

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01775

**MANHATTAN NURSING & REHABILITATION
CENTER, LLC, ET AL**

APPELLANTS

v.

IRA SIMMONS

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT FOR
THE FIRST JUDICIAL DISTRICT OF HINDS
COUNTY, CAUSE NO. 251-05-433CIV**

BRIEF OF APPELLEE

(ORAL ARGUMENT IS REQUESTED)

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MANHATTAN NURSING & REHABILITATION
CENTER, LLC, ET AL

APPELLANTS

v.

IRA SIMMONS

APPELLEE

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 Justices of the Court of Appeals may evaluate possible disqualification or recusal.

1. Manhattan Nursing and Rehabilitation Center, LLC, Appellant;
2. Bobbie Blackard, Appellant;
3. Aurora Cares, LLC d/b/a Tara Cares, Appellant;
4. Lisa Byrd, F.N.P., Appellant;
5. Dr. William F. Krooss;
6. Ira Simmons, Appellee; and
7. Hon. Bobby B. DeLaughter.

SO CERTIFIED, this the 9TH day of July 2008.



JOHN G. (TRAE) SIMS, III
Counsel of Record for Appellee

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STATEMENT OF THE ISSUES

1. Whether Mississippi law regarding contract principals and contract formation required the signature of a representative or employee of Manhattan Nursing & Rehabilitation to establish a valid arbitration agreement as alleged by Defendants/Appellants.

2. Whether the trial court erred in denying Defendants/Appellants' motions to compel arbitration on the ground that Ira Simmons did not have the authority to bind Elsie Fidelia Simmons, Deceased, to arbitration.

3. Whether the trial court erred in denying Defendants/Appellants' motions to compel arbitration on the ground that Ira Simmons was not estopped from challenging the arbitration agreement.

STATEMENT OF THE CASE

NATURE OF THE CASE: Plaintiff/Appellee, Ira Simmons, is seeking damages for the injuries and wrongful death of Elsie Fidelia Simmons, Deceased, due to the negligence and grossly negligent acts and/or omissions of Defendants/Appellants or their agents or employees acting in the course and scope of their employment.

COURSE OF THE PROCEEDINGS: Plaintiff/Appellee filed his Amended Complaint on December 8, 2005, in the Circuit Court of the First Judicial District of Hinds County, Mississippi. (R. 67). The lower court filed Plaintiff/Appellee's action as cause number 251-05-433CIV. Defendants/Appellants responded with their respective motions to compel arbitration, each predicated upon an Arbitration Agreement signed by Ira Simmons, son and personal representative of Elsie Fidelia Simmons, Deceased. The lower court ruled on the pleadings of the parties regarding Defendants/Appellants' motions without a hearing. (R. 33-36).

DISPOSITION IN TRIAL COURT: On July 2, 2007, the lower court entered a written order denying Defendants/Appellants' respective motions to compel arbitration ruling that Ira Simmons did not have the authority to bind Elsie Fidelia Simmons, Deceased, to arbitration. (R. 33-36).

STATEMENT OF THE FACTS

Elsie Fidelia Simmons, Deceased, was admitted to Beverly Healthcare-Manhattan in July of 2001. In approximately July of 2003, Beverly sold the facility and it became known as Manhattan Nursing & Rehabilitation, LLC (hereinafter referred to as "Manhattan Nursing & Rehab"). In approximately September of 2003, Mrs. Simmons' son, Ira Simmons, was presented with certain admissions paperwork to sign related to the ownership change. One of the documents presented to Ira Simmons was the Resident and Facility Arbitration Agreement (R. 64-65) that is the justification for Appellants' filing of their motions to compel arbitration.

Ira Simmons, son and personal representative of Elsie Fidelia Simmons, signed both the admission agreement and the Resident and Facility Arbitration Agreement (R. 64-65). There is not a signature present on the Resident and Facility Arbitration Agreement from any nursing home representative or employee of Manhattan Nursing & Rehab, despite the document having a line for an individual's signature in such capacity.

