IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-M-01053-SCT CA

Trinity Mission Health & Rehabilitation of Clinton; LPNH Holdings Limited, LLC; APPELLANT/DEFENDANTS

VS.

The Estate of Mary Scott, by and through Elzenia Johnson, Individually and as the Personal Representative of the Estate of Mary Scott, and on behalf of and for the use and benefit of the wrongful death beneficiaries of Mary Scott APPELLEE/PLAINTIFF

CERTIFICATE OF INTERESTED PERSONS

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 Court may evaluate possible disqualification or recusal.

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Trinity Mission Health & Rehabilitation of Clinton;
LPNH Holdings Limited, LLC

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Circuit Court Judge:

Honorable Winston L. Kidd, Hinds County Circuit Court Judge

Other Parties:

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Mariner Health Central, Inc.
Mariner Health Care Management Company f/k/a LC Management Company
MHC Holding Co.
MHC Mid America Holding Co.
Grancare, Inc.
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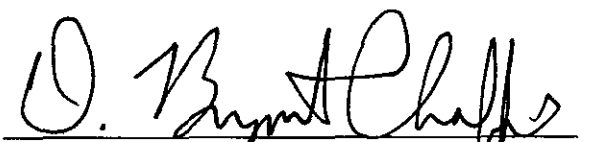
By: 

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee disagrees with the Appellant and submits that Oral Argument is not required in this matter. The issues in the case at bar are straightforward and can be readily determined from the record and the briefs filed by the parties. If the Court should determine that Oral Argument is warranted, however, Plaintiff will gladly submit her arguments to the Court and participate in any manner that is desired.

STATEMENT OF THE ISSUES

I. Whether a nursing home resident's relative who possesses no actual or apparent authority to bind the resident may, nonetheless, bind the resident to an arbitration agreement, regardless of whether or not the resident is competent.

II. Whether a non-signatory to an arbitration agreement that is otherwise invalid may still be bound to arbitrate under the theory of third party beneficiary.

III. Whether an arbitration clause executed in connection with a resident's admission to a nursing home is a Health Care Decision under Miss. Code Ann. § 41-41-211.

IV. Whether an arbitration clause that lacks mutual obligations and alleviates a nursing home from statutorily required duties is unconscionable.

V. Whether a pre-dispute arbitration clause is enforceable despite a material term of the clause that holds that later injuries are not arbitrable.

STATEMENT OF THE CASE

Nature of the Case

This appeal is from the opinion and order of the Circuit Court of Hinds County denying Defendants' Motion to Compel Arbitration in a nursing-home abuse-and-neglect case filed on behalf of Mary Scott (Scott) in the Circuit Court of Hinds County, Mississippi against the owners, operators, licensees, managers, and administrators of Clinton Health and Rehabilitation Center in a case styled *The Estate of Mary Scott, by and through Elzenia Johnson, Individually and as the Personal Representative of the Estate of Mary Scott, and on behalf of and for the use and benefit of the wrongful death beneficiaries of Mary Scott v. Mariner Health Care, Inc. f/k/a Mariner Post-Acute Network, Inc.; Mariner Health Central, Inc.; Mariner Health Care Management Company f/k/a LC Management Company; MHC Holding Co.; MHC Mid America Holding Co.; Grancare, Inc.; National Heritage Realty, Inc.; Evergreen Healthcare, LLC; Trinity Mission Health & Rehabilitation of Clinton; LPNH Holdings Limited, LLC; George Morgan; Boyd P. Gentry; Charles W. "Tripp" Francis, III; Unidentified Entities 1 through 10 and John Does 1 through 10 (as to Clinton Health & Rehabilitation),* Cause No. 251-04-858-CIV. R. 5, 595.[1]

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 well over a year after Ms. Scott became a resident of Clinton Health and Rehabilitation Center.

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[1] References herein to the record will be denoted "R. __ ", and references to the hearing transcript as "H.T. __ ".

Course of the Proceedings Below

Due to injuries suffered by Mary Scott during her residency at Clinton Health and Rehabilitation Center, Ms. Scott's daughter, Elzenia Johnson, filed suit Individually and as the Personal Representative of the Estate of Mary Scott, and on behalf of and for the use and benefit of the wrongful death beneficiaries of Mary Scott, in the Circuit Court of Hinds County, Mississippi, against the owners, operators, licensees, managers, and administrators of Clinton Health and Rehabilitation Center on August 25, 2004. R. 5-40. In her complaint, Plaintiff alleged that Ms. Scott suffered numerous and horrendous injuries, including pressure sores, infections, sepsis, amputation, disfigurement, poor hygiene, and ultimately death. R. 7-8.

During the first part of Ms. Scott's residency, Clinton Health and Rehabilitation Center was owned and operated by Mariner Health Care, Inc f/k/a Mariner Post-Acute Network, Inc.; Mariner Health Central, Inc.; Mariner Health Care Management Company f/k/a LC Management Company; MHC Holding Co.; MHC Mid America Holding Co.; Grancare, Inc.; National Heritage Realty, Inc.; and Evergreen Healthcare, LLC, etc. (hereinafter "Mariner Defendants"). The facility was subsequently taken over and operated by Defendants/Appellants Trinity Mission Health & Rehabilitation of Clinton and LPNH Holdings Limited, LLC (hereinafter "Trinity Defendants"). The Mariner Defendants filed answers and affirmative defenses, asserting that arbitration was appropriate pursuant to the arbitration agreement presently asserted by the Trinity Defendants subsequent to the Mariner Defendants' ownership and operation of Clinton Health and Rehabilitation Center. R. 41-267. The Mariner Defendants also filed a concurrent action in United States District Court for the Southern District of Mississippi

against the Plaintiff, seeking to compel arbitration under this agreement. However, Chief United States District Judge Henry T. Wingate dismissed the action in June 2005, finding that the Mariner Defendants were not named anywhere in the document. R. 353-56.

The Trinity Defendants filed a Motion to Compel Arbitration on October 28, 2005. R. 276. Plaintiff filed her response on November 23, 2005, asserting that Defendants had failed to meet their burden of establishing that a valid agreement to arbitrate existed, that Elzenia Johnson lacked authority to enter into said agreement, and that Ms. Scott had not signed the agreement, among other arguments. R. 307-460. Plaintiff's response included an affidavit from Ms. Johnson that supported Plaintiff's position. R. 389-90. Defendants replied to Plaintiff's response, but offered no evidence whatsoever of Ms. Johnson's authority to waive Ms. Scott's Constitutional right to jury trial nor evidence regarding whether Ms. Scott signed the purported agreement. R. 465-531.

A hearing was held on Defendants' motion on February 27, 2006. H.T. 1-17. At the hearing, the lower court asked counsel for the Defendants directly whether Ms. Scott had signed the agreement and that if she had not signed it, he would "need to have something to show me that Ms. Johnson had the authority to sign it on behalf of Ms. Scott." H.T. 16. The court gave Defendants the opportunity to supplement their motion and Plaintiff the opportunity to submit further affidavits in support of her position. H.T. 16. Plaintiff filed an additional affidavit of Ms. Johnson on March 3, 2006, indicating that Ms. Scott did not sign the agreement. R. 541-42. Defendants filed their supplement on March 8, again lacking documents showing affirmative proof, but instead

attempting to show that Defendants relied on apparent authority based on other documents signed by Ms. Johnson. R. 549-92.

The lower court did not find Defendants' arguments persuasive, however, and denied Defendants' Motion to Compel Arbitration in an Order dated May 18, 2006. R. 595-96. In doing so, the court specifically found that Defendants failed to meet their burden of establishing that Elzenia Johnson had the authority, either actual or apparent, to bind Mary Scott to the arbitration agreement at issue. R. 595-96. The continued, "Elzenia Johnson did not have the legal capacity to waive Mary Scott's constitutional right to a jury trial." R. 596. This appeal followed. R. 597-98.

