IN THE SUPREME COURT OF MISSISSIPPI

MANHATTAN NURSING & REHABILITATION CENTER, LLC, ET AL.	**APPELLANTS,**
V.	**NO. 2007-CA-01775**
IRA SIMMONS,	**APPELLEE**

BRIEF OF THE APPELLANTS

Appeal from the Circuit Court For Hinds County
The Hon. Bobby B. DeLaughter Presiding
No. 251-05-433 CIV

THE LAW & MEDIATION OFFICES
OF REBECCA ADELMAN, PLC

Rebecca Adelman, ##[redacted]
Chase Pittman, #[redacted]

Counsel of Record for Appellants
Manhattan Nursing and Rehabilitation Center, LLC
Aurora Cares, LLC, d/b/a Tara Cares, and
Bobbie Blackard

545 South Main St., Suite 111
Memphis, Tennessee 38103
Tel., 901/529-9313
Fax., 901/529-8772
www.adelmanfirm.com

ORAL ARGUMENT IS REQUESTED

CERTIFICATE OF INTERESTED PERSONS

Manhattan Nursing and Rehabilitation Center, LLC, et al. v. Simmons
No. 2007-CA-01775

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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

H. Chase Pittman, #101388

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II. Whether the trial court erred in denying Appellants' Motions to Compel Arbitration on the ground that Ira Simmons was not estopped from challenging the Arbitration Agreement?

STATEMENT OF THE CASE

The case underlying this appeal is based upon allegations that Elsie Fidelia Simmons sustained injury resulting from a deficient course of care at Manhattan Nursing and Rehabilitation Center, a skilled-nursing facility. Ira Simmons commenced this case in the Circuit Court for Hinds County with his Complaint, filed on May 18, 2005. (T.R., Vol. 1, pp. 8-18).[1] Appellants responded with their respective Motions to Compel Arbitration under the Federal Arbitration Act, (T.R., Vol. 1, pp. 19-26), each predicated upon an Arbitration Agreement signed by Ira Simmons, who is the son of Elsie Simmons. (*Id.*, pp. 50-51).

The Arbitration Agreement is contained within a greater contract, the Admission Agreement, which Mr. Simmons signed in the process of admitting his mother, Ms. Simmons, to the nursing facility for health care. Under the Admission Agreement, Mr. Simmons became Ms. Simmons' responsible party for her residency at the facility. At the time, Mr. Simmons was acting as his mother's duly appointed agent pursuant to a durable power of attorney for general purposes. (*Id.*, pp. 39-41).

The parties did not conduct discovery relating to the enforceability of the Arbitration Agreement. Thus, when the circuit court, the Hon. Bobby B. DeLaughter presiding, considered the Motions to Compel Arbitration, the court ruled on the basis of the written submissions and other documents in the record. In denying the Motion, the lower court ruled in principal part:

> "...this Court finds that Ira Simmons' authority is limited to the areas of health care and business affairs, which do not include the ability to bind Elsie Simmons to arbitration agreements. Therefore, there was not a binding arbitration agreement between Manhattan Nursing Home and Rehabilitation Center and Elsie Simmons, and the defendant's motion must be denied."

(*Id.*, p. 36).

[1] References to the technical record are denominated "T.R."

STATEMENT OF THE FACTS

Ira Simmons, the appellee here and the plaintiff below, is the personal representative and wrongful-death beneficiary of the Elsie Fidelia Simmons. (T.R, Vol. 1, p. 8, at ¶1). On January 9, 1986, Ms. Simmons executed a durable power of attorney ("DPOA") for general purposes, appointing Mr. Simmons as her attorney-in-fact and agent. (*Id.*, pp. 39-41).[2]

Ms. Simmons was a resident of a nursing facility in Jackson known as Manhattan Nursing and Rehabilitation Center, ("Manhattan"), where she allegedly sustained injuries resulting from deficient care. (*Id.*, pp. 11-13, at ¶¶13-24). Appellants Manhattan Nursing and Rehabilitation Center, LLC, and Aurora Cares, LLC, are entities that operate and manage Manhattan. (*Id.*, p. 11, at ¶13). Appellant Bobbie Blackard is the administrator of the facility. (*Id.*, p. 10, at ¶8).

On September 23, 2003, Mr. Simmons admitted his mother, Ms. Simmons, to Manhattan, signing on her behalf an Admission Agreement and becoming her responsible party. (*Id.*, p. 33; Exhibit 1, attached).[3] Contained within the Admission Agreement are the terms and conditions upon which Manhattan was to render health care and other related services to Ms. Simmons. (Exhibit 1, pp. 1-16). Also contained with the Admission Agreement was a Resident and Facility Arbitration Agreement, ("Arbitration Agreement"), which Mr. Simmons signed as well. (*Id.*, pp. 29-30; T.R., Vol. 1, pp. 50-51).

[2] A copy of the DPOA is attached for the Court's convenience as Exhibit 1.

[3] The Admission Agreement was filed in the record of the lower court on Jan. 17, 2006, as an exhibit to the Memorandum of Law supporting Appellants' Motion to Compel Arbitration, and the Memorandum was designated for inclusion in the appellate record. (T.R., Vol. 1, p. 83, at ¶3). It came to the Appellants' attention in the preparation of this Brief, however, that the clerk of the circuit court mistakenly excluded that Memorandum from the appellate record. Appellants will forthwith seek to supplement the appellate record. In the mean time, they refer the Court to Exhibit 2 hereto, a copy of the Admission Agreement.

SUMMATION OF ARGUMENTS

Appellants respectfully submit herein three main arguments supporting their conclusion that the circuit court's decision to deny their motions to compel arbitration was error and should be reversed. First, they argue that Ira Simmons had all of the authority necessary to sign the Arbitration Agreement on behalf of Ms. Simmons by virtue of the general DPOA, which granted him plenary authority over Ms. Simmons' personal affairs. Second, Mr. Simmons had all of the necessary authority as the medical surrogate of Ms. Simmons because case law includes within a surrogate's power to make healthcare decisions the power to agree with a medical provider on terms of dispute resolution, namely arbitration. Third, Appellants argue that Mr. Simmons is now estopped from challenging the Arbitration Agreement because: a) he has sued for breach of the greater Admission Agreement containing the Arbitration Agreement; and b) Ms. Simmons was a third-party beneficiary of the Admission Agreement.

ARGUMENTS

1. Authority As Ms. Simmons' General Agent.

Appellants first submit that the trial court erred in denying their motions to compel arbitration upon a finding that the DPOA did not endow Mr. Simmons with the authority necessary to sign the Arbitration Agreement. On the contrary, Mr. Simmons had all necessary authority under the clear terms of the DPOA granted him by his mother, Ms. Simmons.

In Mississippi, courts regard powers of attorney as generally enforceable according to the expressions of the principal's intent therein, so long as the instrument is made a part of the judicial record. *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So.2d 211, 216 (¶12) (Miss 2008). Here, the DPOA, which is part of the record before this Court, begins with a lengthy enumeration of the specific matters over which Mr. Simmons has power. (T.R., pp. 39-40). Later, though, the instrument changes course to conclude with a very broad endowment of authority, granting Mr. Simmons power "to conduct all of my personal and business affairs the same as I could do if acting personally and do and perform and execute all acts necessary to carry on said personal or business affairs as fully, completely and amply, to all intents and purposes as I myself could or might do if acting personally." (*Id.*, p. 40).

Language in a power of attorney is to be treated according to the same rules of law that apply to contracts and other written instruments. *Tennessee Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 749 (Tenn. 2007) ("*Rose*"). In Mississippi, when contractual terms are clear and unambiguous, courts are to enforce them as written. *HeartSouth, PLLC v. Boyd*, 865 So.2d 1095, 1105 (¶27) (Miss. 2003); *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 752 (¶9) (Miss. 2003).

Here, the meaning of Mr. Simmons' authority under the DPOA is clear and written in

simple terms. First, Mr. Simmons held essentially plenary authority over the personal affairs of Ms. Simmons. In the DPOA, Ms. Simmons granted her son authority "to conduct *all* of my personal … affairs the same as I could do if acting personally." This language means precisely as it sounds: it is a grant of *plenary* authority over Ms. Simmons' "personal affairs." Notably also, in keeping with this plenary grant, nothing in the DPOA even suggests a limitation this authority.

Second, Mr. Simmons' act of signing the Arbitration Agreement was within his power over such personal affairs. At its core, the Arbitration Agreement is an instrument governing the exercise of certain rights, namely the rights of action that the parties to the Agreement might gain against each other, as well as their rights to a jury trial. These rights were of course personal to Ms. Simmons, and thus the broad phrase "personal affairs" would naturally encompass these rights. Again, Mr. Simmons' signing of the Arbitration Agreement was well within his plenary power over his mother's personal affairs.

Here, then, no lofty analysis of the DPOA is necessary. When the DPOA granted Mr. Simmons plenary authority to conduct "all" of Ms. Simmons' "personal affairs," it did not mean power to do more or less everything but to agree on terms governing the exercise of the rights to sue and to a jury trial. When the DPOA said all personal affairs, it meant *all*, including the rights now subject to the Arbitration Agreement. Contrary to the circuit court's ruling, then, Mr. Simmons' powers cannot reasonably be understood to exclude the power to exercise Ms. Simmons' personal rights through signing the Arbitration Agreement.

The Tennessee case shown above emphasizes Appellants' conclusion, and Appellants submit it as cogent authority. In the *Rose* case, Brenda Langley purchased a life insurance policy designating her children as the beneficiaries, and she also gave her sister, Linda Rose, a durable power of attorney granting Rose in pertinent part power to "to transact all insurance business on

my behalf" and to "take any other action necessary or proper in this regard." *Rose*, 239 S.W.3d at 746. Acting under the power of attorney, Rose changed the beneficiary designation to herself from the children, and in the eventual litigation over the insurance proceeds, the trial court granted the children a summary judgment, finding that Rose lacked authority to change the designation. *Id.* at 7467. The Court of Appeals affirmed the trial court, and Tennessee Supreme Court reversed. *Id.*

Of course, the Tennessee Supreme Court ultimately remanded the case for the trial court to determine whether Rose's act of changing the designation violated other principles of law, such as her fiduciary duties and the like. *Id.* at 751. But, the high court was clear that the lower courts erred in concluding that Rose acted beyond her authority. *Id.* at 751. In pertinent part, the Tennessee Supreme Court held:

> "Langley's power of attorney is neither ambiguous nor uncertain-it grants Rose the authority 'to transact all insurance business' and to 'take any other action in this regard.' There simply is no escaping the significance of the word 'all' and the words 'take any other action in this regard' in delineating the scope of the insurance business which Rose was authorized to conduct. By authorizing Rose 'to transact all insurance business' and 'to take any other action in this regard,' the power of attorney plainly and unambiguously authorized her to conduct any and all insurance-related business on Langley's behalf, which includes the power to change the beneficiary of Langley's life insurance policy. Just as Rose could have canceled this policy, purchased another one, and named a new beneficiary for the second policy, she had authority to make this change. *If we were to construe the words of Langley's power of attorney to exclude the power to change beneficiary designations, we would effectively be rewriting Langley's power of attorney from authorizing Rose to transact 'all' insurance business on Langley's behalf to authorizing Rose to transact 'nearly all' of Langley's insurance business.*"

Id. at 750-51 (italics added).[4]

Here, in concluding that Mr. Simmons lacked authority to sign the Arbitration Agreement for Ms. Simmons, the circuit court likewise effectively rewrote the DPOA from granting "all"

[4] A copy of the *Rose* opinion is attached as Exhibit 3.

power over his mother's personal affairs to granting "nearly all" such power. But, in this case, as *Rose* court held, there is "no escaping the significance of the word 'all.'" Just as Ms. Simmons could have signed the Arbitration Agreement herself in conducting her own personal affairs, so also Mr. Simmons, empowered to conduct "all" of her personal affairs for her, had all of the authority necessary to execute the Arbitration Agreement.

Respectfully, Appellants again submit that the circuit court erred in concluding otherwise. The lower court's ruling must therefore be reversed on at least this ground.

2. Authority As Ms. Simmons' Medical Surrogate.

Appellants next submit that the trial court erred in denying their motions to compel arbitration upon a finding that Mr. Simmons lacked the necessary authority as his mother's medical surrogate under M.C.A. § 41-41-211. Respectfully, Appellants submit that the circuit court's conclusion is contrary to the case law.

The proper starting point is an appreciation of the Mississippi Supreme Court's decision in *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007) ("*Brown*"). There, the plaintiffs sued a nursing facility on allegations that their mother sustained injuries at the facility because of deficient care, and the facility defended with a motion to compel arbitration, which was predicated upon an arbitration provision in the mother's admission agreement that one of the plaintiffs, Goss, had signed in the process of admitting her mother to the facility. *Brown*, 949 So.2d at 735-36 (¶¶4, 5). The plaintiff opposed the motion on the grounds that, *inter alia*, Goss lacked authority to sign for her mother. *Id.* at 736 (¶¶5, 9).

The Supreme Court considered the facility's argument that Goss had authority to bind her mother by virtue of her status as a healthcare surrogate under the Uniform Health-Care Decisions Act, M.C.A. § 41-41-211, which grants a surrogate authority to make healthcare decisions for a

mentally incapacitated patient. *Id.* at (¶10). Finding that Goss qualified as such a surrogate, the Court agreed with the facility, holding that "Goss could contractually bind [her mother] in matters of health care," *Id.* at 737 (¶10), and further "confirm[ing] Goss' authority to sign the agreement" that contained the arbitration provision. *Id.* at (¶11). Ultimately, the Court remanded the case with directions to enforce that provision. *Brown*, 949 So.2d at 742 (¶29).

The meaning *Brown* is clear, and its importance cannot be understated. Conceivably, the Supreme Court might have held that the power to make a healthcare decision is strictly limited to such activities as selecting a care provider and consenting to treatment. The Court did not stop so short, though. Instead, *Brown* manifests a recognition that the power to make a healthcare decision realistically involves more and further means agreeing on *all* lawful terms of the engagement for health care, including terms of dispute resolution.

Here, in light of *Brown*, the error of the circuit court becomes evident. Again, Mr. Simmons alleged in his Complaint that Ms. Simmons "was essentially helpless and totally dependent upon [Appellants'] staff" during her residency at Appellants' facility. (T.R., Vol. 1, p. 12, at ¶5). And, although the lower court found that Mr. Simmons was Ms. Simmons' responsible party at the nursing facility, (T.R., Vol. 1, p. 33), and further found that M.C.A. § 41-41-211 "allows responsible parties or health care surrogates to make health care decisions regarding people like Elsie Simmons," (T.R., Vol. 1, p. 35), the lower court ruled that the health care decisions that surrogates may make exclude the power to agree to arbitration for the ward. (*Id.*). As explained above, though, *Brown* squarely contradicts such reasoning. In *Brown*, the Supreme Court recognized that authority to agree on terms of arbitration with a healthcare provider is implicit within the power to make healthcare decisions, and subsequent opinions have borne out this point.

The Mississippi Court of Appeals elaborated on *Brown* in *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss. Ct. App. Aug, 28, 2007).[5] There, a son admitted his mother to a nursing facility and, in that process, signed an arbitration agreement contained within the greater admission contract that provided for healthcare services. *Barber*, 2007 WL 2421720, at *1 (¶2). In its analysis of the son's authority to agree to arbitration on his mother's behalf, the Court reviewed *Brown* and explained "the court in *Brown* impliedly held that the surrogate's authority to contractually bind the patient includes the authority to bind the patient to arbitration." *Id.* at *4 (¶17). Later, the Court went further: "We further interpret the *Brown* decision to authorize the surrogate to bind the patient and her estate to arbitration if the admissions agreement contains an arbitration provision otherwise valid and enforceable." *Barber*, 2007 WL 2421720, at *4 (¶19).

The Court later examined the meaning of *Brown* again in *Covenant Health & Rehabilitation of Picayune, LP v. Lumpkin*, 2008 WL 306008 (Miss. Ct. App. Feb. 5, 2008).[6] There also, a daughter admitted her mother who was suffering from mental illnesses to a nursing facility and, in the process, signed an arbitration provision contained within the admission contract. *Lumpkin*, 2008 WL 306008, at *1 (¶3). Finding that the daughter, who qualified as her mother's healthcare surrogate under the Statute, had authority to sign the arbitration provision, the Court of Appeals interpreted *Brown* as follows: "...in *Brown,* the supreme court implicitly held that the surrogate's authority to bind the patient extended to the arbitration clause in the admissions agreement." *Id.* at *2 (¶10).

Again, in the case *sub judice*, although the circuit court concluded that Mr. Simmons qualified as Ms. Simmons' medical surrogate, the lower court incorrectly concluded that his

[5] A copy of the *Barber* opinion is attached as Exhibit 4.
[6] A copy of the *Lumpkin* opinion is attached as Exhibit 5.

powers as such did not extend so far as to authorize him to sign the Arbitration Agreement for his ward, Ms. Simmons. Because the foregoing case law contradicts that conclusion, the lower court's decision declining to enforce the Arbitration Agreement must be reversed on this additional basis.

3. Estoppel.

In any event, the lower court's order denying Appellants' motion to compel arbitration should be reversed, if for no other reason, because Mr. Simmons is estopped from challenging it. More specifically, he is so estopped for two reasons: 1) he sued to enforce the Admission Agreement containing the Arbitration Agreement; and 2) Ms. Simmons was a third-party beneficiary of the Admission Agreement.

Estoppel via the contractual claim for damages

Appellants begin with the first ground. In his Complaint, Mr. Simmons brought a claim for breach of contract against Appellants. (T.R., Vol. 1, pp. 14-16, at ¶¶30-38). Significantly, Mr. Simmons alleges that "at all material times, an enforceable contract existed by and between ELSIE FIDELIA SIMMONS and the defendants, including BOBBIE BLACKARD, to provide reasonable, minimally competent, and adequate care to ELSIE FIDELIA SIMMONS." (T.R., Vol. 1, pp. 14-15, at ¶31). He then goes on to allege that, by their rendition of negligent health care to Ms. Simmons as alleged elsewhere in the Complaint, Appellants breached the terms of the contract and caused injury to Ms. Simmons, entitling him to an award of damages. (T.R., Vol. 1, pp. 15-16, at ¶¶32-38).

Clearly, when Mr. Simmons' allegations refer to a contract for the provision of healthcare services by Appellants to Ms. Simmons, he means the Admission Agreement, which he signed for Ms. Simmons' course of care at Appellants' facility. The legal significance of these

allegations cannot be understated. Having made them, Mr. Simmons is now bound under the pertinent case law to the Arbitration Agreement contained within the Admission Agreement.

Under the Federal Arbitration Act, courts hold that a party is forbidden to take the benefit of a contract, particularly by suing to enforce it, but then simultaneously to deny that he is bound to the contract's provisions for arbitration. *Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260, 268 (5th Cir. 2004); *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 418 (4th Cir.2000)("[A plaintiff] cannot seek to enforce those contractual rights and avoid the contract's requirement that "any dispute arising out of" the contract be arbitrated."). Mississippi has adopted this rule of law as well. *Terminix Intern., Inc. v. Rice*, 904 So.2d 1051, 1058 (¶28) (Miss. 2004) ("*Rice*") ("'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'").

In the *Rice* case, Mr. Rice made a contract with Terminex for the provision of services to safeguard the Rices' home from termite damage, and the contract contained an arbitration clause. *Rice*, 904 So.2d at 1053 (¶2). After they discovered termite damages, Mr. and Mrs. Rice sued Terminex, bringing claims of negligence and breach of contract, to which Terminex responded with a motion to compel arbitration. *Id.* at (¶3). The circuit court denied the motion, and Terminex appealed. *Id.* at 1053-54 (¶¶4, 5).

