IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NO. 2007-CA-01250-SCT

Covenant Health & Rehabilitation of Picayune, LP; Covenant Dove, Inc.; and Unidentified Entities 1 through 10 (as to Picayune Convalescent Center, now known as Covenant Health and Rehabilitation Center of Picayune) — APPELLANTS

versus

Estate of Mittie M. Moulds, by and through James Braddock, Administrator, for the use and benefit of the Estate and Wrongful Death Beneficiaries of Mittie M. Moulds — APPELLEE

RULE 17 SUPPLEMENTAL BRIEF OF APPELLEE-PETITIONER

F. M. Turner, III (MB#[redacted]
F. M. Turner, III, PLLC
P.O. Box 15128
Hattiesburg, MS 39404-5128
Tel: (601) 264-7775
Fax: (601) 264-7776

Attorney for Appellee-Petitioner

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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 Covenant Health and Rehabilitation of Picayune, L.P.; and Covenant Dove, Inc.
2. Plaintiffs/Appellees James Braddock and Estate of Mittie Moulds
3. John L. Maxey, II, Esquire and Heather M. Aby, Esquire, Attorneys for Defendants/Appellants
4. F. M. Turner, III, Esquire, Attorney for Plaintiffs/Appellees
5. The Honorable R. I. Prichard, III, Pearl River County Circuit Court Judge

F. M. Turner, III (MB[redacted]
Attorney for Appellees

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The Defendants – owners and operators of nursing homes for the care of the aged and infirm – argue in their Supplemental Brief that this Court's following of its own decision in *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So. 2d 211 (Miss. 2008), would somehow "undermine" the surrogacy provisions of the Uniform Health-Care Decisions Act. They state: "If surrogacy is not an option, then time-consuming and expensive conservatorships must be established or powers of attorney must be executed to admit patients into a long-term care facility, something which an incompetent would-be resident no longer has the competency to do." (Appellant's Supplemental Brief *at* 1) However, nothing in *Hinyub* or its application to this case would create such a result. This is a pure scare tactic.

In its unanimous decision[1] in *Hinyub*, the Supreme Court stated:

> ¶16. ... **[U]nder the [Uniform Health Care Decisions] Act, the authority of a health-care surrogate is limited to making "health-care decisions."** According to Miss. Code Ann. § 41-41-203 (h):
>
> > "Health care decision" means a decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including:
> >
> > (i) Selection and discharge of health-care providers and institutions;
> >
> > (ii) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and

[1] Seven Justices joined the majority opinion in *Hinyub*, with Presiding Justice Diaz and Justice Graves concurring in the result only. One week later, in *Magnolia Healthcare, Inc. v. Barnes*, 994 So. 2d 159 (Miss. 2008), Justice Graves, in an opinion joined by Presiding Justice Diaz, asserted that an arbitration provision in a nursing home admission agreement is not a "health-care decision" as defined by Miss. Code Ann. § 41-41-203(h). *Barnes*, 994 So. 2d at 163-64 (¶¶19-21).

> (iii) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care."

975 So. 2d at 218 (¶16)(emphasis added). Nothing in *Hinyub* or its application in the instant case undermines this rule. Surrogates before *Hinyub* had the authority to make health care decisions, and they continue to do so today. What was made clear by *Hinyub* was that surrogates could **only make decisions related to health care.** Clearly, a health care surrogate is empowered to make a decision regarding "[s]election ... of health-care providers and institutions." Miss. Code Ann. §§41-41-203(h)(i). Necessarily implied in the selection of a health-care provider or institution is the capacity to agree for the provision of health care services by such provider and payment for such services. The Court need go no further to discuss the settled question of how the parties are to deal with other agreements affecting the resident **outside of the provision health care**, whether provision of ancillary services like telephone, cable television or beautician services, or the resolution of disputes by arbitration. If the resident is not competent, and no person is empowered to act as her agent, then settled law requires appointment of a conservator to make such decisions for her.[2] The Court's decision in *Hinyub* imposes no new or greater burden on the parties to such agreements.

