IN THE SUPREME COURT OF MISSISSIPPI

FOREST 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. — CASE NO.: 2007-CA-00327

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

REPLY BRIEF OF APPELLANTS

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I. Precedent Dictates Enforcement of the Arbitration Provision Contained within the Contract

There have been numerous Mississippi cases analyzing arbitration agreements in the nursing home industry. These cases have generally supported the enforcement of the arbitration agreements, recognizing that an agreement to arbitrate "merely provides for a mutually agreed-upon forum for the parties to litigate their claims and is benign in its effect on the parties' ability to pursue potential actions." *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 522 (Miss. 2005). Unsurprisingly, the Plaintiff seeks solace and support from the only Mississippi Supreme Court case which has declined to enforce an arbitration agreement in the nursing home industry, *Grenada Living Center v. Coleman*, 961 So.2d 33 (Miss. 2007). However, as the Plaintiff, herself, acknowledges, *Coleman* is easily distinguishable from the case at bar. The circumstances in the instant case are more analogous to the scenarios in *Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007), *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007), and *Stephens*. These cases are controlling, and binding precedent demands the reversal of the trial court's decision not to enforce the arbitration agreement.

The Plaintiff relies heavily on *Coleman* in arguing Patti Mathews had no authority to act as health care surrogate pursuant to Miss. Code Ann. § 41-41-211. The Plaintiff admits, however, the factors in Coleman which distinguish it from the instant case; in *Coleman*, the parties stipulated the resident was competent at the time of admission and was not present when the contract containing the arbitration agreement was signed. In fact, the Mississippi Supreme Court described the agreement on those issues as follows:

"the parties stipulated to several facts which are **critical** to our analysis." *Coleman*, 961 So.2d at 36 (emphasis added). Those **critical** stipulations did not occur in the instant case, for reasons made obvious below. The Court later referred to the stipulation of competence again and concluded "[b]ecause [the resident] was not incapacitated, the statutes governing health care surrogates do not apply." *Id.* at 37.

Mary Louise McFarlan (sometimes hereinafter referred to as "McFarlan") was described as moderately impaired when she was admitted to the facility. (R. at 119). She had problems with both her short-term and long-term memory, and she had periods of altered perception wherein she would move her lips or talk to people who were not there, believe she was elsewhere, or confuse night and day. (R. at 119). At the time of her admission, McFarlan wandered with no rational purpose and required help changing her position in bed. (R. at 120). McFarlan was unable to dress, feed herself, use the toilet, or maintain personal hygiene without substantial staff assistance. (R. at 120).

In fact, not only did the Defendants not stipulate to McFarlan's competence, the Plaintiff, at the very least, cast serious doubt upon her mental capacity. In her Response to Defendants' Motion to Stay Proceedings Compel Arbitration and Plaintiff's Motion to Obtain Arbitration Related Discovery, the Plaintiff concluded McFarlan was incompetent by stating the following:

> Person being admitted into facilities such as Forest Hill Nursing Center are often incompetent. In fact, Defendants own assessment of Ms. McFarlan stated that she had memory problems and periods of altered perception. See Exhibit C.[1]

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[1]Exhibit C to the Plaintiff's Response consisted of the Minimum Data Set (sometimes hereinafter referred to as "MDS") prepared when McFarlan was admitted to Forest Hill Nursing Center. The MDS stated McFarlan suffered from long- and short-

> Thus, Defendants were put on notice that they needed to seek out the party with authority to enter into the contract at issue. Absent specific proof that Patti Matthews had authority to bind Ms. Farlan (sic) or her estate, there is no reasonable basis for nursing home personnel to assume that any acts of a supposed agent are binding as to an **incompetent principal**.

(R. at 80-81). The distinction between *Coleman* and the instant case is clear. While competence was conceded by the defendants in *Coleman*, the Plaintiff here describes McFarlan as an "incompetent principal".

