SUPREME COURT OF MISSISSIPPI COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO.: 2007-CA-00945

The Estate of Theodore Davis, by and through Patricia Davis, Individually and as Personal Representative of the Estate of Theodore Davis, and on behalf of and for the use and benefit of the wrongful death beneficiaries of Theodore Davis,

PLAINTIFF

vs.

Bedford Health Properties, LLC; Bedford Care Center of Hattiesburg, LLC; Hattiesburg Medical Park, Inc.; Hattiesburg Medical Park Management Corp.; Michael McElroy; Robert Perry; Unidentified John Does 1 through 10 (as to Bedford Care Center-Warren Hall)

DEFENDANTS

REPLY BRIEF OF APPELLANTS

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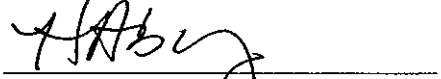
CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies 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, Bedford Health Properties, LLC, et al.;
2. Plaintiffs/Appellees, Patricia Davis;
3. S. Mark Wann, Esquire, Heather M. Aby, Esquire and Marjorie S. Busching, Esquire - Attorneys for Appellants;
4. Lance Reins, Esquire and Annette Bulgar Mathis, Esquire- Attorney for Appellees;
5. Honorable Robert Helfrich, Forrest County Circuit Court Judge



Heather M. Aby

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I. PATRICIA DAVIS POSSESSED AUTHORITY TO BIND HER HUSBAND IN MATTERS OF HEALTH CARE, INCLUDING EXECUTION OF THE NOVEMBER 12, 2002 ADMISSION AGREEMENT.

A. The Power of Attorney allowed Patricia Davis to enter into the November 12, 2002 Admission Agreement on behalf of her husband, Theodore Davis.

Patricia Davis (hereinafter "Davis") argues against enforcement of the arbitration agreement based upon allegations of limiting language contained within the power of attorney. Davis, however, did not raise this argument before the lower court; thus, it is procedurally barred from review by the Court. *See Tate v. State*, 912 So. 2d 919, 928 (Miss. 2005) (appellate court will not review issues raised for the first time on appeal). In *Cleveland v. Mann*, the Mississippi Supreme Court reversed the denial of arbitration and also declined to consider certain arguments raised by the appellee on appeal because those arguments had not been raised at the trial court level. 942 So. 2d 108, 115 (Miss. 2006).

Although an alleged limitation of a power of attorney has not been addressed as to an attorney-in-fact's ability to bind a resident to arbitration by Mississippi Appellate Courts, it has been considered by other appellate courts.[1] In *Garrison v. Superior Court*, a California appellate court looked at this very issue:

> This case arises from the death of Ella Marie Needham, which is alleged to have resulted from elder abuse and medical malpractice. Penny Garrison is the daughter of Ms. Needham. Ms. Garrison was designated as Ms. Needham's attorney in fact under a durable power of attorney. After the execution of the durable power of

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[1] *See also Owens v. National Health Corp.*, __ S.W.3d __, 2007 WL 3284669 (Tenn. Nov. 8, 2007) ("Durable power of attorney for health care authorized attorney-in-fact to enter into an arbitration agreement."); and *Hogan v. Country Villa Health Services*, 142 Cal. App. 4th 259 (Cal. App.4 Dist. 2007) (relied upon by Appellants in the principal brief on appeal).

> attorney, Ms. Needham was admitted to a residential care facility. As part of the admissions process, Ms. Garrison, acting under the durable power of attorney, executed two arbitration agreements. At issue is whether Ms. Garrison was authorized to enter into the two arbitration agreements thereby requiring that all of Ms. Needham's claims be arbitrated. . . .

