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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Covenant Health and 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-RESPONDENTS**

v. — **Docket No.: 2007-CA-01250-COA**

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 — **APPELLEES-PETITIONERS**

RULE 17 SUPPLEMENTAL BRIEF OF APPELLANTS-RESPONDENTS

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IN THE SUPREME COURT OF MISSISSIPPI
Case No.: 2007-TS-01250

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VS.

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 — APPELLEES PETITIONERS

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 Rehab of Picayune, LP; and Covenant Dove, Inc.;

2. Plaintiff/Appellee 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;

3. John L. Maxey II, Esquire; S. Mark Wann, Esquire; Heather M. Aby, Esquire, Maxey Wann PLLC - Attorneys for Appellants;

4. F.M. Turner, Esquire - Attorney for Appellees-Petitioners; and

5. The Honorable Prentiss G. Harrell, Pearl River County Circuit Court Judge.

John L. Maxey II

JAMES BRADDOCK AS HIS MOTHER'S HEALTH CARE SURROGATE AGREED TO THE ALTERNATIVE DISPUTE RESOLUTION CONTAINED IN THE NOVEMBER 16, 2000 AND APRIL 24, 2002 ADMISSION AGREEMENTS

Should the Court reverse the Court of Appeals decision – and in effect reverse *Covenant Health and Rehab of Picayune LP v. Brown* decision – the objective of the Uniform Health-Care Decisions Act will be undermined. 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. The Mississippi legislature recognized citizens of this state would be subjected to unnecessary expense, delay, and bureaucratic red tape if family members were required to pursue judicial intervention before entering into contracts to receive the health care their parents, spouses or other loved ones urgently need. Instead, the legislature codified the ability of family members to enter into just such contracts at issue in the case at bar. The legislature, while considering which restrictions would apply concerning what constitutes a health care decision, made no such restriction as to arbitration provisions.

The issue here is whether a health care surrogate has the authority to bind a nursing home resident to arbitration as a forum for resolving disputes which arise between the parties. 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. Petitioner Braddock incorrectly maintains an alternative dispute resolution agreement executed by a health care surrogate is not binding because it is not a health care decision.

In settled law, both federal and state courts recognize arbitration agreements are favored and

are to be enforced as any other contract. However, in situations wherein the would-be resident of a long term care facility is not competent, no conservatorship has been established and no power of attorney exists, to deprive the surrogate of authority to enter into such agreements effectively eliminates any and all persons with whom the facility may exercise this right of contract generally recognized to exist by the courts and specifically provided for in the Federal Arbitration Act. The facility's only alternative in such cases would be to require the surrogate to undergo the legal process of setting up a conservatorship before admission, a result which the Mississippi legislature specifically sought to avoid by adoption of the Uniform Health-Care Decisions Act (§41-41-201, *et seq.)*, especially where the need for the medical care is imperative.

James Braddock possessed the authority to enter into the November 16, 2000 and April 24, 2002 Admission Agreements (which were identical to each other) as Mittie Moulds' health care surrogate pursuant to the Act. Mittie Moulds resided at the defendant long term care facility from November 2000 until September 2004. During this almost four-year residency, the terms of the legal relationship between Braddock and Picayune Convalescent Center were defined by the Admission Agreements.

The act of admitting his mother into Picayune Convalescent Center and executing the November 16, 2000 Admission Agreement was a health care decision by James Braddock. When he made the decision to admit Moulds into the skilled nursing facility, the collateral provisions contained within the comprehensive, mutual contract became binding upon him, as her responsible party and health care surrogate – and are now binding upon the Estate of Mittie Moulds. These mutual agreements included the following:

A. Financial Agreement

The Patient and/or the Responsible Party shall pay to Facility basic daily room charges. . . . The Patient and/or Responsible Party shall be responsible for payment of additional charges for items or services not included in the daily room rate, at the established rates for such services/items. . . .

B. The Facility Agrees:

To furnish room, board, linens and bedding, general duty nursing and nurse aide care, and certain personal services. The Facility agrees to furnish general duty nursing and nurse aide care equal to at least the State Medicaid minimum hours per Resident day (this is generally approximately 2.0 to 2.8 hours per Resident day on average including nursing administration time). . . .

To orient the Resident to the Facility, its services and personnel, the type and level of nursing care given and the rights and privileges of the Resident. . . .

C. THE RESIDENT AND/OR RESPONSIBLE PARTY FURTHER AGREE:

To provide and be responsible for personal clothing or effects as needed or desired by the Resident.

To provide and be responsible for spending money as needed or desired by the Resident. . . .

E. OTHER IMPORTANT PROVISIONS

The Resident and Responsible Party availed themselves of the opportunity, if they deemed it desirable, to have had third party advice and legal counsel regarding this Agreement prior to its execution or will during the Termination period set forth in Article D.2.

