IN THE SUPREME COURT OF MISSISSIPPI

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

APPELLANTS

VS.

CASE NO.: 2006-TS-01053

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

BRIEF OF APPELLANTS
(Oral Argument Requested)

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CERTIFICATE OF INTERESTED PERSONS

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

1. Defendants/Appellants, Trinity Mission Health & Rehabilitation of Clinton and LPNH Holdings Limited, LLC;

2. Plaintiffs/Appellees, The Estate of Mary Scott, by and through Elzenia Johnson;

3. John L. Maxey II, Esquire and Heather M. Aby, Esquire-Attorneys for Appellants;

4. A. Lance Reins, Esquire-Attorneys for Appellees;

5. William Grubbs, Esquire-Attorney for Defendant, Charles W. "Tripp" Frances, III; and

6. The Honorable Winston L. Kidd, Hinds County Circuit Court Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES/RULES

SECONDARY AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

The Appellants Trinity Mission Health & Rehabilitation of Clinton, LLC, and LPNH Holdings Limited, LLC, believe oral argument would aid the resolution of the appeal before this Court and respectfully request the Court grant its request for oral argument. The jurisprudence concerning the issues in the instant case is in the early stages of development; as such, oral argument will assist the Court in continuing to set forth the law surrounding enforcement of nursing home/long-term care facility arbitration agreements when the authority of a responsible party to act on behalf of a resident is questioned.

STATEMENT OF THE ISSUE

Whether the lower court erred in refusing to enforce an arbitration provision contained within a fully enforceable Admission Agreement.

STATEMENT OF THE CASE

On August 25, 2004, Elzenia Johnson (hereinafter referred to as "Ms. Johnson" and/or "Elzenia Johnson") filed suit in Hinds County Circuit Court alleging Mary Scott (hereinafter referred to as "Ms. Scott" and/or "the Resident") suffered personal injuries while residing at Clinton Health & Rehabilitation Center, identified in the lower court proceedings as Trinity Mission Health & Rehabilitation of Clinton (hereinafter referred to as "Clinton Health & Rehabilitation Center" and/or "the Facility").[1] R.5-38. Ms. Johnson additionally named the following individuals/entities as defendants:

> Mariner Health Care, Inc., F/k/a Mariner Post-Acute Network, 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 Healthcar, LLC; George Morgan; Boyd P. Gentry; Charles W. "Tripp" Francis, III; and LPNH Holdings Limited, LLC.

Id.

Upon admission to Clinton Health & Rehabilitation Center, Elzenia Johnson, Ms. Scott's daughter, entered into an Admission Agreement on her Mother's behalf. Thereafter, on September 13, 2002, she executed an updated Admission Agreement on her own behalf, as well as on behalf of her. R. 563-63. Accordingly, and in lieu of answering the Complaint, Clinton Health & Rehabilitation Center, and LPNH Holdings filed a Motion to Compel Arbitration. R. 273-303.[2]

After full briefing on the issue of the enforcement of the arbitration provision, the lower court found as follows:

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[1]Appellants citation form is as follows: Citation to the record is (R. ___) and citation to the transcript is (TR. ___).

[2]Charles W. "Tripp" Francis, III, joined in this Motion. R. 304-06.

> Under Mississippi law, the elements of a valid contract are (1) two 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,* 364 So. 2d 266, 270 (Miss. 2003). The Trinity Defendants have the burden to show that Elzenia Johnson had the authority to bind Mary Scott to the admission agreement. No evidence has been presented that shows Elzenia Johnson had actual or apparent authority to bind Mary Scott to the admission agreement, and subsequently the arbitration agreement. Elzenia Johnson did not have the legal capacity to waive Mary Scott's right to a jury trial.

