IN THE MISSISSIPPI SUPREME COURT
Case No. 2007-CA-00327

FORREST HILL NURSING CENTER, INC.; LONG TERM CARE MANAGEMENT, LLC.; CAREFIRST SENIOR SERVICES, INC.; HUGH FRANKLIN; SCOTT A. LINDSEY; RHODA BOUNDS; UNIDENTIFIED ENTITIES 1 THROUGH 10; AND JOHN DOES 1 THROUGH 10 (AS TO FOREST HILL NURSING CENTER) — APPELLANTS

v.

MARY LOUISE McFARLAN, BY AND THROUGH PATRICIA MATHEWS AS NEXT FRIEND FOR THE USE AND BENEFIT OF MARY LOUISE McFARLAN — APPELLEE

APPEAL FROM THE
FIRST JUDICIAL DISTRICT
CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

HONORABLE BOBBY DeLAUGHTER, CIRCUIT JUDGE

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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Certificate of Interested Parties

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 the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Patricia Mathews, her next friend

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III. Whether a competent nursing-home resident can be required to arbitrate her claims as a third-party beneficiary of a contract that does not exist.

IV. Whether arbitration is barred by the material terms of this contract.

V. Whether arbitration-related discovery is needed in this case.

VI. Whether *Covenant Health Rehab of Picayune v. Brown*, 949 So.2d 732 (Miss. 2007), should be overturned.

Statement of the Case

Nature of the Case

This case is a nursing-home abuse-and-neglect case. R. 3-32.[1] Plaintiff is the next friend and granddaughter of Mary Louise McFarlan. Defendants are the owners and operators of the nursing home where Ms. McFarlan resided and incurred her injuries.

This appeal does not involve the merits of the case. Rather, this appeal will decide whether the case will be heard by a paid arbitrator or by a Mississippi jury. At issue is the validity and enforceability of an arbitration clause contained in an admission agreement signed by Ms. McFarlan's granddaughter who had no power of attorney or other legal document vesting such power in her.

Course of the Proceedings Below

Following the filing of the complaint, Defendants moved to compel arbitration. Plaintiff initially sought discovery directed solely at the validity of the arbitration clause, but Defendants refused to cooperate and the trial court refused to direct such discovery. R. 67. Plaintiff raised several arguments opposing the arbitration motion including that the person who signed the clause did not have the authority to waive Ms. McFarlan's right to a trial by jury. R. 74. The trial court agreed and denied the motion. Defendants filed a timely notice of appeal.

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[1] References to the record are denoted as R.____.

Statement of Facts

The record in this case is bare because Defendants refused to engage in discovery directed at the validity of the arbitration clause in question. Indeed, what is not present in this case is much more striking that what is. A discussion of both follows.

What is known is not terribly complicated. According to the admissions documents, Ms. McFarlan was admitted to the nursing home by her granddaughter on July 25th, 2003. R. 130. The granddaughter did not have a power of attorney over her grandmother at that time and had not been appointed as a guardian or conservator. The admissions paperwork signed that day contained an arbitration clause requiring arbitration of claims "in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Rules of Procedure for Arbitration which are hereby incorporated into this agreement. . . ." R. 134-135. No other facts are established in this record.

What is absent from the record, again, is striking and in fact dispositive in this case. No averment by Plaintiff alleges that Ms. McFarlan lacked "capacity" at the time of her admission and no physician's statement to that effect is to be found anywhere. The one document speaking to her capacity at all, a nursing-home document known as a Minimum Data Set, reveals that she had minimal mental difficulties at most. She could usually understand what was communicated to her, had clear speech, and could make herself understood. R. 119.

Other material facts are also missing. Nowhere in the record can one find a single representation made by Ms. McFarlan regarding her granddaughter's ability to

bind her to arbitration or anything else, even though Defendants make arguments grounded in implied authority and third-party beneficiary. One cannot tell from this record whether Ms. McFarlan had a living spouse, adult child or sibling, even though the statute on which Defendants rest most of their case prioritizes "surrogacy" based on those degrees of relation. The record is devoid of any evidence surrounding the execution of the document, even though unconscionability is an issue.

As will be seen below, these *failures of proof* on the part of Defendants require one of two things. This case must either be affirmed or it must be remanded for discovery devoted to the absent facts. The reasons why follow.

Summary of the Argument

The trial court should be affirmed. Mary Louise McFarlan did not sign the arbitration clause in this case. Her granddaughter did. Her granddaughter, however, had no authority to bind Ms. McFarlan to an arbitration clause. Ms. McFarlan is presumed competent until proven otherwise by a physician, and no such proof exists in this case. Thus, no agreement to arbitrate exists.

No evidence of implied authority exists in this case. The record is devoid of any representation made by *Mary Louise McFarlan* that could be construed to create such authority. The trial court was right to reject this argument.

Arbitration cannot be compelled on a third-party-beneficiary theory. First, the Mississippi Supreme Court has clearly held that this theory is not available where there is no binding, underlying contract with the resident, such as here. *Grenada Living Center v. Coleman*, No. 2006-CA-00169-SCT, ¶ 17 (Miss. 2007). Second, for the theory to apply, Plaintiff must be suing on the contract, and none of Plaintiff's causes of action are contract theories. Finally, in order for the theory to apply, a contract between the granddaughter and Defendants would have to exist, and one does not.