To the extent that *Covenant Health Rehab of Picayune v. Brown*, 949 So. 2d 732 (Miss. 2007) and *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005), had blurred that limitation, *Hinyub* clarified the interpretive gloss that had been placed on the statutory language. In doing so, the Court qualified the *Brown* and *Stephens* rulings:

> [I]n both *Covenant Health Rehab of Picayune v. Brown*, 949 So. 2d 732 (Miss. 2007) and *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005), this Court found that execution of the arbitration provision as part of the admissions agreement was part

[2] It should also be pointed out that a conservator would not have the authority to execute an arbitration agreement waiving the constitutional rights of the ward or her right to collect her full legal damages, absent Chancery Court approval. *See, e.g.*, Miss. Code Ann. §93-13-59.

> of the "health-care decision," [because] the arbitration provision was an essential part of the consideration for the receipt of "health care" in those instances. On the other hand, in today's case, Hinyub was not required to sign the arbitration provision to admit Don Wyse to the Mississippi Care Center of Greenville....
>
> ...
>
> ¶17. Since signing the arbitration provision was not a part of the consideration necessary for Wyse's admission to MCCG and not necessarily in the best interest of Wyse as required by the Act, Hinyub did not have the authority as Wyse's health care surrogate to enter into the arbitration provision contained within the admissions agreement.

975 So. 2d at 218 (¶¶16-17).

Attempting to come within the limited rulings in *Brown* and *Stephens*, the Defendants next state: "The agreement to arbitrate is an integral part of the contract to provide skilled nursing care which must be signed at the time the resident is admitted to the nursing home." (Appellant's Supplemental Brief *at* 1) This is untrue as an assertion of fact in this case. In the present case, the Defendants asserted – after suit was filed – that the execution of the arbitration provision was *not* a condition for the resident's admission to the facility or the provision of health care while a resident. The Defendants offered the affidavit of the nursing home's administrator, Keri H. Ladner, to establish this fact:

> Our facility has never refused to admit an individual based on a refusal to consent to the Arbitration Agreement aspect of the Admission Agreement. A refusal to consent to the Arbitration Agreement would not lead the facility to refuse admittance.

(Affidavit of Keri Ladner, December 7, 2006, R. 58-60, at R. 59, ¶6, Appellants' Record Excerpts at 9) Just as in *Hinyub*, the Defendants in this case take the position that neither Mrs. Moulds' admission to the nursing home nor the provision of services to her while a resident was dependent upon execution of the arbitration clause. Therefore, just as in *Hinyub*, James Braddock was not required to sign the arbitration agreement to admit her mother to the nursing

home. To paraphrase the Court's opinion in *Hinyub,* "Since signing the arbitration provision was not a part of the consideration necessary for [Mittie Moulds'] admission to [Covenant Health & Rehabilitation] and not necessarily in the best interest of [Mittie Moulds] as required by the Act, [James Braddock] did not have the authority as [Mittie Moulds'] health care surrogate to enter into the arbitration provision contained within the admissions agreement. Because [James Braddock] lacked authority to enter into the arbitration provision within the admission agreement, the arbitration agreement is invalid." *See Hinyub,* 975 So. 2d at 219 (¶¶17-18).

CONCLUSION

The decision of the Court of Appeals must be reversed and the decision of the Circuit Court affirmed.

Respectfully submitted,

The Estate of Mittie M. Moulds, by and through James Braddock, Administrator

F. M. Turner, III (MS Bar No[redacted]
F. M. TURNER, III, PLLC
P.O. Box 15128
Hattiesburg, MS 39404-5128)
Tel: (601) 264-7775
Fax: (601) 264-7776

Attorney for Appellee

CERTIFICATE OF SERVICE

I, F. M. Turner, III, attorney of record for Appellee, do hereby certify that I have this day mailed, postage prepaid, true and correct copies of the foregoing document to:

The Honorable R. I. Prichard, III
Pearl River County Circuit Judge
P.O. Box 1075
Picayune, MS 39466

John L. Maxey, II, Esq.
Heather M. Aby, Esq.
Maxey Wann, PLLC
P. O. Box 3977
Jackson, MS 39207-3977

Attorneys for Appellants

This 12th day of March, 2009.

F. M. Turner, III (MS Bar No[redacted]