R. 595-96.

Aggrieved by this ruling, Trinity Mission Health & Rehabilitation of Clinton and LPNH Holdings, LLC filed the instant appeal pursuant to Mississippi Rule of Appellate Procedure 4. This Court has recognized that "an appeal may be taken from an order denying a motion to compel arbitration." *Tupelo Auto Sales, Ltd. v. Scott*, 844 So. 2d 1167, 1170 (Miss. 2003).

STATEMENT OF FACTS

This case involves the question of whether a long-term care facility/nursing home can rely on a child's apparent authority to execute an admission agreement on his or her parent's behalf. Elzenia Johnson admitted her mother, Mary Scott, to Clinton Health & Rehabilitation Center on January 4, 2001. R. 550, 558-59. That same day, Ms. Johnson also excuted, as the "legal/resident representative," an Advance Directives document. R. 550, 560. By executing this document, she authorized the Facility to perform CPR on her mother, "in the event of its necessity." R. 560. Also, on the day of admission, Ms. Johnson executed a Medicare Secondary Payer Questionnaire as the "Patient/Caregiver." R. 561.

Later, on June 15, 2001, Elzenia Johnson, again acting as her Mother's Responsible Party, executed a Patient Fund Authorization, authorizing Clinton Health & Rehabilitation Center to handle Ms. Scott's funds "in accordance with the Patient fund procedures established by this nursing facility." R. 562.

Thereafter, on September 13, 2002, Elzenia Johnson executed the Admission Agreement at issue both as herself (as the Responsible Party) and as her mother. R. 563-63. This contract was also signed by a Facility Representative and witnessed by another Facility employee. R. 568. The September 13th Admission Agreement contained the following clearly and conspicuously placed arbitration provision:

> F. ARBITRATION
>
> 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 this 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. . . .

R. 293. The Admission Agreement additionally contained the following acknowledgment provision:

> **THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS AGREEMENT, INCLUDING THE ARBITRATION PROVISION AND HAS RECEIVED A COPY OF THIS AGREEMENT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO AND ACCEPTS ALL OF ITS TERMS AND PROVISIONS.**

Id. (Emphasis in original). This provision was indented, in all caps and bold font, and found directly above the signature lines. In conjunction with the above-conspicuous language, the Admission Agreement contained language encouraging Elzenia Johnson to seek legal counsel prior to executing the contract or prior to the termination period. R. 291.

On July 25, 2003, Elzenia Johnson executed as a document entitled "Resident Pharmacy choice opinions," on her Mother's behalf. R. 569. Although Elzenia Johnson executed the Admission Agreement on her Mother's behalf, as well as numerous other documents throughout Ms.

Scott's three (3) year residency and his Mother benefitted from that contract, the lower court found the Admission Agreement (and arbitration provision) to be unenforceable, denying the request to move to binding arbitration. R. 595-96.

SUMMARY OF THE ARGUMENT

The September 13, 2002 Admission Agreement entered into by Ms. Scott's daughter, Elzenia Johnson, and Clinton Health & Rehabilitation Center is a valid contract and should be enforced accordingly. This Court has long followed the four-corners rule when interpreting a contract. It is a court's duty to construe an instrument, such as an admission agreement, as written. The lower court erred in failing to do so.

By executing the Admission Agreement, as her Mother Responsible Party, Elzenia Johnson held herself out as having the authority to bind her mother and to continue engagement of services of Clinton Health & Rehabilitation Center. Clinton Health & Rehabilitation Center, in turn, acted in good faith, believing Ms. Johnson had the apparent authority to continue to bind her Mother to contract. To hold otherwise would place an undue burden on nursing homes to investigate a prospective, and as in this case a current, resident's financial and business circumstances and would preclude such facilities from relying on the apparent authority of such obvious agents as a resident's child. The lower court erred in finding Elzenia Johnson lacked the authority to bind her mother.

