COPY

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-TS-01053-SCT
CA

TRINITY MISSION HEALTH & REHABILITATION OF CLINTON; LPNH HOLDINGS LIMITED, LLC;

APPELLANTS

vs.

FILED

APR - 9 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Per Order of 4/9/07

THE ESTATE OF MARY SCOTT, BY AND THROUGH ELZENIA JOHNSON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY SCOTT AND FOR THE USE AND BENEFIT OF THE WRONGFUL DEATH BENEFICIARIES OF MARY SCOTT

APPELLEES

ON APPEAL FROM JACKSON, HINDS COUNTY, MISSISSIPPI
THE HONORABLE WINSTON S. KIDD

SUPPLEMENTAL BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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Corrected Brief
Substituted 4/12/07

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A.

Cases

B.

Statutes, Rules, and Regulations

SUPPLEMENTAL ARGUMENT

I. IT IS NOT NECESSARY FOR THE COURT TO CONSIDER PLAINTIFF'S ARGUMENTS REGARDING JUDICIAL ECONOMY, AS PLAINTIFF HAS REACHED A SETTLEMENT AGREEMENT WITH THE DEFENDANTS IN THE CIRCUIT COURT ACTION.

On pages 26-27 of Plaintiff's Appellee Brief, Plaintiff asserted that judicial economy supports Plaintiff's claims being tried together in one action. In additional to the claims against the Appellants/Defendants in the matter at bar, Plaintiff filed claims against the previous owners of Clinton Health and Rehabilitation Center, the Mariner Defendants. The Mariner Defendants owned the facility before the arbitration agreement at issue was signed. A Federal District Court ruled that the Mariner Defendants were not parties to the arbitration agreement and could not compel arbitration under its terms. R. 353-56. Therefore, Plaintiff's claims against the Mariner Defendants remained in the Circuit Court of Hinds County.

Plaintiff argued that 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 would require the same witnesses and evidence to be presented. Therefore, 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 submitted that the proper forum would be the Circuit Court of Hinds County.

Plaintiff filed her Appellee Brief on January 22, 2007. Subsequent to her brief being filed, a settlement agreement was reached with the Mariner Defendants. This settlement is in the process of being finalized, after which Plaintiff will dismiss her claims

against the Mariner Defendants. Therefore, Plaintiff seeks to inform the Court that her argument regarding judicial economy need not be considered by the Court. Plaintiff will forward a copy of the dismissal of the Mariner Defendants to the Court after its entry by the Circuit Court of Hinds County. Plaintiff submits that the dismissal of the Mariner Defendants will have no other effect on the appeal at bar.

II. THIS COURT'S RECENT DECISION IN *COVENANT HEALTH REHAB OF PICAYUNE, L.P. V. BROWN*,--- SO. 2D ----, 2007 WL 529675 (MISS. 2007) IS EASILY DISTINGUISHED FROM THE CASE AT BAR.

Subsequent to Plaintiff filing her Appellee's brief, this Court handed down its decision in *Covenant Health Rehab of Picayune, L.P. v. Brown,* --- So. 2d ----, 2007 WL 529675 (Miss. 2007). Defendants/Appellants relied heavily on *Brown* in their reply brief, citing it on nearly every page. *See* Reply Brief of Appellants, List of Authorities, showing *Brown* cited on pages 1,2,4,5,6,7,8,9,10, and 11. Plaintiff submits that *Brown* is easily distinguished from the case at bar and thus is not applicable as suggested by Defendants in their reply brief.

In *Brown*, Sharon Goss signed an arbitration agreement on behalf of her mother, Bernice Brown. *Brown,* --- So. 2d ----, 2007 WL 529675 at *1. The plaintiff argued that Bernice Brown was incompetent of entering into a contract and that Goss had no authority to bind her mother. *Id.* at *2. The defendants argued that Goss had authority as a health care surrogate under Miss. Code Ann. § 41-41-211, which states in part:

> (1) A surrogate may make a health-care decision for a patient who is an adult or emancipated minor **if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available**.
>
> (2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably

> available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:
>
> (a) The spouse, unless legally separated; (b) An adult child; (c) A parent; or (d) An adult brother or sister.
>
> (7) A health-care decision made by a surrogate for a patient is effective without judicial approval.

