Establishment,* 744 F.Supp. 14 (D.D.C.1990); *Ferreri v. First Options, Inc.*, 623 F.Supp. 427 (E.D.Pa.1985); *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648 (1986) (To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the "first principle" of arbitration that "a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit."); *Sphere Drake Insurance Limited v. All American Insurance Company,* 256 F.3d 587 (7th Cir. 2001); *Sandvik AB v. Advent International Corp.*, 220 F.3d 99, 105-09 (3d Cir.2000); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 729 (8th Cir.1976). Mr. Smith did not have authority to bind his mother. Respectfully, the trial court erred when it held that he did and compelled arbitration. This case should be reversed and remanded for trial.

II. <u>The Clause was fraudulently induced and, therefore, is unenforceable.</u>

Even if Mr. Smith did have authority to enter into a binding agreement to arbitrate on behalf of his mother, this arbitration clause is nevertheless unenforceable. Under the peculiar facts of this case, Defendants breached their fiduciary duties to Ms. Dixon in the procurement of the arbitration clause. The clause is therefore a product of fraud in the inducement and unenforceable.

Those facts bear repeating here. Ms. Dixon was already a long-time resident of Defendants' nursing home when her son was asked to come to the facility and sign a new admission agreement. The agreement was ostensibly required because of a facility name change, and that is what Mr. Smith was told. The name change was at best only a part of the reason for the new agreement and at worst a ruse. In reality, this agreement, with its exculpatory language and its arbitration clause, was required by Defendants' liability insurance carrier and was a method for limiting the potential liability of Defendants for their abuse and neglect of residents like Jettie Dixon.

Ms. Dixon was brought to Defendants' facility because she could not take care of herself and needed nursing care and assistance. She was at a severe disadvantage; physically and mentally weak, and totally dependant upon Defendants to provide for her every need. Defendants, on the other hand, are engaged in the in the custodial care of elderly, helpless individuals who are chronically infirm, mentally impaired, and in need of nursing care and treatment. Defendants had a fiduciary and confidential relationship with Ms. Dixon. The relationship created an affirmative duty on Defendants to place Ms. Dixon's interests above their own and to refrain from enticing her to waive her constitutional rights without first ensuring that she was fully and completely aware of the consequences of that waiver and in agreement with it.

So far as Plaintiff can discern, only one court has squarely addressed whether those providing long-term care stand in a confidential relationship to residents such that fiduciary duties arise. In *Petre v. Living Centers-East, Inc.,* 935 F. Supp. 808 (E.D.La. 1996), Judge Fallon wrote:

> A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:
>
> > One is said to act in a "fiduciary capacity" when the business which he transacts, or the money or property he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. *Office of the Commissioner of Insurance v. Hartford Fire Insurance Co.*, 623 So.2d 37, 40 (La.App. 1st Cir. 1993).
> >
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> >
> > [T]he Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the *Schenck* court, "one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities" as those created by a business relationship. *Schenck v. Living Centers-East Inc., et al*, 917 F. Supp. 432, 437-38 (E.D.La. 1996).

Id. at 812.

This holding is consistent with cases uniformly affirming the notion that those who provide medical care stand in a confidential relationship with and fiduciaries to those to whom the care is provided. *E.g., Benton v. Snyder,* 825 S.W.2d 409, 414 (Tenn. 1992); *Shadrick v. Coker*, 963 S.W.2d 726 (Tenn. 1998); *Ison v. McFall*, 400 S.W.2d 243 (Tenn. Ct. App. 1964); *Grubbs v. Barbourville Family Health*, 120 S.W.3d 682 (Ky. 2003). Mississippi courts have found fiduciary relationships to exist in situations that are much less compelling than the relationship at issue here. For example, in *Risk v. Risher*, 19 So. 2d 484 (Miss. 1944), the Mississippi Supreme Court held that a fiduciary relationship is not restricted to situations involving a trustee and beneficiary, principal and agent, or guardian and ward, but instead "applies to all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise." *Id.* at 486.

It is also consistent with logic and the whole notion of confidential relationships creating fiduciary duties. Those who provide long-term care do not just provide casual care. Residents depend on them for life's basic necessities such as food, water, cleanliness and even going to the bathroom, often at the end of life, when they are the most frail and vulnerable. There could hardly be a greater relationship of trust. Thus, the idea that duties fiduciary in nature are not owed is incredulous.

As if the case law were not enough, statutes and regulations governing the care to be provided residents further establish this confidential relationship. In order to prevent the type of abuse and neglect suffered by residents like Ms. Dixon, federal authorities have enacted various regulations governing care to be given nursing home residents in homes that receive government funds. See 42 C.F.R. § 483 *et. seq.* These regulations are meant to provide nursing home residents "a dignified existence, self determination, and communication with and access to persons and services inside and outside the facility." 42 C.F.R. § 483.10. They govern staffing levels, nutrition and hydration, turning and repositioning of residents to prevent pressure sores, and a plethora of other issues in order to guarantee that nursing home residents are provided with quality care.

As the United States District Court for the District of Columbia has acknowledged, "Congress has maintained a longstanding, continuing concern with the well being of America's elderly population. . . ." *Beverly Health and Rehabilitation Services v. Thompson*, 223 F.Supp.2d 73, 76 (D.D.C. 2002) (hereinafter *BHRS*). This concern led to oversight of nursing homes beginning with the 1935 Social Security Act and was expanded in 1965 with the creation of Medicare and Medicaid. *Ibid.* Criticism

of the efficacy of government efforts resulted in a major overhaul of the system by the Omnibus Budget Reconciliation Act of 1987 (OBRA). *Id.* at 76-77; H.R.Rep. No. 100-391(I), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-272. OBRA and the regulations promulgated under it have as their very purpose the creation of standards of care for nursing homes in this nation. They also define a relationship of trust between providers of care like Defendants and recipients of care like Ms. Dixon. Those rules and regulations are found at 42 C.F.R. §§ 483.1-483.75.