The Plaintiff also claims that McFarlan's adult granddaughter, Pattie Mathews (sometimes hereinafter referred to as "Mathews") did not have the authority to act as a surrogate, noting that Miss. Code Ann. § 41-41-211(2) provides that authority to spouses, children, parents, and siblings. Of course, the Plaintiff completely ignores Miss Code Ann. § 41-41-211(3) which provides "[i]f none of the individuals eligible to act as surrogate under subsection (2) is 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 surrogate." Miss Code Ann. § 41-41-211(3). Clearly, Mathews, an adult granddaughter who is admitting her grandmother to a nursing home, was exhibiting special care and concern for McFarlan and is familiar with her personal values. Mathews was the family member admitting McFarlan to the facility, and she exercised her authority as a health care surrogate to enter into a contract for health care on McFarlan's behalf which contained a valid, enforceable arbitration agreement. The Plaintiff complains the facility performed no investigation to locate members of the classes

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term memory problems. It also noted that she was unable to recall the current season, the location of her own room, staff names or faces, or even that she was a patient in a nursing home.

enumerated in Miss. Code Ann. § 41-41-211(2). Such is not required under the statute. Miss Code Ann. § 41-41-211(3) specifically states that an adult who has exhibited special care can act as a surrogate if a spouse, parent, adult child, or sibling is not "reasonably available". These individuals were not reasonably available as it was Mathews, McFarlan's granddaughter, who was present at her admission to the facility. To suggest that the Forest Hill Nursing Center must scour the community for alternative surrogates is ludicrous; the law places no such burden on health care providers. The instant case is clearly distinguishable from *Coleman*.

In contrast, the facts in this case track those in *Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007), closely. In both cases, the resident was incapable of caring for herself and was admitted by a family member. In response to a motion to compel arbitration, the plaintiff in each case claimed the resident was incompetent at admission to the facility. *Id.* at 736. In *Brown*, the admitting family member was a member of a class permitted to make decisions as a surrogate pursuant to Miss. Code Ann. § 41-41-211(2)(b), while Mathews was authorized to act as a surrogate by Miss. Code Ann. § 41-41-211(3). The Supreme Court ruled that surrogates do have the authority to enter into a contract for the provision of health care which contains an arbitration clause for the persons for whom they act. *Brown*, 949 So.2d at 737. Clear precedent demands the reversal of the trial court's decision and the enforcement of the valid agreement to arbitrate claims which arise out of McFarlan's residency at the facility.

In addition, other Mississippi case law demands the enforcement of the subject arbitration provision. The Plaintiff blithely dismisses *Trinity Mission of Clinton, LLC v.*

Barber, 2007 WL 2421720 (Miss.App. 2007), simply because the case was decided by the Mississippi Court of Appeals rather than the Mississippi Supreme Court. The resident in *Barber*, just as in the instant case, received the benefit of the bargain entered into on her behalf. *Id.* at 5. "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." *Id.* The Court noted "[t]he plain language of the admissions agreement indicates the clear intent of the parties to make [the resident] a third-party beneficiary." *Id.* The clear language of the instant contract indicates the undeniable intent of the parties that McFarlan benefit through the receipt of health care, living assistance, and food and lodging. As the court put it, the resident's "care is the *sine qua non* of the contract." *Id.* "It is beyond dispute that the benefits of receiving [the facility]'s health care services outlined in the admissions agreement flowed to [the resident] as a 'direct result of the performance within the contemplation of the parties as shown by its terms.' " *Id.* (citation omitted). Just as in *Barber*, the facility agreed to furnish room, board, linens and bedding, nursing care and certain personal services. *Id.* (R. at 42). The facility undertook the contractual duty to orient McFarlan to the facility, its services and personnel, the type of nursing care given, and the rights and privileges of the resident. (R. at 42). They also agreed to help McFarlan become acquainted with their surroundings and to make available to her recreational and social activities. (R. at 42). The facility also agreed to coordinate treatment by a physician and transportation for the receipt of medical

care not available at the facility. (R. at 43). In *Barber*, the Court found "that the contract between [the responsible party] and [the facility] was entered into for the benefit of [the resident] and that she is a third-party beneficiary under the contract. As such, she is bound by the arbitration provision contained in the admissions agreement, notwithstanding her status as a non-signatory to the agreement." *Id.* The admission agreement executed by Mathews and the facility was entered into for the benefit of McFarlan; therefore, she is a third-party beneficiary under the contract. Under the clear holding in *Barber*, McFarlan is bound by the valid arbitration agreement contained within the contract. Once again, clear precedent demands the reversal of the trial court's decision and the enforcement of the valid agreement to arbitrate claims which arise out of McFarlan's residency at the facility.

