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

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, Esq., Marjorie S. Busching, Esq. and Heather M. Aby, Esq. - 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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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument would not aide resolution of the issue before the Court. The jurisprudence concerning arbitration in the nursing home context has been examined and ruled upon by the Court; as such, oral argument is unnecessary.

STATEMENT OF THE ISSUE

Whether the lower court erred in refusing to enforce a valid agreement to arbitrate.

STATEMENT OF THE CASE

On August 25, 2004, Patricia Davis, Individually and as Personal Representative of the Estate of Theodore Davis, filed suit in Forrest County Circuit Court alleging Theodore Davis suffered personal injuries while a resident of Bedford Care Center-Monroe Hall.[1] 1 R.10-42. In response and in lieu of filing an answer to the specific allegations of the Complaint, the named Defendants, Bedford Health Properties, LLC, Hattiesburg Medical Park, Inc., Hattiesburg Medical Park Management Corp., Michael McElroy, Jr. and Robert Perry requested the lower court stay proceedings and enforce arbitration pursuant to the terms and conditions of the November 12, 2002 Admission Agreement entered into between Patricia Davis, Wife and Responsible Party of Theodore Davis, and Bedford Care Center-Monroe Hall.[2] 1 R. 45-53. Thereafter, Scott Clifton "Toby" Davis, son of Theodore Davis, acting as Intervener, objected to the binding nature of the arbitration agreement because he was not a party thereto. 1 R. 78–89. Patricia Davis also refused to submit her claims to binding arbitration, arguing the Admission Agreement was unconscionable, unenforceable and illegal. 1 R. 90-130. Following full briefing on the matter, the lower court denied Defendants' Motion to Dismiss and Motion to Compel Arbitration and Stay Proceedings. 2 R. 183.

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[1]Appellants citation form is as follows: Citation to the record is (__ R. __) and (Supp.R. __).

[2]On June 30, 2006 a final judgment was entered dismissing McElroy-York Life Care Facilities, LLC and McElroy-York Life Care Community, LLC.

STATEMENT OF THE FACTS

At the time of admission to Bedford Care Center-Monroe Hall, although only sixty-five (65) years of age, Theodore Davis had been diagnosed with Alzheimer's and Dementia. 1 R. 143. Prior to admission he had also suffered from five (5) strokes. *Id.* On November 12, 2002, Patricia Davis, executed an updated Admission Agreement containing a binding agreement to arbitrate. Supp.R. 217-223. Section "E" of the Admission Agreement entitled, **"ARBITRATION - PLEASE READ CAREFULLY"**, provided that any claim arising out of or related to the admission agreement or the care Theodore Davis received at the Facility would be resolved exclusively through binding arbitration pursuant to the Federal Arbitration Act. Supp.R. 221-22. This section of the Admission Agreement had a space for resident or responsible party to initial. *Id.* Ms. Davis initialed this section, thus evidencing her having carefully read the provision.

This Section also provided, in bold font: "**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.**" Supp.R. 221. Contained within Section "E" was also a right to rescind:

> 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.

Supp.R. 222. The agreement was never rescinded.

In executing the updated Admission Agreement, Patricia Davis acted consistent with the September 20, 2000 Durable Power of Attorney for Health Care of Theodore Alton Davis, wherein she was designated as his "Agent to make Health-Care Decisions." Supp.R. 234-245. Pursuant to the power of attorney, Ms. Davis, had authority to make health care decisions on her husbands behalf, including the "selection and discharge of Health Care Providers and Institutions. . . ." *Id.*

On August 25, 2004, in complete disregard for the binding contract previously executed, Patricia Davis filed suit in the Circuit Court of Forrest County, Mississippi. 1 R. 10-42. In an effort to avoid the arbitrable forum, she argued the agreement to arbitrate was unconscionable and the entire Admission Agreement was void and/or illegal. 1 R. 90-130. The lower court found her arguments persuasive and denied Defendants' Motion. 2 R. 183. This appeal ensued.

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)); *see also 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; *and IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998)).