SUMMARY OF THE ARGUMENT

Mississippi law regarding contract principals and contract formation required the signature of a representative or employee of Manhattan Nursing & Rehab to establish a valid arbitration agreement as alleged by Defendants/Appellants. Ira Simmons signature on the Resident and Facility Arbitration Agreement on September 23, 2003, constituted an offer to agree to the terms of arbitration. Mr. Simmons' offer to agree to arbitration was rescinded in writing on November 10, 2006 (R. 66) by letter from his counsel before any representative or employee of Manhattan Nursing & Rehab signed and/or accepted Mr. Simmons' offer to agree to arbitration.

Furthermore, Ira Simmons did not have the authority to bind Elsie Fidelia Simmons, Deceased, to arbitration based upon the powers vested to him by the Durable Power of Attorney signed by Elsie Fidelia Simmons, Deceased, on January 9, 1986. Ira Simmons cannot be regarded as a Health Care Surrogate for Elsie Fidelia Simmons, Deceased. Even under a determination as a health care surrogate Mr. Simmons still did not possess the requisite authority to bind Elsie to the arbitration agreement, because the arbitration agreement was not a "health care decision."

Finally, the severability clauses found in Manhattan Nursing & Rehab's admission agreement and arbitration provision allowed Ira Simmons to pursue contractual claims for damages, while denying enforceability of the arbitration agreement. Therefore, Ira Simmons was not estopped. In addition, estoppel via third-party beneficiary status did not apply as a result of Ira Simmons signing the admission agreement.

ARGUMENT

I. Standard of Review

The Mississippi Supreme Court applies a de novo standard of review to the denial of a motion to compel arbitration because the motion presents a question of law as to whether the circuit court has jurisdiction to hear the underlying matter. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 513(¶ 9) (Miss.2005). When reviewing a trial court's disposition of a motion to compel arbitration, the Mississippi Supreme Court uses a two-pronged inquiry. *Sullivan v. Mounger*, 882 So.2d 129, 132 (Miss.2004). The first prong focuses on whether there is a valid arbitration agreement. *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss.2002). The second prong requires a determination of whether the parties' dispute is within the scope of the arbitration agreement. *Id.*

II. Whether Mississippi law regarding contract principals and contract formation required the signature of a representative or employee of Manhattan Nursing & Rehab to establish a valid arbitration agreement as alleged by Defendants/Appellants.¹

With respect to the first prong of the analysis outlined above, “[t]o determine whether the parties agreed to arbitration, we simply apply contract law.” *Terminix Int’l, Inc. v. Rice*, 904 So.2d 1051, 1055(¶ 9) (Miss.2004). Under Mississippi law, the elements of a valid contract are: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation. *Rotenberry v. Hooker*, 864 So. 2d 266 (¶13) (Miss. 2003). Ira Simmons submits that no valid agreement to arbitrate exists between

¹ While Appellee/Plaintiff submitted this issue to the Trial Court in his Response to Manhattan’s Motion to Compel Arbitration, the Trial Court’s Order and Memorandum Opinion do not specifically discuss the issue. Nonetheless, this issue is central to Appellee’s/Plaintiff’s argument. (R. 42-52).

Plaintiff/Appellee and Defendants/Appellants. Mr. Simmons' offer to agree to arbitration made on September 23, 2003, was rescinded in a letter from his counsel on November 10, 2006. (R. 66).

As stated in *Rottenberry*, supra, one of the elements of a valid contract under Mississippi law is that it contains two or more contracting parties. It is also a requirement of Mississippi law regarding contract principals and contract formation for parties to actually come to an agreement or a "meeting of the minds." *Hunt v. Davis*, 45 So.2d 350, 352 (Miss. 1950). Enforceable contracts must have an offer, acceptance, and consideration. *Gatlin v. Methodist Medical Center, Inc.*, 772 So.2d 1023, 1029 (Miss. 2000). In the majority of contracts, such as the arbitration agreement in question, assent or acceptance is shown by the signature of the parties to the contract, and the mere fact that a written instrument purports to be an agreement does not make it an enforceable contract if not signed. *McInnis v. Southeastern Automatic Sprinkler Co.*, 233 So.2d 219, 221 (Miss. 1970) (quoting 17 C.J.S. Contracts §62 (1963)).