As an additional point, this case is not arbitrable under the terms of the contract for arbitration. The Rules of Procedure of the American Health Lawyers Association are incorporated into the clause. Those Rules hold that a pre-dispute arbitration clause in this sort of case will not be enforced. This clause is a pre-dispute clause. Therefore, Plaintiff's claim is not arbitrable.

If this Court disagrees, compelling arbitration is still premature. Many of the defenses to an arbitration clause, like any contract defense, are fact specific. The facts have not been developed in this case because the trial court did not allow discovery. If the trial court is not simply affirmed, the case must be remanded for discovery dedicated to arbitration issues alone.

Argument

This appeal is from a denial of a motion to compel arbitration. This Court reviews motions to compel arbitration *de novo*. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 502 (Miss. 2005). Moreover, the issues presented in this case are questions of law, namely whether a valid arbitration clause exists, thus *de novo* review is appropriate.

In determining whether parties should be compelled to arbitrate a dispute, courts perform a two-step inquiry. *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992). "First, the court must determine whether the parties agreed to arbitrate the dispute in question. This determination involves considerations: (1) Whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Am. Heritage Life Ins. Co. v. Beasley*, 174 F. Supp. 2d 450, 454 (N.D. Miss. 2001) (citing 9 U.S.C. § 4). See also *Pre-Paid Legal Services, Inc. v. Battle*, 873 So. 2d 79, 83 (Miss. 2004). If the Court finds that the parties agreed to arbitrate, "it must then consider whether a federal statute or policy renders the claims nonarbitrable." *Ibid.* "A party seeking to avoid arbitration must allege and prove that the arbitration provision itself was a product of fraud or coercion; alternatively, that party can allege and prove that another ground exists at law or in equity that would allow the parties' contract or agreement to be revoked." *Ibid.* (citing *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976)).

The policy of favoring arbitration applies *only* after a valid arbitration agreement has been found. See *Mariner Health Care et al v. Kay and Lawrence Guthrie, Jr., et al*, Civil Action No. 5:04cv218-DCB-JCS, p. 6, fn 4 (S.D. Miss. 2005) (citing *Fleetwood*

Enters., Inc. v. Garkamp, 280 F. 3d 1069, 1070 & 1070 n.5 (5th Cir. 2002)) (emphasis in original). An agreement to arbitrate is treated like any other contract. *Kresock v. Bankers Trust Co.*, 21 F.3d 176, 178 (7th Cir.1994). A party cannot be forced to submit to arbitration if he has not agreed to arbitrate his dispute. *May v. Higbee, Co.*, 372 F. 3d 757, 763 (5th Cir. 2004). In determining whether a valid arbitration agreement arose between the parties, a court should look to the state law that ordinarily governs the formation of contracts. 9 U.S.C. § 2; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

The trial court was correct to refuse to compel arbitration in this case. First, no contract for arbitration exists because the person who signed the arbitration clause lacked authority to bind Ms. McFarlan to arbitrate her claims. Also, under the material terms of this contract, arbitration is not available because the clause is a pre-dispute arbitration clause not arbitrable by its very terms. Finally, if the trial court is not simply affirmed, the case must be remanded for discovery on the arbitration issue. Each point will be addressed in turn below.

I. Binding Precedent Controls this Case.

This case is actually quite easy to decide because its outcome is dictated by a recent precedent of this Court, *Grenada Living Center v. Coleman*, No. 2006-CA-00169-SCT (Miss. 2007), and by cases that make the law of apparent agency clear and inapplicable here such as *Eaton v. Porter*, 645 So.2d 894 (Miss. 1994).[2] Defendants offer three separate bases on which Plaintiff should be bound to this arbitration clause: the

[2] Defendants' counsel also represented the nursing home in *Coleman* and, as will be seen, advanced the same arguments in that case that are advanced in this case.

granddaughter possessed authority as a "health-care surrogate"; the granddaughter possessed "apparent" authority; and Ms. McFarlan must be bound as a third-party beneficiary. As will be seen, the first and third points were directly addressed and rejected by *Coleman* and the second is disposed of by *Porter*. These cases show that the trial court was right.

A. *Coleman* is Dispositive of Two Issues.

Cephus Coleman was a World War II veteran who was wheelchair-bound because of a battle wound. Well into his seventies, his sister could no longer care for him so she admitted him to the Grenada Living Center. The home had her sign the admission documents including an arbitration clause. The parties stipulated that Mr. Coleman was competent at the time of admission. They also stipulated that Mr. Coleman was not present when the agreement was signed, and that the sister did not have a power of attorney, guardianship or conservatorship over her brother.

Mr. Coleman died while a resident of the nursing home and his son filed suit against it. The nursing home "responded with the now-familiar motion to dismiss in favor of arbitration." *Coleman*, No. 2006-CA-00169-SCT, ¶ 3. The trial court denied the motion, and the nursing home appealed. It argued that the sister could bind him to the contract for arbitration as a health-care surrogate, that she possessed express and implied authority, and that Mr. Coleman was bound as a third-party beneficiary to the contract of admission. This Court defined the question in the case as "Is a competent person who is not a signatory to a contract bound by an arbitration clause contained within the contract?" *Id.* ¶ 6.