II. The Arbitration Can Proceed as Mandated by the Contract

The Plaintiff next argues the controversy is not arbitrable because it refers to the American Health Lawyers Association which, the Plaintiff claims, will not hear a case for arbitration unless all parties have agreed in writing to arbitrate the claim after the injury occurred. However, this argument is procedurally barred. The Plaintiff did not raise this argument in her Response to Defendants' Motion to Stay Proceedings Compel Arbitration and Plaintiff's Motion to Obtain Arbitration Related Discovery. (R. at 74-87). An appellate court will not review issues raised for the first time on appeal. *Tate v. State*, 912 So.2d 919, 928 (Miss. 2005). In *Cleveland v. Mann*, the Supreme Court reversed the denial of a motion to compel arbitration and declined to consider certain arguments raised by the plaintiff in their appellate brief because those arguments had not been raised before the trial court. 942 So.2d 108, 115 (Miss. 2006). The Plaintiff's argument that this case is not

arbitrable because of the American Health Lawyers Association desire for a post-injury arbitration agreement was not raised in the court below and is therefore barred.

The wisdom of this rule is manifest in that the Defendants could have produced in the court below an affidavit wherein Jeff Leibold, the executive vice president/chief operating officer of the American Health Lawyers Association, relates that the American Health Lawyers Association will administrate an arbitration which flows from a pre-injury arbitration agreement if arbitration has been ordered by a court of competent jurisdiction. Counsel for the Plaintiff is or should be aware of this fact given that her firm has made this same argument throughout the circuit courts of the state of Mississippi and been rebutted through this same affidavit.

The actions of the American Health Lawyers Association are similar to those of the American Arbitration Association in that it also issued a statement that it did not intend to preside over arbitrations which flowed from a pre-dispute agreement. A neighboring state has recently considered the impact of the AAA's decision to not hear cases in which a pre-dispute arbitration agreement has been signed. The Alabama Supreme Court enforced the arbitration agreement on other grounds, but went on to state,

> Even if we were to accept [the plaintiff]'s argument that the arbitration provision requires arbitration by an AAA arbitrator and that the AAA's Health Care Policy Statement precludes the AAA from providing an arbitrator, we would not be compelled to hold that Blue Cross's motion to compel arbitration was due to be denied on that basis. '**[W]here the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a different arbitrator.**'

Blue Cross Blue Shield of Alabama v. Rigas, 2005 WL 2175451 (Ala. 2005) (emphasis

added) (quoting *Ex parte Warren,* 718 So.2d 45, 48 (Ala.1998)). "[T]he [policy] statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that [the plaintiff]'s claims are not arbitrable." *Id.* Such reasoning also applies to the instant case. The parties bargained for arbitration; the simple fact that the American Health Lawyers Association has adopted a policy concerning health care arbitrations does not mean that the claims made by the Plaintiffs are not arbitrable.

III. Discovery Is Not Necessary to Enforce the Arbitration Clause of the Contract

The Plaintiff summarily states "leading authority from other jurisdictions" demonstrates that discovery is required before a decision can be reached as to the enforceability of an arbitration provision. While the Defendants dispute that statement, what is indisputable is that numerous Mississippi cases have made decisions about arbitration provisions without conducting arbitration-related discovery. *See Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007), *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007), *United Credit Corporation v. Hubbard,* 905 So.2d 1176 (Miss. 2004); *Terminix International v. Rice,* 904 So.2d 1051 (Miss. 2004); *Covenant Health & Rehab of Picayune, LP v. Lambert,* 2006 WL 3593437 (Miss.App. 2006), *Norwest Financial Mississippi, Inc., v. McDonald,* 905 So.2d 1187 (Miss., 2005).

