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.

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

CASE NO.: 2007-CA-00327

BRIEF OF APPELLANTS

(ORAL ARGUMENT NOT REQUESTED)

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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**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal:

1. Defendants/Appellants Forest Hill Nursing Center, Inc.; Long Term Care Management, LLC; Carefirst Senior Services, Inc.;Hugh Franklin; Scott A. Lindsey; and Rhonda Bounds

2. Plaintiffs/Appellees Mary Louise McFarlan, by and through Patricia Mathews for the use and benefit of Mary Louise McFarlan

3. S. Mark Wann, Esquire; Heather M. Aby, Esquire; Paul H. Kimble, Esquire - Attorneys for Appellants

4. Gale N. Walker, Esquire; James G. Thornton, Esquire - Attorneys for Appellees

5. The Honorable Bobby B. DeLaughter, Hinds County Circuit Court Judge

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Paul H. Kimble

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants believe that oral argument would not aid the resolution of the appeal before this Court. The jurisprudence concerning the issues of the instant case has been ably examined and ruled upon by the Mississippi Supreme Court, and oral argument is not needed as the Court has previously stated the law surrounding the enforcement of arbitration agreements in nursing home admission contracts.

STATEMENT OF THE ISSUES

I. Did the lower court err in denying the motion to compel arbitration under the agreement between the parties?

II. Is the admissions contract valid and enforceable?

III. Is the admission agreement substantively unconscionable?

STATEMENT OF THE CASE

On August 25, 2004, the Appellee, Mary Louise McFarlan, by and through Patricia Mathews as Next Friend, for the use and benefit of Mary Louise McFarlan, filed suit – while still a resident at the facility – alleging that Mary Louise McFarlan suffered personal injuries while a resident in the Forest Hill Nursing Center. (R. at 3-6). Mary Louise McFarlan, by and through Patricia Mathews as Next Friend, for the use and benefit of Mary Louise McFarlan (sometimes hereinafter referred to as "McFarlan" or "Plaintiff") named Appellants, Forest Hill Nursing Center, Inc., Long Term Care Management, LLC, Carefirst Senior Services, Inc., Hugh Franklin, Scott A. Lindsey, and Rhonda Bounds as Defendants. (R. at 3-5). Patricia Mathews (sometimes hereinafter referred to as "Mathews", as McFarlan's responsible party and health care surrogate pursuant to Miss. Code Ann. § 41-41-201, *et seq.*, signed a contract wherein all parties agreed to arbitrate any claim which arose. (R. at 44-6). On November 23, 2004, Forest Hill Nursing Center, Inc., Long Term Care Management, LLC, Hugh Franklin, Scott A. Lindsey, and Rhonda Bounds (sometimes hereinafter collectively referred to as "Defendants") filed a Motion to Dismiss, or in the Alternative, to Stay Proceeding and Enforce Mediation and/or Arbitration Agreement. (R. at 33-39).

On January 31, 2007, the Circuit Court of Hinds County found Mathews did not have authority to enter into a contract which could bind Mary Louise McFarlan. (R. at 150-52). Specifically, the trial court stated, "this Court finds that Mathew's authority is limited to the areas of health care and business affairs, which do not include the ability to bind McFarlan to arbitration agreements. Therefore, there was not a binding agreement

between Forest Hill Nursing Center and McFarlan, and the defendant's motion must be denied." (R. at 152). Aggrieved, the Defendants filed the instant appeal pursuant to Miss.R.App.P. 4. The Mississippi Supreme Court has recognized that "an appeal may be taken from an order denying a motion to compel arbitration." *Tupelo Auto Sales, Ltd. v. Scott*, 844 So. 2d 1167, 1170 (Miss. 2003).

STATEMENT OF FACTS

Mary Louise McFarlan was admitted to Forest Hill Nursing Center (sometimes hereinafter referred to as "Forest Hill") on July 28, 2003. (R. at 40). McFarlan's responsible party and health care surrogate, Patricia Mathews, was present at admission and signed the admitting paperwork on McFarlan's behalf. (R. at 40-47). Within the admission agreement was a clearly and conspicuously placed section – Section E – wherein the parties agreed that any claim that arose out of or related to the admission agreement or the care McFarlan received would be resolved exclusively through binding arbitration pursuant to the Federal Arbitration Act. (R. at 44). Section E has a heading – in all capital letters and in bold – which stated as follows : "**ARBITRATION – PLEASE READ CAREFULLY**." (R. at 44). In fact, the responsible party is required to initial the section which clearly states that arbitration is the method by which disputes will be resolved. (R. at 44). This is the only place in the admission agreement which requires initials. Mathews, McFarlan's responsible party and health care surrogate, did, in fact, initial beside the heading entitled **ARBITRATION – PLEASE READ CAREFULLY**. (R. at 44). Section E contains another sentence – again in bold type – which states as follows: "**The parties understand and agree that by entering this Arbitration Agreement they are giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and a jury.**" (R. at 45). Finally, Section E ends with the following paragraph:

> The Resident and/or Responsible Party understand that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this Arbitration is not a precondition to the furnishing of services to the Resident by the

> facility, and (3) this Arbitration Agreement may be rescinded by written notice to the facility from the Resident within 30 days of signature. If not rescinded within 30 days, this Arbitration Agreement shall remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

(R. at 46). The agreement further contained a savings clause which mandated that even if a portion of the agreement was found to be unenforceable, the remainder of the agreement shall be given effect, and a clause which stated that the resident and responsible party had availed themselves – if they deemed it desirable – of the opportunity to have legal counsel review the agreement. (R. at 46). Finally, in all capital letters and bold print, the agreement provides "**ANY RESPONSIBLE PARTY OR PARTIES EXECUTING THIS AGREEMENT REPRESENT AND WARRANT THAT THEY HAVE THE AUTHORITY, EITHER EXPRESS, IMPLIED OR APPARENT, TO ACT AS AGENT FOR THE RESIDENT AND TO EXECUTE THIS AGREEMENT ON RESIDENT'S BEHALF.**" (R. at 46).

McFarlan allegedly suffered injuries while at Forest Hill and filed suit claiming the Defendants were responsible for the injuries she purportedly suffered. (R. at 6). In response, the Defendants filed a Motion to Dismiss, or in the Alternative, to Stay Proceeding and Enforce Mediation and/or Arbitration Agreement. (R. at 33). However, the Hinds County Circuit Court denied the Defendants' Motion, holding that a health care surrogate did not have the power to enter into a contract on the resident's behalf which bound the resident to participate in arbitration proceedings. (R. at 152).

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).

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court has repeatedly made clear there is a preference for the enforcement of arbitration agreements. Nursing homes and long term care facilities affect interstate commerce in such a way as to invoke the provisions of 9 U.S.C. § 1, *et seq.* (the Federal Arbitration Act). Agreements between long-term care facilities and their patients, when taken in the aggregate, affect interstate commerce. In addition, the provisions of the arbitration agreement bear some reasonable relationship to the risks and needs of the business.

The parties entered into a valid, enforceable contract. A facility representative and Mathews, McFarlan's responsible party and health care surrogate, signed a contract wherein each agreed to arbitrate any disputes which arose out of McFarlan's stay at Forest Hill. (R. at 47). Mathews held herself out to have the authority to act on McFarlan's behalf. (R. at 138-43). Mathews executed multiple documents which indicated her authority, including an assignment of McFarlan's Medicare benefit, authorization to make withdrawals from McFarlan's resident trust fund, a drug purchase authorization form, a do not resuscitate form, and a HIPAA authorization. (R. at 138-43). McFarlan ratified this agency relationship by accepting the benefits of the contract Mathews signed on her behalf. In addition, Mathews specifically warranted she had the authority to act as McFarlan's agent and to enter into the agreement to arbitrate on her behalf. (R. at 46).

The arbitration agreement at issue in the instant case is procedurally conscionable. The agreement to arbitrate is clearly and conspicuously marked. (R. at 44). There is a place for the party to initial to signify their acceptance of the agreement to arbitrate. (R.

at 44). The admission agreement also makes clear that agreeing to arbitrate is not a condition of admission to the facility. (R. at 46). There is nothing indicating a lack of voluntariness or a lack of knowledge of the arbitration provision. Therefore, the contract is not procedurally unconscionable.

The contract is also substantively unconscionable. The agreement is not one-sided where one party is deprived of all the benefits of the agreement or left without a remedy. (R. at 40-7). There are no remedies which are barred, attempts to alter the damages available or the statute of limitations, or provisions to modify the standard of care. The agreement simply provides the parties an alternative venue to resolve their disputes. (R. at 40-7). As such, the agreement to arbitrate any dispute which arose out of McFarlan's stay at Forest Hill is substantively conscionable.