Elzenia Johnson executed the Admission Agreement as her Mother's Responsible Party, thereby benefitting from the provisions of the contract. The Record before the Court is devoid of any evidence that Elzenia Johnson or Mary Scott ever informed Clinton Health & Rehabilitation Center that Elzenia Johnson *should not be* acting as Ms. Scott's responsible party. Rather, in addition to the execution of this contract, Ms. Johnson executed several other documents with the

Facility, for or on her Mother's behalf, including:

- Initial Admission Agreement - January 4, 2001;
- Advance Directives document - January 4, 2001;
- Medicare Secondary Payer Questionnaire - January 4, 2001;
- Patient Fund Authorization - June 15, 2001; and
- Resident Pharmacy Choice Options - July 25, 2003.

Accordingly, the Facility was justified in its reliance that Elzenia Johnson, Ms. Johnson's daughter, did in fact have authority to act on her behalf. In light of Mississippi jurisprudence regarding contract interpretation, the terms of the contract are fully enforceable and agreed upon arbitration, rather than litigation, should proceed.

Clinton Health & Rehabilitation Center relied upon Elzenia Johnson's actions and based upon its position as a care provider to Ms. Scott, was justified in such a reliance. As a result of these actions, the doctrine of equitable estoppel applies, barring Elzenia Johnson from denying being bound by the Admission Agreement.

Elzenia Johnson's filing of the lawsuit was in direct contravention to the binding arbitration provision contained within the September 13, 2002 Admission Agreement. This Court has found in favor of arbitration provisions in the nursing home/long-term care facility setting.

As a result of this Court's favored status of arbitration, the lower court had a duty to begin with a presumption the arbitration provision was valid and binding, placing the burden with Elzenia Johnson to prove otherwise. Instead, and in disregard for this precedence, the lower court denied the motion to compel arbitration.

On September 13, 2002, Elzenia Johnson, Ms. Scott's daughter and responsible party, entered into a contract – a contract containing a binding arbitration provision. It has been recognized that to allow a plaintiff to claim the benefit of a contract and simultaneously avoid its burdens would both

disregard equity and contravene the purposes underlying the enactment of the Federal Arbitration Act. Elzenia Johnson's claims are based on the activities arising out of the terms and conditions of the Admission Agreement. As such, she is bound by the terms and conditions of the Agreement, *i.e.*, the contract she entered into on her Mother's behalf, with Clinton Health & Rehabilitation Center.

ARGUMENT

I. Standard of Review

"The decision to grant or deny a motion to compel arbitration is reviewed by this Court *de novo*." *Equifirst Corp. v. Jackson*, 920 So. 2d 458, 461 (Miss. 2006). "This Court has consistently recognized the existence of a 'liberal federal policy favoring arbitration agreements.'" *Terminix International, Inc. v. Rice*, 904 So. 2d 1051, 1054-55 (Miss. 2004) (quoting *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002)).

II. The Admission Agreement is a valid contract and should be enforced as written.

Mississippi has long followed the four-corners rule when interpreting a contract. The goal of a court is to give effect to the intent of the parties. *Heartsouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105 (Miss. 2003). "'The general rule is the intention of the parties must be drawn from the words of the whole contract, and if, viewing the language used, it is clear and explicit, then the court must give effect to this contract unless it contravenes public policy.'" *Id.* (quoting *Jones v. Miss. Farms Co.*, 116 Miss. 295, 76 So. 880, 884 (1917)).

In looking to the four-corners to interpret a contract, "'the court's concern is not nearly so much with what the parties may have intended but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning the meaning with fairness and accuracy.'" *Id.* (quoting *Warwick v. Gautier Utility District*, 738 So. 2d 212, 214 (Miss. 1999)). "Contracts must be interpreted by objective, not subjective standards, therefore '[c]ourts must ascertain the meaning of the language actually used, and not some possible but unexpressed intent of the parties.'" *Id.* (quoting *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 105

(Miss. 1998)). It is the duty of a court to construe an instrument as written. *Thornhill v. System Fuels, Inc.*, 523 So. 2d 983, 998 (Miss. 1988).