STATEMENT OF FACTS

Mary Scott entered Clinton Health and Rehabilitation Center in January 2001, and she was a resident there for approximately three (3) years. R. 541. During her residency, Ms. Scott suffered horrible and preventable injuries, including pressure sores, infections, sepsis, amputation, disfigurement, poor hygiene, and ultimately death. R. 7-8. These injuries caused Mary Scott her personal dignity and her death to be preceded by extreme and unnecessary pain, degradation, anguish, and emotional trauma. R. 12. Ultimately, these injuries led to her death on January 26, 2004. R. 36-38.

Although Ms. Scott was admitted in January 2001, it appears that Elzenia Johnson, Ms. Scott's daughter, was informed that she needed to "sign some paperwork" which included a purported "Admission Agreement" on Ms. Scott's behalf in September 2002, over a year and a half after Ms. Scott had been admitted to the facility. R. 541. On September 13, 2002, Ms. Johnson signed the "Admission Agreement", at issue, including signing her mother's name. R. 542, 542-548. Ms. Scott was not in the room when the admission paperwork was presented for signing, despite the fact that there is no evidence in the record that Ms. Scott was incompetent or unable to make decisions on her own. R. 542.

The arbitration clause in the purported 2002 "Admission Agreement" provides in Section "F" as follows:

> The Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures. The Arbitration shall be heard and decided by one qualified Arbitrator selected by mutual agreement of the Parties. Failing

> such agreement each Party shall select one qualified Arbitrator and the two selected shall select a third. The Parties agree that the decision of the Arbitrator(s) shall be final. The Parties further agree that the Arbitrators shall have all authority necessary to render a final, binding decision of all claims and/or controversies and shall have all requisite powers and obligations. If the agreed method of selecting an Arbitrator(s) fails for any reason or the Arbitrator(s) appointed fails or is unable to act or the successor(s) has not been duly appointed, the appropriate circuit court, on application of a party, shall appoint one Arbitrator to arbitrate the issue. An Arbitrator so appointed shall have all the powers of the one named in the Agreement. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursing a timely resolution of a claim, dispute or controversy, should one arise. The Parties agree to share equally the costs of such arbitration regardless of the outcome. Consistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7.

R. 548.

The Admission Agreement also contains various provisions which basically purported to make the resident or her responsible party financially and legally responsible for providing the resident with additional nursing care if the facility was not able or willing to provide this care and to hold the facility harmless for any liability or harm that could have been avoided had "supplemental one-on-one private duty nursing been provided by Resident or Responsible Party." R. 543-48.

Even though Ms. Scott had been a resident of Clinton Health and Rehabilitation Center for well over a year and a half before the 2002 "Admissions Agreement" was even signed, Section D, paragraph no. 1 provides that "The Resident and/or Responsible Party must read and complete this agreement or make satisfactory arrangements for its completion **prior to admission or at time of admission to the facility**." R. 546, emphasis added. Section D, paragraph no. 3 provides that "The facility **reserves the right to discharge the Resident** if in the Facility's sole discretion

a) the Resident and/or Responsible Party are unable to comply with the terms of this Agreement . . .." R. 546, emphasis added.

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 Arbitration Association (AAA). R. 548. In fact, those Rules are incorporated into the agreement itself as a material term. *Id.* However, effective on January 1, 2003, the American Arbitration Association announced that it would "no longer accept the administration of cases involving individual patients without a **post-dispute agreement** to arbitrate." R. 332-33. Because Plaintiff's complaint addresses injuries occurring after the date of the arbitration agreement, this clause is a pre-dispute arbitration clause. R. 1-40. Accordingly, by its own terms the arbitration clause prohibits Plaintiff's claims from arbitration. Thus, for the reasons set forth herein, the Circuit Court of Hinds County did not err in denying Defendants' Motion to Compel Arbitration.

SUMMARY OF THE ARGUMENT

On September 13, 2002, Elzenia Johnson executed a new "Admission Agreement" so that her mother, Mary Scott, could continue to live at Clinton Health and Rehabilitation Center, where she had resided since January 2001. The 2002 "Admission Agreement" contained an arbitration agreement, the enforceability of which is the subject of this appeal.

Defendants have the burden of establishing that a valid agreement to arbitrate exists. Defendants have failed to meet their burden of establishing that Elzenia Johnson had the requisite authority to waive her mother's Constitutional right to a jury trial. Plaintiff, on the other hand, has provided support for her assertions that Ms. Johnson did not have such authority. Further, nothing in the record establishes that Ms. Scott was unable to make decisions for herself. Thus, the lower court did not err in denying Defendants' Motion to Compel Arbitration.

It is well settled that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Pre-Paid Legal Services v. Battle,* 873 So.2d 79, 83 (Miss. 2004) (quoting *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986)). *See also Waffle House,* 534 U.S. at 279, 122 S.Ct. 754 ("[n]o one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a *contract cannot bind a non-party.*) In *Bridas S.A.P.I.C. v. Government of Tukmenistan*, et al, 345 F.3d 347, 553 (5th Cir. 2003), the Fifth Circuit wrote: "In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause." The Fifth Circuit further noted in *Fleetwood*

Enterprises, Inc. v. Gaskamp, 230 F.3d 1069 (5th Cir. 2002) and in *Westmoreland v. Sadoux,* 299 F3d 462 (5th Cir. 2002), a nonsignatory cannot ordinarily be bound by an arbitration agreement's terms unless the nonsignatory has sued in reliance on the contract's terms. Here, Mary Scott was not a signatory to the arbitration clause. Moreover, the claims brought on behalf of Ms. Scott's estate and her wrongful death beneficiaries are based in tort, not in contract.

It is also clear that Ms. Scott was not a third party beneficiary to the arbitration agreement. Before third party beneficiary principles can apply, the underlying agreement must first be valid. Here, there was no valid agreement to arbitrate in the first instance because Elzenia Johnson lacked authority to bind Mary Scott. Moreover, it is apparent from a review of the arbitration clause itself that Ms. Scott was not an intended third party beneficiary, but an intended principal of the agreement. Because she is a named party in the agreement, by definition, she is not a "stranger" to the contract. Finally, third party beneficiary status does not apply to bind Ms. Scott because she has not sued based upon or in reliance of the Admission Agreement or the arbitration clause. Instead, the claims she has asserted are based in tort.

Elzenia Johnson's execution of the arbitration clause did not constitute a health care decision pursuant to Miss. Code Ann. § 41-41-211(1). "Health-care decision" is defined by 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 Mary Scott in this case. Although currently on Motion for Rehearing, the Mississippi Court of Appeals recent discussion of this issue is directly on point and in agreement with Plaintiff's position. *See Covenant Health & Rehabilitation of Picayune, LP v. Estate of Lambert,* --- So. 2d ----, 2006 WL 3593437 (Miss. Ct. App. 2006)("[W]e find that the circuit judge erred in finding that health care decisions include signing arbitration agreements. The decision to arbitrate is neither explicitly authorized nor implied within section 41-41-203(h), which defines a health care decision . . ..")

Plaintiff submits that the Circuit Court of Hinds County was correct in its order denying Defendants' Motion to Compel Arbitration. However, other reasons for denying Defendants' motion are also supported by the record. "It is well settled that if the actions of a trial court can be upheld for any reason, the appellate court should affirm." *Vinson v. Roth-Roffy*, 829 So. 2d 1250, 1252 (Miss. Ct. App. 2002) (citing *Gates v. Gates,* 616 So. 2d 888, 890 (Miss. 1993)). Plaintiff submits that the lower court's decision denying motion may be affirmed for the following independent reasons, which are supported by the record:

1. The Admission Agreement indicates the nursing home's illegal intent to staff at a level less than the law requires.

2. The admission agreement illegally requires the family to provide staff that the nursing home is required to provide.

3. The Admission Agreement illegally seeks to immunize the nursing home from all suits for abuse and neglect, and by doing so constitutes a violation of the resident's rights and exploitation of a vulnerable adult.