In the instant case, at the conclusion of the document titled "Resident and Facility Arbitration Agreement," there is a line for the signatures of the resident or resident's "designated representative" and a line for the signature of an "authorized representative" for the Manhattan Nursing & Rehab facility. The agreement was signed, and thus assented to as an offer, by Ira Simmons to agree to arbitrate. However, the line for the signatures of the facility's "authorized representative" is left blank. The only signature by anyone other than Ira Simmons on the arbitration agreement is a signature on the line designated as "Witness." See Exhibit "B" attached hereto. Thus, looking at the Resident and Facility Arbitration Agreement using the basic principles of Mississippi contract law, one can only conclude that the arbitration agreement

is not a valid contract due to the lack of mutual assent.

A Mississippi Supreme Court case with facts very similar to the instant case is ***Bedford Care Center-Monroe Hall, LLC v. Lewis***, 923 So.2d 998 (Miss. 2006). In ***Bedford***, a personal representative (Lewis) of a nursing home resident challenged the validity of an arbitration agreement on the grounds that the agreement was not signed by the personal representative or the resident. Although acknowledging the strong federal policy favoring arbitration, the Court recognized that "arbitration is a matter of contract between the relevant parties; no party can be required to arbitrate absent an agreement to do so." *Id.* at 1000 (quoting *Rosenblum v. Travelbyus.com, Ltd.*, 299 F.3d 657, 662(7th Cir. 2002)). In holding that a valid arbitration agreement did not exist due to a lack of a signature by Lewis or the nursing home patient Ora Preston, the Court agreed that Lewis should not be penalized because of Bedford's failure to ensure that both parties assented to the agreement and that Bedford should take "full responsibility for its own contractual negligence." *Id.* at 1002.

Although the non-signing parties are reversed, the same principles which served as the basis of the Court's opinion in ***Bedford*** are applicable in the instant case. As a nursing home facility that is in the business of providing long-term care to its residents, Manhattan Nursing & Rehab undoubtedly has executed hundreds of arbitration provisions identical to the provision presented to and signed by Ira Simmons. Manhattan Nursing & Rehab is by no means unfamiliar with these types of agreements and the requirements that must be met in order for these agreements to be enforceable. This is obvious by the fact that at the end of the arbitration agreement, Manhattan Nursing & Rehab provided spaces for the signature of the nursing home

resident or their personal representative *and* an "authorized representative" of the nursing home. Ira and Elsie Simmons should not be penalized by being forced into a contract made invalid due to the negligence of Manhattan Nursing & Rehab. Manhattan Nursing & Rehab should take full responsibility for their contractual negligence, and this Court must find the arbitration agreement unenforceable and invalid due to a lack of mutual assent.

At best, defendant, Manhattan Nursing & Rehab is left to argue there may have been an offer to arbitrate which was never accepted. Further, that offer was withdrawn in writing by plaintiff through counsel with no acceptance ever having been communicated by the nursing home or anyone on its behalf. (R. 66).

III. Whether the trial court erred in denying Defendants/Appellants' motions to compel arbitration on the ground that Ira Simmons did not have the authority to bind Elsie Fidelity Simmons, Deceased, to arbitration.

Ira Simmons did not have the authority to waive Elsie Fidelity Simmons' right to a jury trial or any other constitutional right nor was Ira Simmons a health care surrogate for Elsie Simmons.

A. Ira Simmons Lacked the Authority to Bind Elsie Fidelity Simmons to Arbitration

Even if the Court were to determine that there was mutual assent to the arbitration agreement by both parties, which plaintiff expressly denies, the purported agreement still must fail. There is no evidence before the Court that would demonstrate that plaintiff, Ira Simmons,

possessed the expressed or implied authority to bind his mother to arbitration. Manhattan Nursing & Rehab has cited only the power of attorney executed by Fidelia Simmons in favor of plaintiff as support for its contention that plaintiff had authority to execute such an agreement with a binding effect. This power of attorney relates only generally to its effect with regard to finances, real property, business affairs, and the like. The power of attorney is thus limited to the specific powers enumerated within the document. Not one of those powers comes anywhere close to touching upon waiving Fidelia Simmons' constitutional right to a jury trial. Absent the existence of a durable power of attorney that specifically authorizes him to waive her constitutional rights or absent a court-ordered conservatorship, her son's signature is not binding on Elsie or her estate.