132 Ca. App. 4th 253, 256 (Cal. App. 2 Dist. 2005). The durable power of attorney at issue in *Garrison* was very similar to the one presently before the Court. In *Garrison*, the power of attorney provided, in part:

> "My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, subject to any limitations in this document. . . . In exercising this authority, my agent shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to my agent, including, but not limited to, my desires concerning obtaining or refusing or withdrawing life-prolonging care, treatment, services, and procedures. . . .
>
> ****
>
> Further, the durable power of attorney expressly provides Ms. Garrison with the following legal powers: the authority to execute documents involving the refusal to permit treatment; the power to sign "[a]ny necessary waiver or release from liability required by a hospital or physician"; the option of reviewing any of Ms. Needham's medical records; the ability to execute any authorization necessary to facilitate the release of medical information; and consent to the disclosure of medical information. At the end of the durable power of attorney and immediately above Ms. Needham's signature and the date of execution, the following appears, "I understand: (1) this document gives my agent serious powers over me; and (2) the powers continue after I am incapacitated; and (3) I can revoke and cancel this document at any time."

Garrison, 132 Ca. App. 4th at 258-59. In reviewing the facts on appeal, the court noted "[a]n agent or fiduciary has the authority to require a patient's medical malpractice claims to be

arbitrated." *Id.* at 264. The court aptly found the "durable power of attorney for health care in this case authorized Ms. Garrison to make 'all health care decisions' for Ms. Needham." *Id.* at 265. The power of attorney included the ability "to decide whether Ms. Needham would live" but in no way ". . . restrict[ed] Ms. Garrison's authority as an agent to enter into an arbitration agreement on behalf of Ms. Needham." *Id.* In finding the power of attorney authorized the agent to enter into the two arbitration agreements, the *Garrison* court held:

> *Ms. Garrison executed the arbitration agreements while making health care decisions on behalf of Ms. Needham.* Whether to admit an aging parent to a particular care facility is a health care decision. The revocable arbitration agreements were executed as part of the health care decision making process. Moreover, the durable power of attorney expressly states, "[M]y agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest." Ms. Garrison was granted the authority to choose a health care facility which: does not require arbitration; makes arbitration optional as to some possible disputes, as here, and includes a 30-day time period to cancel the agreements to arbitrate; or absolutely requires the use of arbitration to resolve disputes over care. *In this case, Ms. Garrison was authorized to act as Ms. Needham's agent in making the decision to utilize a health care facility which included an optional revocable arbitration agreement. . . .*

Id. at 266. (Emphasis supplied)

In this case, the power of attorney executed by Theodore Davis in favor of his wife Patricia Davis, like the one before the court in *Garrison*, allowed Davis to make health care decisions for her husband, including deciding on November 12, 2002, to continue his care at the Facility. Supp.R. 234-45. A "Health-Care Decision" was defined in the power of attorney as: "(i) selection and discharge of Health-Care Providers and Institutions; (ii) approval or disapproval of diagnostic tests, surgical procedures, programs or medication, and orders not to resuscitate; and (iii) directions to provide, withhold or withdraw artificial nutrition and hydration

and all other forms of Health Care." Supp.R. 244. Contained nowhere within the twelve (12) page document is a limitation as to Davis's ability to enter into an arbitration agreement. Thus, like in *Garrison*, Davis's agreement to arbitrate on November 12, 2002 was a health care decision made in support of her husband's continued stay at the Facility and should be enforced accordingly.

B. In executing the November 12, 2002 Admission Agreement on behalf of Theodore Davis, Patricia Davis acted as her husband's Health Care Surrogate.

Davis spends a great amount of time comparing the facts of the instant matter to that of *Grenada Living Center, LLC v. Coleman*, 961 So. 2d 33 (Miss. 2007). The underlying facts of that case are inopposite to those before the Court in *Coleman* -- facts clearly set forth by Davis in pleadings before the lower court.[2] Allegations made by Davis include:

- Because of his mental and physical infirmities, Theodore Davis was particularly dependent upon Defendants, their employees and agents for his daily care and well-being. 1 R. 38

- In this case, Defendants have failed to provide any proof that Mr. Davis's wife had the authority to bind him or his estate to the arbitration agreement.[3] Person being admitted into facilities such as Bedford Care Center are often incompetent. Defendants are well aware that they must ask for proof of either a durable power of attorney, guardianship of the person or estate, or conservatorship, or other court-recognized representative capacity from anyone purporting to act on behalf of the person being admitted. Absent these documents, there is no reasonable basis for facility personnel to assume that any acts of a supposed

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[2]The lower court ruled on the issue of arbitration without oral argument. As such, the pleadings make up the entire Record before the Court.