ARGUMENT

I. Standard of Review

"The decision to grant or deny a motion to compel arbitration is reviewed by this Court de novo." *Equifirst Corp. v. Jackson*, 920 So. 2d 458, 461 (Miss. 2006) (citing *Doleac v. Real Estate Professionals, LLC.*, 911 So. 2d 496, 501 (Miss. 2005); *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002)). "This Court has consistently recognized the existence of 'a liberal federal policy favoring arbitration agreements.' " *Terminix International, Inc. v. Rice,* 904 So. 2d 1051, 1054-55 (Miss. 2004) (quoting *Russell v. Performance Toyota, Inc.,* 826 So. 2d 719, 722 (Miss. 2002)). Arbitration is firmly embedded in both our federal and state laws. *Pass Termite & Pest Control, Inc. v. Walker,* 904 So. 2d 1030, 1032-33 (Miss. 2004) (citing *Russell,* 826 So. 2d 719; *East Ford,* 826 So. 2d 709; *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss.1998)).

II. The Lower Court Erred in Refusing to Compel Arbitration.

The Federal Arbitration Act (sometimes hereinafter referred to as "FAA") provides: "A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, a threshold determination must be made as to whether the subject admission agreement falls within the provisions of the FAA. The Mississippi Supreme Court has specifically held, in analyzing arbitration agreements in the nursing home industry, that circumstances such as those in the case at bar "clearly [fall] within the broad purview of the Federal Arbitration Act... [S]ingular

agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce." *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 515 (Miss. 2005).

"Nursing homes through general practice, which includes basic daily activities like receiving supplies from out of state vendors and payments from out-of state insurance companies or the federal Medicare program affect interstate commerce." *Id.* at 515. "Thus, since the arbitration clause is a part of a contract (the nursing home agreement) evidencing in the aggregate economic activity affecting interstate commerce, the Federal Arbitration Act is applicable ..." *Id.* at 515-16. Admission agreements like the one in the case at bar, when taken in the aggregate, clearly affect interstate commerce; therefore, the FAA applies and close attention should be paid to the strong federal and state policy of favoring the enforcement of agreements to arbitrate.

Mississippi statutes provide authority for Mathews to make decisions concerning McFarlan's health care. Miss. Code Ann. § 41-41-211(1) provides that a surrogate can make health care decisions for a patient. 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). By enacting this 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 concerning the health care their loved one needs. Instead, the legislature codified the ability of health care surrogates to enter into just such contracts at issue in the case at bar.

On January 31, 2007, the Hinds County Circuit Court denied the Defendants' motion requesting it compel the parties to submit to binding arbitration; in so doing, the Circuit Court recognized that it must determine whether a person who is a health care pursuant to Miss. Code Ann. § 41-41-211, can bind a patient absent a pre-authorized agency agreement. (R. at 152). The trial court held the surrogate's ability to make health care decisions do not include the power to "waive [the] constitutional right to a jury or [the] right to collect full legal redress for one's damages." (R. at 152) (citation omitted). Unfortunately, the Circuit Court did not have the benefit of the Mississippi Supreme Court's decision in *Covenant Health & Rehab of Picayune, LP v. Brown*, 949 So. 2d 732 (Miss. 2007), which was handed down less than a month later.

The Supreme Court ruled that surrogates do, in fact, have the power to enter into a contract which requires the resident to arbitrate any claims she may have which arise out of the treatment. *Brown*, 949 So. 2d at 737. The Supreme Court stated a health care surrogate's signature on a contract containing an arbitration agreement dictates that any dispute arising out of that contract be submitted to binding arbitration. Id. at 742. Therefore, Patricia Mathews possessed the authority to enter into a contract which bound Mary Louise McFarlan to arbitrate any claim which arose out of her care and treatment at Forest Hill Nursing Center. The Defendants respectfully suggest this Court reverse the trial court's denial of their Motion to Dismiss, or in the Alternative, to Stay Proceeding and Enforce Mediation and/or Arbitration Agreement and remand the case to the trial court with instructions that it order the parties to submit to binding arbitration.

