**IN THE SUPREME COURT OF MISSISSIPPI**
**NO. 2007-TS-00140**

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

**V.**

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

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# REPLY BRIEF OF APPELLANTS

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**STATUTORY AUTHORITY**

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### I. This matter is ripe for arbitration.

Calvert Brown was initially admitted to Covenant Health & Rehab of Vicksburg, LP on April 5, 2005. At that time, both he and his wife, Rosemary Brown, executed an Alternative Dispute Resolution Agreement and an Admission Agreement. 2 R. 199-214. The first page of the Alternative Dispute Resolution Agreement provided, "IMPORTANT NOTICE":

> THIS ALTERNATIVE DISPUTE RESOLUTION AGREEMENT IS A LEGALLY BINDING DOCUMENT. THE RESIDENT AND RESPONSIBLE PARTY UNDERSTAND THAT THEY HAVE CHOICES AND OPTIONS OTHER THAN PLACEMENT OF THE RESIDENT IN THIS FACILITY. THIS AGREEMENT CONTAINS SEVERAL PROVISIONS INTENDED TO REDUCE THE COST OF NON-CARE RELATED EXPENSES SUCH AS LEGAL FEES, SETTLEMENT COSTS, ADMINISTRATIVE TIME AND SIMILAR EXPENSES IN ORDER THAT THE FACILITY MAY SPEND MORE MONEY IN OTHER AREAS THAT MAY BE OF GREATER BENEFIT TO THE RESIDENT. BEFORE SIGNING THIS AGREEMENT PLEASE READ IT CAREFULLY. IF YOU HAVE ANY QUESTIONS, PLEASE BRING THEM TO FACILITY'S ATTENTION. YOU HAVE THE RIGHT AND ARE ENCOURAGED TO SEEK THE ADVICE OF LEGAL COUNSEL BEFORE SIGNING.

2 R. 207. (Capitalization in original).

Section B. of the Agreement, aptly entitled "**AGREEMENT TO SUBMIT DISPUTES TO ADR**" set forth the scope of disputes subject to alternative dispute

resolution:

> **Disputes Subject to ADR.** The Parties agree that any legal controversy, dispute, disagreement or claim of any kind (collectively "Dispute") now existing or occurring in the future between the parties arising out of or in any way relating to this Agreement, the Admission Agreement or the Resident's stay at the Facility shall be resolved through an ADR process (as defined herein) including, but not limited to, all Disputes based on breach of contract, negligence, medical malpractice, tort, breach of statutory duty, resident's rights, any departure from accepted standards of care, and all disputes regarding the interpretation of this Agreement, allegations of fraud in the inducement or requests for rescission of this Agreement. This includes any Dispute involving a claim against the Facility, its employees, agents, officers, directors, any parent, subsidiary or affiliate of the Facility or any Dispute involving a claim against the Resident, the Resident's Legal Representative or Responsible Party or family member.

2 R. 209.

The language of the above provision is clear – *any legal controversy, dispute or disagreement now existing or occurring in the future . . . shall be resolved through arbitration.* The contract entered into on April 5, 2005 was broad enough in temporal scope to touch the claims and allegations in the Complaint; as such, the lower court erred in refusing to order arbitration.[1]

Appellees cite to *Smith v. Captain D's, LLC*, in support of their argument against enforcement of arbitration. This decision, however, is supportive of Covenant Health &

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[1]*See also*, Section III of Appellant's Brief for an analysis of *Cleveland v. Mann*, which also provides support for reversal of the lower Court's ruling.

Rehab of Vicksburg, LP's and Covenant Dove, Inc.'s request the Court reverse the lower court's ruling. In *Smith*, the Court was faced with the issue of enforcing an agreement to arbitrate employment related disputes when the employee filed suit alleging sexual assault by her supervisor. 963 So. 2d 1116 (Miss. 2007). That agreement before the Court provided:

> [B]oth Captain D's and I agree to settle any and all previously unasserted claims, disputes, or controversies arising out or relating to my application for employment, employment and/or cessation of employment with Captain D's, exclusively by final and binding arbitration before a neutral arbitrator. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the law of contract and the law of tort.

*Id.* at 1120-21.

In analyzing the breadth of the agreement to arbitrate the Court determined "[c]ourts often characterize arbitration language as either broad or narrow.'" *Id.* at 1121 (quoting *MS Credit Center, Inc. v. Horton*, 926 So. 2d 167, 175 (Miss. 2006)).

> The United States Supreme Court has found similar language - "any controversy or claim arising out of or related to" - to constitute a broad arbitration provision. *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 726 (Miss. 2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)). "Because broad arbitration language is capable of expansive reach, courts have held that it is only necessary that the dispute "touch" matters covered by the contract to be arbitrable." *Horton*, 926 So. 2d at 176 (internal quotations

> omitted). Further, "relate" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"; with "to." Black's Law Dictionary 892 (Abridged 6th ed. 1991).