4. The Admission Agreement seeks to unconscionably cap the nursing home's liability by limiting damages and barring punitive damages.

5. Reserving access to the court system to the nursing home is unconscionable.

6. The Admission Agreement illegally seeks to shorten the statute of limitations.

7. The Admission Agreement contains a pre-dispute arbitration clause that is unconscionable.

8. The Admission Agreement indicates that the nursing home does not intend to follow the law regarding notification.

9. The Admission Agreement seeks to unconscionably restrict a Resident's federally protected right to access medical records.

Each of these arguments independently requires affirmance of the Circuit Court of Hinds County's denial of Defendants' Motion to Compel Arbitration.

ARGUMENT

In determining whether parties should be compelled to arbitrate a dispute, courts perform a two-step inquiry pursuant to the Federal Arbitration Act. *East Ford, Inc. v. Taylor,* 826 So. 2d 709, 713 (Miss. 2002).; *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992). The first prong has two considerations: (1) whether there is a valid arbitration agreement, and (2) whether the parties' dispute is within the scope of the arbitration agreement. Under the second prong, the United States Supreme Court has stated that the question is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). *See also Pre-Paid Legal Services, Inc. v. Battle,* 873 So. 2d 79, 83 (Miss. 2004); *Am. Heritage Life Ins. Co. v. Beasley,* 174 F. Supp. 2d 450, 454 (N.D. Miss. 2001) (citing 9 U.S.C. § 4).

If the Court finds that the parties agreed to arbitrate, "it must then consider whether any federal statute or policy renders the claims nonarbitrable." *R.M. Perez,* 960 F.2d at 538. "[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." *Id.* (citing *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 680-681 (5th Cir. 1976)).

Furthermore, federal district courts in Mississippi have noted that the FAA's policy of favoring arbitration applies *only* after a valid arbitration agreement has been found. *See* Memorandum Opinion and Order denying Plaintiffs' Motion to Compel

Arbitration, *Mariner Health Care et al v. Kay and Lawrence Guthrie*, Civil Action No. 5:04cv218-DCB-JCS (U.S. Dist. Ct., So. Dist. of MS, West. Div.), p. 6, fn 4, emphasis in original, citing *Fleetwood Enters., Inc. v. Garkamp,* 280 F. 3d 1069, 1070 & 1070 n.5 (5th Cir. 2002), R. 359-374; *see also* similar Order in *Rhodes,* Civil Action No. 5:04cv217-DCB-JCS, R. 375-88. Other Federal Courts in Mississippi have agreed with the reasoning set forth in *Guthrie* and *Rhodes*. *See Buie v. Mariner Health Care, Inc.,* 2006 WL 3858330 (S.D.Miss. 2006); *JPMorgan Chase & Co. v. Conegie ex rel Lee*, 2006 WL 1666686 (N.D.Miss. 2006), *Mariner Health Care, Inc. v. Ferguson*, 2006 WL 1851250 (N.D.Miss. 2006); *Mariner Healthcare, Inc. v. Green*, 2006 WL 1626581 (N.D.Miss. 2006); *Mariner Healthcare, Inc. v. King*, 2006 WL 1716863 (N.D.Miss. 2006).

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 is undisputed that Mary Scott herself did not sign the arbitration agreement at issue. R. 541-42. In Mississippi, as elsewhere, a principal "is bound by the actions of [her] agent within the scope of the agent's real or apparent authority." *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), R. 375-88

> 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 it a waiver or an estoppel.

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

With respect to apparent authority,

> [T]he principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have.

McPherson v. McLendon, 221 So. 2d 75, 78 (Miss. 1968). In Mississippi, the burden is on the claimant to show the authority of the agent. *See CUE Oil Co. v. Fornea Oil Co., Inc.*, 45 So. 2d 597 (Miss. 1950).

A. There is no evidence in the record that Mary Scott was incompetent or unable to sign the arbitration agreement on her own behalf.

Plaintiff submits that there is no evidence in the record before the Court that Mary Scott was incompetent or unable to sign the arbitration agreement at issue, yet it is undisputed that Ms. Scott did not sign her name to the document. R. 542. Thus, Mary Scott did not enter into an arbitration agreement. The only way that Ms. Scott can be bound by an arbitration agreement is if someone with authority to enter into such an agreement did so on her behalf, or if she is a third-party beneficiary to such an agreement. As set forth below, neither of these conditions occurred. Thus, no valid agreement to arbitrate exists and Defendants' Motion was properly denied.

B. Elzenia Johnson lacked authority to bind Mary Scott to arbitrate her claims.

"It goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House*, 534 U.S. 279, 294 (2002). While the Admission Agreement at issue purports to

be among Mary Scott, Elzenia Johnson, and the Facility, it is undisputed that Ms. Scott did not sign the document and was not present in the room when the document was present to Elzenia Johnson for signing. R. 542. There is no evidence in the record as to whether Ms. Scott had the requisite capacity to sign the agreement on her on behalf. Further, Elzenia Johnson did not have the capacity or the legal authority to intelligently, willingly, and knowingly waive her mother's Constitutional right to a jury trial. Still, at the facility's request through "Ms. Fox", Elzenia Johnson signed the 2002 Admission Agreement as the "Responsible Party" for Mary Scott. R. 542. Ms. Johnson also signed Ms. Scott's name to the document. R. 542.

The record is devoid of any evidence as to how, why, or when Elzenia Johnson was chosen by Mary Scott to be her Responsible Party. There is no indication in the Admission Agreement that the Responsible Party is vested with any legal authority to bind the Resident. In fact, there is no indication of Ms. Johnson's authority in the Admission Agreement at all. Absent the existence of a durable power of attorney or court ordered conservatorship, Elzenia Johnson's signature is not binding on Ms. Scott.

Although this Court has not yet visited this issue, the Mississippi Court of Appeals recently addressed a matter almost identical to the one at bar, and several Federal District Courts in Mississippi have also decided cases that are exactly on point. In *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Lambert,* --- So. 2d ----, 2006 WL 3593437 (Miss. Ct. App. 2006), presently on Motion for Rehearing, the Mississippi Court of Appeals examined a case, also in a nursing home setting, in which the nursing home resident's child had signed an arbitration agreement. The child in *Burr* was the resident's health care surrogate, but otherwise had no authority to enter

into an arbitration agreement on behalf of his mother. *Id.* at *4. The Court of Appeals held that the arbitration agreements are not "health care decisions" provided for in Mississippi Code Annotated Section 41-41-203, stating, "The decision to arbitrate is neither explicitly authorized nor implied within section 41-41-203(h), which defines a health care decision as a decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including: (i) selection and discharge of health-care providers and institutions; (ii)[a]pproval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and (iii)[d]irections to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care." *Id.* (citing Miss. Code Ann. § 41-41-203).

Similarly, in cases involving arbitration agreements purportedly entered into by the family of nursing home residents, United States District Judges Barbour, Bramlette, Davidson, and Mills, respectively, have held that authority must be established for such agreements to arbitrate to be upheld. *See Guthrie*, *supra*, R. 359-374; *Rhodes, supra,* R. 375-88; *Buie, supra; Conegie, supra*; *Ferguson*, *supra*; *Green*, *supra*; *King*, *supra*. In *Guthrie,* the Court held that a daughter-in-law without actual authority could not bind her father-in-law to an arbitration provision in a nursing home admission agreement. Similarly, in *Mariner Health Care, Inc. v. Estate of Sylvester Lee Rhodes, supra,* the United States District Court for the Southern District of Mississippi held that a daughter could not bind her mother to an arbitration provision in a nursing home admission agreement if the mother did not bestow her with authority to do so. *Id.*

In *Rhodes,* Katherine Rhodes signed an arbitration agreement upon her mother's admission to a nursing home facility located in Yazoo City, Mississippi. Katherine

Rhodes possessed a Special Power of Attorney to act on behalf of her mother with regard to certain, specific matters. However, the Court held that that power did not extend to the arbitration agreement. The Court, therefore, held that, "Without express authority to act as an agent, it necessarily follows that there is also no implied authority for Katherine Rhodes to bind her mother to the Agreement to Arbitrate. In the absence of actual authority to act, the Court must next determine whether Katherine Rhodes had any apparent authority to sign as a proxy or representative for Sylvester Rhodes." *See slip op.* at p. 9, R. 375-88.