The record is devoid of any evidence that Elzenia Johnson *ever informed Clinton Health & Rehabilitation Center she lacked the authority to act on her Mother's behalf; accordingly, the Facility was justified in its reliance that Elzenia Johnson did in fact have the authority to act on her behalf.* The lower court erred in refusing to enforce the contract as written – the terms of which are now fully enforceable against Elzenia Johnson.

III. Elzenia Johnson's lawsuit is in direct contravention to the alternative dispute resolution provisions contained within the Admission Agreement.

Very recently, in *MS Credit Center, Inc. v. Horton*, this Court reiterated its approval of arbitration provisions contained within contracts. 926 So. 2d 167 (Miss. 2006). "When Congress enacted the FAA, its purposes were to establish a broad 'federal policy favoring arbitration,' *and* to 'rigorously enforce agreements to arbitrate.'"[3] *Id* at 173 (quoting *East Ford v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002) (citing *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

This Court determined, "[t]he United States Supreme Court - whose decisions the justices of this Court are bound by oath to follow - has clearly declared that Section 2 of the FAA prohibits courts (including this Court) from singling out arbitration provisions for special treatment."

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[3]Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2.

Id. at 173-74. "That is to say, it prevents courts from placing more stringent requirements for the enforcement of arbitration provisions than for other provisions in a contract." *Id.* (citing *Doctor's Assoc., Inc. v. Cassarotto*, 517 U.S. 681, 687 (1996)). The *Horton* Court went on to quote the United States Supreme Court's holding that it is bound to follow: "By enacting § 2, we have several times said, Congress *precludes states from singling out arbitration provisions for suspect status,* requiring instead that such provisions be placed 'upon the same footing as other contracts." *Id.* at 174 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). (Emphasis in original).

Elzenia Johnson has argued that because she did not have a "power of attorney or other legal authority" she is not bound to arbitrate. R. 389-90. That argument lacks merit. In executing the Admission Agreement as her Mother's Responsible Party, Elenia Johnson acted on her Mother's behalf agreeing to the terms contained therein. In *Horton*, this Court aptly found, "***[u]nder Mississippi law . . . parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it.***" *Horton*, 926 So. 2d at 177 (citing *Titan Indem. Co. v. City of Brandon, Miss.*, 27 F.Supp.2d 693, 697 (Miss. 1997) (Emphasis supplied). Elzenia Johnson "may not [now] escape the agreement by simply stating [she] did not read the agreement or understand its terms." *Id.* She is now bound by that choice.

The alternative dispute resolution provisions are part of a fully enforceable contract and as the Court found in *Vicksburg Partners, L.P. v. Stephens*, "[a]rbitration is about a choice of forum - period." 911 So.2d 507, 525 (Miss. 2005). As such, Appellants respectfully request the Court honor

this choice of forum Elzenia Johnson made on September 13, 2002, and reverse the lower court's ruling.

IV. Elzenia Johnson's actions constitute an agency relationship.

On September 13, 2002, the Admission Agreement before the Court was executed by Mary Scott's daughter, Elzenia Johnson. R. 563-63. She executed the agreement once again, holding herself out to Clinton Health & Rehabilitation Center to be her Mother's responsible party. The Admission Agreement contained the following language, in all capital letters:

> **THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS AGREEMENT, INCLUDING THE ARBITRATION PROVISION AND HAS RECEIVED A COPY OF THIS AGREEMENT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO AND ACCEPTS ALL OF ITS TERMS.**

R. 568. (Emphasis in original). The contract further provided, "[t]he Resident and Responsible Party availed themselves of the opportunity, if they deemed it desirable, to have had third party advice and legal counsel regarding this Agreement prior to its execution or will during the Termination Period set forth in Article D.2." R. 566.