Each issue was addressed in turn. The nursing home, again, argued that the sister acted as Mr. Coleman's "surrogate" under the Uniform Healthcare Decisions Act. Miss. Code Ann. § 41-41-203, *et seq.* This Court rejected that argument, writing as follows:

> Section 1 of the statute defines the requirements for any person who wishes to be a surrogate. There are two pre-conditions: "A surrogate may make a health-care decision for a patient who is an adult or emancipated minor *if* [1] the patient has been determined by the primary physician to lack capacity and [2] no agent or guardian has been appointed or the agent or guardian is not reasonably available." Miss. Code Ann. § 41-41-211(Rev. 2005) (emphasis added). Therefore, a close reading of the statute reveals that a prerequisite before any other analysis is that a patient may only have a surrogate if they do not have mental capacity to make decisions and they do not have any other person legally available to care for them. Sections 2 and 3 of the statute define who may be a surrogate, but the preconditions of Section 1 must first be met.
>
> ¶ 13. In the case at hand, the parties stipulated that Mr. Coleman was competent, and no physician had declared him incompetent. In addition, no agent or guardian had been appointed, and so the first pre-requisite of Section 1 was not met. Accordingly, Mr. Coleman's half-sister Anne could not have been his health-care surrogate. Further, it is clear from the statute that the Legislature intended to create a system whereby a family member (or other *de facto* guardian) could tend to the health needs of a loved one when they were incapacitated. Because Mr. Coleman was not incapacitated, the statutes governing health care surrogates do not apply.

Id. ¶¶ 12 and 13 (emphasis in original). The "if" is key. Before this statute can even arguably generate authority to contract, its elements must be met.

The nursing home's argument that no "authority" was required to bind a nursing home resident was rejected because no law supported it. *Id.* ¶ 14. Express authority was easily disposed of because it was stipulated that no power of attorney or

other express grant had been made. *Id.* ¶ 15. Implied authority was rejected due to a procedural bar. *Ibid.*

This Court then turned to the third-party-beneficiary issue. The nursing home pointed to cases such as *Smith Barney, Inc. v. Henry*, 775 So.2d 722 (Miss. 2001), and *Terminix International v. Rice*, 904 So.2d 1051 (Miss. 2004), for the proposition that non-signatories who benefit from a contract can be forced to arbitrate claims arising under it. This Court, however, held that those cases did not apply to the facts in *Coleman*, writing as follows:

> Those cases remain binding precedent, and this case does not stand for the proposition that non-signatories to a contract containing an arbitration clause can never be bound by arbitration. Here, the trial court reasoned in accordance with the stipulations of the parties that "nobody had the authority to speak for Cephus Coleman, Jr. except himself," and therefore "there is no binding written contract between Cephus Coleman, Jr. and the nursing home requiring arbitration." We find this reasoning persuasive. Any wrongful death beneficiaries of Cephus can be bound only to the extent he would be bound. Because there was no contract between Cephus and the nursing home in the first place, no arbitration clause exists to be enforced against the wrongful death beneficiaries of Cephus.

Coleman, No. 2006-CA-00169-SCT, ¶ 17.

Justice Carlson's concurring opinion was even more pointed. He set forth several of the cases where the doctrine had been applied, and pointed out that it required a contract between two principals that someone is a direct beneficiary of before it could be applied. A nursing home resident cannot be a third-party beneficiary of what is supposed to be her own contract, thus the cases are all distin guishable.

B. *Coleman* Destroys the Surrogacy Argument.

Coleman controls this case and holds that no authority existed under the surrogacy statute. Ms. McFarlan's granddaughter simply was not her surrogate under the statute. It is true that these parties have not stipulated to capacity, however no such stipulation is necessary for Plaintiff to prevail. The statute itself holds that "an individual is presumed to have capacity to make a health-care decision, to give or revoke an advance health-care directive, and to designate or disqualify a surrogate." Miss. Code Ann. § 41-41-223(2). A person may only be determined to be incapacitated by her physician. Miss. Code Ann. § 41-41-211(1). Absent such a determination by her physician, capacity is assumed and the statute does not apply. *Coleman* tells us this much. The "*if*" so prevalent in Justice Diaz's opinion predominates here as well.

Moreover, other elements of the statute have not been met on this evidentiary record. Section 41-41-215 of the Mississippi Code holds that "*before implementing a health-care decision made for a patient*, a supervising health-care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision." This record does not indicate that the decision to choose arbitration was ever made to Ms. McFarlan or that her granddaughter had made it for her. Just like the capacity determination, this step is a necessary prerequisite under the statute Defendants rely on and it has not been met.

Likewise, the decision by the granddaughter is suspect. The statute vests spouses, children, parents and siblings, in that order, with authority to act as surrogates. Miss. Code Ann. § 41-41-211(2). As noted above, the record does not reflect whether

any such person exists for Ms. McFarlan. If not, or if they do exist but are not "reasonably available, an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as a surrogate." Miss. Code Ann. 41-41-211(3). Defendants have not met the burden of establishing all of these points.