III. The Contract Between the Parties Is Valid and Enforceable.

The doctrine of "unconscionability has been defined as 'an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.' " *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998) (citing *Bank of Indiana National Ass's v. Holyfield,* 476 F.Supp. 104, 109 (S.D. Miss. 1979)). Meanwhile, a conscionable provision has been found to bear some reasonable relationship to the risks and needs of the business. *Id.* As the Mississippi Supreme Court recognized in *East Ford, Inc. v. Taylor,* the courts have identified "two types of unconscionability, procedural and substantive." 826 So. 2d 709, 714 (Miss. 2002) (quoting *Pridgen v. Green Tree Fin. Servicing Corp.,* 88 F. Supp. 2d 655 (S.D. Miss. 2000)). Procedural unconscionability concerns the overall formation of the contract in which the arbitration clause is contained, whereas substantive unconscionability is applicable only to the arbitration clause itself. *Stephens*, 911 So. 2d at 517.

Procedural unconscionability looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract's formation. Blacks Law Dictionary 1524 (6th ed. 1990). The Mississippi Supreme Court has stated that indicators of procedural unconscionability generally fall into two areas: (1) lack of knowledge, and (2) lack of voluntariness. *Burdette Gin Co.*, 726 So. 2d at 1207. A lack of knowledge is demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and a lack of opportunity to study the contract and inquire about contract terms. *Id.* A lack of voluntariness is demonstrated in contracts of adhesion when there is a great

imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all. *Id.* (citation omitted).

There is clearly no procedural unconscionability in the instant case. Section E of the admission agreement contains the arbitration provision, and it has a heading – in all capital letters and in bold – which stated as follows : **ARBITRATION – PLEASE READ CAREFULLY**. (R. at 44). In fact, the responsible party is required to initial the section which clearly states that arbitration is the method by which disputes will be resolved. (R. at 44). This is the only place in the admission agreement which requires initials. Mathews, McFarlan's responsible party and health care surrogate, did, in fact, initial beside the heading that stated **ARBITRATION – PLEASE READ CAREFULLY**. (R. at 44). Section E contains another sentence – again in bold type – which states as follows: "**The parties understand and agree that by entering this Arbitration Agreement they are giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and a jury.**" (R. at 45). Finally, Section E ends with the following paragraph:

> The Resident and/or Responsible Party understand that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this Arbitration is not a precondition to the furnishing of services to the Resident by the facility, and (3) this Arbitration Agreement may be rescinded by written notice to the facility from the Resident within 30 days of signature. If not rescinded within 30 days, this Arbitration Agreement shall remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident's discharge and

> services are rendered following the Resident's discharge and readmission to the Facility.

(R. at 46). The admission agreement makes clear that agreeing to arbitration was not a condition of admission. (R. at 46). Also included in the agreement were a savings clause which mandated that even if a portion of the agreement was found to be unenforceable, the remainder of the agreement shall be given effect, and a clause which stated that the resident and responsible party had availed themselves – if they deemed it desirable – of the opportunity to have legal counsel review the agreement. (R. at 46). The admission agreement's numerous and conspicuous references to arbitration – as well as making clear to parties that agreeing to arbitration was not a condition of admission – makes it evident there was no lack of knowledge or voluntariness in the case at bar. Even more striking is the requirement that the party specifically initial the portion of the agreement pertaining to arbitration; clearly, there was no procedural unconscionability in the instant case.

While the trial court did not address the issue of procedural unconscionability in its Memorandum Opinion and Order in the instant case, the Plaintiff has attacked the validity of the contract itself, which under the case law set out in *Russell vs. Toyota*, is an argument of procedural unconscionability. 826 So. 2d 719 (Miss. 2002) (quoting *Rojhas vs. TK Communications*, 87 F.3d 745, 749-751 (5th Cir. 1996)). The Fifth Circuit in *Rojhas* ruled when a contract which contained an arbitration agreement is attacked as being procedurally unconscionable, the attack is an attack on the formation of the contract generally, not an attack on the arbitration clause itself. *Rojhas*, 87 F.3d at 749-51. Because the Plaintiff's claims relate to the entire agreement, rather than just the arbitration clause, the FAA requires that her claims be heard by an arbitrator. *Id.* Pursuant to the

rulings above regarding procedural unconscionability, those issues should be decided by an arbitrator.