By signing the Admission Agreement, as well as numerous other documents executed throughout her Mother's three (3) year residency, Elzenia Johnson held herself out as having authority to continue to bind her Mother and continue to engage the services of Clinton Health & Rehabilitation Center. Clinton Health & Rehabilitation Center acted in good faith, continuing to believe Elzenia Johnson had the authority - - apparent or otherwise - - to bind her to contract. Her

actions allowed Clinton Health & Rehabilitation Center to believes he possessed the very authority she now disputes.[4]

It is undisputed that Mary Scott received services from Clinton Health & Rehabilitation Center based on the terms and conditions of the Admission Agreement, thereby benefitting from same. It has been recognized that to allow a plaintiff to claim the benefit of a contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying the enactment of the Federal Arbitration Act. *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d 894, 902 (S.D. Miss. 2001). Should the lower court's holding stand, that injustice will occur.

By agreeing to and signing the September 13th contract as her Mother's responsible party, Elzenia Johnson created an express agency, or alternatively, an implied agency. American Jurisprudence, 2d Edition, has aptly set forth the creation of an expressed or implied agency:

> While the creation of an agency relationship, so far as the principal and agent are concerned, arises from their consent and usually as the result of contract, it is not essential that the actual contract exist. The agency and the assent of the parties thereto may be either express or implied. Further, an agency may be informally created.
>
> An express agency is an actual agency created as a result of the oral or written agreement of the parties, and the implied agency is also an actual agency, the existence of which as a fact is proved by deductions or influences from the other facts and circumstances of the

[4]Although this Court has yet to rule on the precise issue of whether a responsible party can bind a resident to contract, the Alabama Supreme Court has affirmatively decided the issue. In *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004); and *McGuffey Health and Rehabilitation Center v. Gibson*, 864 So. 2d 1061 (Ala. 2003), the Alabama Supreme Court reviewed nursing home agreements which were not signed by the resident but were, instead, executed by the resident's responsible party. In each case, the Alabama Court held the contract to be valid and enforced the arbitration provision.

particular case, including the words and conduct of the parties.

3 Am. Jur. 2d Agency § 16 (2004).

In addition, an agent is one who stands in the shoes of his principal; he is his principal's alter ego. *Bailey v. Worton*, 752 So. 2d 470, 474 (Miss. Ct. App. 1999). In *Bailey*, the Mississippi Court of Appeals expounded that:

> "This Court has defined apparent authority and found that the extent to which it binds the principal is predicated upon the perception of the third party in his dealings with the agent: ***Apparent authority exists when a reasonably prudent person, having knowledge of the nature and the usages of the business involved would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have.***"

Id. (quoting *Eaton v. Porter*, 645 So. 2d 1323, 1325) (Miss. 1994)). (Emphasis supplied).

When approximately a year and a half into Ms. Scott's residency at Clinton Health & Rehabilitation Center, Ms. Johnson read, signed and agreed to the terms of the admission agreements, she again held herself out as "a substitute, a deputy, appointed by the principal, with the power to do things which the principal may or can do."[5] *Id.* (citing 2 C.J.S. Agency § 1 (C) (1936)). Based on the fact that Elzenia Johnson held herself out to be her Mother's agent in admitting her to the Facility, coupled with the Facility's good faith belief that she possessed such authority, she

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[5]Assuming *arguendo*, that no authority, apparent or otherwise existed, Elzenia Johnson's actions would fall within the auspices of Miss. Code Ann. § 41-41-211(2), which provides:

> [A]n adult or an emancipated minor may designate any individual to act as a surrogate by personally informing the supervising health-care provider. In absence of 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.

The Statute further provides in Section 7 that a health care decision made by a surrogate for a patient is effective without judicial approval. Miss. Code Ann. § 41-41-211 (7).

should be equitably estopped from bringing this lawsuit - - a lawsuit that is in direct contravention to the alternative dispute resolution provisions contained within the Admission Agreement.

V. Elzenia Johnson's lawsuit was in direct contravention to the binding arbitration provision contained within the September 13, 2002 Admission Agreement.