[3]*See* Section I, *supra*, for argument in support of Davis's authority based upon the power of attorney.

agent are binding as to an incompetent principal. . . . 1 R. 104.

- While Miss. Code Ann. § 41-41-211 allows for an adult child to act as a healthcare surrogate, such healthcare decisions are to be made in accordance with the patient's wishes or in the best interests when the wishes are unknown. There is no proof Mr. Davis was willing to waive his right to a jury trial, nor could such a waiver be deemed in his best interests. 1 R. 104.

- The [Mississippi Vulnerable Adults] Act defines a vulnerable adult as: A person eighteen (18) years of age or older or any minor whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, physical, or developmental disability or dysfunction, or brain damage or the infirmities of aging. . . . *There can be no doubt that Theodore Davis was a vulnerable adult as defined by the statute.* 1 R. 108. (Emphasis Supplied).

- While a resident at Bedford Care Center, Mr. Davis was both physically and mentally weak, causing him to be totally dependent upon Defendants to provide for his every need. 1 R. 111.

As is clear from Davis's own admissions contained within pleadings part of the Record before the Court, this is not a case wherein the resident was deemed to be competent upon admission. Rather, factually, Theodore Davis was ". . . totally dependent upon Defendants. . . ." 1 R. 111. Thus, the Court's reasoning in *Magnolia Healthcare, Inc. v. Barnes*, is more appropriate in the case-at-bar. __ So. 2d __, 2008 WL 95814 (Miss. Jan. 10, 2008). In *Barnes*, the Court began with a review of the lower court's ruling and Magnolia Healthcare, Inc.'s basis for appeal:

> The trial court denied Magnolia's motion to compel arbitration and found that Grigsby did not possess the statutory or agency authority to bind Barnes to the arbitration provision in the nursing home admission agreement. Magnolia contends that Grigsby had the

> authority to bind Barnes to the arbitration agreement as Barnes's health-care surrogate under the Uniform Health-Care Decisions Act.

Id. at ¶ 5. The Court then looked to Mississippi jurisprudence regarding arbitration and particularly, a surrogate's ability to bind another to arbitration in a health care setting:

> "It is well established that this Court respects the ability of parties to agree to the means of dispute resolution prior to a dispute and enforces the plain meaning of a contract as it represents the intent of the parties." *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 740 (Miss. 2007) (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002); *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 108 (Miss. 1998). In *Covenant Health*, the Court recently addressed whether surrogates can bind patients by signing arbitration agreements on behalf of the patients. *Covenant Health*, 949 So. 2d at 736-37. At the time the trial court ruled on Magnolia's motion to compel arbitration, it did not have the benefit of this Court's holding in *Covenant Health*. The Court stated therein:
>
> Plaintiff(s) assert that the admissions agreement is procedurally unconscionable because Brown was incompetent and incapable of entering into a contract, and ***Goss had no authority to bind Brown.*** With regard to Goss's authority to bind Brown, Defendants cite Miss. Code Ann. § 41-41-211 (Rev. 2005). . . . Plaintiff's submit in their motion that Brown was ***incapable of managing her affairs at the time she entered the hospital.*** Neither party presents a declaration by Brown's primary physician stating she was incapable of managing her affairs prior to the signing of the admission agreement, but Plaintiff's state in their motion that Brown's admitting physician at the hospital found that she did not have the mental capacity to manage her affairs. Seeing that Brown was incapacitated by virtue of admission by her representatives and corroboration by her admitting physician, she was capable legally of having her decisions made by a surrogate. Her adult daughter, ***Goss, was an appropriate member of the classes from which a surrogate could be drawn,*** and thus ***Goss could contractually bind Brown*** in matters of health care.