II. The November 12, 2002 agreement to arbitrate is valid and should be enforced.

As this is an issue of contract construction, basic contract principles apply. Mississippi has long followed the four-corners rule when interpreting a contract. The goal of a court is to give effect to the intent of the parties. *Heartsouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105 (Miss. 2003). "'The general rule is the intention of the parties must be drawn from the words of the whole contract, and if, viewing the language used, it is clear and explicit, then the court must give effect to this contract unless it contravenes public policy.'" *Id.* (quoting *Jones v. Miss. Farms Co.*, 116 Miss. 295, 76 So. 880, 884 (1917)).

In looking to the four-corners, "'the court's concern is not nearly so much with what the parties may have intended but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning the meaning with fairness and accuracy.'" *Id.* (quoting *Warwick v. Gautier Utility District*, 738 So. 2d 212, 214 (Miss. 1999)). "Contracts must be interpreted by objective, not subjective standards, therefore '[c]ourts must ascertain the meaning of the language actually used, and not some possible but unexpressed intent of the parties.'" *Id.* (quoting *IP Timberlands Operating Co.*, 726 So. 2d at 105).

On November 12, 2002, Patricia Davis initialed her understanding of the following agreement to arbitrate:

> It is understood and agreed by the Facility and Resident and/or Responsible Party that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or relates to the Admission Agreement or any

service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration pursuant to the Federal Arbitration Act, to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration which are hereby incorporated into this agreement, and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any rights granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

******

The parties understand and agree that by entering into 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.

Supp.R. 221. The terms of the contract are clear - - each party must submit to binding arbitration any claims against the other arising out of Theodore Davis' residency at Bedford Care Center - Monroe Hall. As such, the lower court erred in denying arbitration.

III. Patricia Davis had authority to bind her husband to arbitration.

A. The September 20, 2000 Durable Power of Attorney for Health Care, executed by Theodore Davis, provided Patricia Davis full authority to act on his behalf.

"Generally speaking, our law regards as valid and enforceable as a power of attorney any written instrument signed by the principal and 'expressing plainly the authority conferred.'" *Kountouris v. Varvaris*, 476 So. 2d 599 (Miss. 1985) (quoting Mississippi Code Annotated § 83-3-7)). "A designated power of attorney is nothing more than one form of a principal-agency relationship." *Clark v. Ritchey*, 759 So. 2d 516, 518 (Miss. Ct. App. 2000) (citing *McKinney v. King*, 498 So. 2d 387, 388-89 (Miss. 1986)).

Patricia Davis, acting as her husband's agent, possessed the authority to make health care decisions for her husband, which included executing an updated Admission Agreement containing an agreement to arbitrate. There is no evidence Mr. Davis ever revoked this authority given in September of 2000. Supp.R. 234-45.

Although no case law is on point in Mississippi, an appellate court in California has upheld an arbitration provision contained within an admission agreement executed by a family member, acting as a resident's attorney-in-fact. In *Hogan v. Country Villa Health Services*, a California appellate court found a resident's designation of her daughter in a durable power of attorney for health care authorized the daughter to enter into a binding arbitration agreement with a nursing home. 148 Cal. App. 4th 259 (2007). The *Hogan* court held the lower court erred in denying the facility's motion to compel arbitration:

> The decedent had signed a Probate Code section 4701 health care power of attorney that authorized her daughter to make health care decisions for her, including the selection of health care providers.

> This authorization impliedly included the power to execute contracts of admission when having the decedent admitted to a long-term health care facility. ***Inasmuch as the decedent had not elected to restrict the powers of the daughter as her agent so as to exclude the power to enter into arbitration agreements, the daughter had the power to execute arbitration agreements when presented to her by the long-term health care facility as part of the package of admissions documents.***

Id. at 262. (Emphasis supplied). Patricia Davis' actions were consistent with authority conferred by Theodore Davis; this, it was erred to deny arbitration.

