IN THE SUPREME COURT OF MISSISSIPPI

COVENANT HEALTH AND REHAB OF VICKSBURG, LP, and COVENANT DOVE, INC. — APPELLANTS

VS. — CAUSE NO. 2007-TS-00140

MARY CALVERT BROWN and CALVERT BROWN, JR., INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF CALVERT BROWN, SR. — APPELLEES

BRIEF OF APPELLEES

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

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ORAL ARGUMENT NOT REQUESTED

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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 any judge of this Court may evaluate possible disqualifications or recusal.

1. Plaintiffs/Appellees, Mary Calvert Brown and Calvert Brown, Jr., individually and as the personal representative of the Estate (Conservatorship) of Calvert Brown, Sr.;
2. Plaintiff/Appellee, Rosemary Cashman Brown, Executrix of the Estate (testamentary) of Calvert Brown, Sr.;
3. Defendants/Appellants, Covenant Health and Rehab of Vicksburg, LP, and Covenant Dove, Inc.;
4. M. James Chaney, Jr. and Jami L. Crews, attorneys for Appellees;
5. John L. Maxey, Esq. and Heather M. Aby, Esq., attorneys for Appellants;
6. Honorable Isadore W. Patrick, Warren County Circuit Court Judge.

Respectfully submitted, this the 24 day of October, 2007.

M. JAMES CHANEY, JR.
JAMI L. CREWS
Attorneys for Appellees

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STATEMENT OF THE ISSUE

Whether the Warren County Circuit Court properly denied the Defendant's Motion to Compel Arbitration, when it found there was no binding, enforceable contract for Alternative Dispute Resolution between the parties at the time of Mr. Brown's injury on June 6, 2005.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below

On April 14, 2006, Plaintiffs, Mary Calvert Brown and Calvert Brown, Jr. individually and as personal representatives of the Estate (Conservatorship) of Calvert Brown, Sr., filed a complaint in the Circuit Court of Warren County against Defendants Covenant Health and Rehab of Vicksburg, LP and Covenant Dove, Inc. for an injury Mr. Calvert H. Brown, Sr. sustained on June 6, 2005, while under the care of the Defendants. By agreement of the parties, Plaintiffs filed an Amended Complaint on June 21, 2006, in compliance with Mississippi's Tort Reform Act. In response, the Defendants moved to compel arbitration and requested a stay of the proceedings on June 30, 2006, claiming Mr. Brown's wife (Rosemary Brown) was the Responsible Party and had agreed to Alternative Dispute Resolution. Defendants then brought on for hearing its Motion to Compel Arbitration, on November 8, 2006. Said Motion was denied on January 5, 2007. Defendants have appealed the denial of its Motion to Compel Arbitration.

II. Statement of Relevant Facts

Plaintiffs, Mary Calvert Brown and Calvert Brown, Jr. are the children of Calvert H. Brown, Sr., a 91 year old gentleman who suffered from Alzheimer's and dementia. Mr. Brown had been admitted to Covenant Health and Rehab of Vicksburg, LP in Vicksburg, Mississippi, on several occasions. During one admission, he suffered an injury on June 6, 2005. (2 R. 173-174). Covenant Health and Rehab of Vicksburg, LP is owned and operated by the Defendant, Covenant Dove, Inc. (2 R. 173).

In April 2005, Mr. Brown was initially admitted into Defendants' care for rehabilitation and evaluation after a hospitalization for a fall at his home. (2 R. 174). At his initial admission, the Defendants' employee and Business Office Manager, Amanda Morgan, met with Mr. Brown