Furthermore, Mathews possessed the apparent authority to enter into a contract on McFarlan's behalf. The arbitration provision and the admission agreement now before the Court is signed by Mathews, McFarlan's health care surrogate, who held herself out to the facility as McFarlan's Responsible Party. Mathews signed the admission agreement, as well as numerous other documents, such as the financial, pharmaceutical, and Medicare/Medicaid documents in which she further asserted the authority to act on McFarlan's behalf. (R. at 138-40). In fact, Mathews even signed a request on behalf of McFarlan that no extraordinary measures be taken to prolong her life; it would be incongruous at the very least if Mathews is able to determine whether McFarlan receives potentially life-saving medical care but is not able to enter into a contract concerning health care. In addition, Mathews specifically represented she had the authority to act as McFarlan's agent. In all capital letters and bold print, directly above one of the places Mathews signed the contract, the admission agreement signed by Mathews provides "**ANY RESPONSIBLE PARTY OR PARTIES EXECUTING THIS AGREEMENT REPRESENT AND WARRANT THAT THEY HAVE THE AUTHORITY, EITHER EXPRESS, IMPLIED OR APPARENT, TO ACT AS AGENT FOR THE RESIDENT AND TO EXECUTE THIS AGREEMENT ON RESIDENT'S BEHALF.**" (R. at 46). McFarlan accepted the terms of the contract in the admission agreement by becoming a resident of the facility, receiving health care from the facility, and through her actions authorizing Mathews to sign as her Responsible Party.

By signing the admission agreement as McFarlan's Responsible Party, Mathews held herself out generally and specifically to have the authority to bind McFarlan and to engage the services of Forest Hill Nursing Center. Forest Hill Nursing Center, acting reasonably and in good faith, believed Mathews had authority to bind McFarlan, since she signed the admission agreement and other admitting documents. McFarlan received services from the Defendants based on the terms and conditions of the admission agreement and, therefore, benefitted from the agreement.

It has been recognized that to allow a plaintiff to claim the benefit of a contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying the enactment of the Arbitration Act. *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d. 894, 903 (S.D. Miss. 2001). Mathew's actions in agreeing to and signing the contract as McFarlan's Responsible Party created an express agency, or alternatively, an implied agency. American Jurisprudence, 2d Edition, aptly explains the creation of an expressed or implied agency:

> While the creation of an agency relationship, so far as the principal and agent are concerned, arises from their consent an usually as the result of contract, it is not essential that the actual contract exist. The agency and the assent of the parties thereto may be either express or implied. Further, an agency may be informally created.
>
> An express agency is an actual agency created as a result of the oral or written agreement of the parties, and the implied agency is also an actual agency, the existence of which as a fact is proved by deductions or influence from the other facts and circumstances of the particular case, including words and conduct of the parties.

3 Am. Jur. 2d. Agency § 16 (2004).

An agent is one who stands in the shoes of his principal; he is his principal's alter ego. *Bailey v. Worton*, 752 So. 2d 470, 474 (Miss.Ct.App. 1999). An agent is one who acts for and in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by his authority. *Id.* The *Bailey* Court further explained that:

> This Court has defined apparent authority and found that the extent to which it binds the principal is predicated upon the perception of the third party in his dealings with the agent: Apparent authority exists when a reasonably prudent person, having knowledge of the nature and the usages of the business involved would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have.

Id. (quoting *Eaton v. Porter*, 645 So. 2d 1323, 1325 (Miss. 1994).

When Mathews came to Forest Hill, she read, signed, and agreed to the terms of the admission agreement, and she held herself out as "a substitute, a deputy, appointed by the principal, with the power to do things which the principal may or can do." *Id.* (citing 2 C.J.S. Agency § 1 (c) (1936)). Forest Hill required that Mathews fill out all the necessary paperwork in person prior to admitting McFarlan into the facility. McFarlan's subsequent actions ratifying the contractual agreement Mathews made - receiving the benefits of the contract and care at the Forest Hill Nursing Center - reinforces the agency which she granted to Mathews. Employees of the Forest Hill believed, just as would the archetypal reasonable, prudent person, that Mathews had the authority to act on McFarlan's behalf.

Also, it is incongruous at the very least to give credence to Mathew's argument that the arbitration agreement should not apply given that she admits that she signed the contract containing the arbitration agreement and she and McFarlan received benefits

resulting from the formation of the contract. The Plaintiff is estopped from asserting that contract is invalid because Mathews and McFarlan benefitted by her receipt of health care and domicile at the Forest Hill. "Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a ... contract ... which he might have rejected or contested." *Heritage Cablevision v. New Albany Electric Power System*, 646 So. 2d 1305, 1310 (Miss. 1994). "[A party] cannot accept the benefit under this contract and also repudiate its obligations." *Id.* "Such estoppel operates to prevent the party thus benefitted from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him, or, in other words, it *precludes one who accepts the benefits from repudiating the accompanying or resulting obligation.*" *Id.* (emphasis is original). McFarlan accepted the benefits of the contract - i.e. health care and living assistance. However, she now seeks to avoid a bargained for material term contained within that contract. Estoppel prevents McFarlan from reaping the benefits of her contract and then avoiding the terms contained therein. Therefore, the principles of estoppel dictate that the arbitration provision contained within the admission agreement must be enforced.