The Court then specifically recognized that Katherine Rhodes signed the agreement as her mother's "legal representative." Nevertheless, the Court held that such statement by Katherine Rhodes "does not make her an agent without some indication of either an express or apparent authority *derived from the acts of the alleged principal.*" *See slip op.* at p. 10, R. 375-88. Because the resident did not take any action herself to empower Katherine Rhodes to act as her agent *with regard to the arbitration agreement*, "the Court will not presume that one exists merely because she signed as a "legal representative." *See slip op.* at p. 10, R. 375-88. The Court further held, like the Mississippi Court of Appeals in *Burr*, that even if Katherine Rhodes could act as a health care surrogate on behalf of her mother, "the decision to authorize certain treatments or other medical-related procedures is distinguishable from a decision which waives a party's right to a jury trial." *See slip op.* at p. 13, R. 375-88.

In *Buie, Conegie, Ferguson, Green*, and *King*, the United States District Courts applied the analysis from *Guthrie* or *Rhodes* or used a similar analysis to determine if authority was present. Notably in *Ferguson,* Judge Davidson found that no evidence of

express authority existed, and without express authority to act as an agent, there can be no implied authority. *Ferguson*, 2006 WL 1851250 at *4. In the case at bar, there is no evidence in the record to support an argument that express authority existed, yet Defendants attempted, after the hearing on their motion, to assert that other documents purportedly signed by Elzenia Johnson indicate apparent she had apparent authority to enter into the arbitration agreement at issue. R. 549-93.

These documents nor Ms. Johnson's signature were ever authenticated, but even if they are taken to be true and correct, when examined, these documents do not indicate that Ms. Johnson had authority to waive her mother's Constitutional right to a jury trial. Defendants rely on a document that clearly has options for "Living Will, Durable Power of Attorney for Healthcare, Designation of Surrogate/Proxy Decision Maker", yet none of these boxes are marked, clearly indicating that Defendants were aware that Ms. Johnson did not have the requisite authority. R. 560. Instead, Ms. Johnson purportedly signed that she wished to have CPR performed on her mother in the event of its necessity. *Id.* Additionally, Ms. Johnson purportedly signed a Medicare Payer Questionnaire as the patient/caregiver as well as a Patient Fund Authorization authorizing Clinton Health and Rehabilitation Center to handle Ms. Scott's funds. R. 561. Finally, Ms. Johnson purportedly signed a document that did nothing more than choose a pharmacy for Ms. Scott. R. 569. These documents are clearly insufficient for a reasonable person to assume from them that Ms. Johnson had the authority to enter into contracts on behalf of her mother, ultimately waiving a Constitutional right. In fact, the plain reading of the first document mentioned above indicates that a reasonable

person would know that Ms. Johnson *did not* have such authority. R. 560. Thus, Defendants' argument is without merit.

The *Guthrie* decision relies in part on the California Court of Appeals decision in *Pagarigan v. Libby Care Center, Inc.*, 120 Cal. Rptr. 2d 892 (Cal. Ct. App. 2002). In *Pagarigan*, the nursing home resident had been admitted to the facility in a comatose state and remained in residence for nearly a year, during which time she developed pressure sores, became malnourished and dehydrated. The adult children of the resident brought a personal injury action and a wrongful death claim against the nursing home owners and operators. The defendants filed a petition to compel arbitration based upon two arbitration agreements signed by the resident's adult children. The trial court denied the petition to compel arbitration and the appellate court affirmed:

> As explained below, we have identified two independently adequate reasons for affirming the trial court's ruling: (1) defendants failed to produce any evidence Teri or Mary Pagarigan had authority to enter into an arbitration contract on behalf of their mother; and (2) defendants failed to provide any evidence they were entitled to seek enforcement of the arbitration agreements.

Id. at 894.

The *Pagarigan* court noted that the nursing home bore the burden of establishing a valid agreement to arbitrate, and the nursing home admitted that the resident had not signed the arbitration agreements. The nursing home further admitted that the resident was incompetent upon admission. Like the instant case, there was no durable power of attorney and no legal guardian appointed. In discussing the resident's incompetency upon admission, the court noted that "[I]t necessarily follows Mrs. Pagarigan lacked the capacity to authorize either daughter to enter into the arbitration agreements on his behalf. Consequently, no valid arbitration contract exists." *Id.*

The nursing home argued that because the adult daughters signed the arbitration agreements, they represented themselves as having the power to bind their mother to the arbitration documents. The court was not persuaded by this argument and cited long-standing agency principles:

> A person cannot become the agent of another merely by representing herself as such. To be an agent, she must actually be so employed by the principal, or the principal intentionally, or by want of ordinary care, [has caused] a third person to believe another to be her agent who is not really employed by her. Defendants produced no evidence Mrs. Pagarigan had ever employed either of her daughters as her agent in any capacity. Nor did Defendants produce any evidence this comatose and mentally incompetent woman did anything which caused them to believe that either of her daughters was authorized to act as her agent in any capacity.
>
> Defendants' second argument is equally lacking in merit. Defendants contend Teri and Mary Pagarigan had authority to bind their mother to an arbitration agreement merely by being their mother's next-of-kin. In support of this argument, Defendants cite [California Code section regarding informed consent]. Under subdivision (c) of the statute, the term "person with legal authority" includes the patient's "next-of-kin."
>
> * * *
>
> Defendants do not explain how the next-of-kin's authority to make medical treatment decisions for the patient at the request of the treating physician translates into the authority to sign an arbitration agreement on the patient's behalf at the request of the nursing home. . . . [D]efendants maintain that since the state conferred on Teri and Mary Pagarigan the authority to sign their mother's admission agreement, make medical treatment decisions on her behalf and enforce her rights as a nursing home patient "to argue neither have the authority to sign the arbitration agreement is counter-intuitive and inconsistent with legislative intent."
>
> It appears to us just the opposite is true. The statutes and regulations cited by Defendants demonstrate that when the Legislature and the Department of Health Services wanted to confer authority on next-of-kin to take some action on behalf of a nursing home resident they knew how to say so. It would indeed be counter-intuitive and inconsistent with legislative intent to hold that by failing to confer authority on the next-of-kin to bind a nursing home resident to an arbitration agreement, the Legislature, an administrative agency, intended to confer the very authority they withheld.

Id. at 894-95.

In this case, the Trinity Defendants failed to provide any proof that Elzenia Johnson had the authority to bind Mary Scott to an arbitration agreement. Absent a durable power of attorney, guardianship of the person or estate, conservatorship, or other court-recognized representative capacity, there is no reasonable basis for nursing home personnel to assume that any acts of a supposed agent are binding as to Ms. Scott. Accordingly, the lower court's denial of the Motion to Compel Arbitration must be affirmed.

C. Mary Scott Was Not a Third Party Beneficiary to the Arbitration Agreement.

"Arbitration agreements are enforceable to non-signatories to the contract when the non-signatory party is a third-party *beneficiary.*" *Adams v. Greenpoint Credit, LLC,* 943 So. 2d 703, 708 (Miss. 2006).