In *Vicksburg Partners, L.P. v. Stephens*, this Court, for the first time, ruled on the issue of arbitration in the nursing home/long-term care facility setting. 911 So. 2d 507 (Miss. 2005). In *Stephens*, this Court held that an arbitration clause contained within an admission agreement was both procedurally and substantively conscionable. *Id.* That case involved the trial court's denial of a "motion to enforce a dispute resolution/arbitration clause contained within a nursing home's standard admissions form." *Id.* at 513.

In *Vicksburg Partners*, the Court began its discussion with a reminder of its view of arbitration:

> This Court has recognized that arbitration is favored and firmly embedded in both our federal and state laws. *Pass Termite & Pest Control, Inc. v. Walker*, 904 so. 2d 1030, 1032-33 (Miss. 2004) (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002); *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002); *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998)). Since our decision in *IP Timberlands*, we have explicitly recognized the applicability of arbitration for resolving disputes and have stated that we will respect the right of an individual or an entity to agree in advance of a dispute to arbitration or other alternative dispute resolution. 726 So. 2d at 104. We have thus endorsed the undisputed province of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA), and recognized its clear authority to govern agreements formed in interstate commerce wherein a contractual provision provides for alternative dispute resolution. *Id.* at 107. Consistent with federal law, our case law now clearly emphasizes the favored status of arbitration:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This Court has adopted this preference for arbitration. *See Smith Barney, Inc. v. Henry*, 775 So. 2d 722 (Miss. 2001); *IP Timberlands Operating co. v. Denmiss Corp.*, 726 So. 2d 96, 103-04 (Miss. 1998); *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809, 812 (1948).

Id. (quoting *East Ford, Inc.*, 826 So. 2d at 713).

The Court next focused on whether a nursing home/long-term care facility affected interstate commerce in such a way as to invoke the provisions of the Federal Arbitration Act (hereinafter "FAA"). Section 2 of the FAA provides, in part, that ". . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

In *Vicksburg Partners*, this Court determined that "singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce." 911 So. 2d at 515. The Court specifically found the case fell within the auspices of the FAA because, "[n]ursing homes through general practice, which includes basic daily activities like receiving supplies from state vendors and payments from out-of-state insurance companies of the federal Medicare program,

affect interstate commerce." *Id.* Clinton Health & Rehabilitation Center is a nursing home that receives services and good from out-of-town vendors, admits out-of-state residents, and receives payment from out-of-state insurance carriers, and receives funds through Medicare and Medicaid. As such, the arbitration agreement at issue falls within the confines of the FAA and should properly be submitted to arbitration, rather than to trial.

VI. The arbitration provision is enforceable.

The arbitration provision contained within the September 13, 2002 Admission Agreement should be enforced. In *Vicksburg Partners*, the Court aptly held that "[i]n line with U.S. Supreme Court precedent, we will review the arbitration agreement in this case, paying close attention to the strong federal policy of favoring the enforcement of agreements to arbitrate." 911 So. 2d at 516. "'Absent a well-founded claim that an agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract,' the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability." *Id.* (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

As a result of this Court's favored status of arbitration, the lower court had a duty to begin with a presumption the arbitration provision was valid and binding and should have placed the burden with Elzenia Johnson to prove otherwise. The lower court erred in denying arbitration.

Taking the presumption of the validity of arbitration agreements, the analysis becomes two-fold: The first prong, whether the parties agreed to arbitrate the dispute in question, has two considerations: (1) whether a valid written agreement to arbitrate exists; and (2) whether the dispute

falls within the scope of the arbitration agreement. *East Ford, Inc.*, 826 So. 2d at 713. The second prong considers "whether legal constraints external to the parties' agreement foreclose the arbitration of those claims." *Gulf Ins. Co. v. Neel-Schaffer, Inc.*, 904 So. 2d 1036, 1042 (Miss. 2004).