These points are not mere trivial matters. Defendants wish to deprive Ms. McFarlan of her right to access to the courts and a trial by a jury of Mississippi citizens even though she admittedly never signed an arbitration clause herself. They carry the burden of establishing authority to contract on her behalf, and have chosen to rely on this statute to do it. Having chosen that path, they must live with its mandates, and strict adherence to its terms are required. They have not proved authority under this statute because they have not paid attention to its evidentiary elements. That failure is fatal to their argument. Again, the trial court was right because no authority exists.

One final point regarding express authority is necessary. Defendants' brief is convoluted, and it is difficult to tell whether Defendants assert some undefined express authority or not. They mix elements of ratification with protestations about express authority arising from actions of the granddaughter. While these arguments have no basis in the law, one need look no further than *Coleman* to address them. These very arguments were rejected in that case. Express authority does no t exist here.

C. *Coleman* Controls on Third-Party Beneficiary.

The third-party-beneficiary argument must meet the same fate. *Coleman* could not be more clear: '"nobody had the authority to speak for Cephus Coleman, Jr. except

himself," and therefore "there is no binding written contract between Cephus Coleman, Jr. and the nursing home requiring arbitration."' *Coleman*, No. 2006-CA-00169-SCT, ¶ 17. Likewise, nobody had the authority to speak for Mary McFarlan except herself and therefore there is no binding contract between Mary McFarlan and the nursing home requiring arbitration.

Presumably, Defendants will point to a case decided by the Court of Appeals one month after *Coleman* that holds in their favor on this point. *Trinity Mission v. Barber*, No, 2005-CA-02199-COA (Miss. Ct. App. 2007).[3] Certainly, this opinion is troubling because it is directly contrary to *Coleman*. This Court's opinion, obviously, must control. *Coleman* is the law in this state.

Moreover, *Coleman* understands what *Barber*, respectfully, does not. In order for the doctrine to apply, a contract must exist between the granddaughter and Defendants. The law could not be more clear on this point:

> In order for the third person beneficiary to have a cause of action, *the contracts between the original parties must have been entered into for his benefit*, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promise to such third person beneficiary. This obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the right of the third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself.

[3] Defendants' lawyers also participated in *Barber*. One would hope that *Coleman* was brought to the attention of the Court of Appeals. However, the conflicting results cast doubt on the assumption that such disclosure was made.

Burns v. Washington Savings, 171 So.2d 322, 325 (Miss. 1965) (emphasis added). Very clearly, no contract exists between Ms. McFarlan's granddaughter and Defendants, thus this theory is inapplicable.

The third-party-beneficiary theory was explained in some detail in *Bridas S.A.P.I.C. v. Government of Tukmenistan*, 345 F.3d 347 (5th Cir. 2003), an opinion relied on by Defendants. There, the United States Court of Appeals for the Fifth Circuit wrote that "In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause" but recognized exceptions to the general rule, one of which is a third-party-beneficiary theory. Examination of that opinion reveals even more assuredly that Defendants' argument is misplaced.

The third-party-beneficiary theory espoused in *Bridas* allows a *signatory* to an agreement to compel a *non-signatory* to arbitrate its claims on the basis that the non-signatory is the intended third-party beneficiary of the contract between two other signatories. *Id.* at 362. If two parties to a contract manifest an intent to benefit a third party in *their* contract, then the third party can be bound to the terms of the contract when he sues under that contract. *Ibid; Fleetwood v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002).

But that is not what Defendants try to do here. Defendants contend that because an admission agreement was signed *on behalf of Ms. McFarlan by one lacking authority to do so*, Ms. McFarlan can be bound to the arbitration clause. In other words, Defendants try to substitute the third-party-beneficiary theory for an actual contract. Nothing in *Bridas* or any other case allows them to do so.

Second, in order for the third-party-beneficiary theory to be applicable, the third party must be asserting claims arising under the contract. A perusal of the complaint in this case reveals that it does not assert a claim arising under the admissions agreement and certainly does not assert breach of contract. Absent such a claim, the theory cannot be applied.

D. *Porter* Controls on Implied Authority.

Short work can be made of Defendants' implied-authority argument. According to Defendants, the granddaughter held herself out to be Ms. McFarlan's agent and thus vested herself with authority. Defendants' brief at 15-16. They do not point to a single action taken by Ms. McFarlan to hold her granddaughter out as her agent. Indeed, Defendants do not point to any evidence that Ms. McFarlan even knew the arbitration clause existed. In fact, the facility knew that the granddaughter did not possess any power of attorney and was not her grandmother's guardian. R. 119, Box 9.

Three elements must be proven to sustain a claim of apparent authority, and they are very clear:

> (1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third person as a result of that reliance.

Eaton v. Porter, 645 So.2d 1323, 1325-26 (Miss. 1994) (citations omitted). Not one of these elements has been shown in this case. No act on the part of Ms. McFarlan is pointed to, Defendants knew that the granddaughter was not an agent, and there has

been no change in position by Defendants. The trial court correctly rejected this argument and should be affirmed.

II. This Case is not Arbitrable Under the Clear Terms of the Contract.

As written previously, the arbitration clause in this case incorporates the Rules of Procedure of the American Health Lawyers Association into the contract. Those Rules, therefore, are material terms of the contract. If the contract is valid, those terms must be followed.