B. The Uniform Health Care Decisions Act Mississippi Code Annotated §41-41-211 Did Not Apply to the Arbitration Agreement at Issue

In a recent line of cases with facts very similar to the case at bar, both this Court and the Federal District Courts in the Northern District of Mississippi have addressed the validity of arbitration agreements binding nursing home residents signed by family members without the legal capacity to do so.

Recently, this Court issued its opinion in *Mississippi Care Center of Greenville, et al v. Hinyub*, 975 So.2d 211 (Miss. 2008). The case is directly on point as to the issue of whether Ira Simmons' signature on the admission documents created a valid arbitration agreement based upon the medical surrogate statute. In *Hinyub*, this Court considered the first prong of the well established two-prong test of whether the parties agreed to arbitrate, and found it unnecessary to consider the second prong when the first was not met. *Id.*, at 7,12. The present case falls in to

the same category. In *Hinyub*, Mississippi Care Center contended that Nancy Hinyub had authority to bind her father in health care matters, including the agreement to arbitrate.

Mississippi Care Center relied upon a power of attorney executed by Hinyub's father, but not properly admitted into evidence or placed in to the record for this Court's review, and relied upon the Uniform Health Care Surrogate Statute, Miss.Code Ann. 41-41-211 (Rev. 2005).

Because no power of attorney appeared in the record and because no information appeared in the record that Hinyub's father lacked capacity to make his own health care decisions, this Court affirmed the lower court's denial of Mississippi Care Center's Motion to Compel Arbitration.

In the present case, the power of attorney in the record does not authorize Ira Simmons to bind his mother. Nor is there any evidence presented that Elsie Fidelia Simmons lacked capacity to make her own health care decisions. In particular, there is no evidence that a primary physician determined she lacked capacity. As to Ira Simmons' signature and the issue of whether he had authority to bind his mother, this Court should simply look to its clear reasoning in *Hinyub* and find Mr. Simmons' signature on the Admissions Documents to be of no consequence as regarding the issue of Arbitration.

In *Hinyub*, it was undisputed that the father had never signed an arbitration agreement. The present case is completely analogous, in that, the resident, Elsie Simmons did not sign the arbitration agreement. Mississippi Care Center essentially lost its bid to compel arbitration in *Hinyub* because they failed to produce evidence establishing a valid arbitration agreement. In Judge DeLaughter's Order Denying Binding Arbitration, Manhattan Nursing & Rehab lost its bid for the same reason. Manhattan Nursing & Rehab produced no evidence that Ms. Simmons signed the arbitration agreement. By failing to meet the "first prong"—that is, showing a valid

agreement to arbitrate--they gave Judge DeLaughter no chance to grant their motion or even to consider the underlying arguments of both sides as to procedural and substantive unconscionability.

This Court in *Hinyub* further determined that because the arbitration agreement expressly stated that signing was not a pre-condition to admissions or to the furnishing of services (just as it does in the case at bar) (R. 65), the arbitration agreement was not a healthcare decision which was covered under the surrogate statute. The Court thus concluded that the family member could not authorize arbitration as a healthcare surrogate where the surrogate statute did not apply.

As noted above, Mississippi Federal Courts have used the same reasoning as this Court in several cases in recent years. In *Mariner Healthcare, Inc. v. Green*, 2006 WL 1626581 (N.D. Miss), the District Court determined that agreements signed by family members without legal capacity to do so are only binding if the signor has been given agency authority to act on behalf of the resident. *Id.* Such agency authority can be express, implied, apparent or given by statute, and the existence of such agency must be proven by the nursing home defendant. *Id.* The nursing home defendants in *Green* did not meet their burden with regards to express or implied authority, as they provided no evidence that Green conveyed to her daughter any express or implied grant of authority. Although the nursing home defendants did provide evidence of past agreements signed by Green's daughter, the Court reiterated the ruling in prior cases that "apparent authority is to be determined only from the acts of the principal and requires reliance and good faith on the part of the third party." *Id.* With regards to statutory authority, Miss. Code Ann. § 41-41-211, the "Surrogate Statute", does grant surrogates the power to make "health-care decisions" for the resident. However, courts have determined that the signing of an arbitration

agreement is not a “healthcare decision” that qualifies under the statute. *Id.* See also *Guthrie*, Civil Action No. 5:04cv218-DCB-JCS.