B. Alternatively, Patricia Davis acted as Theodore Davis' health care surrogate on November 12, 2002, when she executed the updated Admission Agreement on his behalf.

Should the Court determine Patricia Davis' authority, by virtue of the durable power of attorney for health care, to not include the ability to agree to an alternative forum for resolution of disputes, authority can be found in Mississippi's Health Care Surrogate Statute.[3] *See* Mississippi Code Annotated § 41-41-211. 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 Legislature recognized Mississippi citizens would be subjected to unnecessary expense, delay and bureaucratic red tape if family members were required to seek judicial approval prior to

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[3]Contracts concerning the provision of health care are an integral part of the 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 agreements to bring those decisions to fruition. In *Consolidated Resources Health Care Fund, I, Ltd., v. Fenelus*, a Florida appellate court held the resident's son as the resident's health care surrogate, "could execute the admission agreement, enforcing the arbitration provision contained therein." 853 So. 2d 500 (Fla. 4th DCA 2003).

entering into contracts concerning the health care of their loved ones. Rather than allow that scenario play out, the Legislature codified the ability of health care surrogates, like Patricia Davis, to enter into contracts such as the one before the Court.

In *Covenant Health & Rehab of Picayune, LP v. Brown*, the Court applied the Statute in the long-term care context, finding a surrogate had the power to enter into a contract requiring the resident arbitrate any claims he may have arising out of the treatment while at the Facility. 949 So. 2d 732, 737 (Miss. 2007). The Court found a health care surrogate's signature on a contract containing an arbitration agreement dictated any dispute arising out of that contract be submitted to binding arbitration. *Id.* at 742.

Based upon the clear language of the Statute, as well as the Court's recent ruling in *Brown*, it is clear Patricia Davis acted as her husband's health care surrogate on November 12, 2002. She stepped into this role and contractually bound him in matters of health care, including the agreement to arbitrate "any legal dispute, controversy, demand or claim . . . that arises out of or relates to the Admission Agreement or any service or health care provided by the Facility. . . ." Supp.R. 221. Thus, the lower court's denial of arbitration constitutes reversible error.

C. Patricia Davis possessed apparent authority to enter into a contract on behalf of her husband, Theodore Davis.

In addition to the above authority held by Patricia Davis, she further acted with apparent authority in entering into the updated Admission Agreement. The agreement to arbitrate now before the Court was executed by Patricia Davis, who held herself out to the Facility as her husband's Responsible Party and health care surrogate. In executing the contract, Ms. Davis specifically represented she had authority to act on his behalf. Theodore Davis accepted the

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.* In *Bailey,* the Mississippi Court of Appeals further explained:

> 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)).

Broughsville v. OHECC, LLC, further supports the argument Patricia Davis had authority to execute the updated Admission Agreement. 2005 WL 3483777 (Ohio App. 9 Dist. 2005). In *Broughsville*, an Ohio appellate court reviewed whether "Appellant's daughter . . . had the authority to bind Appellant to arbitration, effectively waiving her right to a jury trial." *Id.* at *1. The court held, "[e]ven setting aside the arguably self-serving nature of this statement, the question is not whether [the daughter] had *actual* authority to bind Appellant to arbitration, but whether she had apparent authority to do so." *Id.* (Emphasis in original). The court explained how authority may arise in the long-term care context:

> The authority for one party to bind another can arise in several ways. The Ohio Supreme Court has held that: 'Even when assuming to act as agent for a party in the making of a contract has no actual authority to so act, such party will be bound by the contract if such party has by his words or conduct, reasonably interpreted, caused the other party

> to the contract to believe that the one assuming to act as agent had the necessary authority to make the contract.'

Id. (Citations omitted).

The *Broughsville* court next found apparent authority present, bringing the appellant under the guise of arbitration:

> The present case is a classic example of apparent authority. [The resident's daughter] by signing the Agreement on behalf of her mother, acted in such a way that a reasonable person could believe that she had the necessary authority to make the contract. Regardless of actual authority, circumstances were such at the time of the signing that [the daughter's] conduct could be interpreted as authority to enter into an agreement on Appellant's behalf.