Based on the above case law and Mississippi statutes it is obvious and apparent that Patricia Mathews had statutory authority to make health care decisions and enter into contracts to effectuate those decisions and had apparent authority to sign as a Responsible Party of Mary Louise McFarlan. Therefore, the Plaintiff should be bound to the arbitration provision contained within the admission agreement.

IV. The Admission Agreement Signed by Patricia Mathews Is Not Substantively Unconscionable.

To determine whether a contract is substantively unconscionable, a court should look within the four corners of the agreement in order to discover whether there are any terms which violate the expectations of, or cause gross disparity between, the contracting parties. *Stephens*, 911 So. 2d at 521. In *Stephens* and *Brown*, the Mississippi Supreme Court examined a nursing home admission agreement which contained provisions that sought to limit liability, prohibit any award of punitive damages, shorten the applicable statute of limitation, exempt the nursing home from liability for any criminal or intentional acts, change the applicable standard of care, enforce a grievance resolution process, require a party to pay all costs incurred in defending an arbitration award or enforcing the right to arbitrate, and establish a notice provision prior to the institution of any claim. The Court ruled those provisions to be unconscionable. *Brown*, 949 So. 2d at 738-40. However, the Supreme Court noted in each case the agreement also contained a valid arbitration clause and concluded the arbitration provision was not unconscionable. *Stephens*, 911 So. 2d at 521.; *Brown*, 949 So. 2d at 740. The admission agreement at issue in the instant case contains no such oppressive terms. The agreement simply defines the financial agreement between the parties, outlines the facility's obligations, establishes the duties of the resident and/or responsible party, describes the agreement's duration and scope, and provides for an alternative forum – arbitration – for the resolution of disputes between the parties. (R. at 40-7). The agreement is not one-sided where one party is deprived of all the benefits of the agreement or left without a remedy. Each side receives the benefits of an alternative forum for the resolution of any disputes that arose

out the contract. There are no overreaching and unconscionable terms such as those stricken from the admission agreements in *Stephens* and *Brown*.

The Mississippi Supreme Court also noted in *Brown* and *Stephens* that there was a savings clause in the admission agreement which stated that even if provisions of the agreement were invalidated, the arbitration provision would still be in effect – just as in the instant case. In addition, the Court stated one factor weighing against unconscionability was that the arbitration provision, just like the one at issue in the instant case, was typical of those endorsed by the Federal Arbitration Act. *Stephens*, 911 So. 2d at 521; *Brown*, 949 So. 2d at 741. The Court identified the reasonable relationship of the arbitration provision to the risks and needs of the business as yet another substantial argument against a finding of unconscionability. *Stephens*, 911 So. 2d at 517; *Brown*, 949 So. 2d at 741. Obviously, the arbitration agreement at issue in the case at bar was likewise drafted because of the risks and needs of the nursing home industry. The admission agreement in the instant case does not contain any unconscionable terms. The arbitration provision is typical of those endorsed by the Federal Arbitration Act. The arbitration provision is reasonably related to the risks and needs of the nursing home industry. The admission agreement at issue in the instant case is clearly not substantively unconscionable.

CONCLUSION

The Mississippi Supreme Court has previously enforced arbitration agreements in the nursing home industry. Arbitration agreements in the nursing home field are subject to the Federal Arbitration Act as the operation of that industry has a significant impact on

interstate commerce. Patricia Mathews possessed both statutory authority and apparent agency to enter into a contract on Mary Louise McFarlan's behalf. The arbitration provisions are conspicuous and clearly marked. The arbitration agreement at issue simply provides a speedy, efficient, and cost-effective procedure in an alternative forum in which disputes between the parties can be heard. Therefore, the Appellants respectfully request that this Court reverse the trial court's refusal to grant their Motion to Dismiss to Stay Proceedings and Compel Arbitration and remand the case with instructions for the trial court to order the parties to submit to arbitration.

This the 19th day of July, 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:

Judge Bobby DeLaughter
Hinds County Circuit Court
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