Among other issues in the appeal, the Supreme Court considered the argument of Mrs. Rice that she could not be deemed bound to the arbitration clause because her husband, not she, signed the contract with Terminex. *Id.* at 1057-58 (¶27). The Supreme Court turned to *Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260 (5th Cir. 2004), in which

another wife made the same argument, and the Court observed the Fifth Circuit's holding that "'nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.'" *Id.* at 1058 (¶27) (quoting *Bailey*). The Supreme Court emphasized the Fifth Circuit's reasoning on point:

> "'In the arbitration context, the doctrine [of estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'"

Rice, 904 So.2d at 1058 (¶28) (quoting *Bailey*). Adopting the quoted analysis as the law for Mississippi, the Supreme Court thus held that Mrs. Rice was just as bound to the arbitration clause as her husband. *Id.* at (¶29).

Here, again, Mr. Simmons sued for breach of the contract providing for Ms. Simmons' health care at Appellants' facility, the Admission Agreement. Having so sued for breach of the Admission Agreement, Mr. Simmons is now estopped under *Rice* from challenging the Arbitration Agreement contained therein. Accordingly, the circuit court erred in failing to compel arbitration on this basis.

Estoppel via third-party-beneficiary status

The *Rice* opinion appears to stand for another proposition as well, namely that one who is a third-party beneficiary to a contract is likewise estopped from challenging the provision for arbitration within that contract. See e.g., *Forest Hill Nursing Center, Inc. v. McFarlan*, No. 2007-CA-00327-COA, 2008 WL 852581, *6 (Miss. Ct. App. Apr 01, 2008) (interpreting *Rice* to bind Mrs. Rice to arbitration clause as third-party beneficiary).[7] Upon this basis as well Appellants are entitled to an order enforcing the Arbitration Agreement.

[7] A copy of the *McFarlan* opinion is attached as Exhibit 6.

The Mississippi Court of Appeals established the applicability of the third-party-beneficiary theory to the nursing-home context with its decision in *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss. Ct. App. Aug., 28, 2007) ("*Barber*"), which Appellants discussed previously concerning the matter of medical surrogacy. See Exhibit 4, attached. Again, Mike Barber admitted his mother, Laurentine Barber, to a nursing facility in Hinds County, signing as his mother's "responsible party" a number of documents relating to her admission, including an admission agreement that contained an arbitration provision. *Barber*, 2007 WL 2421720, at *1 (¶2). When Mr. Barber eventually sued alleging that deficient nursing care at the facility caused his mother's death, the facility responded with a motion to compel arbitration, predicated on the arbitration provision. *Id.* at (¶3). The circuit court denied the motion, reasoning *inter alia* that Ms. Barber herself did not sign the provision and had not given a power of attorney for anyone to act for her. *Id.*

Among the issues on appeal, the Court of Appeals also considered whether Ms. Barber, having received the benefit of health care through the contract that her son signed for her, should be deemed estopped from challenging the arbitration provision contained therein. *Id.* at *5 (¶20). The appellate court turned first to Mississippi law, which makes a person a third-party beneficiary of a contract 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. There must have been a legal obligation or duty on the part of the promise [sic] to such third person beneficiary. This obligation must have been a legal duty which connects the beneficiary with the contract."

Barber, 2007 WL 2421720, at *5 (¶21) (quoting *Burns v. Washington Savs.*, 171 So.2d 322, 325 (Miss. 1965)). Returning to the facts before it, the Court of Appeals ruled: "the facts of the instant case clearly establish that Ms. Barber was a third-party beneficiary of the agreement

signed and executed by Mr. Barber." *Id.* at *6 (¶24). Explaining, the appellate court wrote:

> "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,* 251 Miss. at 796, 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."

Id. at (¶¶25, 26). Concluding, the court further held that the arbitration provision bound Mr. Barber, as his mother's wrongful-death beneficiary, as a matter of Mississippi law. Id. at (¶27).

Here, these same factors clearly make Ms. Simmons a third-party beneficiary of the Admission Agreement signed by Mr. Simmons. Beyond all doubt, the only logical reason that Mr. Simmons had or would have had for signing the Admission Agreement in this case was Ms. Simmons' need for skilled-nursing care, and on its face the Admission Agreement shows that its sole reason for existence was to secure health care for Ms. Simmons. Clearly, the rendition of care to Ms. Simmons resulted to her directly from the performance of the Admission Agreement by its parties, as contemplated in the that contract. And, Ms. Simmons' right to health care springs from those contractual terms; the language of the Admission Agreement creates an evident obligation requiring Manhattan to give adequate health care to Ms. Simmons. Because under *Barber* Ms. Simmons was a third-party beneficiary of the greater Admission Agreement, she, and Mr. Simmons in turn, are bound to its Arbitration Agreement.

Barber is also far from a mere anomaly in the case law, for the Court of Appeals has applied the same reasoning to reach the same conclusion in subsequent cases. The first such case is *Trinity Mission Health & Rehabilitation of Clinton v. Scott*, No. 2006-CA-01053-COA, 2008 WL 73682 (Miss. Ct. App. Jan. 8, 2008) ("*Scott*").[8] There, a daughter signed two admission agreements for her mother to be admitted to a nursing facility, and both contracts contained arbitration provisions. *Scott*, 2008 WL 73682, at *1 (¶¶2, 3). In the eventual case brought by the daughter over allegedly deficient nursing care, the circuit court denied the facility's motion to compel arbitration, and the facility appealed. *Id.* at (¶¶5, 6). Considering the plaintiff's argument that she lacked authority to sign the arbitration agreement, the appellate court turned to "ordinary principles of contract law" and then to the facility's argument that the mother was bound to arbitration as a third-party beneficiary. *Id.* at *2 (¶¶14, 15). Acknowledging the general rule that "arbitration agreements are enforceable to non-signatories to the contract when the non-signatory party is a third-party beneficiary," *Id.* at *2-3 (¶¶14, 15) (quoting *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703, 708 (¶ 15) (Miss. 2006)), the Court of Appeals reviewed the applicable case law, *Id.* at *2-3 (¶¶17-19), and reasoned:

> "The facts of this case clearly establish that Scott was a third-party beneficiary of the contract, unlike Brown. While Scott did not sign the contract, the plain language of the contract makes it very clear that its sole purpose is to bind Trinity to provide services for Scott. The benefit that she received was the health-care services that were laid out in the admissions agreement. Finally, these rights and benefits bestowed upon Scott sprang forth from the terms of the contract."

Scott, 2008 WL 73682, at *3 (¶20). The appellate court concluded that both the arbitration provision bound both the mother and in turn the plaintiff daughter. *Id.* at (¶21).

The Court of Appeals reached the same conclusion on the same reasoning again in *Forest Hill Nursing Center, Inc. v. McFarlan*, 2008 WL 852581 (Miss. Ct. App. Apr. 1, 2008). See

[8] A copy of the *Scott* opinion is attached as Exhibit 7.

Exhibit 6, attached. There, a grand-daughter, Mathews, admitted her grandmother, McFarlan, to a nursing facility, Forest Hill, and in the process signed an admission agreement that included an arbitration provision. *McFarlan*, 2008 WL 852581, at *1 (¶2). In the eventual litigation against the facility for deficient nursing care, the facility defended with a motion to compel arbitration that the circuit court denied on a finding that Matthews lacked the authority necessary to bind McFarlan to the arbitration agreement. *Id.* at (¶4). On appeal, the facility argued that McFarlan should be bound to the arbitration provision as a third-party beneficiary of the greater admission agreement, *Id.* at *2 (¶6), to which the plaintiff responded arguing that the third-party beneficiary theory failed because there was no contract between Matthews and the facility. *Id.* at *5 (¶18). The Court of Appeals disagreed, stating:

> "The admission agreement was signed by both Mathews and a representative of Forest Hill. Based on the record, we have no reason to conclude that anything other than a valid contract exists between Mathews and Forest Hill. Thus, we will consider whether McFarlan is a third-party beneficiary of that agreement."

Id. The appellate court then turned to Mississippi law on point and, returning to the facts before it, the Court of Appeals held:

> "Although McFarlan did not sign the admission agreement, many other factors indicate that she is a third-party beneficiary to the agreement. She is named at the top of the agreement as the resident to be admitted to Forest Hill. The plain language of the contract refers numerous time [sic] to benefits and responsibilities of both the resident and the responsible party. The benefits of residing at Forest Hill flow directly to McFarlan as a result of the agreement. By the terms of the contract, Forest Hill incurred a legal duty to care for McFarlan and provide services directly to her including "room, board, linens and bedding, nursing care, and certain personal services."
>
> McFarlan's care was not incidental to the contract, but instead was the essential purpose of the agreement. We find that she is an intended third-party beneficiary of the agreement between Forest Hill and Mathews; thus, she is bound by the terms of the contract, including the agreement to arbitrate any legal disputes related to the contract."

Id. at (¶¶23, 24).

Here, again, these same factors again bring Ms. Simmons within third-party beneficiary status. Ms. Simmons' care was not "incidental" to the Admission Agreement; rather, it was the sole and essential purpose of that contract. Ms. Simmons is named therein as the resident who is to receive nursing care and other services pursuant to the Admission Agreement, and the benefit of all such care and services, as well as the obligation of the facility to provide the same, resulted directly to her from the very terms of the contract. Under the foregoing case law, then, Ms. Simmons is the third-party beneficiary of the Admission Agreement, which contract Mr. Simmons made with the facility for her benefit. Ms. Simmons was and is therefore bound to the Arbitration Agreement contained therein. On this additional basis, the circuit court's ruling is contrary to the case law and must be reversed.

4. Lisa Byrd's Right to Join in Arbitration.

Appellants note that the Supreme Court permitted Petitioner Lisa Byrd to join this appeal in order to determine whether she is entitled to join Appellants in arbitration. Ms. Byrd's legal theory, at least in part, is that, as a putative agent of Appellant Manhattan Nursing and Rehabilitation Center, LLC, she has a right under the language of the Arbitration Agreement and the case law to seek the arbitration of the claims against her in this case as well.

Appellants respectfully disagree with and oppose Ms. Byrd's argument insofar as she would represent herself as Manhattan's agent. Her position in the circuit court to that effect was based on no more than her own allegations, not evidence in the form of testimony or other proof establishing any fact on which her agency position depends. Indeed, although Appellants are not aware of an appellate record designated by her, her filings in the lower court represented that she is a nurse practitioner who works for Dr. William Krooss, a medical doctor who treated Ms. Simmons at Manhattan. In sum, she is not an agent of any of Appellants.

CONCLUSION

Appellants again respectfully submit for all foregoing reasons that the lower court erred in denying their Motions to Compel Arbitration. Appellants pray that this Court vacate and reverse the circuit court's order denying the Motions and remand this case with instructions to enforce the Arbitration Agreement as to Appellants. Appellants pray for such other and general relief as this Court may deem proper.

Respectfully submitted,

THE LAW & MEDIATION OFFICES OF REBECCA ADELMAN, PLC
Counsel of Record for Appellants

H. Chase Pittman

REBECCA ADELMAN, #[redacted]
H. CHASE PITTMAN, #[redacted]
545 South Main St., Suite 111
Memphis, Tennessee 38103
Tel., 901/529-9313
Fax., 901/529-8772
www.adelmanfirm.com

CERTIFICATE OF SERVICE

I hereby certify, as required by M.R.A.P. 25(a), that I served the Appellants' original Brief, as well as 3 copies of the same, upon the following clerk of court via FedEx delivery:

Betty W. Sephton
CLERK OF THE APPELLATE COURTS
Gartin Justice Building
450 High Street
Jackson, MS 39201

And, I further certify that I served a true copy of the Brief via U.S. Mail, first class, postage prepaid, upon the following counsel of record and circuit judge:

John G. Sims, Esq.
SIMS LAW GROUP, PLLC
P.O. Box 917
223 West Center Street, Suite A
Canton, MS 39046

Heber S. Simmons, III
SIMMONS LAW GROUP
5 Old River Place, Ste. 203
Jackson, MS 39202

R. Mark Hodges
WISE CARTER CHILD & CARAWAY
600 Heritage Building
401 East Capitol Street
Jackson, MS 39201

The Hon. Bobby B. DeLaughter
HINDS COUNTY CIRCUIT COURT
P.O. Box 27
Raymond, MS 39154

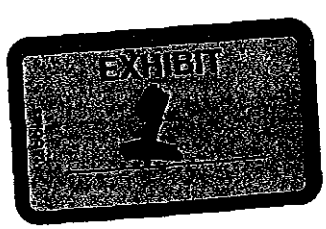
All on this 7th day of May, 2008.

Chase Pittman

This instrument was prepared by Walker & Walker, Attorneys at La
Dyersburg, Tennessee.

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS That I, MRS. I.W. SIMMONS, J
of Dyersburg, Tennessee, have made, constituted and appointed an
do, by these presents, make, constitute and appoint IRA W. SIMMO
III., as my true and lawful attorney for me and in my name, plac
and stead, to make deposits in my name in any bank or banks in
either savings or checking accounts, to endorse any checks payab
to me for deposit to my account in any bank, banks, or savings
institutions, to sign and issue checks on my account or accounts
in any bank or banks, to collect all sums of money due and owing
to me of any kind or character including interest on any savings
accounts, crop rentals, other rentals, dividends and any and all
other income or sums due me, to execute and issue on my behalf
checks in payment of all indebtedness owed by me, to sign on
behalf of and in my name any and all checks, drafts, papers and



documents in connection with the conduct of any of my business or personal affairs, to sell any part or all personal, mixed or real property which I may own or in which I may have an interest and to execute, acknowledge and deliver on my behalf leases, contracts, rental agreements, deeds, bills of sale and conveyances with such covenants, warranties and assurances as my said attorney in-fact shall deem necessary, desirable or expedient, to sign, sea acknowledge and deliver the same, to accept and receive the sum or sums of money or other consideration or considerations which shall be coming to me on account of said sale or sales and to do, to execute and perform all and every other act or acts, thing or things, in law needful and necessary to be done in and about the premises and to conduct all of my personal and business affairs the same as I could do if acting personally and do and perform and execute all acts necessary to carry on said personal or business affairs as fully, completely and amply, to all intents and purpose as I myself could or might do if acting personally, and I hereby ratify and confirm all lawful acts done by my said attorney-in-fact by virtue hereof.

I expressly provide in accordance with Chapter 224 of the Public Acts of the State of Tennessee of 1977 that this Power of Attorney shall remain in full force and effect and is not revoked by operation of law upon my physical or mental debility but is to continue in full force and effect for and during my lifetime unless revoked in writing by me.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of January, 1986.

Mrs. I.W. Simmons, Jr.
MRS. I.W. SIMMONS, JR.

STATE OF TENNESSEE
DYER COUNTY

Personally appeared before me, the undersigned Notary Public in and for the state and county aforesaid, Mrs. I.W. Simmons Jr., the bargainor hereinabove with whom I am personally acquainted and who acknowledged that she executed the above and foregoing instrument for the purposes therein contained.

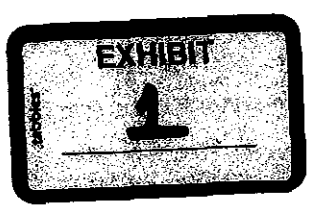
WITNESS MY HAND AND NOTARIAL SEAL OF OFFICE this 9th day of January, 1986, at Dyersburg, Tennessee.

C.R. Lucas
NOTARY PUBLIC

MY COMMISSION EXPIRES: 11-7-1988

Fidelia
Simmons

Admission Agreement



Fidelia Simmons-Admin.
Manhattan 0001

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ADMISSION AGREEMENT

SKILLED NURSING FACILITY

THIS AGREEMENT is made this 23 day of Sept, 2003, by and between Manhattan Nursing & Rehab (hereinafter the "Facility"), and Fidelia Simmons, whose address is 1283 Woodfield Dr. Jackson, MS 39211, (hereinafter the "Designated Representative"), for the admission of Fidelia K. Simmons. (Resident) to the Facility.

Whereas, the Facility is responsible for the operation of the nursing home including: providing and/or arranging for services listed in this Agreement; employing or otherwise arranging for the services of such personnel as is required and listed in this Agreement and complying with local, State and federal laws governing the Facility; and

Whereas, the Facility will admit a resident only upon a physician's order and will retain only those Facility residents for whom it can provide adequate care; and

Whereas, admission to the Facility is contingent upon a common understanding of the conditions set forth in this Agreement

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. THE RESIDENT'S AGENTS

1.1 The "Designated Representative" is the person chosen by the Resident who agrees to be responsible to assist the Resident in meeting his/her obligations under this Agreement. Unless the Designated Representative is also the Resident's spouse, the Designated Representative is not obligated to pay for the cost of the Resident's care from his/her own funds.

1.1.1 By signing this Agreement, however, the Designated Representative personally guarantees continuity of payment from the Resident's funds to which he/she has access or control and agrees to promptly arrange for third-party payment if necessary to meet the Resident's cost of care.

1.1.2 The Designated Representative shall have sufficient access to the Resident's funds and financial information to assure payment of the Resident's

obligations under this Agreement if the Resident lacks or develops a lack of capability or capacity. This access, usually granted through a Durable Power of Attorney, may be limited solely to meeting the payment and insurance obligations of the Resident under this Agreement, and may be structures to take effect in the future only if necessary to fulfill the Resident's obligations under this Agreement.

1.2. The Spouse or "Sponsor" is the person (usually, but not necessarily the Resident's spouse) who is responsible in whole or in part for paying for the Resident's cost of care. A Spouse may also serve as the Resident's Designated Representative. The Spouse's personal financial duty may be limited by the amount of his/her assets if the Resident becomes a Medicaid recipient.

1.3 The "Financial Agent" is the individual who has access to or control over some or all of the Resident's assets. A Financial Agent who does not sign this Agreement as the Designated Representative or Spouse (herein the "Undersigned' or the "Undersigned Agents") is not primarily responsible to assist the Resident in meeting the payment and/or insurance obligations under this Agreement. However, because the cooperation of a Financial Agent other than the Undersigned often becomes necessary, the Facility requires that other Financial Agents agree to help meet the Resident's obligations if so requested, to the extent permitted by their access to or control of the Resident's assets and financial information. A Financial Agent's Personal Agreement is attached to this Agreement as Appendix #4, and is incorporated herein by reference.

1.4 The Resident and the Undersigned Agents confirm and warrant that they have provided the Facility with a complete list of the Resident's current Financial Agents, and copies of all attorneys in fact (Powers of Attorney), Guardianship Commissions or other documents that authorize an agent to act for the Resident, or to have access to, or control of, any of the Resident's assets, *e.g.*, bank accounts, securities, pension, or social security payments. The Resident and the Undersigned Agents agree to inform the Facility of future appointments or revocations.

1.5 The Resident, or the Undersigned Agent (including, without limitation, the Designated Representative) and/or other legal representative(s) on behalf of the Resident, hereby direct all of the Resident's Agents, including future appointees and the Undersigned, to: (i) meet all payment obligations under this Agreement from the Resident's assets and/or from insurance coverage; (ii) cooperate with, and facilitate the process of obtaining Medicaid coverage and/or recertification if required; and (iii) manage the Resident's assets responsibly so that the Facility is paid for the cost of care from the Resident's funds and from Medicaid.

2. PHYSICIAN SERVICES

2.1. The Resident and Designated Representative agree to an examination by a physician at least once every 30 days during the first 90 days following admission, and at least once every 60 days thereafter, or more frequently as required by the Resident's medical condition or by state regulations.

2.1 The Resident and Designated Representative agree to pay the cost of such physician's examination (together with any tests that, in the sole discretion of the physician are required by the Resident's medical condition), and for the physician's review of the Resident's Comprehensive Care Plan upon admission and annually, or more frequently as required by the Resident's medical condition or state regulations.

2.2 The Resident and Designated Representative agree that if the Resident's attending physician is not available, the Facility is authorized to have the Facility's Medical Director arrange for another physician to examine the Resident for the next scheduled examination, or immediately when required by the Resident's medical condition.

2.3 When the Resident's attending and/or covering physician has not examined the Resident as required by the Facility, the Resident's medical condition, or state regulations, the Facility is authorized to have the Medical Director arrange for another physician to examine the Resident within 72 hours of the date the examination was due, or immediately as required by the Resident's medical condition.