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

Id. at 708-09 (citing 17A C.J.S. *Contracts* 519(4) (1963)). Indeed, "the fact that a person is directly affected by the parties' conduct, or that he 'may have a substantial interest in the contract's enforcement does not make him a third-party beneficiary.'" *Fleetwood v. Gaskamp,* 280 F3d 1069, 1075 (5th Cir. 2002).

In *Gaskamp,* the Gaskamp parents purchased a mobile home manufactured by Fleetwood. The financing agreement for the mobile home contained an arbitration

provision. The Gaskamps later brought suit in Mississippi state court against the mobile home manufacturer, seller and financing institution for personal injuries resulting from exposure to formaldehyde. The manufacturer then brought suit against the Gaskamps in federal court and sought to enforce the terms of the arbitration provision contained in the financing agreement. The district court granted manufacturer's motion to compel arbitration and the Gaskamps appealed claiming, in part, that their minor children were not bound by the terms of the arbitration provision.

As a threshold matter, the Fifth Circuit noted that it must first determine whether the parties agreed to arbitrate the dispute. "This determination is generally made on the basis of state-law principles that govern the formation of contracts." *Id.* at 1073. Moreover, the federal policy favoring arbitration does not apply to the determination of whether the parties entered into a valid agreement to arbitrate. *Id.* The federal policy favoring arbitration agreements does not extend to the determination of who is bound because the purpose of the Federal Arbitration Act is "to make arbitration agreements as enforceable as other contracts, but not more so." *Id.* at 1074, n. 5 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

The *Gaskamp* Court applied Texas law to determine whether the Gaskamp children were required to arbitrate. The Court recognized that the circumstances under which a nonsignatory can be bound to arbitrate are limited. In Texas, nonsignatories can only be bound to arbitrate when the nonsignatory sues in reliance on the contract or when the non-signatory is a third-party beneficiary.

> [O]ther jurisdictions that have addressed the question of when non-signatories are bound have only gone a little further than Texas, holding there are five theories under 'common law principles of contract and agency law' that provide a basis 'for binding non-signatories to arbitration

agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/ alter ego; and 5) estoppel.'

Id. at 1076 (citations omitted).

Following this analysis, the *Gaskamp* Court reversed the district court and held that the Gaskamp children were not bound to arbitrate their claims because they were not signatories or third party beneficiaries to the arbitration agreement. Moreover, the claims they brought in Mississippi state court were tort claims, not contract claims based on the terms of the written agreement containing the arbitration provision.

In reviewing the *Gaskamp* decision, it is apparent that before a third party beneficiary argument can apply, the underlying agreement must first be valid. Here, there was no valid agreement to arbitrate in the first instance because Elzenia Johnson lacked authority to bind Mary Scott. Moreover, it is apparent from a review of the arbitration clause itself that Ms. Scott was not an intended third party beneficiary, but an intended principal of the agreement. Because she is a named party in the agreement, third party beneficiary status does not apply to bind Ms. Scott to the agreement. Finally, third party beneficiary status does not apply to bind Ms. Scott because she has not sued based upon or in reliance of the Admission Agreement or the arbitration clause. Instead, the claims she has asserted are based in tort. Accordingly, this is not a situation where Ms. Scott is simultaneously embracing a portion of the Admission Agreement but turning her back on the arbitration clause. The trial court's Order denying the Trinity Defendants' Motion to Compel Arbitration should be affirmed.

D. Executing The Arbitration Clause Was Not a Health Care Decision.

Defendants' argue that they "reasonably relied" on Ms. Johnson's authority because she had admitted her mother to the nursing home. However, statutes that

gave Ms. Johnson the ability to admit her adult daughter to the nursing home did not give her the authority to bind Mary Scott to an arbitration clause. 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, the record here 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 resident's right to counsel. It simply does not create any authority that might bind Mary Scott in this case.

A Florida court, in a recent *en banc* opinion on the issue of a health care proxy's authority to bind a nursing home resident to arbitration, *Blankfeld v. Richmond Healthcare, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005), held that a health care proxy is authorized to make *only* health care decisions, which authority ***does not*** extend to permit such statutory designee to bind a nursing home resident to arbitration. The Court reasoned that:

> There is nothing in the statute to indicate legislative intent that such a proxy can enter into contracts which agree to things not strictly related to health care decisions. In our opinion, a proxy is not authorized to waive the right to trial by jury, to waive common law remedies, or to agree to modify statutory duties applicable generally to all persons receiving health care services.

902 So.2d at 301. In his concurrence, Judge Farmer succinctly noted the irony of allowing the proverbial fox to guard the hen house:

> [I]t is absurd to allow nursing homes to escape chapter 400 regulation by consensual arbitration under rules weakening or modifying those statutes. It is absurd to think that a regulatory scheme can be evaded by private contracts of the very person being controlled. It is absurd that an entire industry escape regulation by simply embedding choice of governing substantive law clauses in its contracts. What other police power regulation can be side-stepped by contracts eliminating it? Common carriers evading safety laws by form contracts for passage? Restaurants avoiding health codes by contractual provisions in the bill? Cigarette dealers canceling health warnings by provisions in sales papers? Home builders modifying building codes in contracts for construction?"

902 So.2d at 303.

Judge Farmer's concurrence further noted that in order to satisfy the *informed consent* requirement under chapter 765, the nursing home has an *affirmative duty* to advise the signatory of the presence and significance of an arbitration clause in a nursing home admissions agreement. *Id* at 302.

> We are left with only two possible outcomes under informed consent. If arbitration provisions are included in the definition of *health care services*, they are subject to the informed consent requirement. If they are not included, a proxy is not authorized to agree to arbitration. Either way, this proxy's assent to arbitration in the admission contracts is ineffective.
>
> Here the nursing home made no attempt to inform any consent to arbitration. It did not call the provision to the proxy's attention or explain the outcome and alternatives. Nor did the nursing home explain that the *administration* of arbitration by the NHLA would require the claim to be decided under substantive rules developed by that organization modifying Florida statutory and common law [by changing the plaintiff's burden of proof for punitive damages recoverable under chapter 400 from a preponderance of the evidence to clear and convincing evidence]. Instead of informing the consent, the nursing home presented the admission form on the basis of take-it-or-leave-it. *(emphasis in original).*

902 So.2d at 302. Notably, as noted above, the federal district courts in Mississippi have uniformly reached this conclusion, as well. *See Guthrie*, *supra*, R. 359-374; *Rhodes,*

supra, R. 375-88; *Buie, supra; Conegie, supra*; *Ferguson*, *supra*; *Green*, *supra*; *King*, *supra.* They have done so because it is legally obvious. This Court should follow suit and affirm those decisions.

II. Additional Reasons Exist in the Record that support denial of Defendants' Motion to Compel.

Plaintiff submits that the Circuit Court of Hinds County was correct in its order denying Defendants' Motion to Compel Arbitration. However, other reasons for denying Defendants' motion are also supported by the record. "It is well settled that if the actions of a trial court can be upheld for any reason, the appellate court should affirm." *Vinson v. Roth-Roffy*, 829 So. 2d 1250, 1252 (Miss. Ct. App. 2002) (citing *Gates v. Gates,* 616 So. 2d 888, 890 (Miss. 1993)). Plaintiff submits that the lower court's decision denying motion may be affirmed for the following independent reasons, which are supported by the record:

A. Judicial economy supports Plaintiff's claims being tried together in one action.

As noted above, Plaintiff has filed claims against the previous owners of Clinton Health and Rehabilitation Center, the Mariner Defendants. These Defendants owned the facility before the arbitration agreement at issue was signed. A Federal District Court has ruled that the Mariner Defendants were not parties to the arbitration agreement and cannot compel arbitration under its terms. R. 353-56. Thus, Plaintiff's claims against the Mariner Defendants will continue in the Circuit Court of Hinds County. Since Plaintiff's claims arose out of the residency of Mary Scott at Clinton Health and Rehabilitation Center, which spanned the ownership of both the Mariner and Trinity Defendants, many of her claims are of a continuing nature and will require the

same witnesses and evidence to be presented. As a matter of judicial economy, it would be prudent to allow Plaintiff's claims to be heard together in one venue. Since the Mariner Defendants are not parties to an agreement to arbitrate, Plaintiff submits that the proper forum is the Circuit Court of Hinds County.