In relevant part, those Rules of Procedure read:

> The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service under these Rules. The Service will administer a 'consumer health care liability claim' under the Rules on or after January 1, 2004 only if all the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators.

American Health Lawyers Association, Rules of Procedure for Arbitration. In other words, cases where the arbitration clause was signed before the dispute arose cannot be arbitrated. Only those cases where the agreement to arbitrate followed the occurrence giving rise to the suit are arbitrable.

Once again, this provision is a term of the contract for arbitration. If it is valid at all, it is only valid as to those situations where the reason for the dispute preceded the signing of the clause. Plaintiff's claims arose after the clause was signed. By the very terms of the contract, then, this case is not a dispute that "falls within the scope of that arbitration agreement." *Am. Heritage Life Ins. Co. v. Beasley,* 174 F. Supp. 2d 450, 454 (N.D. Miss. 2001) (citing 9 U.S.C. § 4).

This specific choice made in this contract is material. The admission agreement chooses these Rules and this service. It makes them part of the alleged contract. Those Rules dictate that a pre-dispute arbitration clause will not be enforced. Thus, according to the admission agreement's own terms, no arbitration will go forward unless an agreement to arbitrate is made subsequent to the filing of this suit.

It is interesting to note the genesis of this rule. It appears to have originated with the Health Care Due Process Protocol, a copy of which can be found at http://www.adr.org/sp.asp?id=28633, and is attached for the Court's convenience This work was the product of a Commission formed by the American Arbitration Association, the American Medical Association and the American Bar Association. The final report was issued in July 27, 1998.

> This Commission made five unanimous recommendations:
>
> Alternative dispute resolution can and should be used to resolve disputes over health care coverage and access arising out of the relationship between patients and private health plans and managed care organizations.
>
> Alternative dispute resolution can and should be used to resolve disputes over health care coverage and access arising out of the relationship between health care providers and private health plans and managed care organizations.
>
> ***In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.***
>
> It is essential that due process protections be afforded to all participants in the ADR process.
>
> Review of managed health care decisions alternative dispute resolution complements the concept of internal review of determinations made by private managed health care organizations.

The highlighted recommendation, of course, is the portion relevant to this appeal. It embodies the protocol that resulted in the AHLA rule that should bar arbitration in this case.

Section XII(a) is the key to the Protocol. It begins by stating the concern the Commission developed in applying arbitration to the health-care setting:

> The members of the Commission believe that mediation and arbitration of health care disputes -- *conducted with proper due process safeguards* -- should be encouraged in order to provide expeditious, accessible, inexpensive, and fair resolution of disputes. As ADR systems are developed for resolving private managed health care disputes, *it is essential that such systems provide adequate levels of procedural due process protections for all involved.*
>
> *The nature of the relationship between plans and patients or providers is such that little, if any, negotiation over terms -- including external review or ADR systems -- takes place. Since these ADR systems or external review procedures will invariably not be the product of a negotiated agreement, the Commission believes it would be especially useful to set forth key aspects of procedural due process,* to ensure a "level playing field" for resolving health care disputes by ADR. Similarly, these due process protocols can serve as guidance for legislators or regulators as they focus on establishing fair and appropriate methods for resolving health care disputes.

Once again, the highlighted portions are key. The Commission was concerned about the lack of negotiation between providers and patients, thus it determined that it needed to "set forth key aspects of procedural due process" to be used in this area. Those "key aspects" are the due-process protocol and its various "principles" that follow in subsection C. Principle 3 is the relevant principle for this case. It reads:

> **PRINCIPLE 3: KNOWING AND VOLUNTARY AGREEMENT TO USE ADR**
>
> *The agreement to use ADR should be knowing and voluntary. Consent to use an ADR process should not be a requirement for receiving emergency care or*

treatment. In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.

(Emphasis in original).

These provisions read together lead to important conclusions. First, the Commission charged with studying the applicability of arbitration to health care had significant and important concerns with arbitration in the health-care context. Those concerns were grounded in the lack of negotiation in the health-care setting. The concern was so great that the Commission saw fit to draft a principle that tied agreements entered into before the dispute arose with the absence of a knowing and voluntary waiver of the right to trial by jury. Such waivers, the Commission believed, were not knowing and voluntary.

That much being established, this analysis leads to another, more sweeping reason to bar enforcement of this arbitration clause. Under Mississippi law, a waiver of a right to a jury trial must be made knowingly and voluntarily. *Vicksburg Partners, L.P. v. Stevens*, 911 So.2d 507 (Miss. 2005). Thus, under the Commission's conclusions, the clause is not enforceable because it is not the product of a knowing and voluntary waiver. Ms. McFarlan did not sign the arbitration clause herself, nor is there any evidence in the record that she even knew that it existed. Alternatively, the clause is not enforceable because the material terms of the very contract Defendants rely on make it impossible to perform. Under either line of reasoning, the case is not arbitral.

III. Discovery is Necessary Before Enforcement of the Clause.

As noted above, the trial court refused to allow Plaintiff to conduct discovery related to the validity and enforceability of the arbitration clause. The trial court made this decision apparently on the basis that the clause was so clearly *unenforceable* that discovery was not needed. In the event this Court does not accept the arguments above, it should remand the case for discovery related to the arbitration clause.