Id.

When Patricia Davis came to Bedford Care Center-Monroe Hall, she read, signed, and agreed to the terms of the updated Admission Agreement, and held herself out as her husband's substitute. Bedford Care Center-Monroe Hall believed, just as the archetypical reasonable, prudent person would, that Patricia Davis had the authority to act on Theodore Davis' behalf. Accordingly, the lower court erred in denying arbitration.

IV. Theodore Davis was a third-party beneficiary to the Admission Agreement.

It is undisputed that Theodore Davis received care and services from Bedford Care Center-Monroe Hall based upon the terms and conditions of the updated Admission Agreement and, therefore, benefitted from the agreement. "'[A]rbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary." *Trinity Mission of Clinton, LLC v. Barber*, __ So. 2d __, 2007 WL 2421720, at *5 (Miss. Ct. App. Aug. 28, 2007 (Rehearing denied Dec.11, 2007)(quoting *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006)). This

Court has held as follows with regard to a third-party beneficiary – such as Theodore Davis– to a contract:

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

Burns v. Washington Savs., 171 So. 2d 322, 325 (Miss. 1965).

In *Barber*, the Mississippi Court of Appeals very recently held, in analyzing a resident's admission to a nursing home:

> The plain language of the admissions agreement indicates the clear intent of the parties to make Ms. Barber a third-party beneficiary. Ms. Barber's care is the *sine qua non* of the contract. She is named in the contract as the resident to be placed in Trinity's facility for care. It is beyond dispute that the benefits of receiving Trinity's health care services outlined in the admissions agreement flowed to Ms. Barber as a "direct result of the performance within the contemplation of the parties as shown by its terms." *Burns*, 171 So. 2d at 324-25. The admissions agreement states that, *inter alia*, "the facility agrees to furnish room, board, linens and bedding, general duty nursing and nurse aide care, and certain personal services." Trinity had a duty to provide these services to Ms. Barber and these rights "spring from the terms of the contract itself." *Id.*
>
> We find that the contract between Mr. Barber and Trinity was entered into for the benefit of Ms. Barber 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.

Barber, 2007 WL 2421720 at *6. Likewise, in the instant matter, Patricia Davis executed the

updated Admission Agreement on her husband's behalf and for his benefit. Thus, any claims arising ". . . out of or relat[ing] to the Admission Agreement *or any service or health care provided by the Facility to the Resident, shall be resolved by binding arbitration. . . .*" Supp.R. 221. Based upon the clear language of the Admission Agreement, all claims arising out of Mr. Davis' residency at Bedford Care Center-Monroe Hall are to be resolved through binding arbitration. The lower court erred in denying same.

V. Both Theodore Davis' Estate, as well as Patricia Davis, and all Wrongful Death Beneficiaries are bound to arbitrate.

By executing the updated November 12, 2002 Admission Agreement, Patricia Davis bound herself, as well as Theodore Davis' Estate, and the Wrongful Death Beneficiaries to binding arbitration. "The United States Supreme Court has held '[i]t is a presumption of law that the parties to a contract bind not only themselves but their personal representatives:" *Brown,* 949 So. 2d at 738 (quoting *United States ex rel Wilhelm v. Chain,* 300 U.S. 31, 35 (1937)). "This Court has held that arbitration agreements, specifically are not invalidated by the death of a signatory and may be binding on successors and heirs if provided in the agreement." *Id.* (citing *Cleveland v. Mann,* 942 So. 2d 108, 118 (Miss. 2006)). Furthermore, "[a] wrongful death suit is a derivative action by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent." *Carter v. Miss. Dep't. of Corrections,* 860 So. 2d 1187, 1192 (Miss. 2003) (citing *Wickline v. U.S. Fid. & Guar. Co.,* 530 So. 2d 708, 715 (Miss. 1998)).