*Id.* In applying the jurisprudence the *Smith* Court held:

> The question of "scope" is narrowed to whether Tammy's rape claim arises out of or relates to "[Tammy's] application for employment, employment, and/or cessation of employment with Captain D's," so as to subject Tammy's sexual assault claim to arbitration. While recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment.

*Id.* In the instant matter, Appellees' allege Mr. Brown was neglected and injured while a resident of Covenant Health & Rehab of Vickburg, LP. In applying the Court's reasoning in *Smith*, the scope thus becomes whether allegations set forth in Appellees' Complaint falls within the broad language of the arbitration provision - - clearly the answer is in the affirmative.

Appellees' citation to *Fradella v. Seaberry*, further supports reversal of the lower court's holding. In *Fradella*, this Court reviewed a real estate contract to determine whether, although non-signatories, the real estate agent and agency could seek enforcement of the arbitration provision contained therein. 952 So. 2d 165 (Miss. 2007). The Court found the broad arbitration provision within the real estate contract executed by the buyer and seller of property to allow the real estate agent and agency to seek enforcement of the provision:

> [I]n today's case, Fradella/Prudential Gardner was clearly mentioned in the arbitration clause. The arbitration clause, in express terms, informed both the buyers and the sellers that by initialing and signing the contract, they were agreeing to resolve by arbitration "any controversy, claim, action or inaction arising out of, or relating to, the 'purchase' set out herein, *as against the listing company or selling company and/or their agents or representatives (hereinafter 'company') involved in this transaction.*

*Id.* at 174-75. In the instant case, it is of no moment Rosemary Brown did not execute the Alternative Dispute Resolution Agreement upon Mr. Brown's readmission to the Facility on June 3, 2005. This is true because the broad breadth of the April 5, 2005 agreement to arbitrate covers all allegations and claims asserted by Appellees.

## II. The contracts are not unconscionable rendering them unenforceable.

In *Vicksburg Partners, L.P. v. Stephens*, this Court properly held: "In line with U.S. Supreme Court precedent, we will review the arbitration agreements in this case, paying close attention to the strong federal policy of favoring the enforcement of agreements to arbitrate." 911 So. 2d 507, 516 (Miss. 2005). "'The Court went on to state that absent a well-founded claim that an agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for 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/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)). (Emphasis

supplied).

As a result of this Court's favored status of arbitration, there exists a presumption that the arbitration provision is valid and binding. Mary Calvert Brown and Calvert Brown, Jr. have failed to prove otherwise. In *Covenant Health & Rehab of Picayune v. Brown*, the Court, following the dictate of *Stephens*, found it proper to sever sections waiving liability for criminal acts; requiring forfeiture of all claims except those for wilful acts; limitation of liability; shortened statute of limitations; waiver of punitive damages; as well as language requiring "the resident to pay all costs for enforcement of the agreement if the resident avoids or challenges either the grievance resolution process or an award therefrom." 949 So. 2d 739 (Miss. 2007). The Court in *Brown* (and in *Stephens*) was able to strike these provisions due to a "savings clause" contained in the contract.

Such a clause is present in the facts before the Court. Section F, ¶ 2 of the Alternative Dispute Resolution Agreements provides: "In the event any provision of this Agreement is held to be unenforceable for any reason, the unenforceability thereof shall not affect the remainder of this Agreement, which shall remain in full force and effect and enforceable in accordance with its terms." 2 R. 212, 228 and 244. Therefore, in accord with *Brown* and *Stephens*, the Court may strike any terms it considers unconscionable and enforce the remainder of the contract, *i.e.*, the agreement to arbitrate "***any legal controversy, dispute, disagreement or claim of any kind . . . now existing or occurring***

***in the future between the parties arising out of or in any way relating to this Agreement, the Admission Agreement or the Resident's stay at the Facility.***. . . ." 2 R. 209, 225 and 241. (Emphasis supplied).

In addition to arguing against enforcement of the agreement to arbitrate based upon the above-language, Appellees urge the Court to uphold the lower court's denial of arbitration based upon the waiver of a jury trial. That argument, however, lacks merit. The Alternative Dispute Resolution Agreements provided clear notice of the waiver to Mr. Brown and Rosemary Brown in several sections of the contract:

> **A. STATEMENT OF PURPOSE**
> . . . . **While there are certain advantages to Grievance Resolution, Mediation and Arbitration, by signing this Agreement, the Resident and/or Responsible Party are giving up certain rights that they may consider important, for example the right to have your dispute heard by a judge or jury.** Therefore, should you have any questions while reading this Agreement, do not sign it until those questions have been answered to your satisfaction, either by someone at the Facility or by your own attorney or legal advisor.
>
> **C. ALTERNATIVE DISPUTE RESOLUTION PROCEDURE**
> 2. **Binding Effect.** The Parties agree that the arbitration shall have all the authority necessary to render a final, binding decision of all Disputes and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The decision of the arbitrator shall be binding on all parties to the Arbitration, and also on the successors and assigns, including the agents and employees of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including but not limited to, that of

any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The Parties specifically agree that the decision of the Arbitrator shall be final and may not be appealed to a court of law or equity.