3. PREPAYMENT

3.1 The Resident and Designated Representative agree to pay one (1) month of the Resident's daily rate in advance upon admission to the Facility. The one (1) month advance daily rate payment is not required if a Resident is receiving Medicare Part A coverage upon admission.

3.2 In instances where payment under Medicare Part A had been received by the Facility, the Resident and Designated Representative agree to make the one (1) month advance daily rate payment immediately upon notice from the Facility that a one (1) month advance daily rate payment is due, effective from the first day of non-coverage by Medicare Part A. Non-coverage may result, without limitation, from exhaustion of benefit days or cessation of the need for daily skilled nursing or rehabilitative services.

3.3 Upon discharge, any prepayment will be applied by the Facility to cover outstanding charges. Any unapplied prepayment will be promptly refunded to the Resident. If the Resident is deceased, refunds will be paid as required by applicable state law.

4. PAYMENT FOR SERVICES

4.1 Charges for all services to be provided by or at the Facility are due and payable, in advance, on the first day of each and every month. Any charges that remain unpaid after the tenth day of the month for which they are due may be assessed a service charge of one percent (1%) per month, or such other percentage as may be permitted from time to time under applicable state law and regulation.

4.2 In the event the Facility refers the Resident's account to an attorney, collection agency or other third party for collection, the Resident and Designated Representative agree to reimburse, indemnify and hold the Facility harmless for any and all costs of collection, including, without limitation, attorney's fees.

4.3 If the Designated Representative is responsible for making one or more required payments and the Facility refers the Resident's account to an attorney, collection agency or other third party for collection, then the Designated Representative hereby agrees to personally reimburse, indemnify and hold the Facility harmless for any and all costs of collection, including, without limitation, attorney's fees.

5. AGREEMENT TO PAY FOR, OR ARRANGE TO HAVE PAID FOR, SERVICES PROVIDED BY OR AT THE FACILITY.

5.1 The Resident hereby directs the Designated Representative, the Sponsor, and all other Financial Agents, to make all payments due, and fulfill all obligations under this Agreement in accordance with section 1.5 herein.

5.2 The Resident and Designated Representative hereby agree to pay from the Resident's funds, or to arrange to have paid by Medicaid, Medicare or other insurers, all charges for services provided by or at the Facility.

5.3 The undersigned, wishing to facilitate the Resident's admission to the Facility, personally and independently guarantee continuity of payment to the Facility for the cost of the Resident's care. Unless the undersigned are obligated by law to pay for the Resident's care, as the Resident's spouse may be, the undersigned are not required to use personal resources to pay for the Resident's care. Notwithstanding the preceding, in order to meet the payment obligations of the Resident to the Facility under this Agreement, the undersigned personally guarantee payment of Facility charges (including, without limitation, the basic daily rate and as outlined in sections 18 and 19 and as applicable) after any Medicare Part A coverage has been applied or exhausted, until the month in which the Resident's Medicaid eligibility covers such charges.

5.4 The Resident and Designated Representative agree that if insurance does not cover, or pays an amount less than the rate stated in this Agreement, the Resident and Designated Representative are responsible for payment of the Facility's charges (including, without limitation, the daily rate and as outlined in section 18 and 19 and as applicable). Where the Resident has insurance with which the Facility does not have a participating provider agreement and does not accept any tendered insurance payment as payment in full, the Resident and Designated Representative are responsible for payment of the difference between the insurance payment received by the Facility and the Facility's charges under this Agreement. The Resident and Designated Representative also hereby agree that the Resident shall at all times be responsible for any deductibles and co-insurance amounts, and for services that are "non-covered" services by the applicable insurance (for example, private room rate differential, beauty shop charges, etc.).

5.5 The Resident or the undersigned Agents on the Resident's behalf assigns the benefits due the Resident to the Facility and requests the Facility to claim payment from Medicare or other insurance for covered services or supplies provided by the Facility. The Resident authorizes release of information necessary for the Facility to claim and receive such payments on the Resident's behalf. A separate assignment of benefits will be signed, attached hereto as Exhibit A, and incorporated by reference herein.

5.6 The Resident and Designated Representative understand and agree that the Resident will be responsible for, and must pay the Facility's private rate from the Resident's funds during the preparation of a Medicaid application, while a Medicaid application is pending, and if the Medicaid application is denied. It is the responsibility of the Resident and the Designated Representative to ensure continuity of payment, including the responsibility to arrange for timely Medicaid coverage, if Medicaid coverage becomes necessary.

5.7 If the Resident's assets are exhausted or unavailable prior to the Resident's receipt of Medicaid benefits, the Resident and Designated Representative agree to pay the Resident's Net Available Monthly Income ("MEDICAID ASSIGNED AMOUNT") to the Facility as partial payment for Facility charges incurred by the Resident under this Agreement.

5.8 If a Medicaid application is delayed or denied, the Resident and Designated Representative agree to pay (from the Resident's funds), for services at the Facility's private pay rate. If Medicaid eligibility is eventually established and covers any period retroactively for which the private pay rate has been paid, the Facility will refund or credit any amount in excess of the Resident's Medicaid Assigned Amount paid during the covered period.

6. WARRANTY OF INFORMATION ACCURACY.

6.1 The Resident and each of the undersigned (including, without limitation, the Designated Representative), each separately and individually warrant that the financial information submitted to the Facility concerning the Resident's finances is true, correct, complete and accurate in all material respects, and that there are no material omissions. The execution of this Agreement by the Resident and the undersigned shall act as an acknowledgment by the Resident and the undersigned that the Facility relies upon the accuracy of all such information.

6.2 The Resident and Designated Representative warrant and certify that the information given in connection with an application for payment under Title XVIII of the Social Security Act is true, complete and correct.

7. AUTHORIZATION TO RELEASE INFORMATION AND PAYMENT REQUEST.

7.1 The Resident and Designated Representative hereby consent to and authorize the release of any medical or other information by any holder thereof (including, without limitation, the Facility) to the Social Security Administration and/or the Medicare Program or its intermediaries or carriers, provided that such release is made consistent with the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as amended, and applicable state law and regulation.

7.2 The Resident and Designated Representative hereby consent to and authorize the release of any medical or other information by any holder thereof (including, without limitation, the Facility) to the professional standards review organizations associated with any payor (whether federal, state or private) provided that such release is made consistent with requirements of HIPAA, and applicable state law and regulation.

7.3 The Resident and Designated Representative hereby consent to and authorize the release of any medical or other information by any holder thereof (including, without limitation, the Facility) to the state Medicaid Program or its intermediaries or carriers, provided that such release is made consistent with the requirements of HIPAA, and applicable state law and regulation.

7.4 The Resident and Designated Representative request that payment of authorized benefits be made to the facility on the Resident's behalf.

8. OBLIGATION TO ARRANGE FOR TIMELY MEDICAID COVERAGE AND PAYMENT TO THE FACILITY.

8.1 The Resident and Designated Representative agree to monitor the Resident's resources to assure uninterrupted payment to the Facility.

8.2 The Resident and Designated Representative further agree and warrant that a Medicaid application will be timely and accurately filed so as to fulfill the contractual obligation set forth in section 6.2 above.

8.3 The Resident and Designated Representative agree to notify the Facility regarding: (a) the anticipated time when the Resident will have spent the Resident's resources to the Medicaid resource level set by the state, and (b) the date upon which a Medicaid application has been completed, and the date upon which the application was filed.

8.4 Once the Resident has been approved for Medicaid benefits, the Resident and Designated Representative agree to cooperate with the Medicaid recertification process in order to assure uninterrupted payment to the Facility, including, without

limitation, the execution of a Release of Resident Medicaid Information to the Facility form (see appendix 5).

8.5 The Resident and Designated Representative understand that if the Resident receives monthly income and also qualifies for Medicaid, an adjustment in Medicaid payment may be made, and the Resident's Medicaid Assigned Amount must be paid to the Facility as part of the Resident's obligation under this Agreement (or paid as otherwise required under applicable state regulations).

8.6 If the Resident receives a monthly income in addition to Medicaid benefits, the Resident and the Designated Representative represent, warrant and agree that: (a) the Resident and/or the Designated Representative will arrange for the income payor to send the monthly income directly to the Facility; or (b) the Resident and/or the Designated Representative will deliver the Resident's Medicaid Assigned Amount to the Facility no later than the tenth (10^{th}) day of each and every month.

8.7 The Resident and the Designated Representative represent, warrant and agree that if the Medicaid Assigned Amount is disputed, it is the Resident or Designated Representative's responsibility to resolve the dispute. That Portion of the Medicaid Assigned Amount that is not in dispute will be paid to the Facility on or before the tenth (10th) of each month.

9. REFUND POLICY

9.1 The Resident and Designated Representative agree to notify the Facility at least ten (10) days in advance of a request for a non-emergency discharge. In the event that the Resident leaves the Facility for reasons that are within the control of the Resident or the Designated Representative, the Facility shall retain from the Resident's prepayment, or shall, in the absence of a prepayment, charge, an amount equal to one (1) day's daily rate in addition to any charges incurred by the Resident for services furnished by the Facility.

9.2 In the event the Resident leaves the Facility prior to the end of the period covered by the prepayment for reasons that are beyond the control of the Resident and the Designated Representative, the Facility will refund any portion of the prepayment in excess of the amount due for charges incurred by the Resident for services furnished by or at the Facility.

10. BEDHOLD POLICY

10.1 In the event the Resident is discharged to a hospital and or Therapeutic Leave, the Resident's option to reserve a bed in the Facility shall be subject to the Facility's Bed Hold Policy in effect at the time of discharge, and applicable state law and regulation. The Facility shall advise the Resident and Designated Representative regarding the Facility's Bed Hold Policy and applicable state rules and regulations addressing bed hold reservations.

11. INVOLUNTARY DISCHARGE FROM THE FACILITY

11.1 The Facility may discharge a resident for nonpayment. Nonpayment occurs when the Resident and/or the Designated Representative fail to make full payment for Facility charges incurred by the Resident either from private funds, or through Medicare, Medicaid or other third party payor. Discharges from the Facility for nonpayment shall be in accordance with applicable state law and regulation.

11.2 In the case of a Resident who is receiving Medicaid benefits, it is the policy of the Facility that non-receipt by the Facility of the Resident's Medicaid Assigned Amount is cause for involuntary discharge of the Resident.

11.3 The Facility may involuntary transfer or discharge the Resident because the Resident poses a danger to the health or safety of individuals in the Facility where reasonable alternatives to discharge have been considered.

11.4 The Facility may involuntary transfer or discharge the Resident because: (a) the Resident's health has improved and the Resident no longer requires the Facility's services; or (b) because the Resident's health needs can no longer be met in the Facility; or (c) the Resident's urgent medical needs require an immediate transfer or discharge.

11.5 Involuntary discharge will be effected after the minimum notice requirements prescribed by applicable state law and regulation, or thirty (30) days notice if no state law or regulation is applicable (unless the health or safety of others in the Facility is jeopardized), subject to any legal rights of appeal or challenge prescribed by law.

12. ADMISSION AND RETENTION OF RESIDENTS

12.1 The Facility will admit residents under sixteen (16) years of age only if space is available in a Facility area approved for such occupancy by the regulatory agency or department having jurisdiction over Facility admissions.

12.2. Potential residents in need of care provided at the Facility will not be automatically barred from admission or retention solely on the basis that they also receive treatment in an alcohol or substance abuse programs, provided, however, that the potential resident meets all of the Facility's admission criteria.

12.3 The Facility will not admit prenatal, intrapartum or postpartum, and maternity patients.

12.4 The Facility will not admit a prospective resident who manifests a behavioral or emotional disorder that, in the exclusive opinion of the Facility, makes the potential resident a danger to himself/herself or others, or whose behavior interferes with the care or comfort of other residents.

12.5 The Facility will not admit or retain a prospective resident suffering from a communicable disease unless a physician certifies in writing that transmissibility is negligible, and poses no danger to other residents, or the Facility is staffed and equipped to manage such cases without endangering the health of other residents.

12.6 The Facility will not admit a prospective resident who requires a life support system.

13. DAILY ROOM RATE POLICY

13.1 The Privately paying resident agrees to pay the applicable daily basic room rate ("private pay rate") after any Medicare Part A or other plan coverage has been applied or exhausted , unless and until the resident is determined to be Medicaid eligible for chronic care. The private pay rate is owed while a Medicaid application is pending and if the Medicaid application is denied unless other insurance covers the rate.

13.2 Specifically, the Resident agrees to pay, or arrange for payment of _____ per day in a _____ room. Payment for all services is due by the 10th of each month. Medicaid Approved

14. SERVICES AND SUPPLIES PROVIDED BY THE FACILITY AS PART OF THE DAILY RATE

14.1 Board, including a therapeutic, modified diet as prescribed by a physician.

14.2 Lodging, including a clean, healthful environment, properly outfitted.

14.3 Twenty-four (24) hour per day personal care.

14.4 The use of all equipment, medical supplies and modalities not withstanding the quantity usually used in every day care of a Facility resident, including but not limited to; catheters, hypodermic syringes and needles, irrigation outfits, dressings and pads, etc.

14.5 Fresh bed linen, as required, changed at least twice a week, including sufficient quantities of necessary bed linen or appropriate substitutions, changed as often as required, for incontinent residents.

14.6 Incontinent products as provided by the facility's incontinent program. In the event the Resident and/or Designated Representative requests the use of incontinent products that are not the use of the facility incontinent program, the cost of these items will be incurred by and charged to the Resident.

14.7 Hospital gowns as required by the clinical condition of the resident unless the Resident and Designated Representative elect to furnish these items; laundry service for these and other washable clothing items will be provided by the facility.

14.8 General household medicine cabinet supplies, including: stocked non-prescription medication, supplies for the care of the hair (except for Beauty Shop appointment), oral hygiene, routine skin care, except when specific items are medically indicated and prescribed by a physician for exceptional use and for a specific intent.

14.9 Assistance and/or supervision, when required, with activities of daily living including, but not limited to: bathing, toileting, feeding, and assistance with ambulation.

14.10 Services rendered in the daily performance of their assigned duties by members of the Facility staff concerned with care of the Resident.

14.11 The use of customarily stocked equipment including: crutches, walkers, wheelchairs, or other supportive equipment; training in their use for the Resident.

14.12 An activities program including a planned schedule of recreational, motivational, social and other activities, together with the necessary materials and supplies to make the Resident's life more meaningful.

15. PRIVATE ROOM DIFFERENTIAL

15.1 The Facility will consider the application of a prospective resident for a private room. If the Facility agrees to admit the Resident to a private room, the Resident and the Designated Representative hereby agree that the Resident: (a) if a private pay resident, shall pay the full cost of the private room from the Resident's personal assets; or (b) if the Resident receive Medicare Part A benefits, Insurance benefits, or Medicaid eligibility, the Resident will remain responsible for the difference between the private room rate and the semi-private room rate, which in most instances shall not be less than $ 6.25.

15.2 If the Resident receives Medicare Part A benefits, Insurance benefits, or Medicaid eligibility and admission to a private room is medically necessary as defined by Medicare, the Resident will not be responsible for the difference between the private room rate and the semi-private room rate. Medicare currently defines medical necessity for room occupancy purposes as: (a) a need for isolation, where placement in a semi-private room would jeopardize the health of the resident or other residents; or (b) immediate admission is required and only private rooms are available. In the case of subsection 15.2(b) above, at such time as the Facility has a semi-private room available, and the Resident elects to remain in a private room, the Resident and Designated Representative agree to accept responsibility for the room rate differential as set forth in subsection 15.1(b) above.

16. SUBACUTE SERVICES

16.1 Subacute or other short term services are those aimed at enabling residents to reach a specific performance goal so that that continued recovery can take place at home or at a lower level of care. The duration of such services is determined by the Resident's continued need for and/or continued improvement from the services. Where an insurer or health benefit plan manages the stay and covers only "medically necessary" services, the initial anticipated length of stay is determined by such health plan. This anticipated length of stay in a subacute bed shall be set forth in the Resident's discharge plan and notice of discharge.

16.2 The Resident and the undersigned have accepted and agreed to an initial discharge notice and the discharge plan, subject to subsequent adjustments as the Resident's needs, choices and post-discharge options are re-evaluated. The Resident and the undersigned hereby agree to cooperate in securing adequate aftercare services, if needed. Upon discontinuance of subacute services, the Resident agrees to transfer to another room or unit within the Facility.

17. FACILITY CHARGE ASSESSMENT POLICY

17.1 The Facility maintains a written record of all financial arrangements with the Resident and the Designated Representative, with copies executed by and furnished to each party. The Facility will not assess additional charges, expenses, or other financial liabilities in excess of the daily rate as set forth in this Agreement, except as set forth in this Agreement, and except for the following:

17.1.1. Charges for Physicians' services and prescription medications that are not included in the daily rate under this Agreement.

17.1.2. Upon written orders of the Resident's attending, alternate or staff physician stipulating specific services and supplies not included in or covered by this Admission Agreement.

17.1.3. Upon thirty (30) days prior written notice to the Resident and the Designated Representative of additional charges, expenses, or other financial liabilities due to a change in the Resident's care level; or increased costs of maintenance and/or operation of the Facility.

17.1.4 Upon the written approval and authority of the Resident and/or the Designated Representative.

17.1.5 In the event the Resident experiences a health emergency that requires special services and/or supplies not contemplated by this Agreement.

17.2 The Facility will not charge Residents receiving Medicare Part A benefits for prescription medications, physical therapy, occupational therapy or speech therapy, unless, and only to the extent, such charges are allowed by applicable law and regulation.

17.3 The Facility will not charge Residents receiving Medicaid benefits for prescription medications, physician visits, physical therapy, occupational therapy or speech therapy, unless, and only to the extent, such charges are allowed by applicable law and regulation.

18. DEDUCTIBLES AND CO-INSURANCE

18.1 Medicare or other insurers require a deductible and/or con-insurance payment by the Resident to the Facility. The Resident and/or Designated Representative agree to make the required deductible and/or coinsurance payments to the Facility in a complete and timely manner.

19. ITEMS/SERVICES NOT COVERED IN THE DAILY RATE OR BY INSURANCE.

19.1 Certain items and services generally associated with daily living are not covered under the daily rate, nor are they paid for by Medicaid, Medicare or private insurance carriers. Such items are made available by the Facility, but must be paid for or charged against the Resident's personal account as and when the cost is incurred by the Resident. Such service and/or items include, without limitation:

19.1.1 Barber/Beauty parlor services.

19.1.2 Private in room telephone, including installation, maintenance and monthly fees.

19.1.3 Private television in room including installations, maintenance and monthly cable fees, when Applicable.

19.1.4 Newspapers and other subscriptions.

19.1.5 Clothing and shoes.

19.1.6 Dry cleaning.

19.1.7 Any transportation for personal and/or medical necessity and only to the extent, such charges are allowed by applicable state law and regulation.

20. ADVANCE INSTRUCTION OR DIRECTIVES POLICY.

20.1 The Facility will comply with applicable state law and regulation concerning health care treatment decisions made in good faith by a Resident's duly appointed health care agent as prescribed by law.

20.2 Residents of the Facility are presumed by the Facility to consent to initiation of cardio-pulmonary resuscitation ("CPR") in the event of cardiac or pulmonary arrest, unless the Facility has been duly provided with notice, in legal form prescribed by the state that the Resident does not want CPR. CPR is initiated by certified Facility staff awaiting the arrival of community advanced life support services for continuance of the CPR, and immediate transfer to a hospital.

20.3 The Facility will respect the Resident's right to refuse medical treatment, to execute a Health Care Proxy, and formulate an advance directive to the extent permitted under state law and regulation.

20.4 It is the philosophy of the Facility to support the Resident's informed choice in decision making, and the decisions of a health care agents duly appointed pursuant to law. This support includes the insertion and/or withdrawal of feeding tubes. However, should the Facility object to a health care agent's decision or to the Resident's advance directives (including hydration and nutrition), the Facility Ethics Committee shall be convened to consider the matter. Following the committee meeting and determination, the Facility may object to the agent's decision regarding hydration and nutrition, in which case the Resident shall be transferred to another facility that is readily accessible under the circumstances and willing to honor the Resident's or agent's decision.