Similarly, the Mississippi state regulations governing long-term care define a fiduciary and confidential relationship between residents and nursing homes. For example, upon admission, the facility must see to it that the resident is fully informed of her resident's rights. Miss. Min. Std. 408.2(a). The facility must subsequently assist the resident in exercising her rights. Miss. Min. Std. 408.2(e). Finally, the regulations require facilities to see to it that the resident:

> Is assured of exercising her civil and religious liberties including the right to independent personal decisions and knowledge of available choice. The facility shall encourage and assist in the fullest exercise of these rights.

Miss. Min. Std. 408.2(p).

The term "fiduciary relationship" is a broad term and includes "both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enter., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996) (citing *Lowery v. Guaranty Bank and Trust Co.*, 592 So. 2d 79 (Miss. 1991)).

> Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind

> or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character.

Madden v. Rhodes, 626 So. 2d 608, 617 (Miss. 1993) (citing *Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982)).

The relationship between Defendants and Ms. Dixon, a long-time resident of Defendants' facility, was one of trust and confidence, and Defendants had a higher duty to speak the truth affirmatively to Ms. Dixon because of her age and infirmities and their confidential relationship to her. This relationship is key to resolving this case. While parties have a right to make contracts not prohibited by law in matters affecting business and civil rights, where contracts involve a fiduciary relationship of some kind, a court can relieve a person from the consequences of those acts. *See In re Estate of Sadler*, 98 So. 2d 863 (Miss. 1957). Importantly, a contract entered with a fiduciary through which the fiduciary derives a benefit at the expense of the inferior party is presumptively fraudulent. *Gwin v. Fountain,* 126 So. 18 (Miss. 1930).

Defendants took advantage of their established relationship with Ms. Dixon and foisted an arbitration clause upon her. Defendants used a name change as an excuse to entice residents and their loved ones to sign new admission agreements even if they were current residents of the facility. These new agreements contained an arbitration clause that was required by the facility's liability-insurance carrier and was for the purpose of limiting liability for abuse and neglect. These facts are undisputed in the record. It is also undisputed that these purposes and benefits were never conveyed to Ms. Dixon or her son. Under these facts, the clause was presumptively fraudulently induced and cannot be enforced. For this additional reason, the trial court should be reversed and this case should be remanded for a trial on the merits

III. This case is not arbitrable under the clear terms of the contract.

One additional and brief point requires reversal. As written previously, the arbitration clause in this case incorporates the Rules of Procedure of the American Health Lawyers Association into the contract. Those Rules, therefore, are material terms of the contract. If the contract is valid, those terms must be followed.

In relevant part, those Rules of Procedure read:

> The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service under these Rules. The Service will administer a 'consumer health care liability claim' under the Rules on or after January 1, 2004 only if all 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.

R. 142-143; American Health Lawyers Association, Rules of Procedure for Arbitration. In other words, cases where the arbitration clause was signed before the dispute arose cannot be arbitrated. Only those cases where the agreement to arbitrate followed the occurrence giving rise to the suit are arbitrable.

Once again, this provision is a term of the contract for arbitration. If it is valid at all, it is only valid as to those situations where the reason for the dispute preceded the signing of the clause. Plaintiffs claims arose after the contract was signed. By the very terms of the contract, then, this case is not a dispute that "falls within the scope of that arbitration agreement." *Am. Heritage Life Ins. Co. v. Beasley*, 174 F. Supp. 2d 450, 454 (N.D. Miss. 2001) (citing 9 U.S.C. § 4). Compelling arbitration was error, and that error requires reversal.

CONCLUSION

No enforceable contract for arbitration exists in this case. The person who signed the clause lacked authority to bind Jettie Dixon to arbitration, and Defendants breached their fiduciary duties to Ms. Dixon and fraudulently induced the arbitration clause. Finally, under the clear terms of the contract, Plaintiff's claims are not arbitrable. The trial court should be reversed, and this case should be remanded for trial on the merits.

Susan Nichols Estes

CERTIFICATE OF SERVICE

I certify that a copy of the preceding pleading has been served via the United States Postal Service on the following counsel of record on this 15th day of November 2006:

Ben Heinz
Andrew C. Clausen
William R. Lancaster
Christina May Bolin
E. Larkin Hatchett
Alford, Clausen & McDonald, LLC
One St. Louis Centre, Ste. 5000
Mobile, Alabama 36602

The Honorable Robert B. Helfrich
Forrest County Circuit Judge
630 Main Street
Hattiesburg, MS 39403

Mark Wann
Charles R. Saltzman
Maxey Wann PLLC
P.O. Box 3977
Jackson, Mississippi 39207

Susan Nichols Estes
Wilkes & McHugh, P.A.

Attorneys for Plaintiff/Appellant

CERTIFICATE OF FILING

I hereby certify that I, Susan Nichols Estes, counsel for the Plaintiff/Appellant, on this 15 day of November, 2006, deposited with Federal Express for overnight delivery to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and seven (7) copies of the above Appellant's Brief.

The original and seven (7) copies of Appellant's record excerpts.

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.

Susan Nichols Estes

Susan Nichols Estes
Wilkes & McHugh, P.A.

Attorneys for Plaintiff/Appellant

CERTIFICATE OF VIRUS-FREE COMPUTER DISK

I certify that the computer disk accompanying this brief has been scanned and is virus free.

Susan Nichols Estes

Wilkes & McHugh, P.A.
Susan Nichols Estes
D. Bryant Chaffin
Kenneth L. Connor

Attorneys for Plaintiff/Appellant