The majority of the Plaintiff's support for arbitration-related discovery concerns either procedural and substantive unconscionability or investigations into the impartiality of the arbital forum. The appellate courts of the state of Mississippi have repeatedly indicated they have sufficient information before them to make determinations regarding the conscionability of nursing home arbitration agreements without the need for costly, time-

consuming discovery. *Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007), *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007), *Grenada Living Center v. Coleman*, 961 So.2d 33 (Miss. 2007). Indeed, such discovery would frustrate the very purpose of arbitration as an expedited and less expensive method of resolving disputes between parties. In addition, the Mississippi Supreme Court has held that no further investigation than the four corners of the agreement is necessary to make a determination as to substantive unconscionability. *Stephens*, 911 So.2d at 521. The Defendants are unaware – and the Plaintiff has produced no evidence – of any lack of impartiality by any proposed arbiters.

The Plaintiff cites *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005), at length to support her claim that discovery is appropriate. However, Walker does not discuss permitting discovery-related arbitration. In fact, the only discussion of discovery at all concerned a finding that the arbital forum was not impartial because it only permitted limited discovery to occur. *Id.* at 373. *Morrison v. Circuit City Stores, Inc.*, also cited by the Plaintiff as supporting her argument for arbitration, also only discusses the impact of limitations on discovery once in arbitration – not on conducting discovery prior to a determination of arbitrability. 317 F.3d 646 (6th Cir. 2003).

The Plaintiff claims that discovery is particularly important in that she claims the Defendants breached fiduciary duties. The Defendants maintain that there is no fiduciary duty relationship existing in this case. The Courts have clearly outlined numerous cases of a fiduciary duty relationship between parties. The Court has yet to extend a fiduciary duty between a resident and a long term care facility such as Forest Hill Nursing Center.

Furthermore, there is case law in which a claim for breach of fiduciary duty against other Defendants has been submitted to arbitration. Defendants would suggest to this Court that even if it should find there was a fiduciary duty owed to McFarlan by the facility, that it does not invalidate the arbitration provision contained within the admission agreement.

The Mississippi Supreme Court has stated, "Mississippi law is well-settled in that in order to establish a claim for breach of fiduciary duty . . . [you] must first establish a duty." *Mabus v. St. James Episcopal Church*, 884 So.2d 747, 758 (Miss. 2004). (stating "Whether a fiduciary relationship exists depends upon factual circumstances, not upon professional standards of conduct for a reasonable member of the clergy."). The Court has previously defined and clarified that a fiduciary duty is established:

> Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the former, arising either from weakness in mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character.

Mullins v. Ratcliff, 515 So.2d 1183, 1192 (Miss. 1987) (citing *Hendricks v. James,* 421 So.2d 1031, 1041 (Miss.1982). The Court continued by finding, "the relationship arises when a dominant, overmastering influence controls over a dependent person or trust justifiably reposed." *Id.* In the case before the court now, there is no such duty owed to Plaintiff.

The Defendants were in no such position to "exercise a dominant influence," nor an "overmastering influence," over McFarlan or Mathews. Defendants only provided health-care services to and for McFarlan, as contracted with Mathews, as responsible party and health care surrogate of McFarlan. McFarlan's trust and dependency was with Mathews, her responsible party and health care surrogate. The Mississippi Court of Appeals has held

that "a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger." *Langston v. Bigelow*, 820 So.2d 752, 757 (Miss. Ct. App. 2002). The Mississippi courts have further instructed that "one of the key elements of a fiduciary relationship is the "fiduciary's control of the supervised party's property, and that things of value such as land, monies, a business, or other things of value must be possessed or managed by the dominant party." *Univ. Nursing Assoc., PLLC v. Phillips*, 842 So. 2d 1270, 1275 (Miss. 2003) (quoting *Arnold v. Erkmann*, 934 S.W.2d 621, 629 (Mo.Ct.App.1996)). Defendants contend that if any fiduciary relationship exists, it exist between McFarlan and Mathews, as her responsible party and surrogate, and not between the Defendants and McFarlan.