20.5 In the absence of legally constituted, written advance directives, including those related to artificial nutrition and hydration, the Facility may convene its Ethics Committee. At this meeting, involved parties are afforded the opportunity to present evidence regarding the Resident's wishes under the current circumstances. The standard of proof at such a meeting of the Ethics Committee shall be the clear and convincing standard.

20.6 Following the meeting of the Ethics Committee, and the issuance of a determination thereby, the Facility may object to the desires of the involved party(ies) regarding hydration and nutrition, in which case the Resident shall be transferred to another facility that is readily accessible under the circumstances and willing to honor the involved parties request.

20.7 The Ethics Committee shall consist of the Executive Director, Director of Nursing and the Medical Director. Other health care professionals may provide additional information to the Ethics Committee as appropriate. A copy of the Ethics Committee policy is available from the Executive Director upon request.

21. PHYSICAL RESTRAINT POLICY.

21.1 The Facility's policy and philosophy disfavors the use of physical restraining devises. Alternate methods of control are first considered. It is important to note that restraining devices are sometimes necessary to protect residents from injury or to help a resident experience an improved quality of life. Therefore, when a restraint is necessary, the least restrictive type of devise will be utilized. The use of restraints occurs only as a result of an informed decision making and evaluation process by the Resident, the physician, the family and the Facility's professional staff.

21.2 The Facility's professional staff assesses the Resident following admission and makes every effort to use techniques and equipment other than restraints to ensure safety and maximum mobility. Major components in this decision making process include medical considerations, the Resident's functional status, the Resident's feelings, safety considerations and family concerns. If it is determined that a restraining devise is indicated, it should be prescribed by the Resident's personal physician.

22. FACILITY DIRECTORY AUTHORIZATION

22.1 The Facility Directory is used to provide visitors, interested parties and service providers with patient/resident information as follows: (a) the Resident's Name; (b) The Resident's room number (location within the facility); and (c) religious affiliation. Clinical information is not included in the Facility Directory.

☒ The Facility is hereby authorized to include the Resident's information in the Facility Directory.

☐ The Facility is requested not to include the following information about the Resident in the Facility Directory: _____
_____.

☐ The Facility is requested to restrict access to the Resident's Facility Directory information.

23. MISCELLANEOUS

23.1 At the time of discharge from the Facility, the Facility requires that personal items and other belongings be removed from the Facility within a reasonable amount of time. Items and other belongings left in the Facility after a reasonable amount of time shall be considered abandoned.

23.2 Certain rooms may be designated as isolation rooms. In the event that a room so designated is needed to facilitate isolation precautions, residents residing in these rooms will be transferred to another room, upon notice.

23.3 Certain rooms may be designated for sub-acute care. In the event that your room is so designated, the Resident may be requested to transfer to another comparable room if a sub-acute room is unavailable for a prospective resident requiring sub-acute care.

23.4 The Resident's facial photograph may be taken to use as identification, and photographs of specific injuries or conditions, as medically necessary. These photographs will be kept confidential.

23.5 Not withstanding any other provision in this Agreement, the Facility remains responsible for ensuring that any services provided pursuant to this Agreement comply with all applicable federal, State and local statutes, rules and regulations.

23.6 The Resident and the Undersigned agree to abide by the Facility's rules and regulations, and to respect the dignity, personal rights and property of residents, visitors, and staff.

23.7 In addition to the parties signing this Agreement, the Agreement shall be binding on the heirs, executors, administrators, distributees, successors, and assigns of said parties.

23.8 This Agreement remains in effect if the Resident is readmitted to the Facility after a hospitalization or temporary absence.

23.9 This Agreement may not be amended or modified except in writing signed by the Facility and the Resident and/or the Undersigned Agents except for: (a) increases on charges according to this Agreement; and (b) modification required by changes in the law, which are deemed to become part of this Agreement.

23.10 The failure of any party to enforce any term of this Agreement or the waiver by any party of a breach of this Agreement will not prevent the subsequent enforcement of such term, and no party will be deemed to have waived subsequent enforcement of this Agreement.

23.11 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 part of this Agreement.

23.12 This Agreement with its Appendices, Exhibits and all executed Addenda are incorporated herein and contain the entire agreement between the parties.

23.13 This Agreement shall be governed by, and subject to, the laws of the state in which the Facility is located.

23.14 Any disputes arising under, or in connection with, or related to this Agreement shall be subject to the terms and condition of the Arbitration Agreement, attached hereto as EXHIBIT A, and incorporated herein by reference.

THIS FACILITY DOES NOT DISCRIMINATE IN THE ADMISSION, RETENTION AND CARE OF RESIDENTS BECAUSE OF RACE, CREED, COLOR, NATIONAL ORIGIN, AGE, GENDER, MARITAL STATUS, SEXUAL PREFERENCE, BLINDNESS, SPONSOR, DISABILITY OR HANDICAP

THE UNDERSIGNED CERTIFY (IES) THAT HE/SHE/THEY HAS (HAVE) READ THE FOREGOING AGREEMENT, FULLY UNDERSTAND ITS TERMS AND CONDITIONS, AND IN CONSIDERATION OF THE SERVICES TO BE RENDERED TO THE RESIDENT, AGREE(S), WHETHER AS THE RESIDENT OR AS AN AGENT OF THE RESIDENT, TO ALL OF THE TERMS AND CONDITIONS SET FORTH HEREIN.

DATE: 9-23-03

RESIDENT: FideliaK.Simmons

SIGNATURES:

/

SIGNATURE OR MARK OF RESIDENT

SIGNATURE OF SPONSOR, e.g. SPOUSE

SIGNATURE OF DESIGNATED REPRESENTATIVE — **RELATIONSHIP** Son

SOCIAL SECURITY NUMBER

SIGNATURE OF FACILITY (ADMINISTRATOR)

FACILTY REPRESENTATIVE

*If spouse is also the Designated Representative must sign as both the spouse and the Designated Representative if acting in both capacities.

APPENDIX # 1

ANCILLARY SERVICES PROVIDED ON A FEE FOR SERVICE BASIS

1. Physical therapy as prescribed by a physician, administered by or under the direct supervision of a licensed and currently registered Physical Therapist.

   Fee: Available upon request.
   80% of which is billed to Medicare Part B – up to Medicare allowable amount.

2. Occupational therapy as prescribed by a physician, administered by or under the supervision of a licensed and currently registered Occupational Therapist.

   Fee: Available upon request.
   80% of which is billed to Medicare Part B – up to Medicare allowable amount.

3. Speech therapy and/or audio logical services as prescribed by a physician, administered by a qualified Speech Pathologist/Audiologist.

   Fee: Available upon request.
   80% of which is billed to Medicare Part B – up to Medicare allowable amount.

4. Laboratory services as ordered by a physician.

5. X-Ray services as ordered by a physician.

6. Podiatry services as prescribed by the Resident's physician. The Resident agrees to be seen by the Facility's consulting Podiatrist unless the Resident and Designated Representative notify the Facility otherwise.

7. Optometric services as prescribed by the Resident's physician. The Resident agrees to be seen by the Facility's consulting Optometrist/Optician unless the Resident and Designated Representative notify the Facility otherwise.

8. In the event of Medicare Part A coverage, Ancillary Services will be provided by the Facility as outlined under the Medicare Act.

9. In the event of Medicaid coverage, Ancillary Services may be covered, or partially covered, by Medicaid.

APPENDIX # 2

NOTICE OF PRIVACY PRACTICES

THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT THE RESIDENT MAY BE USED AND DISCLOSED AND HOW THE RESIDENT CAN OBTAIN ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.

The Facility uses the Resident's Protected Health Information for treatment, to obtain payment for our services and for our operational purposes, such as improving the quality of care we provide to the Resident. The Facility is committed to maintaining the Resident's confidentiality and protecting the Resident's health information. The Facility is required by law to provide the Resident with this Notice which described the Facility's health information privacy practices and those of affiliated health care providers that provide care at the Facility.

This Notice applies to all information and records related to the Resident's care that the Facility workforce members and Business Associates (described below) have received or created. It also applies to health care professionals, such as physicians, and organizations that provide care to the Resident at the Facility. It informs the Resident about the possible uses and disclosures of the Resident's Protected Health Information and describes the Resident's rights and the facility's obligations regarding the Resident's Protected Health Information.

The Facility is required by law to:

Maintain the privacy of the Resident's Protected Health Information;

Provide to the Resident's this detailed Notice of the Facility's legal duties and privacy practices relating to the Resident's Protected Health Information; and

Abide by the terms of the Notice that are currently in effect. The Facility reserve the right to change the terms of this Notice, and will notify the Resident or the Designated Representative by letter if the facility makes any material changes to the Notice.

I. WITH THE RESIDENT'S CONSENT THE FACILITY MAY USE AND DISCLOSE THE RESIDENTS PROTECTED HEALTH INFORMATION FOR TREATMENT, PAYMENT AND HEALTH CARE OPERATIONS

The Resident will be asked to sign a Consent allowing us to use and disclose your Protected Health Information to others to provide you with treatment, obtain payment for our services, and run our health care operations. Here are examples of how we may use and disclose your health information.

For Treatment. Our staff and affiliated health care professionals may review and record information in your record about your treatment and care. We will use and disclosure this health information to health care professionals in order to treat and care for you. For example, a physician may consult with another physician located at another location to determine how to best diagnose and treat you.

For Payment. Our facility may use and disclosure your Protected Health Information to others in order for the facility to bill for your health care services and receive payment. For example, we may include your health information in our claim to Blue Cross/Blue Shield or Medicare in order to receive payment for services provided to you. We may also disclose your health information to other health care providers so that they can receive payment for your services.

For Health Care Operations. We may use and disclose your Protected Health Information to others for our facility's business operations. For example, we may use Protected Health Information to evaluate our facility's services, including the performance of our staff, and to educate our staff.

II. WE MAY USE AND DISCLOSURE YOUR PROTECTED HEALTH INFORMATION FOR OTHER SPECIFIC PURPOSES

Business Associates. We may share your Protected Health Information with our vendors and agents who help us with obtaining payment or carrying out our business functions. For example, we may give your health information to a billing company to assist us with our billing for services, or to a law firm or an accounting firm that assists us in complying with the law and or improving our services.

Facility Directory. Unless you object, we may include general information about you in our facility directory. This information may include your name, location in the facility, and religious affiliation. We may release information in our directory, except for your religious affiliation, to people who ask for you by name. Your religious affiliation may be given to any member of the clergy even if they don't ask for you by name.

Family and Friends Involved in Your Care. Unless you object, we may disclose your Protected Health information to a family member or close personal friend, including clergy, who is involved in your care or payment for that care.

Disaster Relief. We may disclose your Protected Health Information to an organization assisting in a disaster relief effort.

Public Health Activities. We may disclosure your Protected Health Information for public health activities including the reporting of disease, injury, vital events, and the conduct of public health surveillance, investigation and/or intervention. We may also disclose your information to notify a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition if a law permits us to do so.

Health Oversight Activities. We may disclose your Protected Health Information to health oversight agencies authorized by law to conduct audits, investigations, inspections and licensure actions or other legal proceedings. These agencies provide oversight for the Medicare and Medicaid programs, among others.

Reporting Victims of Abuse, Neglect or Domestic Violence. If we have reason to believe that you have been a victim of abuse, neglect or domestic violence, we may use and disclose your Protected Health Information to notify a government authority if required or authorized by law, or if you agree to the report.

Law Enforcement. We may disclose your Protected Health Information for certain law enforcement purposes or other specialized governmental functions.

Judicial and Administrative Proceedings. We may disclose your Protected Health Information in the course of certain judicial or administrative proceedings.

Research. In general, we will request that you sign a written authorization before using your Protected Health Information or disclosing it to others for research purposes. However, we may use or disclose your health information without your written authorization for research purposes provided that the research has been reviewed and approved by a special Privacy Board or Institutional Review Board.

Coroners, Medical Examiners, Funeral Directors, Organ Procurement Organizations. We may release your health information to a coroner, medical examiners, funeral director or, if you are an organ donor, to an organization involved in the donation of organs and tissue.

To Avert a serious Threat to Health or Safety. We may use and disclose your Protected Health Information when necessary to prevent a serious threat to your health or safety or the health or safety of the public or another person. However, any disclosure would be made only to someone able to help prevent the threat.

Military and Veterans. If you are a member of the armed forces, we may use and disclose your Protected Health Information as required by military command authorities. We may also use and disclose Protected Health Information and foreign military personnel as required by the appropriate foreign military authority.

Worker's Compensation. We may use or disclose your Protected Health Information to comply with laws relating to workers' compensation or similar programs.

National Security and Intelligence Activities; Protective Services. We may disclose health information to authorized federal officials who are conducting national security and intelligence activities or as needed to provide protection to the President of the United States, or other important officials.

As Required By Law. We will disclose your Protected Health Information when required by law to do so.

III. YOUR AUTHORIZATION IS REQUIRED FOR OTHER USES OF YOUR PROTECTED HEALTH INFORMATION

We will use and disclose your Protected Health Information other than as described in this Notice of required by law only with your written Authorization. You may revoke your Authorization to use or disclose Protected Health Information in writing, at any time. To revoke your Authorization, contact the Medical Records/Health Information Management (HIM) staff. If you revoke your Authorization, we will no longer use or disclose your Protected Health Information for the purposes covered by the Authorization, except where we have already relied on the Authorization.

IV. YOUR RIGHTS REGARDING YOUR HEALTH INFORMATION

You have the following rights with respect to your health information. If you wish to exercise any of these rights, you should make your request to the Medical Records/HIM Director.

Right of Access to Protected Health Information. You have the right to request, either orally or in writing, to inspect and obtain a copy of your Protected Health Information, subject to some limited exceptions. We must allow you to inspect your records within 24 hours of your request. If you request copies of the records, we must provide you with copies within 2 days of that request. We may charge a reasonable fee for our costs in copying and mailing your requested information.

In certain limited circumstances, we may deny your request to inspect or receive copies. If we deny access to your Protected Health Information, we will provide you with a summary of the information, and you have a right to request review of the denial. We will provide you with information on how to request a review of our denial and how to file a complaint with us or the Secretary of the Department of Health and Human Services.

Right to Request Restrictions. You have the right to request restrictions on the way we use and disclose your Protected Health Information for our treatment, payment or health care operations. You also have the right to restrict your Protected Health Information that we disclose to a family member, friend or other person who is involved in your care or the payment of your care.

We are not required to agree to your requested restriction, and in some cases, the law may not permit us to accept your restriction. However, if we do not agree to accept your restriction, we will comply with your restriction in most situations. We may not be required to honor your restriction in the following situations: (1) you are being transferred to another health care institution; (2) the release of records is required by law, or (3) the release of information is needed to provide you emergency treatment.

Right to an Accounting of Disclosures. You have the right to request an "accounting" of our disclosures of your Protected Health Information. This is a listing of certain disclosures of your Protected Health Information made by the facility or by others on our behalf, but does not include disclosures made for treatment, payment and health care operations or certain other exceptions.

You must submit a request in writing, stating a time period beginning after April 13, 2003 that is within six years from the date of your request. For example, you may request a list of disclosures the facility made between May 1, 2003 and May 1, 2004. You are entitled to one free accounting within one 12-month period. For additional requests, we may charge you our costs.

We will usually respond to your request within 60 days. Occasionally, we may need additional time to prepare the accounting. If so, we will notify you of our delay, the reason for the delay, and the date when you can expect the accounting.

Right to Request Amendment. If you think that your Protected Health Information is not accurate or complete, you have the right that the facility amend such information for as long as the information is kept in our records. Your request must be in writing and state the reason for the requested amendment. We will usually respond within 60 days, but will notify you within 60 days if we need additional time to respond, the reason for the delay and when you can expect our response. We may deny your request for amendment, and if we do so, we will give you a written denial including the reasons for the denial and an explanation of your right to submit a written statement disagreeing with the denial.

Right to a Paper Copy of This Notice. You have the right to obtain a paper copy of this Notice, even if you have agreed to receive this Notice electronically. You may request a copy of this Notice at any time.

Right to Request Confidential Communications. You have the right to request that we communicate with you concerning personal health matters in a certain manner or at a certain location. For example, you can request that we speak to you only at certain private locations in the facility. We will accommodate your reasonable request.

V. COMPLAINTS

If you believe that your privacy rights have been violated, you may file a compliant in writing with us or with the Office of Civil Rights in the U.S. Department of Health and Human Services. To file a complaint with the facility, contact Bobbie Blackard at 982-7421. No one will retaliate or take action against you for filing a complaint.

VI. CHANGES TO THIS NOTICE

We will promptly revise and distribute this Notice whenever there is a material change to the uses or disclosures, your individual rights, our legal duties, or other privacy practices stated in this Notice. We reserve the right to change this Notice and to make the revised or new Notice provisions effective for all Protected Health Information already received and maintained by the facility as well as for all Protected Health Information we receive in the future. We will post a copy of the current Notice in the facility. In addition, we will provide a copy of the revised Notice to all residents by delivering a hard copy to them or their personal representatives.

VII. FOR FURTHER INFORMATION

If you have any questions about this Notice or would like further information concerning your privacy rights, please contact:

Bobbie Blackard, Executive Director at 982-7421

Effective Date of this Notice: June 30, 2003

APPENDIX # 3

RESIDENT'S WRITTEN ACKNOWLEDGEMENT OF RECEIPT OF NOTICE OF PRIVACY PRACTICES

Resident Name: Fidelia K. Simmons

I acknowledge that I have received a copy of the Facility's Notice of Privacy Practices and have been advised of how the facility [and the other named individuals and organizations listed in the Notice] will handle my Protected Health Information. I have also been advised of my rights to obtain access to and control my Protected Health Information. I understand that I may receive other notices which describe how the Facility will handle specialized forms of Protected Health Information such as HIV/AIDS-related, alcohol and substance abuse, and genetic information and psychotherapy notes.

SIGNATURE

I have received a copy of the Facility's Notice of Privacy Practices. I have had an opportunity to ask questions about the Notice and the use or disclosure of my Protected Health Information.

Signature of Resident or Personal Representative: Ira W. Simmons

Print Name of Resident or Personal Representative: Ira W. Simmons

Description of Personal Representative's Authority: Power of Attorney

Date: 9-23-2005

CONTACT INFORMATION

Contact information of the personal representative who signed this form:

Address: 1283 Woodfield Dr.
Jckson, MS 39211

Telephone: _____ (Daytime) _____ (Evening)

For Facility Use Only:

Date Notice Provided 9-23-05

Name of Facility Staff Member [illegible] Title Adm.

APPENDIX # 4

FINANCIAL AGENT'S PERSONAL AGREEMENT

N/A

THIS AGREEMENT is made this ___ day of _____, 20___, by and between _____ (the hereinafter the "Facility"), and _____ (the "Financial Agent"), residing at _____, for the benefit of and concerning the admission of _____ (the "Resident") pursuant to the attached Admission Agreement (the "Admission Agreement") between the Facility and the Resident and/or Sponsor and/or the Designated Representative.

WHEREAS, the Financial Agent understands that he/she is a financial agent of the Resident because the Financial Agent has access to some or all of the Resident's assets; and

WHEREAS, the Financial Agent understands the Resident's obligation to the Facility set forth in the Admission Agreement and acknowledges the Resident's wishes for the Financial Agent's compliance with its terms; and

WHEREAS, the Financial Agent wishes to assist the Resident and to facilitate the Resident's admission referenced herein;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

The Financial Agent agrees to provide the following assistance to the Facility in the event such assistance is needed and requested:

1. Without incurring the obligation to pay for the cost of the Residents care from the Financial Agent's own funds, the Financial Agent personally agrees to use the Financial Agent's access to the Resident's funds to assist and facilitate the Resident in meeting his/her obligations under the attached Admission Agreement.

