IN THE SUPREME COURT OF MISSISSIPPI

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

VS. **CASE NO.: 2006-CH-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**

RESPONSE TO APPELLEE'S SUPPLEMENTAL BRIEF

A. Elzenia Johnson bound Mary Scott (and her Wrongful Death Beneficiaries) to arbitration.

On January 4, 2001, Mary Scott was admitted to Clinton Health & Rehabilitation Center. R. 550, 558-59. Over the next three (3) years, Elzenia Johnson acted as her Mother's Responsible Party and Healthcare Surrogate in executing documents on her behalf, to include the September 13, 2002 Admission Agreement -- the contract at issue before the Court. R. 293. From 2001 until Ms. Scott's discharge from the Facility, Elzenia Johnson held herself out as having the authority she is now arguing does not exist. She did this by executing numerous documents and otherwise attending to and being responsible for her Mother's needs, *i.e.*, acting as her Healthcare Surrogate.

The September 13, 2002 Admission Agreement contained language whereby all disputes would be resolved through binding arbitration. The same language of the provision has been upheld in *Vicksburg Partners, L.P. v. Stephens* and *Covenant Health Rehab of Picayune v. Brown*. It provides, in part: "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." *See Stephens*, *Brown* and R. 299.

While Elzenia Johnson would argue otherwise, the Mississippi Supreme Court has affirmatively answered the question as to whether a responsible party, acting as a resident's healthcare surrogate, has the ability to bind the individual in matters such as arbitration.[1] *Covenant Health Rehab of Picayune v. Brown*, 949 So. 2d 732 (Miss. 2007). Ms. Johnson asserts that "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.'" *See* Appellee's Supplement Brief, pg. 6. *What is important is the Court's final decision in Brown, not Elzenia Johnson's speculations regarding what the Court might have meant or how it got there.*

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[1]Further, *Covenant Health Rehabilitation of Picayune, LP v. Lambert*, a Mississippi Court of Appeals decision, is pending rehearing.

In *Brown*, following a finding Goss had authority to bind Brown, pursuant to Mississippi Code Annotated, § 41-41-211, to an admission agreement containing a binding arbitration provision, this Court held:

> Her adult daughter, Goss, was an appropriate member of the classes from which a surrogate could be drawn, and thus, *Goss could contractually bind Brown in matters of health care.*
>
> Having confirmed Goss' authority to sign the agreement, the remaining inquiry is whether Goss signed the agreement in a voluntary and knowledgable manner.

Brown, 949 So. 2d at 737. It is elementary that before the Court moved to its analysis of the actual agreement to arbitrate, the Court made a determination the arbitration agreement was in fact, part of a healthcare decision made by Goss, who had been found to be her mother's healthcare surrogate.

In support of her argument against arbitration, Ms. Johnson cites to several Mississippi federal district court cases whereby Judge Bramlette found Mississippi's healthcare surrogate statute to be inapplicable. In *Mariner Health Care, Inc. v. Rhodes* and *Mariner Health Care Inc., v. Guthrie*, the court, relying primarily upon Florida and California case law, refused to enforce an arbitration provision contained within an admission agreement executed by a responsible party.[2] In so doing, the court refused to follow precedent in other states (including Alabama) upholding such arbitration agreements

[2]In refusing to apply Mississippi's healthcare surrogate statute, the court made an *Erie*-guess that, in light of *Covenant Health Rehab of Picayune v. Brown*, proved erroneous.

executed under similar circumstances. *See In re: Ledet*, 2004 WL 2945699 (Tex. App. Dec. 22, 2004); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983(Ala. 2004); *Briarcliff Nursing Home, Inc. v. Woodman*, 894 So. 2d 661 (Ala. 2004); and *McGuffey Health and Rehabilitation Center v. Gibson*, 864 So. 2d 1061 (Ala. 2003).[3]

In *In re: Ledet, supra*, the Texas Court of Appeals found a son could bind his mother (and her estate) to a nursing home arbitration agreement *in the absence of a conservatorship or a power of attorney*. Judge Bramlette refused to following the *Ledet* reasoning, finding the court failed to distinguish between medical and legal decisions; however, the controversy surrounded an arbitration agreement contained within a nursing home admissions agreement, so obviously the Texas Court considered the action of a son agreeing to an arbitration provision under the circumstances as part of the healthcare decision-making process.

Judge Bramlette further failed to apply the logic of *Owens*, an opinion from the Alabama Supreme Court. In *Owens, supra*, a challenge to the arbitration agreement was made because the resident did not sign, but her daughter executed the agreement on her behalf. Several arguments were made on appeal, including the resident (her estate) should not be bound to arbitrate because the resident did not sign the agreement, *i.e.*, in essence no contract was formed. *Owens*, 890 So. 2d at 987. This argument, however, was found to be without merit:

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[3]In *Briarcliff, supra*, the court found a relative was an appropriate party to sign admission and arbitration agreements on a resident's behalf. Authority to sign was not an issue in *McGuffy, supra*; however, in that case, the Alabama court enforced a nursing home arbitration agreement signed by a friend who admitted the resident into the nursing home.