and his wife, Rosemary Brown, regarding two documents: an Admission Agreement; and an Alternative Dispute Resolution Agreement. (2 R. 275 - 279). On April 25, 2005, Mr. Brown was discharged from Defendants' facility to undergo treatment at River Region Medical Center. (2 R. 279). When discharged, the Defendants required the resident's family to either continue to pay the daily room rate through private pay funds, or the patient would be discharged and later readmitted if space were available. See paragraph 10 of affidavit of Morgan, Exhibit "A" to Defendants' Rebuttal, 2 R. 279. Mrs. Brown elected not to pay while Mr. Brown was absent, and the Defendant agreed that upon Mr. Brown's readmission to the nursing home on April 27, 2005, Mr. Brown would be treated as a "new admission." (Tr. 17, 18). As part of the new admission, a new Admission Agreement and Alternative Dispute Resolution Agreement were presented for execution and signed by Mr. Brown's wife, Rosemary. On June 1, 2005, Mr. Brown was again discharged from the Defendants' facility. Upon his readmission, on June 3, 2005, Ms. Morgan prepared and presented a new Admission Agreement and Alternative Dispute Resolution Agreement, but she failed to secure Rosemary Brown's signature as wife and Responsible Party on these agreements.

During this admission, on June 6, 2005, around midnight, Mr. Brown was discovered lying face up on the floor of his nursing home room. (2 R. 174). At approximately 4:55pm, almost 17 hours later, Mr. Brown's family insisted he be transported to the emergency room. (2 R. 175) Two and half hours later Mr. Brown was transported to River Region emergency room where he was diagnosed with a broken hip and fractured femur. (2 R. 175). Mr. Brown remained at River Region to undergo surgery to repair his broken hip. (2 R. 175).

After the June 6, 2005, fall, while Mr. Brown was undergoing surgery at River Region Medical Center for the injury he sustained, the Defendant nursing home repeatedly demanded

that Rosemary Brown execute the new Admission Agreement and Alternative Dispute Resolution Agreement. 2 R. 264, 265. Mrs. Brown refused and never executed the June 3, 2005, Alternative Dispute Resolution agreement. (2 R. 265).

ARGUMENT

I. Standard of Review

" An order denying a motion to compel arbitration raises a question of law and is subject to de novo review." *AmSouth v. Quimby*, 963 So.2d 1145, 2006-CA-00826-SCT, ¶ 5 (September 6, 2007) (citing *Smith v. Captain D's, LLC,* 963 So.2d 1116, 2006-CA-00024-SCT, ¶ 9 (June 14, 2007); *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002)). This Court's review , however, is restricted to a two-pronged inquiry. The first prong consists of: (1) whether there was a valid arbitration agreement; and (2) whether the parties' dispute is within the scope of the arbitration agreement. Second, the Court must look to whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. *Id.* (citing *East Ford, Inc.*, 826 So.2d at 713). Under the second prong, applicable contract defenses available under state contract law such as fraud, duress and unconscionability, may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act. *Id.* (citing *Mitsubishi Motors Corp. v. Soler, Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

II. Defendants' new argument that Mr. Brown had the capacity to enter into the June 3, 2005, arbitration agreement is procedurally barred because it is raised for the first time on appeal.

The issue framed in the lower court by the parties' motion, reply and supplemental responses, as well as during oral argument, was whether the prior admission agreements executed by Mrs. Brown as the responsible party somehow governed Plaintiff's admission to the Defendants' facility on June 3, 2005; (2 R. 261-263) and therefore, if it did, whether it was enforceable. The Defendants never argued in their motion or any pleadings or during argument before the lower court that Mr. Brown had the necessary mental capacity to execute any binding contract. (Tr. 3-8, 17-30; 1R. 143-150; 2 R. 151-152, 266-273; 4 R. 517-530). The trial court's

order correctly states, "that it is uncontradicted that Mr. Calvert Brown suffered from Alzheimer's at that time and lacked the necessary mental capacity to execute a binding contract". (4 R. 526-527). Now, for the first time on appeal, Defendants assert that because Mr. Brown had not been declared legally incompetent or because he may have had a lucid interval when he signed the June 3, 2005 agreement, it should be upheld as validly executed.