The agreement to arbitrate is binding on ". . . the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons who[se] claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor,

administrator, legal representative, or heir of the Resident." Supp.R. 223. "Because [Mr. Davis'] claims would have been subject to arbitration, the claims of his wrongful death beneficiaries [and Estate] are likewise subject [to] the arbitration provision. *Barber*, 2007 WL 2421720, at *6.

Patricia Davis should be equitably estopped from arguing the contract is invalid. *See Heritage Cablevision v. New Albany Electric Power System*, 646 So. 2d 1305, 1310 (Miss. 1994) ("Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, or benefits from . . . a contact. . . which he might have rejected . . . 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.").

VI. Pursuant to *Vicksburg Partners, L.P. v. Stephens* and *Covenant Health Rehab of Picayune, L.P. v. Brown*, the lower court erred in denying arbitration.

Following a finding Patricia Davis possessed authority to execute the updated Admission Agreement, the remaining inquiry requires an analysis of conscionability.[4] "[T]he doctrine of 'unconcionability 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."

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[4]At the trial court level, Patricia Davis argued provisions of the Admission Agreement were illegal, improper or in violation of state and federal regulations; thus, voiding the contract as a whole. Such a determination is for an arbitrator, and not probative in determining whether the arbitration provision is conscionable. As such, and in accord with *Holman Dealerships, Inc. v. Davis*, the Court should overrule the lower court's denial of arbitration, sending the matter to arbitration for a determination of the underlying dispute. 934 So. 2d 356, 358-59 (Miss. Ct. App. 2006). *See also Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) ("court's inquiry on a motion to compel arbitration is limited").

Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 516-17 (Miss. 2005).

> *Procedural* unconcionability is applicable to the overall formation of the contract in which the subject clause (such as the arbitration clause) is contained, whereas *substantive* unconcionability is applicable only to the subject clause (such as the arbitration clause) itself. Thus, while procedural unconcionability must be discussed as to the formation of the overall contract, it must also be discussed as to the arbitration contract itself, since the arbitration clause is contained within the overall contract. On the other hand, when discussing and applying substantive unconsionability, we are looking only to a particular clause within the contract, such as an arbitration clause. We are not looking at the overall contract.

Id.

"In *Vicksburg Partners*, this [C]ourt considered an assertion of procedural unconcionability where the daughter, serving as the responsible party, admitted her father to a nursing home." *Brown*, 949 So. 2d at 737 (citing *Stephens*, 911 So. 2d at 510, 516-20 (Miss. 2005)). A court must take into account two considerations when determining whether a contract is procedurally unconscionable: "(1) lack of voluntariness and (2) lack of knowledge." *Id.* (citing *Stephens*, 911 So. 2d at 517-18 (citing *Entergy Miss., Inc.*, 726 So. 2d. at 1207)).

In *Brown*, the Court found contracts of adhesion not automatically void, but "the party seeking to avoid the contract generally must show that it is unconscionable." *Id.* (quoting *Stephens*, 911 So. 2d at 513). In both *Stephens* and *Brown*, the format of the arbitration provision was found to be procedurally conscionable:

> [T]here were no circumstances of exigency; the arbitration agreement appeared on the last page of a six-page agreement and was easily identifiable as it followed a clearly marked heading printed in all caps and bold-faced type clearly indicated that section "F" was about "Arbitration," the provision itself was printed in bold-faced type of equal size or greater then the print contained in the rest of the document; and, appearing between the arbitration clause and the signature lines was an all caps bold-faced consent

> paragraph drawing special attention to the parties' voluntary consent to the arbitration provision contained in the admission agreement. Under these facts, it can not be said that there was either a lack of knowledge that the arbitration provision was an important part of the contract or a lack of voluntariness in that [the resident and his responsible party] somehow had no choice but to sign.

Id. Likewise, in the instant matter, the arbitration provision contained font of equal size; the provision was highlighted by all caps, bold faced type and a line to initial; the language was simple and non-legalistic and an acknowledgment paragraph was set forth above Patricia Davis' signature. Thus, the agreement was procedurally conscionable.