Id. (quoting *Brown*, 949 So. 2d at 736-37). (Emphasis in original).

After determining Barnes was incapable of managing her affairs and a further finding Grigsby acted as her health care surrogate in admitting her to Magnolia Healthcare, Inc., the Court reversed the Washington County Circuit Court's denial of arbitration: "We find that Mississippi Code Annotated Section 41-41-211 and this Court's holding in *Covenant Health*, 949 So. 2d at 737, provide Grigsby authority as Barnes' health-care surrogate to bind Barnes to arbitration. Therefore, the trial court erred in denying Magnolia's motion to compel arbitration." *Id.* at ¶ 14.

In reaching this conclusion, the Court thus upheld the language of the arbitration agreement – this language was also upheld in *Community Care Center of Vicksburg, LLC v. Mason*, 966 So. 2d 220 (Miss. Ct. App. 2007). The agreement to arbitrate was part of a fully enforceable contract and as the Court found in *Vicksburg Partners, L.P. v. Stephens*, "[a]rbitration is about a choice of forum – period." 911 So. 2d 507, 525 (Miss. 2005). In "construing contracts, a general rule is to give effect to the mutual intentions of the parties contracting." *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170, 176 (Miss. 2007) (citing *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989)). In *MS Credit Center, Inc. v. Horton*, this Court found, "***[u]nder Mississippi law. . . parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it.***" 926 So. 2d 167, 177 (Miss. 2006). (Emphasis supplied). The claims asserted by Ms. Davis cover the entire time-frame of Mr. Davis's residency at the Facility; therefore, the arbitration agreement should be enforced and her claims

resolved through alternative dispute resolution – alternative dispute resolution she agreed to on November 12, 2002.

C. Theodore Davis was a Third-Party Beneficiary to the November 12, 2002 Admission Agreement; therefore, arbitration is mandated.

When Davis executed the Admission Agreement which contained the arbitration agreement at issue, Theodore Davis became the recipient of the benefits contained therein. He became the third-party beneficiary to the contract. In arguing against enforcement, Davis glosses over the import of a recent Mississippi Court of Appeals decision, *Trinity Mission of Clinton, LLC v. Barber*, __ So. 2d __, 2007 WL 2421720 (Miss. Ct. App. Aug. 28, 2007).[4] The resident in *Barber*, as with Theodore Davis, received the benefit of the bargain entered into on his 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 further found, "[t]he plain language of the admissions agreement indicates the clear intent of the parties to make [the resident] a third-party beneficiary." *Id.*

In the instant matter, the clear language of the contract indicates the incontrovertible

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[4]The Court of Appeals has also applied the third-party beneficiary logic to *Trinity Mission Health and Rehab of Clinton v. Scott*, __ So. 2d __, 2008 WL 73682 (Miss. Ct. App. Jan. 8, 2008) and *Forest Hill Nursing Center, Inc. v. McFarlan*, __ So. 2d __, 2008 WL 852581 (Miss. Ct. App. April 1, 2008). In *Alterra Healthcare Corp. v. Linton*, a Florida appellate court also applied the third-party beneficiary argument to a matter on appeal as to the enforceability of arbitration: "But the trial court correctly concluded that Mrs. Linton was an intended third-party beneficiary of the agreement in the present case. A nonsignatory third-party beneficiary is bound by the terms of a contract containing an arbitration clause." 953 So. 2d 574, 579 (Fla. App. 1 Dist. 2007).

intent of the parties – that Theodore Davis benefit through the receipt of health care, living assistance and food and lodging. The *Barber* Court correctly found the resident's care to be "the *sine qua non* of the contract." *Barber*, 2007 WL 2421720, at *5. "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.* (quoting *Burns v. Washington Savs.*, 171 So. 2d 322, 324-25 (Miss. 1965)). As in *Barber*, the Facility agreed to furnish room, board, linens and bedding, nursing care and certain personal services. *Id.* The Facility undertook the contractual duty to continue to provide care to Theodore Davis. Supp.R. 217-223.