The Federal Arbitration Act explicitly holds that a court, in reviewing the enforceability of an arbitration agreement, may inquire into "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Leading authority from other jurisdictions is in accord that discovery is required before various factual matters relating to the enforceability of an arbitration clause can be decided. As a federal court in the Southern District of New York held:

> Discovery is needed before Defendant's motion may be decided, as it should help to clarify several disputed issues of fact that may or may not give rise to special circumstances rendering the U-4 Arbitration Agreement enforceable... Given the Supreme Court's statement in *Gilmer* [*v. Interstate/Johnson Lane,* 500 U.S. 20 (1991)] that claims of special circumstances such as coercion, fraud or unequal bargaining power are "best left for resolution in specific cases," 500 U.S. at 33, further development of the factual record is warranted.

Berger v. Cantor Fitzgerald Securities, 942 F. Supp. 963, 966 (S.D. NY 1966). *See also Ting v. AT&T,* 319 F.3d 1126, 1148 (9th Cir. 2003)(evidence of surveys conducted by AT&T as to the most advantageous place to insert an arbitration provision was relevant on the issue of enforceability).

Other courts agree. For example, a trial court in New York held that discovery is important so that issues regarding the impartiality of the arbitral forum can be decided. *Hayes v. County Bank*, 713 N.Y.S. 2d 267 (N.Y. Sup. Ct. 2000). A federal court in West Virginia discussed the importance of discovery in disclosing whether there will be likely bias on the part of the arbitral form. *See Toppings v. Ameritech Mortgage Services, Inc.*, 140 F. Supp. 2d 683 (S.D. WV 2001). The Missouri Supreme Court recently recognized the usefulness of participating in discovery to determine the underlying merits of a motion to compel arbitration in *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. 2006). Likewise, the Kentucky Supreme Court, on May 18, 2006, affirmed the trial court's broad discretion in allowing parties to conduct discovery on the enforceability of an arbitration agreement. *Kindred Healthcare, Inc. v. Peckler*, 2006 WL 1360282 (KY). As noted by the Kentucky Supreme Court in *Peckler*, "an arbitration agreement may be unconscionable, and therefore unenforceable, if the arbitral forum is biased or the terms of the arbitration are so one-sided that no reasonable person would willingly enter into such agreement...." Some of the evidence that should be considered in addressing whether the arbitration agreement is enforceable includes "factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, . . . [and] whether the terms were explained to the weaker party . . .." *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003)(*en banc*). The same holds true with regard to examination of the costs of arbitration, which may make it impossible for a plaintiff to pursue her claim in that forum.

In the Sixth Circuit opinion in *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005)(*Walker*), the court struck down an arbitration agreement that employees were required to sign as part of their application process. The *Walker* Court held that the plaintiffs could not be compelled to arbitrate their claims because they did not "knowingly and voluntarily waive their constitutional right to a jury trial." The court provided the following factors for determining if a plaintiff knowingly and voluntarily waived her right to a jury trial:

> (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the [plaintiff] had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; and well as (5) the totality of the circumstances.

Id. at 381.

The holding in *Walker* reinforces the need for comprehensive discovery prior to ruling on an arbitration provision. The Court recognized that, while not readily apparent on the face of the agreement, the arbitral forum was not neutral and, therefore, the agreement was unenforceable. The Court further acknowledged that the limited discovery provided in the arbitral forum could significantly prejudice the complaining party:

> We acknowledge that the opportunity to undertake extensive discovery is not necessarily appropriate in an arbitral forum, the purpose of which is to reduce the costs of dispute resolution... But parties to a valid arbitration agreement also expect that neutral arbitrators will preside over their disputes regarding both the resolution on the merits and the critical steps, including discovery, that precede the arbitration award.

Id. at 383-84. Had the parties proceeded under the arbitration agreement in *Walker,* the inherent prejudice of the agreement would not have been revealed. Instead, it was through the court's discovery process in determining whether the arbitration agreement was enforceable that the inherent unconscionability of the arbitration clause was determined. Indeed, much evidence was presented to the court that the arbitral forum was not neutral. For instance, Ryan's annual fee accounted for more than 42 percent of the forum's gross income and there was no process in place to prevent signatory companies from improperly influencing its employee adjudicators. Evidence was presented that the managers explained the arbitration provisions inaccurately to the employees. The evidence in the case revealed that Ryan's stated consideration was, in fact, illusory. Thus, the comprehensive discovery permitted by the Court prior to ruling on the enforceability of the arbitration agreement proved to be critical.