This Court has repeatedly held that a trial judge will not be found in error on a matter that is not presented to the trial court for a decision. *See Purvis v. Barnes*, 791 So.2d 199, 203 (Miss. 2001); *See also Amsouth*, 963 So.2d 1145, 2006-CA-00826-SCT, ¶ 34 ("We accept without hesitation the ordinarily sound principle that this court sits to review actions of trial courts and that we should undertake consideration of no matter which has not first been presented to and decided by the trial court.") (citing *Educ. Placement Serv. v. Wilson*, 487 So.2d 1316, 1320 (Miss. 1986)). Therefore, the Defendants' argument that Mr. Brown had the capacity to execute the agreement should be procedurally barred. *See Purvis*, 791 So.2d at 203; *Grenada Living Center v. , LLC*, 961 So.2d at 37. In any event, as shown in the argument that follows, Plaintiffs' pleadings and uncontradicted affidavit of Rosemary Brown, the wife, establish (2 R. 265) that on June 3, 2005, Mr. Calvert H. Brown, Sr., suffered from an advanced stage of Alzheimer's and dementia and he did not have the mental capacity to make any valid contract.

III. As a matter of law, no valid contract for arbitration existed at the time of Mr. Brown's injury on June 6, 2005, because Mr. Brown lacked the capacity to enter into any agreement upon his June 3, 2005 admission.

To determine if an arbitration contract is valid, the court must apply ordinary principles of contract law. *Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1055 (Miss. 2004). It is well-established that the elements of a contract include the legal capacity to enter into such contract. See *Mauldin Co. v. Lee Tractor Co. of Mississippi, Inc.*, 920 So.2d 513, 515 (Miss. 2006). A

valid contract must have: (1) two or more contracting parties; (2) consideration; (3) an agreement that is sufficiently definite; (4) *parties with legal capacity to make a contract*; (5) mutual assent; and (6) no legal prohibition precluding contract formation. *Grenada Living Center, LLC v. Coleman*, 961 So.2d 33, 37 (Miss. 2007) (emphasis added) (citing *Rotenberry v. Hooker*, 864 So.2d 266, 270 (Miss. 2003)).

Because an agreement to arbitrate is a contract, if parties have not agreed to arbitrate, the courts have no authority to mandate arbitration. *Fradella v. Seaberry*, 952 So.2d 165, 176 (Miss. 2007) (Diaz, J. dissenting) (citing *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995)). This Court has held that a party can not be required to submit to arbitration a dispute which he has not agreed to submit. *Smith*, 963 So.2d 1116, 2006-CA-00024-SCT, ¶ 11 (June 14, 2007) (citing *United Steel Workers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

Mrs. Brown's testimony is uncontradicted that on June 3, 2005, Mr. Brown was "in need of around the clock skilled nursing care due to his condition of Alzheimer's and his prevalence of falling". (2 R. 264). Further, Mrs. Brown testified that "due to [her] husband's condition of Alzheimer's, he did not have the capacity to understand his execution of any documents. If he did sign the admissions agreement on June 3, 2005, he would have had no understanding of what he was signing." (2 R. 265).

Because Mr. Calvert H. Brown, Sr., was a 91 year old Alzheimer's patient who suffered from dementia, he lacked the necessary mental capacity to execute a binding contract. The Alternative Dispute Resolution Agreement dated June 3, 2005, if signed by Mr. Brown, is unenforceable and invalid. Defendants acknowledge that both Mrs. Brown, the responsible party, and the other Plaintiffs (her adult children) refused to execute the arbitration agreement

concerning Mr. Brown's June 3, 2005 admission even when the Defendants' employee, Amanda Morgan, offered to bring the agreement by the hospital where Mr. Brown was undergoing surgery. (2 R. 280; Tr. 21). If the Defendants had a validly signed admissions agreement and alternate dispute resolution agreement, then why were they so desperate to get one signed after he had left the facility? The lower court was correct in denying the Defendants' Motion to Compel Arbitration for lack of a binding agreement concerning Mr. Brown's June 6, 2005 injury.

IV. Even if the April 5th and April 27th agreements can be considered "valid" under *East Ford, Inc. v. Taylor*, Plaintiff's claims are outside the scope of the previously executed agreements to arbitrate because such claims stem from Mr. Brown's injury occurring after his June 3, 2005 admission.