> As noted above, it is undisputed that Owens, on behalf of Tucker, entered into the arbitration agreement with Coosa Valley. The agreement explicitly states that it is "between Coosa Valley Health Care, Inc .... and the undersigned Patient, Guardiean and Sponsor (hereinafter known as 'Patient')." Tucker is clearly designated on the signature page as the "Patient"; Owens is clearly designated on the signature page as both "Guardian" and "Sponsor"; and the agreement states that "[t]he meaning of 'Patient' shall include Patient and his, her or their sponsors, guardians, heirs, executors, successors, and assigns." There is no evidence indicating that Tucker had any objections to Owens's acting on her behalf in admitting Tucker to the nursing home. Coosa Valley has met its burden of proving the existence of a contract between Coosa Valley and Tucker calling for arbitration.

Id.

It was also argued the resident had no knowledge of the agreement to arbitrate, therefore rendering it unconscionable. *Id.* at 988. The court found this "claim of unconscionability" to be "wrong on its face." *Id.*

> The fact that she did not explain the arbitration agreement to Tucker, or that Coosa Valley did not independently bypass Owens and explain the arbitration agreement to Tucker - an odd act that Coosa Valley would have been under no duty to perform, see *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 960 (Ala. 2001) (one who offers a product or a service 'is under no duty to disclose, or explain, an arbitration clause to a buyer") - is simply not relevant to whether the arbitration agreement was unconscionable. While the parties disagree as to whether arbitration as a means of resvoling disputes between the parties was specifically discussed during the process of admitting Tucker to the nursing home, it is undisputed that the details of the arbitration agreement (a freestanding document) were not in any way hidden from Owens. It is true that Tucker was in poor health when she was admitted to the nursing home. However, Tucker did not handle the admission papers; Owens handled the admission papers on Tucker's behalf, and Owens provides no

> basis on which to find that the agreement contained "terms that are grossly favorable to [Coosa Valley]" or that Coosa Valley had "overwhelming bargaining power" – the essential elements of unconscionability as summarized by this Court in *American General Finance, Inc. v. Branch*, 793 So. 2d 738, 748 (Ala. 2000).

Id. at 988-89.

While some Mississippi federal district court's, in reliance upon *Rhodes* and *Guthrie*, have denied arbitration in the context of admission to a nursing home, Judge Pepper in the Northern District of Mississippi, enforced an arbitration agreement executed by a resident's responsible party. *Mariner Health Care, Inc. v. Weeks*, 2006 WL 20565888 (N.D. Miss. 2006). That agreement, like the one at issue before the Court, provided all disputes be resolved through binding arbitration. In enforcing the written contract, the *Weeks* Court held:

> In any event, a person is bound by the contents of a contract he signs, whether he reads it or not. *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 262-63 (5th Cir. 2004) (even a illiterate person is charged with reading a contract); *Stephens v. Equitable Life Assur. Society of the U.S.*, 850 So. 2d 78, 83-84 (Miss. 2003); *Massey v. Tingle*, 867 So. 2d 235, 240 (Miss. 2004) ("[I]n Mississippi, a person is charged with knowing the contents of any document that he executes."); *Turner v. Terry*, 799 So. 2d 25, 36 ("[P]arties to an arms-length transaction are charged with a duty to read what they sign; failure to do so constitutes negligence.") and *McKenzi Check Advance of Mississippi, LLC v. Hardy*, 866 So. 2d 446, 455 (Miss. 2004) ("It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it.").

Id.

Mary Scott was a resident of the Facility for approximately three (3) years. At the time of her admission and later on September 13, 2002, Elzenia Johnson, acting as her Mother's Responsible Party and Healthcare Surrogate, executed contracts – contracts setting forth the terms and conditions of her Mother's residency, the second of which included an agreement to arbitrate. Mary Scott was present at the Facility throughout this time-period and never refuted these actions. Accordingly, the September 13, 2002 agreement to arbitration should be upheld.

B. Arbitration is the proper forum for disposition of this matter.

In determining whether an agreement to arbitrate should be upheld, this Court has a ". . .healthy regard for the federal policy favoring arbitration." *Brown*, 949 So. 2d at 741. The agreement at issue clearly bears a "reasonable relationship to the risks and needs" of the nursing home industry. *Id.* It is no secret that, prior to enactment of Mississippi's Medical Malpractice Tort Reform Act, many nursing home owners were left without insurance to cover claims of negligence. This was the result of the high cost of litigation and runaway jury verdicts. The addition of arbitration provisions became a way to counter these inevitables. This Court has found the arbitration agreement, identical to the one analyzed in *Stephens* and in *Brown*, not oppressive, but simply a fair process to pursue claims.

Accordingly, Appellants respectfully request the Court look past Ms. Johnson's semantics and order this matter to be brought to conclusion in binding arbitration.

This the 17th day of April, 2007

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 a ***Response to Appellee's Supplemental Brief*** was served to the Clerk of this Court and on the following persons at these addresses:

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Dated, this the 17th day of April, 2007.

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