B. The arbitration clause, when read in conjunction with the Admission Agreement, is unconscionable.

When read in conjunction with the law applicable to skilled nursing facilities that participate in Medicare and Medicaid, this admission agreement shocks the conscience. The language in the agreement appears designed to circumvent the requirements of Medicare and Medicaid, and to strip the resident and the resident's family of rights afforded them under law by illegally attempting to reduce the costs of "legal fees, insurance, settlement costs." It is clearly a contract of adhesion. *See Vicksburg Partners, L.P. v. Stephens,* 911 So. 2d 507 (Miss. 2005) (construing a virtually identical admission agreement, but finding that the signatures of both the *resident* and child constituted a voluntary and knowing waiver of jury trial). "The common law ... subjects terms in contracts of adhesion to scrutiny for reasonableness." *Carnival Cruise Lines v. Shute,* 499 U.S. 585, 600, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991)(Stevens, J., dissenting o.g.). Substantive unconscionability may be proven by showing the terms of the arbitration requirement are oppressive. *Pitts v. Watkins*, 905 So. 2d 553, 555 (Miss. 2005).

Unconscionability and illegality permeate this agreement. The overpowering tenor of the agreement leads to one conclusion: No part of it should be enforced. "[A] court may not make a new contract for the parties or rewrite their contact under the guise of construction." *Pannell v. Guess*, 671 So. 2d 1310, 1315 (Miss. 1996) (citing

Travelers Indemnity Co. v. Chappell, 246 So. 2d 498, 510 (Miss.1971) (quoting 17 Am.Jur.2d *Contracts* § 242 (1964)).

Even though *Stephens* suggests that Mississippi case law "holds that if a court strikes a portion of an agreement as being void, the remainder of the contract is binding," Plaintiff submits that if the contract read as a whole is illegal, it must be struck as a whole. *Stephens*, citing e.g., *Lawler v. Government Employees Ins. Co.*, 569 So. 2d 1151, 1153 (Miss.1990)." Incredibly, 14 of the 43 subsections in the Admission Agreement contain unconscionable or illegal provisions. See § A.5, § B.1, § B.5, § C.5, § C.7, § C.8, § D.1, § D.3, § E.7, § E.8, § E.12, § E.13, § E.16, and § E.17, R. 543-48. Furthermore, the non-offensive subsections really lack significant meaning, other than to ensure that the nursing home will be paid for its services (or even the lack thereof). The following examination of the language of the Admission Agreement reveals patent unconscionability and illegality:

1. The Admission Agreement indicates the nursing home's illegal intent to staff at a level less than the law requires.

Mississippi Minimum Standard for Institutions for the Aged or Infirm §201.1(a) (adopted October 9, 2002 and applicable during Ms. Scott's residency) states, "**Minimum** requirements for nursing staff shall be based upon the ratio of two and eight-tenths (**2.80**) hours of direct nursing care per resident per twenty-four hours. Staffing requirements are based upon resident census." (emphasis added). Federal law further provides that a nursing facility is required to provide sufficient staffing to meet the needs of the residents. 42 U.S.C. § 1396r(b)(4)(c)(i). Mississippi Minimum Standard § 304.1(g) states that having "[i]nadequate staff to provide safe care and supervision of a resident" is grounds for the revocation of a nursing home's license.

Here, the nursing home's Admission Agreement states that the nursing home has *no* intention of complying with these laws. The language in the Agreement is that, *on average* (which would mean that sometimes it is lower and sometimes higher), and *including non*-direct nursing caregivers, Defendants staff *somewhere between 2.0 and 2.8 hours* per patient per day:

> *The Facility agrees to furnish general duty nursing and nurse aide care equal to at least the State Medicaid minimum hours per Resident day (this is generally approximately **2.0 to 2.8 hours** per Resident day **on average including nursing administration time**).*

§ B.1, R. 544 (emphasis added).

This is below the state minimum requirement in place in the year 2002 of 2.8 hours PPD. The Agreement further states, "Because the Facility **does not provide one-on-one** care, **extended periods of time** will elapse in which the Resident is **unattended** and could fall, elope from the Facility, or be injured or harmed in other ways." *Id.* Because federal law mandates that "Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being," if a resident needs one-on-one care, that is what the law requires the facility to provide and her to receive. If a nursing home cannot meet the needs of a resident, it is required, under Mississippi Minimum Standard § 503.1, to transfer the resident somewhere else than *can* meet her needs. When a resident needs one-on-one care, she is supposed to get it.

It is clear that Defendants have tried through this admission agreement to illegally abrogate their duties under the law. Attempting such contractual abrogation is not permitted in Mississippi. Like this Court has stated regarding a board of supervisors, "Such being the duty [ ] imposed by law, it was not within their power or

authority to contract it away in whole or in part by any agreement . . . " *U.S. Fidelity & Guar. Co. v. Sunflower County*, 194 Miss. 680, 12 So. 2d 142, 144 (Miss. 1943). The contract is illegal and should be held to be void.

2. The admission agreement illegally requires the family to provide staff that the nursing home is required to provide.

Mississippi Minimum Standard § 404.3, entitled "Admission Agreement," provides,

> **No agreement or contract** shall be entered into between the licensee and the resident or her responsible party **which will relieve the licensee of responsibility for the protection of the person and of the rights of the individual admitted to the facility for care**, as set forth in these regulations. (emphasis added).

Mississippi law, thus, does not permit a licensee, like Trinity Mission of Clinton, LLC, to contract in the manner attempted in this case. Here, Clinton Health and Rehabilitation Center knew full well that it cannot contractually shirk its duties to protect the resident and to protect her rights, but it attempted to do so anyway. Further, Clinton Health and Rehabilitation Center concedes that resident care suffers when it does not provide enough trained and qualified staff to do the job. Their Admission Agreement even states, *"[T]he quality of care provided by the Facility is limited by staffing levels provided and quality of staff."* § C.5, R. 545.

Rather than meeting the needs of the residents by providing qualified staff in sufficient numbers, the nursing home's admission agreement is designed to improperly and illegally shift the burden of care and the associated costs of that care to the resident and her family. Despite the fact that Clinton Health and Rehabilitation Center seeks reimbursement from Medicare and Medicaid for providing care to meet the needs of the

residents, its Admission Agreement all but requires a family, at its cost, to hire private duty sitters to help reduce the risk of injury due to their short-staffing and incompetence.

The law, however, requires the nursing home, and not the family, to provide that supervision to meet those needs: "The facility **must** ensure that . . . each resident receives adequate supervision and assistance devices to prevent accidents" (42 C.F.R. § 483.25(g)(2); *see similar* MS Minimum Standard §503.8). Hence, the contract is void and illegal and should not be enforced.

3. The Admission Agreement illegally seeks to immunize the nursing home from all suits for abuse and neglect, and by doing so constitutes a violation of the resident's rights and exploitation of a vulnerable adult.

The federal OBRA regulations applicable to licensed nursing homes in Mississippi provide that a nursing home must protect and promote the rights of each resident, including each resident's rights as a United States citizen. 42 C.F.R. § 483.10(a)(1). Further, all Mississippi nursing home residents have the right to adequate and appropriate medical care, to be free from abuse and neglect and to dignity in full recognition of their individuality. MS Minimum Standard § 408.2. A licensed skilled nursing facility must protect and promote all the rights of each resident. 42 C.F.R. § 483.10. One of the Residents' Rights set forth in the Mississippi Minimum Standards states that every Mississippi nursing home resident has the right to and:

> Is encouraged and assisted, throughout his period of stay, to exercise his rights as a resident and as a citizen, and to this end may voice grievances, has a **right of action for damages** or other relief for deprivations or infringements of **his right to adequate and proper treatment and care** established by an applicable statute, rule, regulation or contract, and to recommend changes in policies and services to facility staff and/or to outside representatives of his choice, free from restraint, interference, coercion, discrimination, or reprisal . . .