Although a review of the Mississippi case law regarding arbitration indicates a strong liberal federal policy towards arbitration, courts can not construe agreements to arbitrate so broadly as to encompass claims and parties not intended by the contract. *Smith*, 963 So.2d 1116, 2006-CA-00024-SCT, ¶ 11 (June 14, 2007) (citing *Mitsubishi*, 473 U.S. 614, 625, 776 (1985)). "A cardinal rule of construction of a contract is to ascertain the mutual intentions of the parties". *Union Planters Bank, National Ass'n v. Rogers*, 912 So.2d 116, 120 (Miss. 2005). *See id.* (explaining intent is first gathered from the objective reading of words with any ambiguities construed against the drafter, and specific language controls over general language).

The record below reflects that Defendants would not hold a bed for Mr. Brown unless the wife (Responsible Party) agreed to continue to pay the daily room charge with private funds. 2 R. 279. Rather than pay full rate for a vacant bed, the parties agreed that after each stay in a local hospital for medical care, a new contract would be signed by the parties entailing the rights and responsibilities of each party. (Tr. 17, 18). Otherwise, as the court below so appropriately asked "that begs the question of why would you need to sign a contract each time, if the April 5th one

was binding on everybody, why would you need to sign another one?" (Tr. 17). Defendants have conceded they agreed to enter into a new admission agreement for each admission of Mr. Brown to the facility. (Tr. 17-18).Therefore, the Plaintiffs' claims stemming from Mr. Brown's injury after the June 3rd admission are not governed by the April 3rd and April 27th admission/arbitration agreements.

The Defendants cite *Cleveland v. Mann* to support their argument that the April 3rd and April 27th arbitration agreements govern Mr. Brown's June 6, 2005, injury. Such reliance is misplaced. In *Cleveland*, the court determined whether the plaintiff's claims for medical malpractice were within the scope of an agreement to arbitrate signed prior to one surgery that was necessitated by a previous surgery for which no arbitration agreement was signed. *See Cleveland*, 942 So. 2d 108. Because the plaintiff in *Cleveland* claimed that the Defendant's negligence regarding the first surgery led to the need for the second surgery, the court ruled that the plaintiff's claims were within the scope of the arbitration agreement governing the second surgery. However, in this present case, Mr. Brown's previous admissions to Defendant's facility did not *lead to* his June 3, 2005, admission. As stated above, the mutual intent of the parties was that a new agreement would govern each new admission and stay in Defendants' facility.

Defendants further argue that because Plaintiffs claim Defendants acted negligently prior to June 6, 2005, in preventing an injury to Mr. Brown *that occurred on June 6, 2005*, Plaintiffs' claims actually fall within the previous agreements dated April 5, 2005, and April 27, 2005. Again. Defendants are performing a gymnastic feat to stretch the ruling in *Cleveland* way beyond its holding. It is obvious Plaintiffs' claims for a June 6, 2005, injury are not within the scope of the previous agreements or the previous admissions to the Defendants' facility. It is the date of Plaintiff's injury that determines which agreement is relevant.

In *AmSouth v. Quimby*, 963 So.2d 1145, 2006-CA-00826-SCT (September 6, 2007) ¶ 23, this Court held that in examining the temporal scope of an arbitration agreement, courts are required to submit to arbitration only what the parties agreed to submit. (citing *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703, 708 (Miss. 2006)). Therefore, given Defendants' concession that the parties agreed that a new admissions agreement and a new arbitration agreement would govern and be required for each stay at the facility, it was obviously the parties' intent that each new agreement would supercede the previous agreement. Thus, Plaintiffs' claims for the injury that occurred on June 6, 2005, do not fall within the scope of the April 3rd and April 27th agreements. The court must look to the parties' intent in determining the scope of an arbitration agreement. It is the date of the injury that triggers the determination of the scope of the agreement.