2. More specifically, the Financial Agent personally agrees that, to the extent of his/her authority, the Financial Agent will use his/her access to the Resident's assets to ensure continued satisfaction of the Resident's payment obligations to the Facility. The Financial Agent agrees not to use the Resident's assets in a manner that prejudices the Facility's receipt of payment from either the Resident's funds or from Medicaid.

3. If the Resident is or becomes Medicaid eligible, and if the Financial Agent has access to or control over the Resident's income, the Financial Agent personally agrees to assure that the Facility is paid that portion of the monthly Medicaid rate (the "Medicaid Assigned Amount" amount) that the Medicaid agency directs the Resident to pay toward the cost of the Resident's care.

4. The Agent personally agrees to assist in meeting the insurance obligations under the Admission Agreement if requested by providing timely financial information and/or documentation of the Resident's assets to which the Financial Agent has access, or of which the Financial Agent is aware; and

5. The Financial Agent agrees to pay damages to the Facility caused, arising out of, or related to any breach of the Financial Agent's personal obligations set forth in this Agreement.

IN WITNESS WHEREOF, intending to be legally bound, the Financial Agent hereby executed this Agreement for the benefit of the Resident as of the date indicated.

_____ _____

Date Signature of Financial Agent

_____

Name of Financial Agent [Please Print]

_____

Financial Agent's Address

_____

Financial Agent's Telephone Number

Type(s) of Agency (e.g. Power of Attorney, Joint Tenant on Real or Personal Property, Guardian, Conservator, Representative Payee on Pension or (Social Security).

_____ _____[Facility Name]

Date By:

_____

[Name and Title]

A copy of the instrument(s) conferring such authority are attached hereto.

APPENDIX # 5

RELEASE OF RESIDENT MEDICAID INFORMATION TO FACILITY

I, Ina Simmons, hereby authorize the Hinds County Department of Social Services ("the Department") to release information about Fidelia K. Simmons's Medicaid case to: Manhattan Nursing and Rehabilitation Center, LLC 4540 Manhattan Road Jackson, MS 39206 ("the Facility"), located at _____

Telephone: (601) 982-7421.

This information may be used by the Facility to assist the Resident to obtain Medicaid eligibility and annual Medicaid recertification. This information may include, but is not restricted to, income and resource information related to my Medical Assistance case. The Department is authorized to release all information except for the following:

_____

(indicate information you do not want with to release)

_____

I retain the right to rescind this authorization at any time with written notice.

_____ _____

Date Resident Signature

9-23-2003 Ina Simmons

Date Responsible Party or Sponsor

Circle Appropriate Agency: Power of Attorney / Resident's Agent / Designated Representative / Next of Kin / Guardian / Other _____

State of MS }
} SS:
County of Hinds }

On the 23 day of September, in the year 2003 before me, the undersigned, personally appeared Ina Simmons, personally known to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signatures(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

KATHERINE ADEN BURCHAK HINDS COUNTY, MS NOTARY PUBLIC

Katherine Aden Burchak

Notary Public

Fidelia Simmons-Admin.
Manhattan 0030

EXHIBIT A

ASSIGNMENT OF BENEFITS
TO THE FACILITY

RESIDENT"S NAME: Fidella K. Simmons

INSURANCE ID: 409941027-01

MEDICARE NO.: 409941027A

MEDICAID NO.: 721571238

The Resident, or the undersigned on the Resident's behalf, assigns the benefits due to the Resident for services rendered by the Facility to BCBS of TN, Attn: Executive Director. The Resident or undersigned also authorizes the Facility to claim payment from Medicare or other insurance for covered services or supplies received during the Resident's stay at the Facility. The Resident or the undersigned on the Resident's behalf, consents to the release of information by the Facility, which is necessary to claim and receive such payments for the Resident.

DATE: 9-23-2003

Resident

Theo W Simmons
Resident Designated Representative

SON
Relationship to Resident

Witness if Resident Signed with a Mark

Witness if Resident Signed with a Mark

POA
Legal Authorization or Designation

Fidelia Simmons-Admin.
Manhattan 0116

EXHIBIT B

RESIDENT AND FACILITY ARBITRATION AGREEMENT

This ARBITRATION AGREEMENT ("Agreement") is executed by Manhattan Nursing Rehab ("Facility") and Ira Simmons (Resident") or "Resident's Designated Representative", hereafter collectively referred to as "Resident") in conjunction with the agreement for admission and for the provision of nursing facility services (the "Admission Agreement") by the Facility to the Resident. The parties to this Agreement acknowledge and agree that upon execution, this Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction in interstate commerce governed by the Federal Arbitration Act. It is understood and agreed by the Facility and the Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement. This Agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This Agreement to arbitrate includes, without limitation, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, fraud, misrepresentation, suppression of fact, or inducement. However, this Agreement shall not limit the Resident's right to file a grievance or complaint with the Facility.

The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. 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.

RESIDENT AND FACILITY ARBITRATION AGREEMENT

It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child guardian, executor, legal representative, administrator, or heir of the Resident. The parties further intend that this Agreement is to survive the lives or existence of the parties hereto.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose and should reasonably have been discovered prior to the date upon which notice of arbitration is given to the Facility or received by the Resident and such claim is not presented in the arbitration proceeding.

The parties understand and agree that this contract contains a binding arbitration provision which may be enforced by the parties, and that by entering into this arbitration agreement, the parties are giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and a jury, as well as any appeal from a decision or award of damages.

The Resident understands that: (a) he/she has the right to seek legal counsel concerning this Arbitration Agreement; (b) execution of this Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility; and (c) this Agreement may be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

The undersigned certifies that he/she read this Agreement, that it has been fully explained to him/her, that he/she understands its contents, that he/she has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the Resident or otherwise to execute this Agreement and accept its terms.

Date:_____

Signature:_____
(Resident)

Witness:_____
If the resident is unable to consent or sign this provision because of physical disability or mental incompetence or is a minor and this provision is being signed by a Designated Representative, complete the following:

Date: 9-23-2003

Relationship to Resident: SON

Signature: T W Simmons
(Designated Representative)

Witness: Stacey Gammill (LSW)

For Facility:

Date:_____

Authorized Representative Signature:_____

Print Name and Title:_____

EXHIBIT C
RESIDENT TRUST FUND AUTHORIZATION

A RESIDENT Trust Fund is an amount of money held by the Facility for the resident's personal use. Such examples are to allow the resident to pay for room and board, beauty shop charges, cigarettes, postage stamps, or other similar expenses as desired by the Resident.

By signing below, the resident authorizes the Facility to set up a trust fund in his/her name. The individual financial records shall be available through quarterly statements, and on request, by the resident or his/her Agent or Legal representative. The resident understands that all withdrawals shall be authorized by the Resident or his/her Agent or legal Representative in writing. The following persons may authorize withdrawals on the Resident's behalf.

Authorization.

☒ The Facility is hereby authorized to open a Trust Fund Account that will act as a petty cash account for the Resident. Any monies held in this account shall automatically be deposited in an interest bearing account on the Resident's behalf.

☐ The Resident will personally handle personal funds through the Trust Fund Account at the Facility.

or

☐ The Resident prefers to have the authorized representative of the Resident, as indicated on page 32 handle the Resident's personal funds through in the Trust Fund Account at the Facility.

☐ The Resident does not wish to have the authorized Representative open a Trust Fund Account at this time, but may do so at any time during the Resident's stay.

The undersigned understand that funds held in this account shall bear interest at the current industry standard and shall be subject to change as banking rates fluctuate. On a quarterly basis, a statement will be prepared that reflects all transactions and interest earned.

The undersigned, Resident, and Designated Representative understand and hereby agree that should the Resident have a negative balance at any time, the Resident will be billed for such negative balance, which shall then be immediately due and payable.

Resident and/or Designated Representative may request a statement of the Resident's account at any time.

Name of Authorized Person	Name of Authorized Person
Resident's Signature	Date
Witness if Resident Signed with a Mark	Date
Witness if Resident Signed with a Mark	Date
Legal Representative's Signature	9-23-2003 Date
Agent's Signature (if applicable)	Date
Facility Representative	9-23-03 Date

EXHIBIT D
RESIDENT BILL OF RIGHTS

It is the objective of the Facility to herein forth the rights of Residents so as to assure the protection and preservation of dignity, individuality and, to the extent medically feasible, independence.

A. Facility Residents shall have the right to:

1. Privacy in treatment and personal care;
2. Privacy, if married, for visits by the Resident's spouse;
3. Share a room with the Resident's spouse (if both are Residents);
4. Be different, in order to promote social, religious and psychological well being;
5. Privately talk and/or meet with and see anyone;
6. Send and receive mail promptly and unopened;
7. Be free from mental and physical abuse;
8. Be free from chemical and physical restraints;
9. To meet with members of and take part in activities of social, commercial, religious and community groups. Please note that the administrator may refuse access to the Facility to any person if that person's presence would likely be injurious to the health and safety of a Resident or staff, or would threaten the security of the property of the Resident, staff or Facility;
10. Form and attend Resident council meetings. The Facility shall provide space for meetings and reasonable assistance to the council when requested;
11. Retain and use personal clothing and possessions as space permits;
12. Be free from being required by the Facility to work or perform services;
13. Be fully informed by a physician of the Resident's health and medical condition. The Facility shall give the Resident and family the opportunity to participate in planning the Resident's care and medical treatment;
14. Refuse treatment. The Resident shall be informed of the consequences of such decision. The refusal and its reason shall be reported to the physician and documented in the Resident's medical record;
15. Refuse experimental treatment and drugs. The Resident's written consent for participation in research shall be obtained and retained in the Resident's medical records;
16. Have records kept confidential and private. Written consent by the Resident shall be obtained prior to release of information except to persons authorized by law. If the Resident is mentally incompetent, written consent is required from the Resident's legal representative. The Facility shall have policies to govern access and duplication of the Resident's record;
17. Manage personal and financial affairs. Any request by the Resident for assistance must be in writing. A request for any additional person to have access to a Resident's funds must also be in writing;
18. Be told in writing before or at the time of admission about the services available in the Facility and about any extra charges, charges for services not covered under Medicare or Medicaid, or not included in the Facility's bill or daily rate;

19. Be free for discrimination because of the exercise of the right to speak and voice complaints;
20. Exercise the Resident's own independent judgment by executing any documents, including admission forms;
21. Have a free choice of providers of medical services, such as physician and pharmacy. However, medications must be supplied in packaging consistent with the medication system of the Facility;
22. Be free from involuntary transfer or discharge, except for these reasons:
    a. For medical reasons;
    b. For the resident's welfare or that of the other Resident's; or
    c. For non-payment, except as prohibited by applicable law and regulation;
23. Voice grievances and complaints, and to recommend changes in policies and services to the Facility staff or outside representatives of the Resident's choice. The Facility shall establish a grievance procedure and fully inform all Residents and family members or other representatives of the procedure;
24. Have appropriate assessment and management of pain; and
25. Be involved in the decision making of all aspects of the Resident's care.
26. Treated with consideration, respect, and full recognition of his dignity and individuality.

B. The rights set forth in this section may be abridged, restricted, limited or amended only as follows:

1. When medically contraindicated;
2. When necessary to protect and preserve the rights of other Residents in the facility; or
3. When contradicted by the explicit provisions of another rule of the board.

C. Any reduction in Resident's rights based upon medical consideration or the rights of other Residents shall be explicit, reasonable, appropriate to the justification, and the least restrictive response feasible. They may be time-limited, shall be explained to the Resident and documented in the Resident's record by reciting the limitation's reason and scope. Medical contraindications shall be supported by a physician's order. At least once each month, the executive director and the director of nursing shall review the restriction's justification and scope before removing it, amending it, or renewing it. The names of any Residents in the Facility whose rights have been restricted under the provisions of this paragraph shall be maintained on a separate list which shall be available for inspection by the appropriate authorities.

HTennessee Farmers Life Reassurance Co. v. Rose Tenn.,2007.

Supreme Court of Tennessee,at Knoxville.
TENNESSEE FARMERS LIFE REASSURANCE COMPANY
v.
Linda ROSE et al.
No. E2005-00006-SC-R11-CV

Sept. 6, 2007 Session.
Oct. 2, 2007.

Background: Life insurer filed interpleader action against insured's attorney-in-fact, who had revoked insured's original designation of beneficiaries and named herself as sole beneficiary of life insurance policy, and the original beneficiaries. The Chancery Court, Morgan County, Frank V. Williams, III, Chancellor, granted original beneficiaries' motion for summary judgment. Attorney-in-fact appealed. The Court of Appeals, Charles D. Susano, Jr., J., 2006 WL 684595, affirmed. Attorney-in-fact filed application for permission to appeal.

Holdings: The Supreme Court, Cornelia A. Clark, J., held that:
(1) power of attorney was a durable power of attorney;
(2) when powers listed in Uniform Durable Power of Attorney Act are incorporated by reference into power of attorney, attorney-in-fact is not authorized to change beneficiary of principal's life insurance policy unless principal has expressly authorized attorney-in-fact to do so within power of attorney;
(3) language of power of attorney solely controlled attorney-in-fact's power, if any, to change the beneficiary of policy;
(4) power of attorney authorized attorney-in-fact to change the beneficiary of policy; and
(5) holding did not foreclose all of the other defenses raised in original beneficiaries' answer to the complaint.

Judgment of Court of Appeals reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases
Trial court's grant of summary judgment is purely a question of law.

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Appellate review of trial court's grant of summary judgment is de novo.

[3] Appeal and Error 30 ⚿934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
No presumption of correctness attaches to trial court's grant of summary judgment.

[4] Principal and Agent 308 ⚿42

308 Principal and Agent
308I The Relation
308I(B) Termination
308k42 k. Disability of Principal. Most Cited Cases

Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
Power of attorney providing that it "shall not be affected" by principal's subsequent disability or incapacity, if any, was a durable power of attorney, which would be construed in light of the Uniform Durable Power of Attorney Act. West's T.C.A. §§ 34-6-101 et seq, 34-6-102.

[5] Principal and Agent 308 ⚿69(1)

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k69 Individual Interest of Agent
308k69(1) k. In General. Most Cited Cases
In cases in which the powers listed in the Uniform Durable Power of Attorney Act are incorporated by reference into the power of attorney, an attorney-in-fact is not authorized to change the beneficiary of the principal's life insurance policy unless the principal has expressly authorized the attorney-in-fact to do so within the power of attorney. West's T.C.A. §§ 34-6-108(b), (c)(5), 34-6-109(5).

[6] Principal and Agent 308 ⚿69(1)

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k69 Individual Interest of Agent
308k69(1) k. In General. Most Cited Cases
The language of power of attorney solely controlled the attorney-in-fact's power, if any, to change the beneficiary of principal's life insurance policy, where power of attorney did not mention any provisions of the Uniform Durable Power of Attorney Act, nor did it otherwise clearly express an intention to incorporate by reference the various powers listed in the Act. West's T.C.A. §§ 34-6-108, 34-6-109.

[7] Principal and Agent 308 ⚿10(1)

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k7 Appointment of Agent
308k10 Letters or Powers of Attorney Under Seal
308k10(1) k. In General. Most Cited Cases
The execution of a power of attorney creates a principal-agent relationship.

[8] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
Unless otherwise constrained by law or public policy, a person executing a power of attorney may empower his or her agent to do the same acts, to make the same contracts, and to achieve the same legal consequences as the principal would be personally empowered to do. Restatement (Second) of Agency § 17.

[9] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
The authority of the agent under a power of attorney may be couched in general terms and may be as broad as the principal decides to make it.

[10] Principal and Agent 308 ⚿10(1)

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k7 Appointment of Agent
308k10 Letters or Powers of Attorney Under Seal
308k10(1) k. In General. Most Cited Cases

In the absence of specific legal requirements, a power of attorney may be in any form and may be executed in accordance with any recognized common-law method for executing written instruments.

[11] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
The language of a power of attorney determines the extent of the authority conveyed.

[12] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
The more specific a power of attorney is concerning the performance of particular acts, the more the agent is restricted from performing acts beyond the specific authority granted. Restatement (Second) of Agency §§ 33 comment. b, 37(2).

[13] Principal and Agent 308 ⚿97

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k95 Express Authority
308k97 k. Construction of Letters or Powers of Attorney. Most Cited Cases
A power of attorney is a written instrument that evidences to third parties the purpose of the agency and the extent of the agent's powers.

[14] Principal and Agent 308 ⚿48

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k48 k. Nature of Agent's Obligation. Most Cited Cases

Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
A power of attorney should be construed using the same rules of construction generally applicable to contracts and other written instruments, except to the extent that the fiduciary relationship between the principal and the agent requires otherwise. Restatement (Second) of Agency § 32.

[15] Principal and Agent 308 ⚿48

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k48 k. Nature of Agent's Obligation. Most Cited Cases
Agents acting pursuant to an unrestricted power of attorney have a fiduciary relationship with the principal. Restatement (Second) of Agency §§ 33 comment. b, 39.

[16] Contracts 95 ⚿176(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(1) k. In General. Most Cited Cases
The legal effect of a written contract or other written instruments is a question of law.

[17] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases

Powers of attorney should be interpreted according to their plain terms.

[18] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
There is no room for the construction of a power of attorney that is not ambiguous or uncertain, and whose meaning and portent are perfectly clear.

[19] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
When the meaning of a power of attorney is unclear or ambiguous, the intention of the principal, at the time of the execution of the power of attorney, should be given effect. Restatement (Second) of Agency § 34 comment. b.

[20] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
While the parol evidence rule applies, courts may arrive at the meaning of a power of attorney by considering the five factors identified in Restatement (Second) of Agency as "Circumstances Considered In Interpreting Authority." Restatement (Second) of Agency §§ 34, 48.

[21] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
An instrument like a power of attorney should be subjected to careful scrutiny in order to carry out the intent of the author and no more.

[22] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
There should be neither a strict nor a liberal interpretation of a power of attorney, but rather a fair construction that carries out the author's intent as expressed in the instrument. Restatement (Second) of Agency § 34, comment. h.

[23] Principal and Agent 308 ⚿69(1)

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k69 Individual Interest of Agent
308k69(1) k. In General. Most Cited Cases
Power of attorney authorized agent to change the beneficiary/beneficiaries of principal's life insurance policy, where power of attorney authorized agent "to transact all insurance business on [principal's] behalf, to apply for or continue policies, collect profits, file claims, make demands, enter into compromise and settlement agreements, file suit or actions or take any other action necessary or proper in this regard," and did not incorporate by reference the various powers listed in the Uniform Durable Power of Attorney Act. West's T.C.A. § 34-6-109.

[24] Appeal and Error 30 ⚿1177(6)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal

30k1177 Necessity of New Trial
30k1177(6) k. Issues Not Passed on Below. Most Cited Cases
Supreme Court's holding, on appeal from summary judgment, that power of attorney authorized agent to change the beneficiary designation on principal's life insurance policy to herself did not foreclose all of the other defenses raised in original beneficiaries' answer to insurer's interpleader action, namely, that principal did not have the capacity to execute power of attorney, that principal's execution of power of attorney was not of her own free will but was rather the result of the duress, coercion, control and/or undue influence exercised by agent, and that agent's action in changing the beneficiary of the policy to herself was a violation of her fiduciary duty, and thus case would be remanded for further proceedings concerning those issues.

*746Paul T. Coleman and Vivian L. Crandall, Knoxville, Tennessee, for the appellant Linda S. Rose.
Jennifer E. Raby, Rockwood, Tennessee, for the appellees, Kristin N. Taylor, Edward R. Langley, Phillip M. Langley, and Ethan E. Langley.

CORNELIA A. CLARK, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and JANICE M. HOLDER, GARY R. WADE, and WILLIAM C. KOCH, JR., JJ., joined.

OPINION

CORNELIA A. CLARK, J.
We granted permission to appeal in this case to determine whether the decedent's durable power of attorney authorized her attorney-in-fact to change the beneficiary of the decedent's life insurance policy. For the reasons stated below, we conclude that the durable power of attorney authorized the attorney-in-fact to change the beneficiary of the policy. Accordingly, we reverse the judgments of the lower courts; however, because our holding does not resolve all of the issues raised in the pleadings, we remand this case to the trial court for further proceedings.