Id. at § 408.2(e)(emphasis added). Further, under the law, every Mississippi nursing home resident:

> is assured of exercising his 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.

Id. at § 408.2(p). Additionally, the Mississippi Vulnerable Adults Act of 1986 seeks to ensure that frail and vulnerable adults, many of whom reside in nursing homes in this state, are protected and not neglected, abused or exploited. *See* Miss. Code Ann. § 43-47-3. The Act defines a vulnerable adult as:

> A person eighteen (18) years of age or older or any minor whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, physical, or developmental disability or dysfunction, or brain damage or the infirmities of aging.

Miss. Code. Ann. § 43-47-5(m). The Act also defines *abuse* as:

> the willful or nonaccidental infliction of physical pain, injury or mental anguish on a vulnerable adult, the unreasonable confinement of a vulnerable adult, or the willful deprivation by a caretaker of services which are necessary to maintain mental and physical health of a vulnerable adult.

Miss. Code Ann. § 43-47-5(a). *Neglect* is defined as:

> Failure of a caretaker to supply the vulnerable adult with the food, clothing, shelter, health care, supervision or other services which a reasonably prudent person would do to maintain the vulnerable adult's mental and physical health.

Miss. Code Ann. § 43-47-5(k). *Exploitation* is defined as:

> The illegal or improper use of a vulnerable adult or his resources for another's profit or advantage, with or without the consent of the vulnerable adult.

Exploitation is also defined by *Black's Law Dictionary*, 6th Ed., as "Taking unjust advantage of another for one's own advantage or benefit." There can be no doubt that

Mary Scott was a vulnerable adult who resided in a nursing home. Accordingly, the staff of Clinton Health and Rehabilitation Center was obligated to protect her rights and not to take advantage of her.

Here, among other things set out herein (like shifting the burden of care to the resident and her family), through the use of its Admission Agreement, Clinton Health and Rehabilitation Center seeks to violate the Resident's Rights and exploit all its residents by attempting to thwart the resident's ability to prosecute any "right of action for damages." The Admission Agreement has three (3) illegal hold harmless clauses:

> *The Resident and Responsible Party agree, therefore, to* ***hold harmless*** *the Facility for injury or harm to the Resident* ***when said injury or harm could have been avoided had supplemental one-on-one private duty nursing been provided*** *by Resident or Responsible Party.* Exhibit A, § C.5 (emphasis added).
>
> *The Resident and Responsible Party further agree to* ***indemnify and hold harmless*** *the Facility from and against all claims, loss, costs and expenses incurred as a result of claims against the facility for any reason by the Responsible Party, family members and friends of the Resident* ***unless such claim, loss, cost and expense is the result of the Facility's willful misconduct.*** Exhibit A, § C.5 (emphasis added).
>
> *[T]he Resident and Responsible Party agree that should any individual or individuals, whether employees of the Facility or not, commit any criminal act upon or against the Resident or Responsible Party, that the Resident and Responsible Party agree to seek damages and claims only against said individual(s). Accordingly, the Parties hereto agree to* ***hold harmless*** *the Facility, its owners, directors and employees* ***for the criminal actions of any individual(s).*** Exhibit A, § C.8 (emphasis added).

If society is to be measured by looking at how it treats its weakest members, surely this nursing home's agreement condemns us all. These hold harmless provisions seek to immunize Clinton Health and Rehabilitation Center from (1) any injury that a private duty sitter, hired by the family or resident, could have prevented, (2) all other injuries, unless they were willfully caused, and (3) essentially everything else,

since willful misconduct typically constitutes criminal conduct with respect to vulnerable adults. To translate, Plaintiff cannot conceive of any set of facts where, under the terms of the Admission Agreement, Clinton Health and Rehabilitation Center would be held liable or where it would not be impervious to suit. A party may not contract away a duty that by law that party is already under. *Cappaert v. Junker,* 413 So. 2d 378, 382 (Miss. 1982) (a party under a common law or statutory duty supported by public policy cannot contractually immunize himself in a manner to avoid that duty); *see also Divia v. South Hunterdon Regional High School,* 2005 WL 977028, *11 (N.J.Super.A.D. 2005) ('[W]hile freedom of contract permits exculpatory provisions in a contract to exempt a party from its own negligence, most courts have ruled that one cannot exempt himself from negligence where there is a duty imposed by law, in the performance of a legal duty and where a public interest is involved or a public duty owed." (citing *McCarthy v. National Association for Stock Car Auto Racing, Inc.*, 87 N.J.Super. 442 (L.Div.1965)). The hold harmless provisions of the Admission Agreement are illegal, and the contract should not be enforced.

4. The Admission Agreement seeks to unconscionably cap the nursing home's liability by limiting damages and barring punitive damages.

This Court has expressly stated that "[c]lauses that limit liability are given strict scrutiny by this Court and are not to be enforced unless the limitation is fairly and honestly negotiated and understood by both parties." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 754 (Miss. 2003). Clearly, here, there was no negotiation by the parties. Rather, Clinton Health and Rehabilitation Center, inappropriately attempts to limit actual damages to the lesser of $50,000 or "the number

of days the Resident was in the Facility multiplied times the daily rate applicable to said Resident." § E.7, R. 547. Furthermore, Defendants seek to escape their liability for punitive damages: *"The Parties hereto agree to waive any punitive damages against each other and agree not to seek punitive damages under any circumstances."* § E.8, R. 547. *See* Miss. Code Ann. § 11-1-65 (Mississippi's punitive damages statute). Similar provisions were actually struck by this Court in *Vicksburg Partners, L.P. v. Stephens,* 911 So. 2d 507 (Miss. 2005).

This Court has held that it generally:

> does not look with favor on contracts intended to exculpate a party from the liability of his or her own negligence although, with some exceptions, they are enforceable... "Clauses limiting liability are given rigid scrutiny by the courts, and will not be enforced unless the limitation is fairly and honestly negotiated and understandingly entered into." *Farragut v. Massey,* 612 So.2d 325, 330 (Miss.1992) (quoting 17 Am.Jur.2d *Contracts* § 297, at 298 n. 74 (1991)). The wording of an exculpatory agreement should express as clearly and precisely as possible the *extent* to which a party intends to be absolved from liability. Failing that, we do not sanction broad, general "waiver of negligence" provisions, and strictly construe them against the party asserting them as a defense.

Turnbough v. Ladner, 754 So. 2d 467 (Miss.1999) (*rehearing denied* 2000). Indeed, "there are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for freedom of contract." *Scott v. Pac. W. Mountain Resort,* 119 Wash.2d 484, 834 P.2d 6, 11, 12 (1992) (holding that "to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable"). *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1232 (Colo. 2002). Here, there is no proof that the various exculpatory clauses and limitations on liability were understandingly entered or honestly negotiated. The Trinity Defendants put on no proof that the Plaintiff knew what

these clauses meant, and the terms of this contract of adhesion actually emphasize the complete lack of negotiation. § D.1. R. 546 ("The Resident and/or Responsible Party **must** read and complete this agreement or make satisfactory arrangements for its completion **prior to admission** or at time of admission to the Facility.") (emphasis added). The attempts to limit liability and avoid punitive damages, if not avoid liability altogether, contained in the Trinity nursing home Defendants' Admission Agreement are unconscionable and should not be enforced.