This logic is supported by an examination of this court's analysis regarding the breadth of arbitration agreements, which has clarified that the scope of an arbitration agreement can not be so broad as to encompass claims outside the intent of the parties. See *Smith v. Captain D's, LLC*, 963 So.2d 1116, 2006-CA-00024-SCT (June 14, 2007) (holding an employee's claim of sexual assault was not within the scope of an arbitration agreement contained in an employment application because the sexual assault neither pertained to nor had a connection with employment); *Rogers-Dabbs Chevrolet Hummer v. Blakeney*, 950 So.2d 170, 176-77 (Miss. 2007)(holding that no reasonable person would agree to submit to arbitration claims that would subject them to fraud or theft).

Because it was the uncontradicted mutual intent of the parties that each admission to the Defendants' facility would be governed by the new admissions agreement and new arbitration agreement, only the June 3, 2005, agreement is relevant to the claims the Plaintiffs have made

regarding the injury occurring on June 6, 2005. Plaintiffs' claims for the Defendants' negligence stemmed from the injury occurring on June 6, 2006, and it is the date of injury that triggers the determination of the scope of an arbitration agreement. Therefore, Plaintiffs' claims regarding the June 6, 2005, injury are outside the scope of the previous agreements. The lower court's decision to deny the Defendants' Motion to Compel Arbitration was proper and should be upheld.

V. In the Alternative, the Admission Agreements and Alternative Dispute Resolution Agreements in question are unconscionable and therefore invalid.

Applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate an arbitration agreement without offending the Federal Arbitration Act. *Mitsubishi Motors Corp.*, 473 U.S. at 626; *Fradella*, 952 So.2d at 176 (Diaz, J. dissenting) (explaining that because arbitration is created by contract, state and common law defenses exist). Courts may refuse to enforce unconscionable contracts, including agreements to arbitrate. See Miss. Code Ann. § 75-2-302.

An unconscionable contract is generally defined as having an absence of meaningful choice by one party, together with contract terms that are unreasonably favorable to the other party and one in which "no man in his senses and not under a delusion would make on one hand and no honest and fair man would accept on the other." *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So.2d 1202, 1207 (Miss. 1998). Mississippi courts have recognized two types of unconscionability - procedural and substantive. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 517 (Miss. 2005).

A contract is substantively unconscionable when the contract terms are oppressive. *See East Ford*, 826 So.2d at 714. This Court has further defined substantive unconscionability as

where the agreement is so one-sided that one party is deprived of all benefits of the agreement or left without a remedy for the other party's nonperformance or breach. *Trinity Mission of Clinton, LLC v. Barber*, ___ So.2d ___, 2005-CA-02199-COA (August 28, 2007) ¶ 40 (citing *Stephens*, 911 So. 2d at 521 and explaining that for an oppressive term to be found substantially unconscionable it must by its very language "significantly alter" the legal rights of parties and "severely abridg[e]" the damages they may obtain).

This Court has already determined that certain provisions contained within the Defendants' Admission Agreement and Alternative Dispute Resolution Agreement are unconscionable, yet the nursing homes continue to include them in their agreements. Provisions already ruled unconscionable by this Court include: (1) the Grievance Resolution process (2 R. 241); (2) the $50,000 limit on damages in the Alternative Dispute Resolution agreement and Admission Agreement (2 R. 243, 235)[1]; (3) the waiver of punitive damages "under any circumstances" in the Alternative Dispute Resolution Agreement and in the Admission Agreement (2 R. 235, 243); and (4) the requirement that a resident hold the Defendant harmless from any criminal acts committed by its employees (2 R. 236). *See Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 522-23 (2005); *Covenant Health and Rehab of Picayune v. Brown*, 949 So.2d 732, 739-41 (Miss. 2007); *Barber*, 2005-CA-02199-COA (August 28, 2007) ¶'s 42-44.