I. SUMMARY OF FACTS & PROCEEDINGS BELOW

On October 20, 1999, Brenda Gail Langley ("Langley") purchased a $50,000 life insurance policy from the plaintiff, Tennessee Farmers Life Reassurance Company ("Tennessee Farmers"). Langley designated three of her four children and one grandchild as the named beneficiaries of the policy; those individuals are Kristin N. Taylor, Edward R. Langley, Phillip M. Langley, and Ethan E. Langley (the child of Edward Langley). The policy provided that the beneficiaries would share equally in the proceeds and also provided that the insured could change the beneficiary/beneficiaries.

On August 21, 2002, Langley executed a durable power of attorney, appointing her sister, Linda S. Rose ("Rose"), as her attorney-in-fact. In pertinent part, the power of attorney provided:

> "I BRENDA GAIL LANGLEY ... do hereby appoint and constitute LINDA SUE ROSE, my true and lawful attorney for me and in my name and on my behalf:
>
> ... to transact all insurance business on my behalf, to apply for or continue policies, collect profits, file claims, make demands, enter into compromise and settlement agreements, file suit or actions or take any other action necessary or proper in this regard;....
>
> Giving and granting unto the said LINDA SUE ROSE, my said attorney, full power and authority to do, execute and perform all and every other act and thing whatsoever, without any limitation *747 whatever and without being confined to the specific acts hereinabove set out, requisite or necessary to be done in and about the premises as fully and to all intents and purposes as I might or could do and I hereby ratify and confirm all that LINDA SUE ROSE, my said attorney, shall lawfully do or cause to be done by virtue of these presents, and for me and in my name and on my behalf. This power of attorney shall not be affected by any subsequent disability or incapacity of mine if such should occur. It is my express intent that the authority herein conferred upon my said attorney shall be exercisable in all events notwithstanding my subsequent disability or incapacity."

On October 28, 2002, Rose, purportedly acting as Langley's attorney-in-fact, signed a "Customer Service Request" revoking Langley's original designation of beneficiaries (Langley's three children and grandchild) and naming Rose as sole beneficiary.

Rose signed the document as "Brenda G. Langley, P.O.A. Linda Rose."The form also was signed by Langley's insurance agent and was submitted to the insurance company.

Langley died on March 29, 2003. Five days later, Rose filed a claim for the proceeds of the policy. In July and early August 2003, the deceased's three children and grandchild filed separate claims for the policy proceeds.

Due to the competing claims for the life insurance proceeds, Tennessee Farmers filed this interpleader action pursuant to Tennessee Rule of Civil Procedure 22.01.[FN1] Tennessee Farmer's complaint named Rose and the four original beneficiaries as defendants. The respective defendants filed answers to the complaint. The original beneficiaries subsequently filed a motion for summary judgment in which they asserted that Rose did not have the authority under the power of attorney to change the beneficiary designation on the policy. Rose responded to the motion, asserting that the power of attorney granted her the power to "transact all insurance business" and "to perform all and every other act and thing whatsoever, without any limitation...." Based upon that language in the power of attorney, Rose argued that she was authorized to change the beneficiary designation to herself.

> FN1.Tennessee Rules of Civil Procedure 22.01 provides, in pertinent part: "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability."

The trial court granted the original beneficiaries' motion for summary judgment, ruling that Rose "did not have the specific authority under the Durable General Power of Attorney executed by the decedent insured to execute a change of beneficiary form applicable to the life insurance policy at issue." The Court of Appeals, with one judge dissenting, affirmed the trial court's judgment.

Rose filed an application for permission to appeal to this Court. We granted permission to appeal to address the issue of whether the deceased's durable power of attorney authorized her attorney-in-fact to change the beneficiary of her life insurance policy.

II. STANDARD OF REVIEW

[1][2][3] The trial court's grant of summary judgment is purely a question of law. Accordingly, our review is de novo, and no presumption of correctness attaches to the lower courts' judgments. *Cumulus Broad. Inc. v. Shim*, 226 S.W.3d 366, 373 (Tenn.2007).

*748 III. ANALYSIS

[4] A written power of attorney that states it is not affected by the subsequent disability or incapacity of the principal is a "durable power of attorney." *See*Tenn.Code Ann. § 34-6-102 (2001). The power of attorney executed by Langley provides that it "shall not be affected" by her subsequent disability or incapacity, if any. Consequently, the instrument at issue is a durable power of attorney, which should be construed in light of the Uniform Durable Power of Attorney Act, Tennessee Code Annotated sections 34-6-101 to -110 (2001) ("the Act").

We begin our analysis by examining two particular sections of the Act, sections 34-6-108 and 34-6-109. Section 34-6-108(a) provides:

> Upon the principal clearly expressing an intention to do so within the instrument creating a power of attorney, the language contained in § 34-6-109 may be incorporated into such power of attorney *by appropriate reference.* The provisions so incorporated shall apply to the attorney-in-fact with the same effect and subject to the same judicial interpretation and control in appropriate cases, as though such language were set forth verbatim in such instrument.

Tenn.Code Ann. § 34-6-108(a) (2001) (emphasis added).

Section 34-6-109 then proceeds to list twenty-two various powers which, pursuant to section 34-6-108, may be incorporated by reference into a durable power of attorney. In pertinent part, section 34-6-109(5) authorizes an attorney-in-fact to "[a]cquire, maintain, cancel *or in any manner deal with* any policy of life, accident, disability, hospitalization, medical or casualty insurance, and prosecute each claim for benefits due under any policy [.]" (emphasis added.)

The words "or in any manner deal with any policy of life ... insurance"*could* be interpreted to include the power to change the beneficiary of a life insurance policy. However, those words must be read *in pari materia* with section 34-6-108(c) which expressly provides:

> Nothing contained in this section and § 34-6-109 shall be construed to vest an attorney-in-fact with, or authorize an attorney-in-fact to exercise, any of the following powers:
>
> (5) Change beneficiary designations on any death benefits payable on account of the death of the principal from any life insurance policy, employee benefit plan, or individual retirement account[.]

Tenn.Code Ann. § 34-6-108(c) (2001).

In light of section 34-6-108(c)(5), the phrase "in any manner deal with any policy of life ... insurance" as used in 34-6-109(5) must be read to *exclude* the power to change the beneficiary of a life insurance policy. Despite section 34-6-108(c)(5)'s exclusion, however, section 34-6-108(b) provides:

> Nothing contained in this section and § 34-6-109 shall be construed to limit the power of the principal either to:
>
> (1) Grant any additional powers to the attorney-in-fact, *including any powers otherwise excluded under subsection (c);* or
>
> (2) Delete any of the powers otherwise granted in § 34-6-109.

Tenn.Code Ann. § 34-6-108(b) (2001) (emphasis added).

[5] While the foregoing sections are somewhat cumbersome to read, they essentially provide that, in cases in which the provisions of section 34-6-109 are incorporated by reference into the power of attorney, an attorney-in-fact is not authorized to change the beneficiary of the principal's ***749** life insurance policy *unless* the principal has expressly authorized the attorney-in-fact to do so within the power of attorney. The appellees (the original beneficiaries under Langley's policy) rely upon these statutory provisions and argue that Langley's power of attorney did not expressly authorize Rose to change the beneficiary/beneficiaries of Langley's life insurance policy. Thus, they contend that the trial court did not err in granting their motion for summary judgment.

[6] We note that Langley's power of attorney did not mention any provisions of the Act, nor did her power of attorney otherwise clearly express an intention to adopt the language contained in section 34-6-109. For that reason, our resolution of this case does not involve the application of sections 34-6-108 and 34-6-109; instead, the language of Langley's power of attorney solely controls the attorney-in-fact's power, if any, to change the beneficiary of Langley's life insurance policy.

[7][8] The execution of a power of attorney creates a principal-agent relationship. *E.g. Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296-97 n. 1 (Tenn.Ct.App.2001). Unless otherwise constrained by law or public policy,[FN2] a person executing a power of attorney may empower his or her agent to do the same acts, to make the same contracts, and to achieve the same legal consequences as the principal would be personally empowered to do. Restatement (Second) of Agency § 17 (1958); 12 Samuel Williston, *Treatise on the Law of Contracts* § 35:9, at 188 (Richard A. Lord ed., 4th ed.1999).

> FN2. For example, other jurisdictions have held that a principal may not use a power of attorney to authorize another to create a will on his or her behalf. *In re Estate of Garrett*, 81 Ark.App. 212, 100 S.W.3d 72, 76 (2003); *Smith v. Snow*, 106 S.W.3d 467, 470 (Ky.Ct.App.2002).

[9][10][11][12] The authority of the agent may be couched in general terms and may be as broad as the principal decides to make it. In the absence of specific legal requirements, a power of attorney may be in any form and may be executed in accordance with any recognized common-law method for executing written instruments. *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 454 (Del.1982). "The language of a power of attorney determines the extent of the authority conveyed." *Armstrong v. Roberts*, 211 S.W.3d 867, 869 (Tex.Ct.App.2006). The more specific a power of attorney is concerning the performance of particular acts, the more the agent is

restricted from performing acts beyond the specific authority granted. *In re Estate of Kurrelmeyer*, 179 Vt. 359, 895 A.2d 207, 211 (2006); *cf.* Restatement (Second) of Agency §§ 33 cmt. b & 37(2).

[13][14][15] A power of attorney is a written instrument that evidences to third parties the purpose of the agency and the extent of the agent's powers. *Lempert v. Singer*, 766 F.Supp. 1356, 1360 (D.Vi.1991); *Realty Growth Investors*, 453 A.2d at 454;*Ho v. Presbyterian Church of Laurelhurst*, 116 Or.App. 115, 840 P.2d 1340, 1343 (1992); *Schall v. Gilbert*, 169 Vt. 627, 741 A.2d 286, 289 (1999). It should be construed using the same rules of construction generally applicable to contracts and other written instruments, except to the extent that the fiduciary relationship between the principal and the agent [FN3] requires otherwise. ***750***In re Trust of Jameison*, 300 Mont. 418, 8 P.3d 83, 87 (2000); *In re Estate of Littlejohn*, 698 N.W.2d 923, 925 (N.D.2005); Restatement (Second) of Agency § 32.

> FN3. Agents acting pursuant to an unrestricted power of attorney have a fiduciary relationship with the principal. *See Askew v. Askew*, 619 S.W.2d 384, 386 (Tenn.Ct.App.1981); Restatement (Second) of Agency §§ 33 cmt. b & 39.

[16][17][18][19][20] The legal effect of a written contract or other written instruments is a question of law. *In re Trust of Jameison*, 8 P.3d at 86-87 (power of attorney); *In re Estate of Littlejohn*, 698 N.W.2d at 926 (power of attorney); *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn.1999) (written contract). Thus, powers of attorney should be interpreted according to their plain terms. *Muller v. Bank of Am., N.A.*, 28 Kan.App.2d 136, 12 P.3d 899, 902 (2000); *see Buettner v. Buettner*, 183 S.W.3d 354, 359 (Tenn.Ct.App.2005). There is no room for the construction of a power of attorney that is not ambiguous or uncertain, and whose meaning and portent are perfectly clear. *See Geren v. Geren*, 29 Kan.App.2d 565, 29 P.3d 448, 451-52 (2001). However, when the meaning of a power of attorney is unclear or ambiguous, the intention of the principal, at the time of the execution of the power of attorney, should be given effect. *Brookfield Prod. Credit Ass'n v. Weisz*, 658 S.W.2d 897, 899-900 (Mo.Ct.App.1983); Restatement (Second) of Agency § 34 cmt. b. While the parol evidence rule applies, Restatement (Second) of Agency § 48, the courts may arrive at the meaning of a power of attorney by considering the five factors identified in Restatement (Second) of Agency section 34.

[21][22] A formal written instrument that has been carefully drawn can be assumed to spell out the intent of the author with a high degree of particularity. Thus, an instrument like a power of attorney should be subjected to careful scrutiny in order to carry out the intent of the author and no more. There should be neither a "strict" nor a "liberal" interpretation of the instrument, but rather a fair construction that carries out the author's intent as expressed in the instrument. *In re Estate of Kurrelmeyer*, 895 A.2d at 211;Restatement (Second) of Agency § 34, cmt. h.

[23] Applying the foregoing principles to the specific power of attorney executed by Langley, we hold that the power of attorney authorized Rose to change the beneficiary/beneficiaries of Langley's life insurance policy. In pertinent part, the power of attorney authorized Rose "to transact *all* insurance business on [Langley's] behalf, to apply for or continue policies, collect profits, file claims, make demands, enter into compromise and settlement agreements, file suit or actions *or take any other action necessary or proper in this regard.*"(emphases added). As stated above, "[t]here is no room for construction of a power of attorney that is not ambiguous or uncertain, and whose meaning and portent are perfectly clear." Langley's power of attorney is neither ambiguous nor uncertain-it grants Rose the authority "to transact all insurance business" and to "take any other action in this regard." There simply is no escaping the significance of the word "all" and the words "take any other action in this regard" in delineating the scope of the insurance business which Rose was authorized to conduct. By authorizing Rose "to transact all insurance business" and "to take any other action in this regard," the power of attorney plainly and unambiguously authorized her to conduct any and all insurance-related business on Langley's behalf, which includes the power to change the beneficiary of Langley's life insurance policy. Just as Rose could have canceled this policy, purchased another one, and named a new beneficiary for the second policy, she had authority to make this change. If we were to construe the words of Langley's power of ***751** attorney to exclude the power to change beneficiary designations, we would effectively be rewriting

Langley's power of attorney from authorizing Rose to transact "all" insurance business on Langley's behalf to authorizing Rose to transact "nearly all" of Langley's insurance business.[FN4]

> FN4. The facts of this case illustrate the critical importance of carefully considering, when drafting a durable power of attorney, whether or not to incorporate by reference the various powers listed in Tennessee Code Annotated section 34-6-109.

If Langley's power of attorney had incorporated by reference the powers listed in Tennessee Code Annotated section 34-6-109, it would have been necessary for the power of attorney to have used the words "change beneficiary designations" or "change beneficiaries" in order to authorize Rose to make such changes, and the words "to transact all insurance business" would have been insufficient to confer that power on the attorney-in-fact. Langley's power of attorney, however, did not incorporate by reference the powers listed in section 34-6-109, and her power of attorney therefore did not trigger the application of section 34-6-108(c)(5). Therefore, without the limitation of section 34-6-108(c)(5), the words of Langley's power of attorney sufficiently authorized her attorney-in-fact to change her beneficiary designation. This holding, however, does not resolve all the issues arising out of this case.

[24] This case was decided in the trial court on the original beneficiaries' motion for summary judgment. The *sole* ground raised in that motion was whether Langley's power of attorney authorized Rose to change the life insurance beneficiary. In granting the original beneficiaries' motion for summary judgment, the trial court pretermitted all of the other defenses raised in the original beneficiaries' answer to the complaint. In their answer to the complaint filed by Tennessee Farmers, the original beneficiaries denied that Langley "had the capacity to execute said durable general power of attorney given her physical and mental condition." They went on to allege "that if the decedent did indeed sign said durable general power of attorney, said execution was not of her own free will but was rather the result of the duress, coercion, control and/or undue influence exercised by the defendant Linda [S.] Rose upon the decedent." Their answer also asserted that Rose's action in changing the beneficiary of Langley's life insurance policy to herself "was a violation of [Rose's] fiduciary duty and was done for her sole benefit and to the detriment of the decedent and the decedent's children and grandchild."

Our holding that Langley's power of attorney granted Rose the authority to change the beneficiary designation does not foreclose any of those defenses. *See Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn.1995) (an attorney-in-fact under an unrestricted power of attorney has a confidential relationship with the principal, and as such, transactions that benefit the agent are looked upon with suspicion); *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn.2002) (where a confidential relationship exists, a transaction which provides a benefit to the dominant party gives rise to a presumption of undue influence that may be rebutted only by clear and convincing evidence of the fairness of the transaction). Instead, our opinion today clarifies that Rose had the legal authority to alter the beneficiary designation. It does not, however, address whether her chosen designation, i.e. to herself, was valid under other principles of law. We therefore conclude that this case should be remanded to the trial court for further proceedings concerning the pretermitted*752 issues. Accordingly, we express no opinion as to the ultimate resolution of the issues arising out of these pretermitted issues.

IV. CONCLUSION

For the reasons stated above, we reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings. The costs on appeal are taxed to appellees, Kristin N. Taylor, Edward R. Langley, Phillip M. Langley, and Ethan E. Langley, for which execution may issue if necessary.

Tenn.,2007.
Tennessee Farmers Life Reassurance Co. v. Rose
239 S.W.3d 743

END OF DOCUMENT

Trinity Mission of Clinton, LLC v. Barber
Miss.App.,2007.
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Mississippi.
TRINITY MISSION OF CLINTON, LLC d/b/a Clinton Health & Rehabilitation Center, Trip Francis and Jan Hampton, Appellants
v.
Mike BARBER Individually and for and on Behalf of the Wrongful Death Beneficiaries of Laurentine Barber, Deceased, Appellee.
No. 2005-CA-02199-COA.

Aug. 28, 2007.
Rehearing Denied Dec. 11, 2007.

Background: Son, individually, and on behalf of wrongful death beneficiaries of his late mother, brought action against **nursing home**, alleging that his mother suffered personal injuries during her residence at **home**, from which she died. **Home** brought motion to compel **arbitration**. The Circuit Court, Hinds County, Tomie T. Green, J., denied motion. **Nursing home** appealed.

Holdings: The Court of Appeals, Carlton, J., held that:
(1) Federal **Arbitration** Act applied to **arbitration** provision in **nursing home** admissions agreement;
(2) son did not have apparent authority to bind his mother to engage services of **nursing home** for mother;
(3) son did not have authority to bind his mother in health care matters as a surrogate pursuant to Uniform Health Care Decisions Act;
(4) mother was **third-party beneficiary** under agreement, and, thus, she was bound by **arbitration** provision contained in agreement, notwithstanding her status as a non-signatory to it;
(5) agreement, which contained binding **arbitration** provision, was not procedurally unconscionable;
(6) grievance resolution process set forth in agreement was substantively unconscionable;
(7) provision of **nursing** agreement requiring parties to submit all disputes to binding **arbitration** was not substantively unconscionable; and
(8) Court of Appeals would enforce remainder of agreement for admission to **nursing home**, including its binding **arbitration** provision, without substantively unconscionable clauses of agreement.

Reversed and remanded.

Irving, J., concurred in part and dissented in part, with opinion, in which King, C.J., and Myers, P.J., joined.

[1] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards of Review. Most Cited Cases
Appellate court employs a de novo standard of review to the denial of a motion to compel **arbitration**.

[2] Alternative Dispute Resolution 25T 139

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk136 Construction
25Tk139 k. Construction in Favor of **Arbitration**. Most Cited Cases
Any doubts concerning the scope of **arbitrable** issues should be resolved in favor of **arbitration**, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to **arbitrability**.

[3] Alternative Dispute Resolution 25T 119

25T Alternative Dispute Resolution

25TII**Arbitration**
25TII(A) Nature and Form of Proceeding
25Tk118 Matters Which May Be Subject to **Arbitration** Under Law
25Tk119 k. In General. Most Cited Cases

Alternative Dispute Resolution 25T 134(1)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases

Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk142 Disputes and Matters **Arbitrable** Under Agreement
25Tk143 k. In General. Most Cited Cases
In determining the validity of a motion to compel **arbitration** under the Federal **Arbitration** Act (FAA), courts generally conduct a two-pronged inquiry; the first prong has two considerations, i.e., (1) whether there is a valid **arbitration** agreement and (2) whether the parties' dispute is within the scope of the **arbitration** agreement, and the second prong asks whether legal constraints external to the parties agreement foreclosed **arbitration** of those claims. 9 U.S.C.A. § 1 et seq.