In order to determine whether a contract is substantially unconscionable, this Court looks to ". . . the four corners of an agreement." *Brown*, 949 So.2d at 733. "Substantive unconcionability is present when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach." *Stephens,* 911 So. 2d at 521 (citing *Bank of Indiana v. Holyfield*, 476 F. Supp. 104-110 (S.D. Miss. 1979.) In *Stephens*, this Court found "arbitration agreements merely submit the question of liability to another forum – generally speaking, they do not waive liability." *Id.* at 522.

In the case-at-bar, the contract is facially valid, containing none of the limiting language stricken in *Stephens* and *Brown*. This agreement does not limit recovery in any way and further set forth *both* a right to legal advice and a right to rescind:

> 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 of the furnishing of services to the Resident by 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.

2 R. 183.

In addition, the waiver provision was in bold font, clearly setting forth "the parties" limitation as to a jury trial:

> **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 jury.**

__ R. __. (Emphasis in original). In *Brown*, this Court addressed the argument head-on:

> ***The provision has the same effect as signing an arbitration agreement.*** It is well established that this Court respects the ability of parties to agree to the means of a dispute resolution prior to a dispute and enforces the plain meaning of a contract as it represents the intent of the parties.

Brown, 949 So. 2d at 740 (citing *Russell,* 826 So. 2d at 922; *I.P. Timberlands Operating Co.,* 726 So. 2d at 108). (Emphasis supplied). The rationale is the same in the instant matter, with both Bedford Care Center-Monroe Hall and Patricia Davis waiving their right to a jury trial.

In *Brown*, this Court reiterating Mississippi jurisprudence favoring arbitration, stated, "[s]eeing that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,' one factor negating an assertion of unconcionability was that the provision was typical of those endorsed by the Federal Arbitration Act." *Brown*, 949 So. 2d at 741. (quoting *Stephens*, 911 So. 2d at 513, 521). The Court further found the "provision contained another characteristic of a conscionable provision in that it was found to bear "some

reasonable relationship to the risks and needs of this business." *Id.* (quoting *Entergy Miss., Inc. v. Burdette Gin, Co.*, 726 So. 2d 1202, 1207 (Miss. 1998)).

In this matter, as in *Stephens* and *Brown*, the arbitration provision contained within the Admission Agreement bears a reasonable relationship to the risks and needs of Bedford Care Center-Monroe Hall. The business of custodial care, includes daily medical treatment and nursing care, all pursuant to doctor's prescriptions and orders, professional care plans drawn up specifically for the resident by a team of trained care givers in a highly regulated and inspected environment. There is an undisputed relationship to the risks and needs of the nursing home profession and the need to keep their costs down in order to continue operating. To resolve disputes through arbitration rather than litigation is one step that is being taken. Avoiding the expense of litigation through the use of arbitration still preserves the right of an individual to recover damages where appropriate. The arbitration provision is not oppressive or unconscionable, but rather, provided Patricia Davis, as Theodore Davis' Responsible Party, and Theodore Davis a ". . . fair process through which to pursue. . . claims." *Brown*, 949 So. 2d at 741. Thus, the lower court erred in denying the Motion to Compel Arbitration.

CONCLUSION

Contracts like the one entered into by Patricia Davis on November 12, 2002, ". . . are solemn obligations, and the court must give them effect as written." *Brown*, 949 So. 2d at 741 (citing *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 487 (Miss. 2005)). "Parties may agree to the means of dispute resolution, in any way they desire." *Id.* This Court aptly found in *MS Credit Center, Inc. v. Horton*, "[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). The claims asserted by Patricia Davis relate directly to the services rendered to her husband and are subject to consideration by an arbitrator, not a judge and jury. Thus, the lower court erred in not ordering the Parties to binding arbitration pursuant to the terms and conditions of the November 12, 2002 agreement to arbitrate.

Dated, this the 13th day of December, 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 ***Brief of Appellants*** and foregoing was sent via United States Mail, postage pre-paid to the following:

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This the 19th day of December, 2007.

Heather M. Aby