Discovery is particularly important to Plaintiff's claims that, in obtaining the granddaughter's signature, Defendants beached fiduciary duties they owed to Ms. McFarlan, and that the arbitration clause is unconscionable. Under Mississippi law, a contract entered with a fiduciary through which the fiduciary derives a benefit at the expense of the inferior party is presumptively fraudulent. Very clearly, Defendants stood as a fiduciary to Mary McFarlan. One court has squarely addressed whether those providing long-term care stand in a confidential relationship to residents such that fiduciary duties arise. In *Petre v. Living Centers-East, Inc.,* 935 F. Supp. 808 (E.D.La. 1996), Judge Fallon wrote:

> A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:
>
> > One is said to act in a "fiduciary capacity" when the business which he transacts, or the money or property he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. *Office of the Commissioner of Insurance v. Hartford Fire Insurance Co.*, 623 So.2d 37, 40 (La.App. 1st Cir. 1993).
> >
> > ***
> >
> > [T]he Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the *Schenck* court, "one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities" as those created by a business relationship. *Schenck v. Living Centers-East Inc., et al*, 917 F. Supp. 432, 437-38 (E.D.La. 1996).

Id. at 812.

This holding is consistent with cases uniformly affirming the notion that those who provide medical care stand in a confidential relationship with and fiduciaries to those to whom the care is provided. *E.g., Benton v. Snyder*, 825 S.W.2d 409, 414 (Tenn. 1992); *Shadrick v. Coker*, 963 S.W.2d 726 (Tenn. 1998); *Ison v. McFall*, 400 S.W.2d 243 (Tenn. Ct. App. 1964); *Grubbs v. Barbourville Family Health*, 120 S.W.3d 682 (Ky. 2003). The term "fiduciary relationship" is a broad term and includes "both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enter., Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996), (citing *Lowery v. Guaranty Bank and Trust Co.*, 592 So. 2d 79 (Miss. 1991)).

> Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of

> mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character.

Madden v. Rhodes, 626 So. 2d 608, 617 (Miss. 1993) (citing *Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982)).

Plaintiff must be allowed to conduct discovery this defense to the arbitration clause. Plaintiff very likely can establish that Defendants adopted the use of an arbitration clause to avoid large verdicts for nursing home abuse and neglect. Mary McFarlan, it is most certain, was not informed of that "benefit," and the duties owed her by Defendants were, therefore, breached.

The unconscionability claim is, likewise, fact-driven and, therefore, reliant on discovery. Like most Courts, this Court divides unconscionability into two elements, procedural and substantive. The procedural element focuses on the circumstances surrounding the contract's formation, and the substantive element focuses on terms of the contract itself. *Entergy Mississippi, Inc. v. Burdette Gin Co.*, 726 So.2d 1202 (Miss. 1998). The procedural element most obviously is fact specific.

Discovery of facts is needed in order to test the reasonableness of this transaction. The circumstances surrounding the signing of this arbitration provision were not fully explained below because discovery was unavailable. Such questions as why Mary McFarlan was unable to sign the arbitration clause and what emotional state her granddaughter was in are unanswered. The record does not reveal the circumstances surrounding the signing of the admission agreement, the cost of arbitration or any one of a number of other important questions. Before Mary McFarlan

is deprived of her constitutional right of access to courts and a trial by jury, these questions should be answered in discovery and placed in the calculus in this case.

IV. This Court Should Overturn *Brown.*

One final argument is necessary in an abundance of caution. Defendants correctly point out that this Court held that the surrogacy statute discussed above can vest certain persons with authority to bind a nursing-home resident to arbitration. *Covenant Health Rehab of Picayune v. Brown*, 949 So.2d 732 (Miss. 2007). Respectfully, Plaintiff asks this Court to revisit that decision, and overturn it. Reasons based on statutory construction and constitutional due process support that request.

At the core of the *Brown* decision is the holding that choosing arbitration during an admissions process is a "health-care decision." As noted above, "a surrogate may make a health-care decision for a patient . . . if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available." Miss. Code Ann. § 41-41-211(1). Without analysis, *Brown* seemed to conclude that choosing arbitration during the admissions process was one of the decisions a surrogate could make

Two problems exist with this holding from a statutory-construction standpoint. First, "health-care decision" is defined as a decision regarding "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition." Miss. Code Ann. § 41-41-203. This definition does not include waiving the right to a jury trial any more than it includes the authority to sell real

property, to commit the resident to a loan agreement or to waive the patient's right to counsel.

The conclusion that a third party cannot bind a person to a contract for arbitration absent some authority is uniform in the precedents. For example, the Tennessee Court of Appeals held that arbitration agreements signed by the next of kin without the express or apparent authority of the nursing home resident are invalid in *Raiteri v. NHC Healthcare/Knoxville, Inc.*, No. 2-791-01, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003). There, a husband admitted his wife to the defendant's nursing home. *Id.* at *1. The husband met with the admissions coordinator of the nursing home to sign all of the admissions papers without his wife being present, during which time he signed an agreement to arbitrate any claims regarding his wife's care against the nursing home. *Ibid.* He signed the agreements as his wife's "legal representative," but he did not indicate to the admissions coordinator that he actually had any authority to enter into agreements on his wife's behalf. *Id.* at *2. The court determined that the arbitration agreement was not binding because the husband did not have any authority to waive his wife's right to a jury trial. *Id.* at *8. Specifically, the Court wrote, "We find persuasive the plaintiff's arguments that Mr. Cox [plaintiff] did not have the express or apparent authority to sign the admission agreement for his wife and that the alternative dispute resolution provisions are otherwise enforceable." *Ibid.* See also *Pagarigan v. Libby Care Center, Inc.*, 120 Cal. Rptr.2d 892 (Cal. Ct. App. 2002); *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. Ct. App. 2005).