In *Barber*, the Court held "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 Davis and the Facility was entered into for the benefit of Theodore Davis; therefore, he was a third-party beneficiary under the contact. Pursuant to the clear dictate of *Barber*, Davis as well as Mr. Davis's wrongful death beneficiaries are bound to the arbitrate all claims against Appellants.

II. DISCOVERY IS NOT NECESSARY TO DETERMINE THE ENFORCEABILITY OF THE ARBITRATION AGREEMENT.

Davis requests further discovery on the issue of arbitration. Davis, however, has already undertaken discovery before the lower court on the issue of arbitration. Thus, further discovery would be futile. Arbitration clauses have been routinely upheld following a review of the contents of the contracts, without the need for outside discovery. In addition to *Stephens*,

Brown, *Mason* and *Barnes*, cases include: *Cleveland v. Mann*, 942 So. 2d 108 (Miss. 2006); *Forest Hill Nursing Center, Inc. v. McFarlan*, __ So. 2d __, 2008 WL 852581 (Miss. Ct. App. April 1, 2008); *Covenant Health and Rehabilitation of Picayune, LP v. Lumpkin*, __ So. 2d __, 2008 WL 306008 (Miss. Ct. App. Feb. 5, 2008); *Trinity Mission Health and Rehab of Clinton v. Scott*, __ So. 2d __, 2008 WL 73682 (Jan. 8, 2008); and *Trinity Mission of Clinton, LLC v. Barber*, __ So. 2d __. 2007 WL 2421720 (Miss. Ct. App.) (Aug. 28, 2007).

In support of this argument, Davis cites numerous cases, the majority of which concerns either procedural and substantive unconsionability or investigations into the impartiality of the arbitral forum. The Appellate Courts in this State 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. *See supra.* Such discovery would frustrate the very purpose of arbitration as an expedited and less expensive method of resolving disputes between parties. In *Stephens*, the Court held no further investigation other than the four corners of the agreement is necessary to make a determination as to substantive unconsionability. *Stephens*, 911 So. 2d at 521.

Davis relies heavily upon *Walker v. Ryan's Family Steak Houses, Inc.* in support of her demand for discovery. 400 F.3d 370 (6th Cir. 2005). The court in *Walker*, however, did not discuss permitting arbitration-related discovery. The only mention of discovery at all concerned a finding that the arbitral forum was not impartial because it only allowed for limited discovery. *Walker*, 400 F.3d at 373. In *Morrison v. Circuit City Stores, Inc.*, another case cited by Davis, the court only discussed the impact of limitations on discovery once in arbitration – not on conducting discovery prior to a determination of whether a matter is referable to arbitration. 317

F.3d 646 (6th Cir. 2003).

Davis argues discovery is important because she claims the Appellants breached fiduciary duties owed to Theodore Davis. No such fiduciary relationship existed. 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). ("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 defined when 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.* No such duty was owed to Theodore Davis.

Appellants were not in a position to "exercise a dominant influence," nor an "overmastering influence" over either Theodore or Patricia Davis. Appellants provided health care services to and for Theodore Davis. Such care was contracted by Patricia Davis, Theodore Davis's attorney-in-fact and health care surrogate. The Mississippi Court of Appeals has held 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)). If any such fiduciary relationship existed, it existed between Theodore Davis and Patricia Davis, as his attorney-in-fact and surrogate, and not between Appellants and Theodore Davis. Furthermore, ths issue of a fiduciary duty is not relevant to whether the arbitration agreement is enforceable. Consequently, no reason exists to conduct arbitration-related discovery in the instant matter.

III. THIS MATTER IS RIPE FOR CONSIDERATION BY AN ARBITRATOR.

Davis argues against enforcement of the agreement to arbitrate because of a reference in the agreement to the American Health Lawyers Association (hereinafter "AHLA"). This argument in no way strengthens her claim that the arbitration agreement be deemed unenforceable. The Admission Agreement at issue provides for use of the AHLA ". . . Alternative Dispute Resolution Service Rules of Procedure which are hereby incorporated into this agreement. . . ." Supp.R. 221. The contract itself does not require use of the AHLA, but rather use of its *procedural rules* during the arbitration hearing itself.