A. The Parties agreed to arbitrate this dispute.

In resolving the first issue - whether the parties agreed to arbitrate the dispute - the Court should look to the language of the contract itself to determine whether the arbitration provision governs the dispute. In regard to contract construction this Court has held as follows:

> The meaning of the language and intention of the parties to be determined by the Court is found in the language used in the instrument. . . . [In] construing written instruments, our concern is not nearly so much what the parties may have intended as it is what they said, for the words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy. . . . Clear, unambiguous instruments must be construed as written. ***Courts must ascertain the meaning of the language actually used, and not some possible but unexpressed intent of the parties. . . . The parties obviously disagree over the meaning, but that fact alone does not render the instruments ambiguous.***

IP Timberlands Operating Co., 2td., 726 So. 2d at, 104 (internal citations and quotations excluded). (Emphasis supplied). On September 13, 2002, Elzenia Johnson agreed to arbitrate (if mediation was not successful), "any claim, dispute and/or controversy . . . . " R. 567.

B. The asserted claims are within the scope of the arbitration provision.

The second and final issue for the Court's consideration is whether Elzenia Johnson's claims fall within the preview of the arbitration provision (in other words, do any legal constraints external to the parties' agreement foreclose arbitration of the dispute). This would include state law contract defenses such as fraud, duress and unconscionability.

In *Vicksburg Partners*, this Court addressed procedural and substantive unconscionability in nursing home agreements, stating:

> [T]he doctrine of unconscionability has been defined as an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party. . . . Conversely, a conscionable provision has been found to bear some reasonable relationship to the risks and needs of the business. . . . [W]e review all questions regarding unconscionability under the circumstances as they existed at the time the contract was made. . . .

911 So. 2d at 516-17.

In the case-at-bar, the arbitration provision contained within the September 13, 2002 Admission Agreement bears a reasonable relationship to the risks and needs of the business. The business of custodial care, includes daily medical treatment and care, all pursuant to doctor's prescriptions and orders, professional care plans drawn up specifically for the resident by a team of trained care givers and a highly regulated and inspected environment. There is an undisputed relationship to the risks and needs of the nursing home industry and the need to keep their costs controlled in order to continue operating. To resolve disputes through arbitration rather than litigation is one step that is being taken. Avoiding the expense of litigation through the use of arbitration still preserves the rights of an individual to recover damages where appropriate.

This Court recognizes two types of unconscionability - procedural and substantive. "*Procedural* unconscionability is applicable to the overall formation of the contract in which the subject clause (such as the arbitration clause) is contained, whereas *substantive* unconscionability is applicable only to the subject clause (such as the arbitration clause) itself. *Vicksburg Partners*, 911 So. 2d at 517. (Emphasis is original). The arbitration provision contained within the September 13, 2002 Admission Agreement executed by Elzenia Johnson, as her Mother's responsible party, is

facially valid (as this Court found in reviewing a virtually identical admission agreement in the *Vicksburg Partners* decision); the Parties to the agreement were guaranteed the same rights with respect to arbitration; accordingly, the provision is not substantively unconscionable.

CONCLUSION

The Admission Agreement, containing a binding and conscionable arbitration provision, should be enforced by this Court. Arbitration agreements in the nursing home/long-term care facility context are enforceable and bear a reasonable relationship to the needs of the business. Elzenia Johnson, acting as her Mother's responsible party, executed a fully enforceable Admission Agreement, containing a binding arbitration provision on September 13, 2002. The lower court erred in denying arbitration as authority had been established based upon Elzenia Johnson's actions over a three (3) year time frame. For the reasons set forth more fully, *supra*, Trinity Mission Health & Rehabilitation of Clinton and LPNH Holdings Limited, LLC respectfully request this Court reverse the lower court's denial of the Motion to Compel Arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of ***Brief of Appellants*** was caused to be served to the following by first class mail:

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THIS, the 21st day of December, 2006.

Heather M. Aby