Ample authority holds that where an agent does not have authority to bind a

party to an arbitration agreement, or where the party otherwise does not sign the agreement, the party cannot be bound by its terms. See *Volt Info. Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 478, 109 S.Ct. 1248, 1255 (1989); *Goldberg v. Bear, Stearns & Co.,* 912 F.2d 1418, 1419 (11th Cir.1990) (per curiam); *Cancanon v. Smith Barney, Harris, Upham & Co.,* 805 F.2d 998, 1000 (11th Cir.1986) (per curiam); *Three Valleys Municipal Water District v. E.F. Hutton & Company, Inc.,* 925 F.2d 1136 (9th Cir. 1991); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.,* 636 F.2d 51 (3d Cir.1980); *N & D Fashions, Inc. v. DHJ Indus., Inc.,* 548 F.2d 722 (8th Cir.1976); *Smith Wilson Co. v. Trading & Dev. Establishment,* 744 F.Supp. 14 (D.D.C.1990); *Ferreri v. First Options, Inc.,* 623 F.Supp. 427 (E.D.Pa.1985); *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648, 106 S.Ct. 1415 (1986)(To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the "first principle" of arbitration that "a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit."); *Sphere Drake Insurance Limited v. All American Insurance Company,* 256 F.3d 587 (7th Cir. 2001); *Sandvik AB v. Advent International Corp.,* 220 F.3d 99, 105-09 (3d Cir.2000); *N&D Fashions, Inc. v. DHJ Industries, Inc.,* 548 F.2d 722, 729 (8th Cir.1976). Perhaps that is why the federal district courts in Mississippi have had no problem resolving this issue. See *Mariner Health Care et al v. Kay and Lawrence Guthrie, Jr., et al,* Civil Action No. 5:04cv218-DCB-JCS (S.D. Miss. 2005); *Mariner Health Care, Inc. v. Rhodes,* No. 5:04CV217 (S.D. Miss 2005); *Mariner v. Green*, No. 4:04-cv-00246-MPM-EMB (N.D. Miss. 2006).

Second, this holding does not take into account another statute setting forth protection from arbitration agreements for those who are incapacitated. Indeed, the

Mississippi Arbitration Act specifically excludes those individuals from the class of persons who may be compelled to arbitration:

> All persons, *except infants and persons of unsound mind*, may, by instrument of writing, submit to the decision of one or more arbitrators any controversy which may be existing between them, which might be the subject of an action, and may, in such submission, agree that the court having jurisdiction of the subject matter shall render judgment on the award made pursuant to such submission. In such case, however, should the parties agree upon a court without jurisdiction of the subject matters of the award, the judgment shall be rendered by the court having jurisdiction in the county of the residence of the party, or some one of them, against whom the award shall be made.

Miss. Code Ann. § 11-5-1 (emphasis added). The point here is that the legislature has created a statute that forbids arbitration where the signatory is not of sound mind. It does not make sense that it would also create another statute tha t allows "surrogates" to bind those very people to arbitration of health-care disputes.

Finally, a general observation about the surrogacy statute is warranted. When one reads the statute, what becomes clear is that it deals with classic health-care issues such as obtaining surgery, withholding life support, and whether to supply artificial nutrients. It does not contemplate where a negligence suit will be filed. *Brown* did not analyze these points, and respectfully erred because of it.

The *Brown* holding creates another concern. Its conclusion that choosing arbitration is a health-care decision raises a due-process concern. Surrogates are legitimately allowed to make true "health-care decisions" for those not competent to make them on their own. Krupp, *Health Care Surrogate Statutes: Ethics Pitfalls Threaten the Interests of Incompetent Patients*, 101 W.Va. L. Rev. 99 (1999); *Cruzan v. Director of*

Missouri Department of Health, 497 U.S. 261 (1990); *Schiavo v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005); *In re Estate of Longway*, 549 N.E.2d 292 (Ill. 1989). These statutes are justified by the need to designate someone to make certain exigent decisions when continuing or obtaining health care is an issue. Decisions like continued life support, extraordinary feeding and hydration efforts, and whether to conduct a surgery typically fall within the definition of the decisions that can be made under some form of agency or statutory authority by a surrogate.

The *Brown* decision takes this authority many steps beyond typical health-care decisions. Stated simply, *Brown* includes deciding where to sue a health-care provider in the definition of "health-care decisions." That construction allows a surrogate to deprive a resident of a nursing home like Ms. McFarlan of the fundamental rights to access to the courts and trial by jury without any manifestation of assent to that delegation of authority at all. This waiver is not justified by the same sorts of exigencies that justify true "health-care decisions" like those noted above. Choosing where to sue if and when a dispute arises simply is not the kind of decision that must be made to ensure the health and well-being of someone seeking care. This due-process deprivation mandates reversal of *Brown*.

Conclusion

No enforceable contract for arbitration exists in this case. The trial court should be affirmed. Alternatively, the case should be remanded for arbitration-related discovery

Susan N. Estes

CERTIFICATE OF SERVICE

I certify that a copy of the preceding pleading has been served via the United States Postal Service on the following counsel of record on this 20th day of September 2007:

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