Miss. Code Ann. § 41-41-211 (emphasis added).

This Court noted that the plaintiff in *Brown* had argued that Bernice Brown was incapable of managing her affairs at the time she entered the hospital. *Brown,* --- So. 2d ----, 2007 WL 529675 at *2. Although neither party presented a declaration by Brown's primary physician stating that she was incapable of managing her affairs prior to the signing of the admission agreement, the plaintiff had provided evidence that Brown's admitting physician at the hospital found that she did not have the mental capacity to manage her affairs. *Id.* This Court held that Brown was incapacitated by virtue of the admission by her representatives and corroboration by her admitting physician. *Id.*

Unlike *Brown*, there is absolutely no evidence in the record that Mary Scott was incapacitated or incompetent in order to meet the requirements set forth in Mississippi Code Annotated Section 41-41-211 for a health care surrogate. Thus, *Brown* is inapplicable to the case at bar for the proposition that Elzenia Johnson had authority to bind Mary Scott to the arbitration agreement at issue. Simply stated, the health care surrogacy statute at issue cannot control this matter absent evidence of Ms. Scott's lack of capacity or a specific designation of Ms. Johnson as her surrogate pursuant to Section 41-41-211.

Additionally, although the Court determined that Goss was an appropriate member of the classes from which a surrogate could be drawn, and thus, could contractually bind Brown in matters of health care, this Court did not examine, nor was it apparently argued by either party, whether or not an arbitration agreement is a "health care decision" as defined within the health care surrogacy statute. Further, this Court did not specifically overrule the Mississippi Court of Appeals' decision in *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Lambert*, --- So. 2d ----, 2006 WL 3593437 (Miss. Ct. App. 2006), in which the Court of Appeals specifically examined this issue and determined that the "decision to arbitrate is neither explicitly authorized nor implied within section 41-41-203(h), which defines a health care decision . . .." *Lambert*, at *3. Section 41-41-203(h) defines a "health care decision" as follows:

> "Health-care decision" means 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) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
>
> (iii) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

Miss. Code Ann. § 41-41-203(h).

As discussed in Plaintiff's Appellee brief, numerous Federal District Courts in Mississippi have discussed the definition of a healthcare surrogate in regard to arbitration agreements, ultimately holding, as the Court of Appeals did in *Lambert*, that arbitration agreements are not within the scope of the healthcare surrogacy statute. *See Mariner Health Care, Inc. v. Rhodes,* No. 5:04-CV-217(DCB)(JCS) (S.D. Miss. 2005); *Mariner Health Care, Inc. v. Guthrie,* No. 5:04cv218-DCB-JCS (U.S. Dist. Ct.,

So. Dist. Of MS, West. Div.); *Mariner Health Care, Inc. v. Ferguson*, 2006 WL 1851250, (N.D. Miss. 2006); *Mariner Healthcare, Inc. v. King*, 2006 WL 1716863 (N.D. Miss. 2006); *JPMorgan Chase & Co. v. Conegie ex rel Lee*, 2006 WL 1666686 (N.D. Miss. 2006); *Mariner Healthcare, Inc. v. Green*, 2006 WL 1626581 (N.D. Miss. 2006).

Thus, as set forth above, *Brown* is inapplicable to the case at bar and no enforceable contract for arbitration exists. Plaintiff respectfully requests that this Court affirm 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

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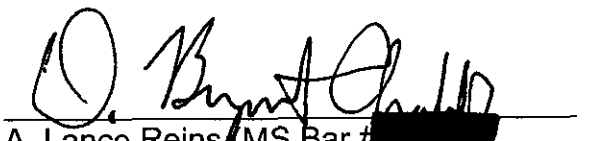

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CERTIFICATE OF SERVICE

I further certify that a true and correct copy of the foregoing has been furnished to the following via First Class Mail this 11th day of April, 2007:

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