With that said, although the AHLA has amended its rules for consumer cases, "[i]f a Court orders parties to arbitrate a consumer healthcare liability claim through the AHLA ADR Service, the AHLA will agree to administer the arbitration even though the parties have not executed a post-dispute arbitration agreement." Supp.R. 232-33. Further, "[i]n circumstances

where a Court simply orders parties to arbitrate a consumer healthcare liability claim according to the AHLA ADR Service Rules, the AHLA will not administer the arbitration, but recommends that its Rules of Procedure be applied by another arbitration service." *Id.*

The actions of the AHLA 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 flowing 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 stated:

> 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, 923 So. 2d 1077, 1092 (Ala. 2005) (quoting *Ex Parte Warren*, 718 So. 2d 45, 48 (Ala. 1998)). (Emphasis supplied). "[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 logic applies to the instant matter. The parties bargained for arbitration; the simple fact that the AHLA has adopted a policy concerning health care arbitrations does not render the agreement to arbitrate unenforceable.

IV. THE REASONING OF *COVENANT HEALTH & REHAB V. BROWN* SHOULD BE REAFFIRMED.

Davis has requested *Covenant Health & Rehab v. Brown* be overturned, arguing contracting for health care does not constitute a "health care decision" under the guise of

Mississippi Code Annotated, § 41-41-211. Appellants, however, respectfully 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 State's 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 produce a decidedly odd effect, by allowing a surrogate to make decisions about whether a patient receives potentially life-saving medical treatment – such as through a DNR – but not permitting that person to enter into contracts giving effect to 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 allowing the surrogate to enter into a contract concerning such care. *See Allred v. Webb*, 641 So. 2d 1218, 1222 (Miss. 1994) (citation omitted) (A law which imposes a duty implies necessary power to achieve those duties.).

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 make decisions about the medical care a patient is to receive, a surrogate must be able to enter into binding contracts 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 eviscerate the surrogacy statute as nearly every health care interaction with a new provider is preceded by the execution of a contract.

The Minimum Standards of the Mississippi Department of Health for the operation of a nursing home requires "[p]rior to or at the time of admission, the administrator and the resident

or the resident's responsible party ***shall*** execute in writing a financial agreement." Nursing Homes, Minimum Standards, § 404.3. (Emphasis supplied). The regulations further provide, "The resident or his lawful agent shall be furnished with a receipt . . . for all sums paid over to the facility." Nursing Homes, Minimum Standards, § 404.3(d). If the regulations are to be complied with by entering into a valid admission agreement and providing the resident or his agent a receipt for sums paid (or continued residency in the case of an individual who returns from a hospitalization such as the case-at-bar) *someone* must have the authority to enter into a contract on behalf of the resident.

If surrogacy is not an option, then time-consuming and expensive conservatorships must be established or powers of attorney must be executed prior to admitting a resident 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 prior to entering into contracts to receive the health care their parents, grandparents or spouses urgently need. Instead, the Legislature codified an individual's ability to enter contract as the one presently before the Court on a loved one's behalf.

CONCLUSION

The claims asserted by Patricia Davis, including wrongful death claims, are derivative, relate directly to the services rendered to Theodore Davis and fall within the purview of the Admission Agreement's valid and fully enforceable arbitration agreement. Accordingly, Patricia Davis is bound to the contractual decision she made on her Husband's behalf – a decision to arbitrate. Appellants respectfully request the Court disregard Davis's attempt to circumvent the binding contract and reverse the lower court's denial of arbitration.

Dated, this the 7th day of April, 2008.

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 ***Reply Brief of Appellants*** and foregoing was sent via United States Mail, postage pre-paid to the following:

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This the 17th day of April, 2008.

Heather M. Aby