All Parties hereto are hereby waiving all rights to a jury trial.

F. ARBITRATION

The Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures. . . .

THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS AGREEMENT,

INCLUDING THE ARBITRATION PROVISION AND HAS RECEIVED A COPY OF THIS AGREEMENT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO AND ACCEPTS ALL OF ITS TERMS AND PROVISIONS.

R. 61-66. Braddock executed both contracts as Moulds' Responsible Party. R.57 , 66 and 161.

Moulds received services of Picayune Convalescent Center pursuant to the valid, binding contracts. Braddock affirmatively stated he "...had for many years handled [his] mother's *personal affairs* and also acted as her "health care surrogate" to make decisions concerning her medical care and treatment." *Id.* (Emphasis added.) There is no evidence in the record to suggest Braddock made any objection to the terms and conditions of the Admission Agreements – that is, not until he filed suit in the circuit court.

Braddock has admitted he was his mother's health care surrogate, but argued he lacked authority to waive her right to a jury trial. This argument, however, proceeds from a false premise. The act of a surrogate to agree to arbitrate simply furthers the means of selecting a forum. *Vicksburg Partners, LP v. Stephens*, 911 So. 2d 507 (Miss. 2005). All substantive rights continue to be preserved. In arbitration, the plaintiff is entitled to the same rights of recovery of any damages to which he or she is entitled were they to file a suit in court. Clearly, a health care surrogate who has the right to contract for the numerous provisions set forth above also has the authority to make decisions on behalf of a resident as to a choice of forum in the event they decide to later bring a claim on behalf of the resident.

The underlying reasoning behind codification of the Uniform Health-Care Decisions Act was

to shield Mississippians from the unnecessary expense, delay and bureaucratic red tape which would otherwise be necessitated if family members were required to seek judicial authority prior to entering into contracts concerning the health care their parents, spouses or other loved ones require. Instead, the legislature enacted the Act so family members, such as Braddock, could enter into contractual agreements with health care providers on behalf of their loved ones to receive the skilled medical care they need. To enforce all provisions of the contract ***except for the choice of forum in which to bring any claim*** would allow the surrogate to pick and choose those provisions by which he should be bound, despite his having knowingly and voluntarily entered into the choice of forum provisions. Surely this cannot be the result intended by the Act.

Appellants assert a "health care decision" is broadly (rather than narrowly) construed language. The Act provides health care surrogates the authority to make decisions for patients. Necessarily, the authority granted to make those decisions must include the ability to enter into contracts concerning that care. The Mississippi legislature has specifically provided that a "health care decision made by a surrogate is effective without judicial approval." Miss. Code Ann. § 41-41-211(7). To hold otherwise would 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 (Do Not Resuscitate) designation – 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) (A law which imposes a duty implies necessary power to achieve those

duties).

Further, Miss. Code Ann. § 41-41-201, *et seq.* allows a surrogate to make *any* health care decisions – not strictly *necessary* health care decisions. The legislature did determine anatomical gifts or organ donations to *not be health care decisions*. The ability to enter into an arbitration provision on behalf of a family member was *not excluded*; thus, the legislature specifically chose not to include such a restriction as to arbitration and, respectfully, this Court should not write such an exclusion into the legislation. There is no doubt the surrogate in this case would be entitled to bring a claim against the defendant for any breach of its obligations under the same agreements at issue before this court. The surrogate should likewise be held to honor those obligations to which he knowingly and voluntarily agreed when obtaining health care for his mother.

THE COURT'S DECISION IN *COVENANT HEALTH & REHAB OF PICAYUNE, L.P. V. BROWN* SHOULD BE FOLLOWED

In the instant matter, there can be no dispute regarding James Braddock's actions as his mother's health care surrogate. This Court first recognized such authority in *Covenant Health & Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007). In *Brown*, the facts before the Court were as follows:

> Plaintiffs 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 that she was incapable of managing her affairs prior to the signing of the admission agreement, but Plaintiffs 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 representative and

> corroboration by her admitting physician, she was capable legally of having her decisions made by a surrogate.

Brown, 949 So. 2d at 736-37. Similar facts to those were presented to the Court of Appeals in this case, which reviewed the underlying facts as follows:

> Moulds was admitted to the Picayune Convalescent Center on November 16, 2000. At that time, she was suffering from Alzheimer's disease, dementia and depression. Due to these illnesses, her son, Braddock, signed the admissions agreement on her behalf as her health-care surrogate. The admissions agreement contained an arbitration clause requiring both parties to submit to binding arbitration in the event of any dispute.