In addition, Section C(5)(a) of the Admission Agreements purports to exempt Defendants from their duties under federal law. These duties include: (1) having sufficient nursing staff to provide the care so that residents can maintain their highest practical, physical, mental and psychosocial well being as determined by the resident's assessments and the individual plans of

[1] Such provision is also unconscionable because it does not apply the $50,000 limitation of liability of payment of services rendered to the resident by the facility.

care as required by 42 C.F.R. Section 483.30; (2) caring for residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life" as required by 42 C.F.R. Section 483.15; and (3) providing each resident the necessary care and services to attain or maintain the highest practicable, physical, psychosocial well-being in accordance with the comprehensive assessment and plan of care, as required by 42 C.F.R. Section 483.25.

The agreements before the Court sub judice further attempt to have a nursing home resident hold the Defendants harmless for any injury that could have been prevented had the resident's family provided 24-hour private duty nursing care! See Section C(5)(a) of the Admission Agreement (2 R. 234). Section C(5)(e) prohibits any resident from bringing an action against the facility which might have been covered by the facility's insurance had the facility purchased insurance, but which it declined to purchase! (2 R. 235). This effectively prevents a resident from ever bringing any action at all against the nursing home. Section C(5)(f) of the Admission Agreement requires a resident to submit any recovery he receives to Medicare or Medicaid or other third party payer (2 R. 235). Section D(1) of the admissions agreement states that it is enforceable whether or not it is ever timely executed. (2 R. 236). Section C(2) of the Alternative Dispute Resolution Agreement prohibits any appeal of an arbitrator's decision. (2 R. 242).

These provisions, by their very language, significantly alter -- virtually eliminate -- any legal rights of a nursing home resident and severely restrict, abridge, and prohibit any damages such parties could obtain. Therefore, such provisions are per se substantively unconscionable under this court's previous rulings. See *Cleveland*, 942 So.2d at 117; *Brown*, 949 So. 2d at 738-41; *Barber*, 2005-CA-02199-COA (August 28, 2007) ¶'s 42-44. How long will the nursing

homes be allowed to continue to insert and assert these horrible clauses? At the present time, they have nothing to lose other than the possible lack of enforcement of the clause -- and then only if the resident can afford an attorney to challenge it to the Supreme Court. Somehow that seems unfair.

Not only are the Defendants' arbitration agreements substantively unconscionable, they are procedurally unconscionable. Contracts are procedurally unconscionable where there is a lack of knowledge, lack of voluntariness, where the arbitration language is in inconspicuous print, where there is a use of complex legalistic language, or there is disparity in the sophistication and bargaining power, and/or there is a lack of opportunity to study the contract and inquire about its terms. *East Ford,* 826 So. 2d at 714. When evaluating procedural unconscionability, a court must look beyond the substantive terms to the circumstances surrounding a contract's formation. *Stephens*, 971 So.2d at 517.

In considering whether there is a lack of voluntariness, the Court should consider that parties should be able to choose to arbitrate claims. It is a choice that affects their constitutional right to a jury of their peers and their access to a court system. *Fradella*, 952 So.2d at 177 (Diaz, J. dissenting); *See Cleveland,* 942 So. 2d at 121-22 (Diaz, J. dissenting)(citing portions of the Mississippi Constitution, including the Bill of Rights that guarantees every person *shall* have a remedy by due course of law). Submitting to arbitration is giving up a right to file a lawsuit in a court of competent jurisdiction and requires more than implied consent. *Rogers,* 912 So. 2d at 119. Waiver of such a right is an act or omission that fairly evidences an intention to permanently surrender a right and requires full knowledge of a right existing and an intentional surrender or relinquishment of that right. *Id.* "It is the voluntary surrender of a right." *Id.*

Several facts render the subject agreements procedurally unconscionable. First, the

Admission Agreement and the Alternative Dispute Resolution Agreement are on pre-printed copyrighted forms not subject to negotiation by the nursing home resident or responsible party. Such "take it or leave it" presentation of an arbitration agreement that has been drafted unilaterally by the dominant party has been considered by this Court in determining whether there was a lack of voluntariness. *See Cleveland*, 942 So. 2d at 116. In the case sub judice, even though Mrs. Brown refused to sign the June 3, 2005, agreements, the Defendants are still attempting to bind Plaintiffs to an agreement never made.