The “Surrogate Statute” states that “A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.” Miss. Code Ann. §41-41-211. So for the statute to apply and for Ira Simmons to have had authority to bind Mrs. Simmons to the arbitration agreement, there must be evidence of a determination made by Mrs. Simmons primary physician that she was mentally incompetent. To date, no proof has been presented of any such finding by the primary physician of Elsie Simmons on or before the admission to the nursing home. Despite defendants/appellants allusions to the contrary plaintiff has made no statement in this litigation that constitutes any thing approaching and admission of incompetence of Elsie Simmons.

There is ample authority for the proposition that where an agent does not have authority to bind a party to an arbitration agreement, or where the party otherwise does not sign the agreement, the party cannot be bound by its terms. See *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (to require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the “first principle” of arbitration that “a party cannot be required to submit [to arbitration] any dispute which she has not agreed so to submit.”); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); *Chastain v. The Robinson-Humphrey Company, Inc.*, 957 F.2d 851 (11th Cir. 1992); *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418 (11th Cir. 1990) (per curiam); *Cannannon v. Smith Barney, Harris, Upham & Co.*,

805 F.2d 998 (11th Cir. 1986) (per curiam); *Three Valleys Municipal Water District v. E. F. Hutton & Company, Inc.*, 925 F.2d 1136 (9th Cir. 1991); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51 (3rd Cir. 1980); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976); *Smith Wilson Co. v. Trading & Dev. Establishment*, 744 F.Supp. 14 (D.D.C. 1990); *Ferreri v. First Options, Inc.*, 623 F.Supp. 427 (E.D. Pa. 1985); *Sphere Drake Insurance Ltd. V. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001); *Sandvik AB v. Advent International Corp.*, 220 F.3d 99 (3rd Cir. 2000); *Raiteri v. NHC Healthcare/Knoxville, Inc.*, No. 2-791-01, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003).

IV. Whether the trial court erred in denying Defendants/Appellants' motions to compel arbitration on the ground that Ira Simmons was not estopped from challenging the arbitration agreement.

The legal authorities, and the arguments stated in Parts I and II, above, are incorporated here by reference. Ira Simmons was not estopped from challenging the arbitration agreement based on his contractual claim for damages nor does estoppel apply based on third-party beneficiary status apply here.

A. Ira Simmons was not stopped from objecting to arbitration via the contractual claim for damages

The language of the Admission Agreement presented to Ira Simmons makes it clear that the Arbitration Agreement can be separated from the Arbitration Provision for purposes of enforceability. In plain and unambiguous language Manhattan Nursing & Rehab's Admission Agreement and the Arbitration Agreement both contain severability clauses. Paragraph 23.11 of the admission agreement states:

"If any provision in this Agreement is determined to be illegal or unenforceable, it will be deemed amended to render it legal and enforceable and to give effect to its intent. If any such provision cannot be amended, it shall be deemed deleted without affecting or impairing and other [sic] part of this Agreement." *See page 15 of Admission Agreement.*

Furthermore, under the section titled "Resident and Facility Arbitration Agreement" it states:

"In the event a court having jurisdiction finds any portion of this Agreement unenforceable, that portion shall not be effective and the remainder of the Agreement shall remain effective." *See page 29 of Admission Agreement.*

Based on the forgoing paragraphs contained in the Admission Agreement, Ira Simmons was not estopped from claiming the validity of the Admission Agreement, while also denying the enforceability of the Arbitration Agreement. Manhattan Nursing & Rehab chose to include the severability clauses in their pre-printed admission agreement form and should not now be allowed to deny their effect.

In addition, consistent with the lower court's ruling, Mississippi Code Annotated section 41-41-211(2) does not allow a responsible party to waive one's right to a jury trial, however it does allow a responsible party to bind one to a nursing home agreement. Thus, the nursing home Admission Agreement can be enforceable, without the arbitration provision.