Covenant Health & Rehabilitation of Picayune, LP v. Moulds, ___ So. 2d ___, 2008 WL 3843820 (Miss. Ct. App. 2008). Due to the similarity in the facts and applicability of the reasoning found in *Brown*, the Court of Appeals was bound to rely upon *Brown* in overruling the lower court's denial of arbitration. *Brown* should be followed here as binding precedent. "The doctrine of *stare decisis* is not new to this Court, which in 1914 held that "'[a] former decision of this Court should not be departed from, unless the rule therein announced is not only manifestly wrong, but mischievous.'" (citation omitted), *Caves v. Yarbrough*, 991 So.2d 142, 151 (Miss., 2008).

In *Brown*, the Court conclusively established a health care surrogate possessed authority to enter into a contract which bound a resident to arbitrate any claims which arose while at a long-term care facility. *Brown*, 949 So. 2d at 737. The Court specifically found because the resident lacked capacity, "[h]er adult daughter, [the responsible party] could contractually bind [the resident] in matters of health care." *Id.* Appellants would suggest the Court follow the decision it made in

Brown and affirm the Court of Appeals' decision in favor of arbitration.

Likewise, in *Gulledge v. Covenant Health & Rehab of Holly Springs, LLC*, the United States District Court for the Northern District of Mississippi, in reviewing an arbitration agreement, found as follows with regard to a health care surrogate:

> The Mississippi Supreme Court has interpreted [Miss. Code Ann. § 41-41-211] broadly. In *Covenant Health & Rehab of Picayune, L.P. v. Brown*, that Court dealt with an analogous factual scenario. In that case, the Court determined that even though no diagnosis by Brown's physician made before admission to the nursing home showed that she lacked capacity to make her own decisions, the individual acting as Brown's surrogate could bind her to an arbitration agreement.

2007 WL 3102141 (N.D. Miss. 2007). The court went on to importantly find:

> In line with *Barber*, this Court does not interpret *Brown* as requiring an express provision of incapacity by a party. This rule would create a "magic words" doctrine allowing individuals seeking to avoid enforcement of health-care agreements to do so by simply not admitting their own subjective beliefs. It would be the rare case in which an opposing party would be able to offer evidence to rebut this failure to admit.

Id. at fn.1. *See JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596 (5th Cir. 2007) (Fifth Circuit, in reliance upon *Brown*, found district court "erred in ruling that Conegie's mother could not sign the agreement on Conegie's behalf."). For these reasons, Appellants believe the Court of Appeals correctly found the trial court erred in refusing to enforce Braddock's decision to arbitrate any disputes arising out of his mother's residency at the Facility.

Since the *Brown* decision, the Court has denied arbitration in the long-term care setting in two recent decisions – *Hinyub* and *Farish*. In neither opinion did the Court overrule *Brown*. In

Mississippi Care Center of Greenville, LLC v. Hinyub, the Court affirmed the lower court's denial of arbitration. 975 So. 2d 211 (Miss. 2008). Appellants would suggest, and the decision of this Court suggests, the *Hinyub* decision be limited by its facts – facts which are much different than those in this case. In *Hinyub*, the contract containing the arbitration agreement was executed the day before the resident died. 975 So. 2d at 213. Also, there was an abundance of confusion surrounding the presence of a power of attorney. *Id.* at 214. Further, the appeal was perfected "on the sole issue of whether the trial court erred in failing to enforce an arbitration provision contained within a nursing home agreement entered into between the nursing home and the resident's daughter operating *under a power of attorney* and as her father's responsible party." *Id.* at 213-14. (Emphasis added.)

Although not specifically argued by Braddock, Appellants would assert the facts of this Court's decision in *Compere's Nursing Home, Inc. v. Farish*, are also distinguishable from those before the Court. 982 So. 2d 382 (Miss. 2008). In *Farish*, the record before the Court was limited to the admission agreement itself. From the agreement, the Court found no evidence of Larry Farish's authority, as the resident's nephew, to act on her behalf. *Id.* at 384. As set forth, *supra*, such is not the case in the present matter where there is no dispute as to Braddock's authority to act as a surrogate.

Contracts like the Admission Agreements entered into by James Braddock ". . . 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)). "Arbitration

merely means both parties have a mutually agreed upon forum through which to pursue their claims." *Community Care Center of Vicksburg, LLC v. Mason*, 966 So. 2d 220, 231 (Miss. Ct. App. 2007).

For the reasoning set forth herein, as well as in Appellants' other briefing on appeal of this matter, it is respectfully requested the Court affirm the Court of Appeals' holding in favor of arbitration. To allow the surrogate to pick and chose those provisions by which he will be bound, despite having voluntarily and knowingly entered into the contracts, will limit and undermine the applicable legislation in ways which the legislature itself declined to do.

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:

The Honorable Prentiss G. Harrell
Pearl River County Circuit Court Judge
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Dated this the 9th day of March, 2009.

John L. Maxey II