The Alternative Dispute Resolution agreement requires in Section B(2) that all disputes "regardless of whether it is the facility or the resident initiating the dispute" be resolved in one ADR proceeding. (2 R. 241). However, the proof shows that the Defendants have disregarded this mandatory provision at their whim and filed numerous lawsuits in Warren County Justice Court and the County Court of Warren County without ever mentioning mediation or arbitration. See Exhibits "A" and "B" to Plaintiffs' Supplemental Response to Motion to Compel Arbitration. (4 R. 475-516).

No doubt Defendants will point out that claims for payment for services due it are exempt from the mandatory arbitration provisions. But that is further evidence that this copyrighted form is completely one sided, totally restricting or eliminating any possible claim that a resident may have[2], while completely exempting the one area where the nursing home facility might have a claim against the resident. There is a clear imbalance in bargaining power.

In addition, the Alternative Dispute Resolution Agreement requires the resident or responsible party to submit to binding arbitration only through ADR Associates, LLC, an entity

[2] Such as any claim that might be covered by insurance if they had it, or which would be prevented if the family provided 24 hour care.

that did not exist at the date of Mr. Brown's injury. In the lower court, Defendants confessed they did not know of that company and further confessed they have "never used this company for arbitration". (Tr. 22). The lower court noted the obvious conflict of financial interest since this particular company is required in all Defendants' contracts. (Tr. 24).

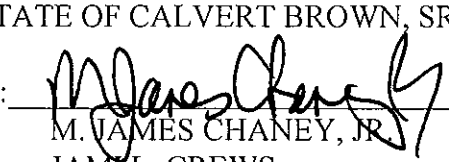
Finally, in both the Admission Agreement and the Alternative Dispute Resolution agreement, the blank for insertion of the identity of the "Facility" was left blank and not completed. (2 R. 230, 239). These are the preprinted, copyrighted forms that the Defendants have prepared and insist on using. Should not the Defendants at least be required to properly complete their own forms before they can be enforced? Otherwise, as in this case, Defendants will complete the forms so they are not binding on the facility, just the resident. All of these facts indicate that there was a lack of voluntariness on behalf of the Browns in any of the agreements, thereby rendering the contracts invalid and unenforceable.

CONCLUSION

There is no basis for reversal of the lower court's decision. The Warren County Circuit Court correctly determined there was no signed contract for alternative dispute resolution at the time of Mr. Brown's injury on June 6, 2005. The Defendants' argument that Mr. Brown had the capacity to enter into a contract for Alternative Dispute Resolution is both procedurally barred because it is raised for the first time on appeal and evidentiary barred since there is no evidence to contradict the sworn affidavit of Rosemary Brown that her husband lacked capacity. Mr. Brown clearly lacked the capacity to enter into an arbitration agreement for his June 3, 2005, admission. His wife, the responsible party, elected not to agree to arbitrate any claims arising from his June 3, 2005, admission. This case is really just that simple. However, since the Defendants insist on prosecuting frivolous appeals and continue to foist horribly unconscionable provisions on the public, this may be the time to declare the entire agreements unconscionable, otherwise there is no incentive for the nursing homes to stop trying to insert and enforce the illegal and unconscionable clauses, and certainly no meaningful protection for our citizens.

Respectfully submitted,

MARY CALVERT BROWN and CALVERT BROWN, JR., INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF CALVERT BROWN, SR.

BY: 

M. JAMES CHANEY, JR.
JAMI L. CREWS

CERTIFICATE OF SERVICE

I, M. James Chaney, Jr., hereby certify that I this day mailed with postage prepaid, a true and correct copy of the above and foregoing document unto:

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Hon. Isadore W. Patrick
Warren County Circuit Court Judge
P.O. Box 351
Vicksburg, MS 39181

Dated: October 24, 2007.

M. JAMES CHANEY, JR.