5. Reserving access to the court system to the nursing home is unconscionable.

In *Pitts v. Watkins*, 905 So. 2d 553, 555 (Miss. 2005), this Court held that the trial court erred for compelling arbitration because of substantive unconscionability. The Court noted that the arbitration clause was substantively unconscionable because it allowed the defendant to pursue his claims in court while requiring the plaintiffs to arbitrate any claims they may have against the defendant. There, the contract stated that "should you fail to timely pay the agreed upon fee(s), you shall be responsible for paying any and all fees associated with collection, including but not limited to administration costs, attorney's fees and costs of litigation." With regard to this clause, the Court stated:

> These terms unreasonably favor Watkins. The language included in the clause, "(unless based on payment of fee)" maintains Watkins's ability to pursue a breach by Pitts in a court of law, while Pitts is required to arbitrate any alleged breach by Watkins. This arbitration clause is clearly one-sided, oppressive, and therefore, substantively unconscionable.

Id. Likewise, the Admission Agreement at issue in this case states:

> Should an account become delinquent and be **referred to an attorney and/or agency for collections**, the Resident and/or Responsible Party shall be responsible to pay all costs of collection. This includes, but is not limited to, attorney's fees and other **costs of litigation**.

R. 544, § A.5, emphasis added.

This contract language clearly makes the agreement one-sided and, in light of this Court's holding in *Pitts v. Watkins,* substantively unconscionable and unenforceable.

6. The Admission Agreement illegally seeks to shorten the statute of limitations.

This case involves both general and professional negligence claims, covered by both two (2) and three (3) year statutes of limitation. *See* Miss. Code Ann. § 15-1-36 (medical malpractice) and § 15-1-49 (general statute of limitations). Here, Defendants' Admission Agreement illegally attempts to shorten the available time for such filing to just one (1) year: no legal action shall be initiated against the Facility . . . in any event more than one year following the happening of the event giving rise to such complaint, claim or grievance" § E.16, R. 548. Under Miss. Code Ann. § 15-1-5, such a contractual provision is not permitted:

> The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contracts stipulation whatsoever shall be **absolutely null and void**, the object of this section being to make the period of limitations for the various causes of action the same for all litigants. (emphasis added).

Accordingly, this specific limitations provision is null and void, and the overall tenor of Defendants' Admission Agreement further reeks of illegality and unconscionability and should not be enforced.

7. The Admission Agreement contains a pre-dispute arbitration clause that is unconscionable.

Defendants' Admission Agreement names the American Arbitration Association ("AAA") as the arbitration service of choice. § F, R. 548 . Effective on January 1, 2003, the American Arbitration Association announced that it would "no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate." According to their press release, the AAA's rationale behind this announcement involves concerns of fairness:

AAA ANNOUNCES CHANGE IN HEALTH CARE POLICY

Cases Involving Patients Must Have Post-Dispute Agreement to Arbitrate

NEW YORK, June 13, 2002
The American Arbitration Association (AAA), the world's leading provider of conflict management and dispute resolution services, announced today that, as a result of a review of its caseload in the health care area, it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate.

The change, which becomes effective on January 1, 2003, will only affect cases where one party is an individual patient. There will be no change in the administration of cases in the health care area where businesses, providers, health care companies or other entities are involved on both sides of the dispute. Additionally, the AAA will continue to administer pre-dispute agreements to arbitrate in all areas outside of the health care field, provided they adhere to appropriate due process safeguards.

This announcement is the latest in ongoing efforts by the AAA to establish and enforce standards of fairness for alternative dispute resolution, following recent changes to the Association's rules and procedures for consumer arbitrations. The AAA has also helped develop and adheres to tailored consumer rules and three due process protocols that set guidelines and provide safeguards in business-to-individual arbitrations.

Although we support and administer pre-dispute arbitration in other case areas, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special

consideration," said Robert Meade, Senior Vice President, American Arbitration Association.

Hence, the very association selected by Defendants indicates that it will not arbitrate claims when the arbitration clause was entered prior to the dispute. That is precisely the fact pattern in this case. It is not fair for a nursing home to mandate that any dispute be resolved through arbitration, when the resident and her family has no idea what atrocities might befall the resident once her care is entrusted to the provider. The arbitration clause itself is unconscionable, and Defendants' motion should be denied.

8. The Admission Agreement indicates that the nursing home does not intend to follow the law regarding notification.

As if the other illegal and unconscionable provisions set out above were not enough, the Trinity Defendants' Admission Agreement even attempts to abrogate their duties to notify the family when something happens to their loved one. Under federal law, a nursing home

> **must** . . . if known, notify the resident's legal representative or an interested family member when there is (A) An accident involving the resident which results in injury and has the potential for requiring physician intervention; (B) A significant change in the resident's physical, mental, or psychosocial status (i.e., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications); (C) A need to alter treatment significantly (i.e., a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or (D) A decision to transfer or discharge the resident . . .

42 C.F.R. 483.10(b)(11) (emphasis added); *see also* MS Minimum Standard § 304.1 (improper or inadequate notice may be grounds for revocation of nursing home license). Here, the Trinity Defendants have illegally attempted to change what the federal law requires of them, stating "The Facility will **attempt** to notify the Responsible Party in the

event of **significant changes** in the Resident's **status**." § B.5, R. 545. When read as a whole in conjunction with the law, the Admission Agreement is offensive and should be rendered null and void.

9. The Admission Agreement seeks to unconscionably restrict a Resident's federally protected right to access medical records.

Again, as if failing to staff appropriately, requiring family to provide a sitter, immunizing the nursing home, limiting its liability, reserving the nursing home's ability to sue in court, requiring additional consideration as a precondition to admission, shortening the statute of limitations, requiring waiver of rights when the dispute is unknown, and failing to give proper notice to loved ones were all not enough, Defendants' Admission Agreement even demands an unconscionable dollar amount to obtain a copy of the records. Although accessing medical records really has nothing to do with being admitted and probably should not be in the "Admission Agreement," here, the Trinity Defendants seek to require through that Agreement that a resident or responsible party pay an exorbitant **$3.00 per page for medical records**. § E.14, R. 547. While Miss. Code Ann. § 11-1-52 (effective 2004) does not permit charging any more than $1.00 per page for medical records, it is perfectly clear that even in 2002, a charge of $3.00 per page for medical records is unconscionable. The contract should not be enforced as it is unconscionable and illegal as a whole. Defendants' motion should be denied.

CONCLUSION

No enforceable contract for arbitration exists in this case. Elzenia Johnson, the person who signed the clause, lacked authority to bind Mary Scott, her claims, and claims on her behalf, to arbitration. Moreover, the theory of third party beneficiary does

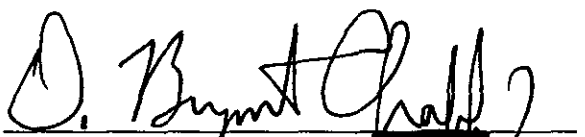
not apply to bind Ms. Scott. The arbitration agreement is not a health care decision pursuant to Miss. Code Ann. § 41-41-211.

Finally, there are additional reasons for affirming the district court's decision, which are supported by the record, as set forth above in Plaintiff's argument. For each of these independent reasons, Plaintiff respectfully requests that the Circuit Court of Hinds County's decision to deny Defendants' Motion to Compel Arbitration.

Respectfully submitted,

The Estate of Mary Scott, by and through Elzenia Johnson, Individually and as the Personal Representative of the Estate of Mary Scott, and on behalf of and for the use and benefit of the wrongful death beneficiaries of Mary Scott

WILKES & McHUGH, P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the following via First Class Mail this 22nd day of January, 2007:

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CERTIFICATE OF FILING

I hereby certify that I, D. Bryant Chaffin, counsel for the Appellee, on this 22nd day of January, 2007, deposited with the United States Postal Service to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and five (5) copies of the above Appellee's Brief.
The original and five (5) copies of Appellee's record excerpts.

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

Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I further certify that a true and correct copy of the foregoing has been furnished to the following via First Class Mail this 22nd day of January, 2007:

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