[4] Alternative Dispute Resolution 25T 114

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases

Commerce 83 80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. **Arbitration**. Most Cited Cases
Arbitration provision in **nursing home** admissions agreement was part of a contract which, when taken in the aggregate, affected interstate commerce, such that Federal **Arbitration** Act (FAA) applied to it, for purposes of determining enforceability of provision, in lawsuit brought by son, individually, and on behalf of wrongful death beneficiaries of his late mother, against **nursing home**, alleging that his mother suffered personal injuries during her residence at **home**, from which she died. 9 U.S.C.A. § 2.

[5] Alternative Dispute Resolution 25T 205

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk205 k. In General. Most Cited Cases
Threshold determination for court on motion seeking to compel **arbitration** under Federal **Arbitration** Act (FAA) is whether the **arbitration** agreement is within the purview of the FAA. 9 U.S.C.A. § 2.

[6] Alternative Dispute Resolution 25T 137

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk136 Construction
25Tk137 k. In General. Most Cited Cases
To determine whether a valid agreement to **arbitrate** exists between the parties, courts apply ordinary principles of contract law.

[7] Parent and Child 285 12

285 Parent and Child
285k12 k. Agency of Child for Parent. Most Cited Cases
Son did not have apparent authority to bind his mother to engage services of nursing home for mother, as there was no evidence that mother, by acts or conduct, represented to home that son had the authority to bind her to home's admissions agreement.

[8] Principal and Agent 308 99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
A principal is bound by its agent on the theory of apparent authority only when the third party can show (1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third person as a result of that reliance.

[9] Principal and Agent 308 19

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k18 Evidence of Agency
308k19 k. Presumptions and Burden of Proof. Most Cited Cases
Party seeking to establish an agency relationship bears the burden of proving it.

[10] Principal and Agent 308 99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases
Acts or conduct indicating an agent's authority must be performed by the principal, not the agent.

[11] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons Affected or Bound. Most Cited Cases

Health 198H 912

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk912 k. Incompetent Persons in General. Most Cited Cases
Son did not have authority to bind his mother in health care matters as a surrogate pursuant to Uniform Health Care Decisions Act, absent proof of mother's incapacity, and, thus, he did not have authority to bind mother to **arbitration** provision in **nursing home** admissions agreement by signing agreement. West's A.M.C. § 41-41-211.

[12] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk141 k. Persons Affected or Bound. Most Cited Cases
Nursing home admissions agreement signed by resident's son was entered into for resident's benefit, such that resident was **third-party beneficiary** under agreement, and, thus, resident was bound by **arbitration** provision contained in agreement, notwithstanding her status as a non-signatory to agreement; plain language of agreement indicated clear intent of parties to make resident a **third-party beneficiary**, as her care was the sine qua non of the agreement, she was named in agreement as the resident to be placed in **nursing home** facility for care, and benefits of receiving **home's** health care services outlined in agreement flowed to resident as a direct result of the performance within the contemplation of the parties as shown by its terms.

[13] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk141 k. Persons Affected or Bound. Most Cited Cases
Arbitration agreements can be enforced against non-signatories if such non-signatory is a **third-party beneficiary**.

[14] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk141 k. Persons Affected or Bound.

Most Cited Cases
Arbitration provision that would have been enforced against **nursing home** resident as **third-party beneficiary** of **nursing home** admissions agreement signed by resident's son could be equally enforced against her wrongful death beneficiaries following resident's death, as wrongful death suit commenced by resident's son, individually, and on behalf of wrongful death beneficiaries of resident was a derivative action by the beneficiaries, such that they stood in the position of resident, agreement stated that **arbitration** provision survived death of any party, including resident, and that the provision was to be binding on estate of resident in the event she was deceased.

[15] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk142 Disputes and Matters **Arbitrable** Under Agreement
25Tk143 k. In General. Most Cited Cases
Claims of son of deceased **nursing home** resident in wrongful death suit he commenced, individually, and on behalf of wrongful death beneficiaries of resident, against **nursing home** arose out of acts or omissions of **nursing home** while it provided care to resident during her residence at **home**, and, thus dispute between the parties was covered by broad language of **arbitration** provision contained in **nursing home** admissions agreement, i.e., that resident and responsible party agreed that any and all claims between them and **home** were to be resolved by binding **arbitration**.

[16] Alternative Dispute Resolution 25T 134(3)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(3) k. Validity of Assent. Most Cited Cases

Alternative Dispute Resolution 25T 134(6)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate an **arbitration** agreement without offending the Federal **Arbitration** Act (FAA). 9 U.S.C.A. § 1 et seq.

[17] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
"Unconscionability" is generally 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.

[18] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
When reviewing a contract for procedural unconscionability, court looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract's formation.

[19] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to

study the contract and inquire about the contract terms.

[20] Alternative Dispute Resolution 25T ⚷134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Agreement for admission to nursing home, which agreement contained a binding arbitration provision, was not procedurally unconscionable, as there were no circumstances of exigency, and it could not be said that there was either a lack of knowledge that arbitration provision was an important part of agreement or a lack of voluntariness in that resident and her son, who signed agreement, somehow had no choice but to sign.

[21] Contracts 95 ⚷93(2)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k93 Mistake
95k93(2) k. Signing in Ignorance of Contents in General. Most Cited Cases
The law imposes a duty to read the terms of a contract on the parties, such that a party to a contract may not later complain that he did not have knowledge of the terms and conditions of an agreement he signed.

[22] Contracts 95 ⚷1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Substantive unconscionability examines the terms of the agreement and may be proven by showing that the terms are oppressive.

[23] Contracts 95 ⚷1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
"Substantive unconscionability" 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.

[24] Contracts 95 ⚷1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
For the court to find an oppressive term to be substantively unconscionable, it must find that the term by its very language significantly alters the legal rights of the parties involved and severely abridges the damages which they may obtain.

[25] Contracts 95 ⚷1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
When interpreting a contract, courts adhere to practice of striking unconscionable terms as void and enforcing the remainder of the agreement without the effect of the unconscionable provisions.

[26] Alternative Dispute Resolution 25T ⚷134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Grievance resolution process set forth in agreement for admission to nursing home, which permitted home to bring suit in court in matters regarding payment for services, while requiring a dispute on any other grounds to be brought in accordance with grievance

resolution process, was substantively unconscionable.

[27] Damages 115 ⚿118

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k118 k. Effect of Provisions of Contract. Most Cited Cases

Health 198H ⚿832

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk828 Damages
198Hk832 k. Amount. Most Cited Cases
Provision of agreement for admission to nursing home imposing limitation on amount of damages that could be recovered in a dispute between nursing home and resident or responsible party was substantively unconscionable.

[28] Damages 115 ⚿118

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k118 k. Effect of Provisions of Contract. Most Cited Cases

Health 198H ⚿831

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk828 Damages
198Hk831 k. Exemplary or Punitive Damages. Most Cited Cases
Provision of agreement for admission to nursing home, in which parties waived punitive damages in any dispute between nursing home and resident or responsible party, was substantively unconscionable, due to its potentially significant effect of substantial deprivation to resident and benefit to nursing home.

[29] Health 198H ⚿276

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk276 k. Nursing Homes. Most Cited Cases
Provision of nursing home admissions agreement requiring party requesting copies of any records to pay charge of three dollars per page violated statute setting forth photocopying, deposition, and medical record affidavit charges, and, thus, was to be stricken from agreement. West's A.M.C. § 11-1-52(1).

[30] Alternative Dispute Resolution 25T ⚿134(6)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Provision of **nursing home** admissions agreement requiring parties to submit all disputes to binding **arbitration** was not substantively unconscionable.

[31] Alternative Dispute Resolution 25T ⚿140

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk140 k. Severability. Most Cited Cases
Court of Appeals would enforce remainder of agreement for admission to **nursing home**, including its **arbitration** provision, without substantively unconscionable clauses of agreement limiting recovery of damages, waiving punitive damages, requiring grievance resolution process which permitted **home** to bring suit in court in matters regarding payment for services, while requiring a dispute on any other grounds to be brought in accordance with grievance resolution process, and requiring party requesting copies of any records to pay charge of three dollars per page.

John L. Maxey, Jackson, Heather Marie Aby, attorneys for appellants.
J. Christopher Klotz, W. Eric Stracener, Joshua Aaron Turner, Jackson, attorneys for appellee.

Before LEE, P.J., BARNES and CARLTON, JJ.

CARLTON, J., for the Court.

*1 ¶ 1. Mike Barber filed a wrongful death suit against Trinity Mission Health and Rehabilitation Center of Clinton, LLC alleging that his mother, Laurentine Barber, suffered personal injuries during her residence at Trinity, from which she died. Trinity filed a motion to compel arbitration which was denied by order of the Circuit Court of Hinds County. Trinity appeals to this Court and asserts that the lower court erred in refusing to enforce the arbitration provision contained in the admission agreement. We find error and reverse and remand.

FACTS

¶ 2. On October 23, 2003, Ms. Barber was admitted to Trinity, a nursing home providing shelter, food, custodial care, and medical care to the aged and/or infirm. Upon admission to the facility, Mr. Barber entered into an admissions agreement on his mother's behalf, signing as her "responsible party;" however, Ms. Barber's signature does not appear on the document. The admissions agreement signed by Mr. Barber contained an arbitration provision which is central to this appeal.

¶ 3. On May 25, 2005, Mr. Barber filed a wrongful death suit in the Circuit Court of Hinds County, First Judicial District, alleging that Ms. Barber suffered personal injuries during her residence at Trinity, which led to her death. On June 27, 2005, Trinity filed a motion to dismiss or, in the alternative, to stay proceedings and enforce mediation and/or arbitration. In response, Mr. Barber sought to have the agreement and the arbitration provision contained therein declared unenforceable. The lower court entered an order on October 25, 2005, denying Trinity's motion to dismiss and/or compel arbitration and granting mediation. In her order, the trial judge reasoned that: (1) the admission agreement, containing an arbitration provision, is complex and ambiguous, (2) the resident, Laurentine Barber, did not execute the admission agreement, (3) no evidence was presented to the Court as to why she did not sign the admission agreement, (4) no evidence was presented to the Court that the resident was incompetent, (5) no power of attorney was in place for someone to act on behalf of Laurentine Barber, (6) not all of Plaintiff's claims are encompassed within the admission agreement. The arguments advanced by the parties in this appeal require us to determine whether the trial court erred in finding the arbitration provision unenforceable.

STANDARD OF REVIEW

[1][2]¶ 4. We employ a de novo standard of review to the denial of a motion to compel. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 513(¶ 9) (Miss.2005). The Federal Arbitration Act ("FAA") provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."*East Ford, Inc. v. Taylor*, 826 So.2d 709, 713(¶ 11) (Miss.2002) (citing 9 U.S.C. § 2)."[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."*Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

*2[3]¶ 5."In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement."*East Ford*, 826 So.2d at 713(¶ 9). The second prong asks "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims."*Id.* at 713(¶ 10) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

DISCUSSION

1. Federal Arbitration Act

[4][5]¶ 6. As a threshold determination, this Court must consider whether the admissions agreement is within the purview of the FAA. *Stephens*, 911 So.2d at 513(¶ 13). The FAA governs written agreements to arbitrate contained in contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2. Trinity argues that the admissions agreement at issue affects interstate commerce in such a way as to invoke the provisions of the FAA. Mr. Barber argues that

Trinity has not put forth any proof to support this proposition.

¶ 7. In *Stephens*, our supreme court held that arbitration agreements contained in nursing home admissions agreements affect interstate commerce and are thus governed by the FAA. *Stephens*, 911 So.2d at 515(¶ 16) ("[S]ingular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce."). The court reasoned that the general practice of nursing homes affects interstate commerce by "[r]eceiving supplies from out-of-state vendors and payments from out-of-state insurance companies or the federal Medicare program...."*Id.* at 515(¶ 17).

¶ 8. Under *Stephens*, we find that the arbitration provision at issue is part of a contract which, when taken in the aggregate, affects interstate commerce. *Id.* at (¶ 18). The FAA applies to the arbitration provision in the instant case.

2. Whether a valid agreement to arbitrate exists between the parties

¶ 9. Trinity argues that the arbitration provision is valid and enforceable. They contend (1) that Mr. Barber had the authority to bind his mother under Mississippi Code Annotated Section 41-41-201 (Rev.2005), (2) that Mr. Barber had the authority to bind Ms. Barber based on principles of agency, and (3) that Ms. Barber received the benefits of the contract and should be bound to the provision for this reason, notwithstanding her status as a non-signatory. Conversely, Mr. Barber argues that there is no valid agreement to arbitrate. He claims that Ms. Barber did not sign the admissions agreement, and thus she and her estate are not bound by the arbitration provision. Mr. Barber further asserts they had no authority to bind Ms. Barber to the admissions agreement.

[6]¶ 10.To determine whether a valid agreement to arbitrate exists between the parties, we apply ordinary principles of contract law. *Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1055(¶ 9) (Miss.2004) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

A. Authority to bind under agency principles

*3[7]¶ 11.Trinity asserts that an agency relationship was created based on Mr. Barber's apparent authority. They contend that, by executing the admissions agreement, Mr. Barber held himself out as having the authority to bind his mother and to engage the services of Trinity, who in turn, believed that he had the authority to bind his mother. Mr. Barber argues that this issue is without merit because Trinity provided no proof to the lower court to make a determination of agency.

[8][9]¶ 12.A principal is bound by its agent on the theory of apparent authority only when the third party can show "(1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third person as a result of that reliance."*Eaton v. Porter*, 645 So.2d 1323, 1325-26 (Miss.1994) (citations omitted). The party seeking to establish an agency relationship bears the burden of proving it. *McFarland v. Entergy Miss., Inc.*, 919 So.2d 894, 902(¶ 25) (Miss.2005) (citing *Highlands Ins. Co. v. McLaughlin*, 387 So.2d 118, 120 (Miss.1980)).

[10]¶ 13.Trinity incorrectly argues that an agency relationship was created because Mr. Barber *held himself out* as having the authority to bind his mother. Mississippi law requires that the acts or conduct indicating the agent's authority be performed by the principal, not the agent. *Eaton*, 645 So.2d at 1325-26.In the instant case, there is no evidence in the record that Ms. Barber, by acts or conduct, represented to Trinity that Mr. Barber had the authority to bind her to the admissions agreement. Trinity filed no affidavits with the lower court and no testimony has been taken in this case by deposition or otherwise to establish an agency relationship. Thus, we are left only with the existence of the admissions agreement and the unexplained absence of Ms. Barber's signature on the document.

¶ 14.The record contains no proof of acts or conduct on the part of Ms. Barber indicating that Mr. Barber possessed the authority to bind her to the admissions agreement. Therefore, this issue is without merit.

B. Authority to bind under the Health Care Surrogate Act

[11]¶ 15.Trinity argues that Mr. Barber had the

authority to bind his mother in health care matters pursuant to the Uniform Health-Care Decisions Act. Miss.Code Ann. §§ 41-41-201 through 41-41-229 (Rev.2005). They contend that section 41-41-211 authorizes a surrogate to contractually bind the patient on whose behalf he acts. Trinity further asserts that the authority to contractually bind the patient includes the right to bind the patient and her estate to arbitration. Mr. Brown argues that he had no authority to act as his mother's surrogate because there is no evidence that his mother was incapable of handling her own affairs, and thus, he had no authority to bind her to the admissions agreement.

¶ 16.Section 41-41-211 provides that:

> *4 (1) 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.
>
> (2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:
>
> (a) The spouse, unless legally separated;
>
> (b) An adult child;
>
> (c) A parent; or
>
> (d) An adult brother or sister
>
> ....
>
> (7) A health-care decision made by a surrogate for a patient is effective without judicial approval....

Miss.Code Ann. § 41-41-211(1), (2), and (7).

¶ 17.Our supreme court recently addressed this issue in *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732, 736-37(¶ 10) (Miss.2007). In *Brown*, the plaintiffs, administrators of the estate of their deceased mother, filed a wrongful death suit against the nursing home in which their mother resided prior to her death. *Id.* at 735(¶ 1). An adult daughter of the deceased signed the admissions agreement as "responsible party" for her mother upon admission to the facility. *Id.* at 735-36(¶ 5). The trial court denied the defendants' motion to compel arbitration. *Id.* On appeal, the Mississippi Supreme Court held that the adult daughter of the patient, as a surrogate, had the authority to contractually bind her mother in health care matters under section 41-41-211. *Id.* In reversing the trial court's denial of the motion to compel, the court in *Brown* impliedly held that the surrogate's authority to contractually bind the patient includes the authority to bind the patient to arbitration. *Id.* at (¶ 10). The patient in *Brown* was found to be incapacitated within the meaning of section 41-41-211(1).*Id.* The court reasoned that "[b]y virtue of admission by her representatives and corroboration by her admitting physician, she was capable legally of having her decisions made by a surrogate."*Id.*

¶ 18.In the instant case, there is no evidence in the record to suggest that Ms. Barber was incapable of handling her own affairs at the time the admissions agreement was signed. Trinity introduced no medical records or testimony from Ms. Barber's primary physician, nor from her admitting physician. While the court in *Brown* did not strictly construe section 41-41-211 so as to require that the determination of incapacity be made by the patient's primary physician, as contrasted from the admitting physician, we do not interpret the *Brown* decision to diminish the requisite proof of incapacity beyond its holding.

¶ 19.In accordance with *Brown*, we find that section 41-41-211 authorizes a surrogate to contractually bind an incapacitated patient in health care matters. We further interpret the *Brown* decision to authorize the surrogate to bind the patient and her estate to arbitration if the admissions agreement contains an arbitration provision otherwise valid and enforceable. To this extent, we agree with Trinity, and acknowledge that, as per *Brown*, Mr. Barber would have been authorized to bind Ms. Barber and her estate to arbitration were she first properly determined to be incapacitated. However, we find that proof as to Ms. Barber's incapacity was insufficient to statutorily authorize Mr. Brown to make a health care decision for her as a surrogate pursuant to section 41-41-211.

C. Third-Party Beneficiary

*5[12]¶ 20.Trinity argues that Ms. Barber has received services from their facility based on the terms and conditions of the admissions agreement, thereby benefitting from the same. Trinity asserts that Ms. Barber as well as her wrongful death beneficiaries are estopped from avoiding the arbitration clause because she has received the benefits of the contract which was executed directly for her benefit. *Miss. Fleet Card, L.L.C. v. Bilstat, Inc.*, 175 F.Supp.2d 894, 902 (S.D.Miss.2001). Mr. Barber argues that there was no valid agreement between Trinity and Ms. Barber as she did not sign the contract, and asserts further that Trinity has cited no authority to support the proposition that a non-signatory may be bound by an agreement to arbitrate.

[13]¶ 21."[A]rbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary."*Adams v. Greenpoint Credit, LLC* 943 So.2d 703, 708(¶ 15) (Miss.2006) (citing *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 727 (¶¶ 18-20) (Miss.2001)); *see also Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1058 (¶¶ 27-29) (Miss.2004). Our supreme court has stated in regards to a third-party beneficiary to a contract that:

> 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., 251 Miss. 789, 796, 171 So.2d 322, 325 (Miss.1965) (citing 17A C.J.S. *Contracts* § 519(4) (1963)).