**E. ACKNOWLEDGMENT OF RESIDENT**

By signing this Agreement, the Resident expressly agrees and acknowledges the following:

**4. THIS AGREEMENT WAIVES THE RESIDENT'S RIGHT TO A TRIAL IN COURT AND A TRIAL BY JURY FOR ANY FUTURE CLAIMS RESIDENT MAY HAVE AGAINST THE FACILITY.**

2 R. 208, 210-11, 212; 224, 226-27, 228; and 240, 242-43, 244. (Emphasis in original). Further, this Court has recognized an individual's waiver of a jury trial ". . . has the same effect as signing an arbitration agreement." *Brown*, 949 So. 2d at 740. In *Brown*, the Court further held: "It is well established that this Court respects the ability of parties to agree to the means of a dispute resolution prior to a and enforces the plain meaning of a contract as it represents the intent of the parties." *Id.* (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002)). In the instant matter, as set forth *supra*, notice of the waiver of a jury trial is set forth throughout the Alternative Dispute Resolution Agreement; as such, arguments regarding its unenforceability should be disregarded by the Court.

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."[2] 911 So.2d 507, 525 (Miss. 2005). In "construing contracts, a general rule is to give effect to the mutual intentions of the parties contracting." *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170, 176 (Miss. 2007) (citing *Kight v. Sheppard Bldg. Supply Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989)). As such, Appellants respectfully request the Court honor this choice of forum

## III. The validity of the June 3, 2005 agreement to arbitrate was raised before the lower court.

In the Motion to Compel Arbitration, Covenant Health & Rehab of Vicksburg, LP and Covenant Dove, Inc. set forth the factual background related to arbitration, including Mr. Brown's final admission into the Facility: "An Admission Agreement and an Alternative Dispute Resolution Agreement was also executed by Mr. Brown following his last hospitalization while residing at the Facility." 1 R. 144. The language of the agreement to have disputes resolved through alternative dispute resolution was also set forth therein:

> Each of the Alternative Dispute Resolution Agreements (the "Agreements"), executed at the time Mr. Brown was initially admitted into the Facility and then again following each hospitalization, contained the following language regarding

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[2]Appellees' argued several provisions of the Admission Agreements and Alternative Dispute Resolution Agreements are illegal; thus, voiding the contract. However, sections of the agreements related to the underlying dispute (and not arbitration) are not probative in determining whether the arbitration provision is conscionable. As such, and in accord with *Holman Dealerships, Inc. v. Davis*, the Court should overrule the lower court's denial of arbitration, sending the matter to arbitration for a determination of the underlying dispute. 934 So. 2d 356, 358-59 (Miss. Ct. App. 2006); *see also Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) ("court's inquiry on a motion to compel arbitration is limited").

> LP late in the afternoon/early evening. At the time of his return, I attempted to reach Rosemary Brown, for the purpose of her coming to the Facility to review and execute the admissions documents. I was, however, unable to reach Mrs. Brown. I then met with Calvert Brown in his room and discussed the terms and conditions of both the Admission Agreement, as well as the Alternative Dispute Resolution Agreement. During my explanation of the language contained in these documents, including the language set forth herein, Mr. Brown shook his head and also stated verbally that [he] understood the agreement. He also questioned "is it the same as the others I signed in the past?" I also asked Mr. Brown whether he had any questions and he had none.

2 R. 269.

Further, it was argued to the lower court the Alternative Dispute Resolution Agreements – *all three agreements* – were valid contracts to be enforced as written.

> 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).
>
> On three (3) separate occasions, arbitration was agreed to as evidenced by the executed contracts. *See* Tabs 2, 4 and 6 to Amanda Morgan's Affidavit, attached hereto. Each contract was identical in its language providing that "***any legal controversy, dispute, disagreement or claim of any kind (collectively 'Dispute') now existing or occurring in the***

## CONCLUSION

Based upon the reasoning set forth herein, and more fully in their principal brief, Appellants, Covenant Dove Health & Rehab of Vicksburg, LP and Covenant Dove, Inc., respectfully request the Court overrule the lower court's findings, strike the provisions of the contract previously deemed unenforceable and order the parties to binding arbitration.

THIS, the 13th day of November, 2007.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS
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## CERTIFICATE OF SERVICE

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

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THIS, the 13th day of November, 2007.

John L. Maxey