The Defendants maintain that even if the Court finds that Forest Hill Nursing Center was in a fiduciary relationship, (which Defendants are not admitting) that a claim for a breach of a fiduciary duty can still be bound by arbitration. The issue of whether or not it had a fiduciary duty is not relevant to the enforceability of the arbitration provision. There is no need to conduct arbitration-related discovery in the instant case.

IV. *Covenant Health & Rehab v. Brown* Should Be Reaffirmed

Given that *Covenant Health & Rehab v. Brown* is the stereotypical "all-fours" case, the Plaintiff is compelled to argue that it should be overturned. The Defendants respectfully disagree and suggest the case should be reaffirmed.

The Plaintiff argues that contracting for health care does not constitute a "health

care decision" pursuant to Miss. Code Ann. § 41-41-211. Respectfully, the Defendants disagree. Mississippi statutes provide health care surrogates the authority to make decisions for patients. Necessarily, the authority granted to make those decisions must include the ability to enter into contracts concerning that care. The Mississippi legislature has specifically provided that a "health care decision made by a surrogate is effective without judicial approval." Miss. Code Ann. § 41-41-211(7). To hold otherwise would be to produce a decidedly odd result, which would permit a surrogate to make decisions about whether a patient receives potentially life-saving medical treatment – such as through a do not resuscitate order -- but would not permit them to enter into contracts giving effect to their health care decisions. Implicit in the legislature's grant of authority to make decisions about a patient's care is a corresponding grant of authority to enter into an agreement which allows the surrogate to enter into a contract concerning such care. A law which imposes a duty implies necessary power to achieve those duties. *Allred v. Webb*, 641 So.2d 1218, 1222 (Miss. 1994) (citation omitted). Contracts concerning the provision of health care are an integral part of the modern health care industry and the practice of medicine. In order to be able to make decisions about the medical care a patient is to receive, a surrogate must be able to enter into binding agreements to bring those decisions to fruition. A necessary part of the authority to make health care decisions is the power to perform those duties. To decline to hold otherwise would essentially eviscerate the surrogacy statutes as nearly every health care interaction with a new provider is preceded by the execution of a contract.

If surrogacy is not an option, then time-consuming and expensive conservatorships must be established or powers of attorney must be executed to admit a patient into a long

term care facility. By enacting the surrogacy statute, the Mississippi legislature recognized that citizens of this state would be subjected to unnecessary expense, delay, and bureaucratic red tape if family members were required to pursue judicial approval before entering into contracts to receive the health care their parents, grandparents, or spouses urgently need. Instead, the legislature codified the ability of family members to enter into just such contracts at issue in the case at bar.

CONCLUSION

Previous Mississippi Supreme Court decision dictate the enforcement of the arbitration provision contained within the admission agreement. *Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007), *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007), and *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 522 (Miss. 2005), all dictate that the arbitration agreement be enforced. In contrast, *Grenada Living Center v. Coleman*, 961 So.2d 33 (Miss. 2007), is clearly distinguishable as it was stipulated that the resident was competent but not present when the admission agreement was executed. The Plaintiff's argument that the arbitration cannot proceed as mandated by the contract is procedurally barred. In any event, despite the Plaintiff's claims, the arbitration could be performed by the American Health Lawyers Association pursuant to a court order. The fact that discovery is not necessary in the instant case is reflected in the large number of decisions wherein the appellate courts of Mississippi have upheld – or denied – orders to arbitrate without conducting time-consuming and expensive discovery. Finally, the Defendants suggest *Covenant Health & Rehab v. Brown* should be affirmed.

This the 4th day of October, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the above and foregoing document was caused to be served via U.S. mail on the following:

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Dated, this the 4th day of October, 2007.

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