B. Estoppel Did Not Apply Based on Third-Party Beneficiary Status

Without a valid agreement the doctrine of third-party beneficiary status is inapplicable. In the event the Court reaches this argument, Appellee contends that the lower court was correct in ruling that estoppel based on third-party beneficiary status did not apply. Elsie Simmons did not in any way "benefit" from the contract entered into by Ira Simmons.

In their Brief, Manhattan Nursing & Rehab rely on several Mississippi Court of Appeals decisions to support their claim for estoppel via third-party beneficiary status, yet these opinions

are not final and subject to revision or withdrawal. Therefore, these opinions have no authority and should not be given deference. However, the cases cited by Manhattan Nursing & Rehab are all distinguishable from the instant case, in that, the arbitration provision in those cases was presumably signed by both parties. As noted earlier, the arbitration agreement in this case was absent any signature of any nursing home representative or employee of Manhattan Nursing & Rehab, despite the document having a line for an individual's signature in that capacity. As a result, there was not a valid arbitration agreement to enforce by means of estoppel, since Manhattan Nursing & Rehab was not a party to the arbitration agreement. Specifically, Appellants cite, *Forest Hill Nursing Center, Inc. v. McFarlan*, 2008 WL 852581 (Miss. Ct. App. Apr. 1, 2008), the facts of that case indicate that the admission agreement was signed by both parties. *Id.* at *2 (¶6). Based on the presence of signatures by both parties the Court, in *McFarlan*, was able to first concluded that a valid contract existed between the parties, before they proceeded to consider whether third-party beneficiary status applied. *Id.* In the present case there is not a valid contract between Ira Simmons and Manhattan Nursing & Rehab, therefore the issue of third-party beneficiary should not be considered.

Furthermore, the Appellants cite *Trinity Mission of Clinton LLC v. Barber*, 2007 WL 2421720 (Miss. Ct. App. Aug., 28, 2007), in which the appellate court states that a person is a third-party beneficiary when "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." *Id.* at *5 (¶21). Elsie Simmons simply did not benefit from any contract entered into by her son. The bed sores, malnutrition, dehydration, falls, sepsis and ultimate death Elsie Simmons suffered while a patient at Manhattan Nursing &

Rehab cannot possibly be seen as a benefit.

As this Court noted in, *B.C. Rogers Poultry Inc. v. Wedgeworth*, 91 So.2d 483 (Miss. 2005), "the doctrine of equitable estoppel should be applied cautiously and only when equity clearly requires it." *Id* at (¶26) (quoting *Bright v. Michel*, 242 Miss. 738, 137 So.2d 155 (1962)). In the present case it would be inequitable to allow Manhattan Nursing & Rehab to enforce an agreement to which they were not a party.

C. Lisa Byrd's Right to Join in Arbitration

Appellee concurs with Appellants position that Lisa Byrd does not enjoy any right to join in Arbitration, in the event the Court should order such action.

CONCLUSION

Manhattan Nursing & Rehab failed to establish the foundation upon which any motion to compel arbitration must be built. They have not shown at any time that a valid arbitration agreement existed. For this reason and the others stated herein, Ira Simmons, as Personal representative of Elsie Fidelia Simmons, Deceased, respectfully requests this Court to AFFIRM the Hinds County Circuit Court's denial of Manhattan Nursing & Rehab's Motion to Compel Arbitration.

This the 9TH day of July 2008.

Respectfully submitted,

**Ira W. Simmons, as Personal Representative
Of Elsie Fidelia Simmons, Deceased, and
On Behalf of the Wrongful Death Beneficiaries
Of Elsie Fidelia Simmons, Deceased**



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CERTIFICATE OF FILING AND SERVICE

I, John G. (Trae) Sims, III, attorney for Appellee, Ira Simmons, certify that I have this day filed this Brief of Appellee with the Mississippi Supreme Court, and have served a copy of the same by U.S. Mail, postage prepaid, to the following:

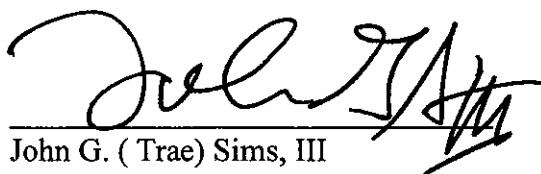
Honorable Bobby B. DeLaughter
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This the 9th day of July 2008.


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