¶ 22.In the case of *Adams v. Greenpoint*, father and mother Adams signed and executed a retail installment contract with creditor Bank-America Housing Services for the purchase of a mobile home. *Adams*, 943 So.2d at 704(¶¶ 2-6). The contract was subsequently assigned to Greenpoint, who drafted monies from the joint checking account of father Adams and daughter Brown. *Id.* Mother Adams was long deceased at the time the draft was presented, yet the check was signed " '[mother] Adams' by 'Authorized Representative Greenpoint Credit.' "*Id.* Father Adams and daughter Brown sued Greenpoint for an unauthorized draft, and Greenpoint moved to compel arbitration pursuant to an arbitration provision contained in the retail installment contract. *Id.* The trial court granted the motion; father Adams and daughter Brown appealed. *Id.*

¶ 23.On appeal, this Court held that father Adams, by virtue of his signature, was bound to arbitrate and that daughter Brown was not because Greenpoint failed to show that daughter Brown was a third-party beneficiary.*Id.* at 706(¶ 7). The supreme court affirmed the decision of this Court on Greenpoint's petition for writ of certiorari. *Id.* at (¶ 8). The court found that daughter Brown was not a third-party beneficiary of the contract, stating as follows:

> *6 Nothing in the plain language of the arbitration provision indicates a clear intent of the parties to make Brown a third-party beneficiary. She did not sign the contract, was in no way alluded to in the contract, and, based on the record before us, received no benefits from the contract.... [T]here is no evidence that the contract was "entered for [her] benefit[;]" *id.*, there is no evidence that any benefit flowed to her as a "direct result of the performance within the contemplation of the parties as shown by its terms [;]"*id.*, or that her suit "spring[s] from the terms of the contract itself."*Id.* As Brown is not a third-party beneficiary to whom the benefits of the contract attach, she is not bound by the arbitration provision.

Id. at 709(¶ 15) (citing *Burns*, 251 Miss. at 796, 171 So.2d at 324-25).

¶ 24.While the court in *Adams* found that daughter Brown was not a third-party beneficiary of the contract signed by her father and mother, the facts of the instant case clearly establish that Ms. Barber was a third-party beneficiary of the agreement signed and executed by Mr. Barber.

¶ 25.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*, 251 Miss. at 796, 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.*

¶ 26.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.[EN1]

[14]¶ 27.We find further that, because the arbitration provision could be enforced against Ms. Barber, it may be equally enforced against her wrongful death beneficiaries. *See Cleveland v. Mann*, 942 So.2d 108, 117-18 (¶¶ 34-41) (Miss.2006); *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 726-27 (¶¶ 15-17) (Miss.2001). Our supreme court has held that "[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 Corr.*, 860 So.2d 1187, 1192(¶ 17) (Miss.2003) (citing *Wickline v. U.S. Fid. & Guar. Co.*, 530 So.2d 708, 715 (Miss.1988)). Additionally, the admissions agreement plainly states that the arbitration provision "[s]hall survive the termination for any reason of this agreement and shall survive and shall not be revoked by the death of any party hereto including the Resident. Said provisions shall be binding on the estate of the Resident in the event the Resident is deceased."Because Ms. Barber's claims would have been subject to arbitration, the claims of her wrongful death beneficiaries are likewise subject the arbitration provision.

3. Whether the parties' dispute is within the scope of the arbitration agreement

*7[15]¶ 28.In her order denying Trinity's motion to compel arbitration, the trial judge found that "not all of [Mr. Barber's] claims are encompassed within the Admission Agreement."Trinity argues that all of the claims asserted are within the scope of the arbitration provision.

¶ 29.The arbitration provision at issue states in pertinent part that "[t]he 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...." All of Mr. Barber's claims arise out of the acts or omissions of Trinity while providing care to Ms. Barber during her residence at the facility. Thus, we find that the dispute between the parties is covered by the broad language of the arbitration provision.

[16]¶ 30.Having determined that a valid agreement to arbitrate exists between the parties, and that the parties' dispute is within the scope of the arbitration agreement, our inquiry now turns to the second prong of *East Ford*."Under the second prong, applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act."*East Ford*, 826 So.2d at 713(¶ 10) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)).

4. Unconscionability

[17]¶ 31.Unconscionability is generally 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."*Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So.2d 1202, 1207(¶ 11) (Miss.1998) (citations omitted). Mississippi courts have recognized two types of unconscionability, procedural and substantive. *Stephens*, 911 So.2d at 517(¶ 22) (citations omitted).

¶ 32.In his response to Trinity's motion to compel, Mr. Barber's main contention was that the terms of the admissions agreement were unconscionable. In her order denying Trinity's motion to compel arbitration, the trial judge, without explanation, stated that "the Admission agreement, containing an arbitration

provision, is complex and ambiguous."In so finding, the trial judge essentially held the entire admissions agreement to be unenforceable.

A. Procedural Unconscionability

[18][19]¶ 33.When reviewing a contract for procedural unconscionability, we "[look] beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract's formation."*Id.* at 517(¶ 24) (citing Black's Law Dictionary 1524 (6th ed.1990))."Procedural unconscionability may be proved by showing 'a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms.'"*East Ford,* 826 So.2d at 714(¶ 13) (citations omitted).

8[20]¶ 34.Mr. Barber argues that the arbitration agreement is procedurally unconscionable. Specifically, his contentions are as follows: (1) that Ms. Barber lacked the knowledge and voluntariness to waive her right to a jury trial, (2) that the location of the provision in the document is inconspicuous, and (3) that the admissions agreement is filled with complex and legalistic language.

¶ 35.Mr. Barber again argues that Ms. Barber did not sign the contract and, therefore, she cannot be held to have voluntarily and knowingly agreed to arbitrate. He contends that Trinity has cited no authority to support the proposition that a non-signatory may be bound to an arbitration agreement.

¶ 36.To the contrary, Trinity cites *Miss. Fleet Card, L.L.C. v. Bilstat, Inc.,* for the proposition that a non-signatory may be bound to the terms of an agreement to arbitrate as a third party beneficiary or "[u]nder theories of (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/ alter ego, and (5) estoppel."175 F.Supp.2d 894, 901-03 (S.D.Miss.2001). As previously discussed, Ms. Barber may be bound to the arbitration provision as a third-party beneficiary to the contract executed by Mr. Barber and Trinity, notwithstanding her status as a non-signatory. The relevant remaining determination then is whether the circumstances surrounding the execution of the agreement between Mr. Barber and Trinity evince procedural unconscionability.

[21]¶ 37.Trinity argues that Mississippi law imposes a duty to read the terms of a contract on the parties, such that a party to a contract may not later complain that he did not have knowledge of the terms and conditions of an agreement he signed. *MS Credit Ctr., Inc. v. Horton,* 926 So.2d 167, 177(¶ 31) (Miss.2006) (holding that a party may not avoid an arbitration provision by claiming that he did not read or understand its terms). We agree. Mr. Barber signed the agreement and will not be heard to complain that he had no knowledge of the arbitration provision. Additionally, we find prior Mississippi Supreme Court decisions in *Stephens* and *Brown* to be controlling on this issue.

¶ 38.In *Stephens,* our supreme court examined an identical arbitration provision in a nursing home admissions agreement for procedural unconscionability. Finding none, the court there stated that:

> [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 indicating that section "F" was about "Arbitration;" the provision itself was printed in bold-faced type of equal size or greater than 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 admissions 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.

9*Stephens,* 911 So.2d at 520(¶ 33). Recently in *Brown,* the court was again faced with the same arbitration clause contained within a nursing home's standard admissions form. *Brown,* 949 So.2d at (¶¶ 11-13). The court, relying on *Stephens,* again found no procedural unconscionability in the admissions agreement.

¶ 39.The arrangement of the admission agreements

and the arbitration provisions in *Stephens* and *Brown* accurately describe the agreement executed by Mr. Barber and Trinity. The record reveals no circumstances of exigency and none are asserted by Mr. Brown. Accordingly, we find no procedural unconscionability in the admissions agreement in the instant case.

B. Substantive Unconscionability

[22][23][24][25]¶ 40.Substantive unconscionability examines the terms of the agreement and may be proven by showing that the terms are oppressive. *East Ford*, 826 So.2d at 714(¶ 14) (citing *York v. Georgia-Pac. Corp.*, 585 F.Supp. 1265, 1278 (N.D.Miss.1984))."Substantive unconscionability 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(¶ 35) (citations omitted). In order for this Court to find an oppressive term to be substantively unconscionable, we must find that the term "[b]y its very language significantly alters the legal rights of the parties involved and severely abridges the damages which they may obtain."*Id.* at 521(¶ 38). When interpreting a contract, Mississippi courts adhere to a well-established practice of striking unconscionable terms as void and enforcing the remainder of the agreement without the effect of the unconscionable provisions. *Brown*, 949 So.2d at (¶ 25) (citing *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 725(¶ 21) (Miss.2002)); *see also*Miss.Code Ann. § 75-2-302(1) (Rev.2002).

¶ 41.Trinity argues that the trial judge erred in finding the entire admissions agreement to be unenforceable. They cite *Russell* and argue that the proper methodology when examining a contract is to strike any unconscionable terms and enforce the remainder of the agreement. Mr. Barber maintains that the trial judge was correct. However, he argues alternatively, should this Court find that the arbitration agreement is valid and enforceable, that several provisions in the agreement be held unconscionable and stricken from the agreement before ordering arbitration. The specific provisions of the admissions agreement will be addressed separately below.

[26]¶ 42.Sections E-5 and E-6 lay out a "grievance resolution process" which allows Trinity to bring suit in court in matters regarding payment for services, while requiring a dispute on any other grounds to be brought in accordance with the grievance resolution process.[FN2]This process has recently been held substantively unconscionable and stricken from a nursing home admissions agreement. *Brown*, 949 So.2d at 739(¶ 18) (citing *Pitts v. Watkins*, 905 So.2d 553, 555-56(¶ 10) (Miss.2005)). Therefore, we find that Sections E-5 and E-6 are unconscionable pursuant to *Brown* and should be stricken from the admissions agreement.

***10**[27]¶ 43.Section E-7 attempts to impose a limitation on the amount of damages that may be recovered in a dispute between the nursing home and the resident or responsible party.[FN3]The exact language of this section has twice been held unconscionable by our supreme court. *Brown*, 949 So.2d at (¶ 16); *Stephens*, 911 So.2d at 522-23 (¶¶ 39-42). In accordance with *Brown* and *Stephens*, we find that Section E-7 is unconscionable and should be stricken from the admissions agreement.

[28]¶ 44.Section E-8 seeks to waive punitive damages in any dispute between the nursing home and the resident or responsible party.[FN4]This exact clause was also considered in *Brown* and held to be unconscionable "[d]ue to its potentially significant effect of substantial deprivation to the resident and benefit to the nursing home."*Brown*, 949 So.2d at 739(¶ 17) (citing *Stephens*, 911 So.2d at 523-24(¶ 43)). In light of the recent decision in *Brown*, we find that Section E-8 is unconscionable and should be stricken from the admissions agreement.

[29]¶ 45.Section E-14 requires a party requesting copies of any records to pay a charge of three dollars per page.[FN5]This clause has been superceded by Mississippi Code Annotated section 11-1-52 which provides:

> (1) Any medical provider or hospital or nursing home or other medical facility shall charge no more than the following amounts to patients or their representatives for photocopying any patient's records: Twenty Dollars ($20.00) for pages one (1) through twenty (20); One Dollar ($1.00) per page for the next eighty (80) pages; Fifty Cents (50) per page for all pages thereafter. Ten percent (10%) of the total charge may be added for postage and handling. Fifteen Dollars ($15.00) may be

recovered by the medical facility for retrieving medical records in archives at a location off the premises where the facility/office is located.

Miss.Code Ann. § 11-1-52(1) (Rev.2004).

¶ 46.We find that the charge listed in Section E-14 is in violation of Mississippi Code Annotated Section 11-1-52(1) and should be stricken from the admissions agreement.

[30]¶ 47.Section F is the arbitration provision central to this appeal.[FN6] Again, we find the decisions of *Brown* and *Stephens* to be controlling. In *Brown,* the exact same arbitration provision was challenged as unconscionable. *Brown,* 949 So.2d at 740-41 (¶¶ 22-25). The court in *Brown* cited the *Stephens* decision as controlling because an identical provision was considered by the *Stephens* court, which found that the provision was not unconscionable. *Id.* (citing *Stephens,* 911 So.2d at 521(¶ 37)). Following the reasoning of the *Stephens* opinion, the court in *Brown* held that the arbitration provision was valid and enforceable except for "the last sentence of the arbitration provision, which limits liability pursuant to section[ ](sic) E-7 and waives punitive damages...."*Id.* at 741(¶ 23). The court struck this sentence from Section F and enforced the remainder of the arbitration provision. *Id.*

*11 ¶ 48.Consistent with the abovementioned authority, we find that the arbitration provision in the instant case is not substantively unconscionable. However, we find, as did the courts in *Brown* and *Stephens,* that the last sentence of Section F is unconscionable and should be stricken from the provision.

[31]¶ 49.We adhere to our practice "of striking unconscionable terms and leaving the remainder of the agreement intact."*Id.* at 735(¶ 3). We find, under recent Mississippi Supreme Court precedent, that Sections E-5, E-6, E-7, and E-8, are unconscionable and shall be stricken from the admissions agreement. We find that Section E-14 shall be stricken from the admissions agreement because it has been superceded by statute. As to Section F, the arbitration provision, we find that it is not unconscionable under *Stephens* and *Brown.*Section F is valid and enforceable against Ms. Barber's wrongful death beneficiaries, except for the last sentence which states: "Consistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7." We find that, as per *Stephens* and *Brown,* this sentence is unconscionable and shall be stricken from the provision.

¶ 50.Accordingly, we hold that the trial court erred in finding the entire admissions agreement to be unenforceable and in denying Trinity's motion to compel arbitration. We direct the trial court to order arbitration. We reverse and remand for proceedings consistent with this opinion.

¶ 51.THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND REMANDED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

LEE, P.J., CHANDLER, GRIFFIS, BARNES, ISHEE AND ROBERTS, JJ., CONCUR. IRVING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY KING, C.J. AND MYERS, P.J.IRVING, J., Concurring in Part and Dissenting in Part:

¶ 52.The majority finds a recent Mississippi Supreme Court case, *Covenant Health Rehab. of Picayune, L.P. v. Brown,* 949 So.2d 732 (Miss.2007), controlling on the issue of whether Mike Barber had the authority under the Health Care Surrogate Act to bind his mother, Laurentine Barber, to the admissions agreement that he signed with Trinity Mission. I agree with the majority that *Covenant Health* stands for the proposition that a surrogate has the authority under Mississippi Code Annotated section 41-41-211 (Rev.2005) to bind a patient, on whose behalf the surrogate has acted, to an admissions agreement that contains an arbitration clause.[FN7]*Id.* at 735(¶ 10).

¶ 53.However, I cannot agree that *Covenant Health* speaks to the real issue here: whether Barber, even if Laurentine is found to be incapable of managing her affairs, has the authority to bind Laurentine to arbitration. I agree that under *Covenant Health,* Barber, as Laurentine's surrogate, would have the authority to contractually bind Laurentine in health care matters. I also agree that in *Covenant Health,* our supreme court held that the trial court erred in denying the nursing home's motion to compel arbitration. *Covenant Health,* 949 So.2d at 742(¶ 29). It seems to me, however, that our supreme court may have

concluded, without having thoroughly examined the extent of the statutory power of a surrogate, that a surrogate's authority to make health care decisions *ipso facto* carries with it the authority to sign admissions agreements which contain arbitration provisions. In the discussion that follows, I look at the statutory powers and limitations of a health care surrogate.

***12** ¶ 54.Mississippi Code Annotated section 41-41-203(g) (Rev.2005) defines "health care" as "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition."Section 41-41-203(h) (Rev.2005) defines a health care decision as:

> a decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including: (i)[s]election and discharge of health-care providers and institutions; (ii)[a]pproval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and (iii)[d]irections to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

A surrogate is statutorily defined as "an individual, other than a patient's agent or guardian, authorized under Sections 41-41-201 through 41-41-229 [cited as the Uniform Health-Care Decisions Act] to make a health-care decision for the patient."Miss.Code Ann. § 41-41-203(s) (Rev.2005). It is clear to me that while a health care surrogate has the statutory authority to make all health care decisions for the patient, the decision to sign an agreement to arbitrate is neither explicitly authorized nor implied within the statutory meaning of a "health care decision." Nestling an arbitration provision in a general admissions agreement among other health care provisions does not, in my judgment, convert it into a health care provision.

¶ 55.In *Covenant Health*, our supreme court did not address the impact or effect of the statutory definitions discussed above. In the absence of any discussion, I must conclude that they were inadvertently overlooked or not brought to the attention of the court. The obvious purpose of a health care surrogate is to facilitate the provision of health care services by a health care provider when the patient is incapacitated and cannot perform that role. A decision regarding arbitration is wholly unrelated to this function. Therefore, I am compelled to conclude that had our supreme court considered the statutory meaning of a health care decision, along with the concomitant power of the surrogate in light of that meaning, its decision in *Covenant Health* may very well have been different. Further, since *Covenant Health* omits a significant discussion of a material point, I do not believe we should accord it the precedential value in this case that would otherwise be due had such a discussion taken place. However, I agree with the majority that the case must be reversed because there is no evidence in the record that Laurentine was incapacitated at the time the admission agreement was signed by her son, Barber.

KING, C.J. AND MYERS, P.J., JOIN THIS SEPARATE OPINION.

FN1. There were no facts presented at trial or stipulated to in the case at bar that would undercut binding precedent that non-signatories may be bound by an arbitration agreement when they are third party beneficiaries.

FN2. Section E-5 reads in pertinent part: "In the event a claim, dispute and/or controversy shall arise between the Parties other than regarding matters concerning the payment for services rendered or refunds due, the Parties agree to participate in a grievance resolution process."

FN3. Section E-7 reads verbatim: "Should any claim, dispute or controversy arise between the Parties or be asserted against any of the Facility's owners, officers, directors, or employees, the settlement thereof shall be for actual damages not to exceed the lesser of a) $50,000 or b) the number of days that Resident was in the Facility multiplied times the daily rate applicable for said Resident. This limitation of liability shall be binding on the Resident, Responsible Party, and the Resident's heirs, estate and assigns."

FN4. Section E-8 reads verbatim: "The Parties hereto agree to waive punitive damages against each other and agree not to seek punitive damages under any

circumstances."

FN5. Section E-14 reads verbatim: "To compensate for the cost of the professional staff involved in the process, the Parties agree that a charge of $3.00 per page shall be charged for copies of any records requested by legally authorized parties."

FN6. Section F reads verbatim: "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 Arbitration shall be heard and decided by one qualified Arbitrator selected by mutual agreement of the Parties. Failing such agreement each Party shall select one qualified Arbitrator and the two selected shall select a third. The Parties agree that the decision of the Arbitrator(s) shall be final. The Parties further agree that the Arbitrators shall have all authority necessary to render a final, binding decision of all claims and/or controversies and shall have all requisite powers and obligations. If the agreed method of selecting an Arbitrator(s) fails for any reason or the Arbitrator(s) appointed fails or is unable to act or the successor(s) has not been duly appointed, the appropriate circuit court, on application of a party, shall appoint one Arbitrator to arbitrate the issue. An Arbitrator so appointed shall have all the powers of the one named in this Agreement. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursuing a timely resolution of a claim, dispute or controversy, should one arise. The Parties agree to share equally the costs of such arbitration regardless of the outcome. Consistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7."

FN7. Five justices (Chief Justice Smith, former Presiding Justice Cobb, Justices Easley, Carlson, and Dickinson) did not find Section F (the arbitration provision) in the admission agreement objectionable. Justice Diaz (now Presiding Justice Diaz) in a dissent, joined by Justice Graves, found the entire admission agreement illegal and unenforceable. Justice Randolph, joined by Presiding Justice Waller and in part by Justice Diaz, concurred in part and dissented in part. Justice Randolph found the arbitration provision (Section F of the admissions agreement) unconscionable and unenforceable.

Miss.App.,2007.
Trinity Mission of Clinton, LLC v. Barber
--- So.2d ----, 2007 WL 2421720 (Miss.App.)

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Covenant Health & Rehabilitation of Picayune, LP v. Lumpkin ex rel. Lumpkin
Miss.App.,2008.
Only the Westlaw citation is currently available.

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Court of Appeals of Mississippi.
COVENANT HEALTH & REHABILITATION OF PICAYUNE, LP and Covenant Dove, Inc., Appellants
v.
Nellie LUMPKIN, by and through Fred Lumpkin, Next Friend, Appellee.
No. 2007-CA-00449-COA.

Feb. 5, 2008.

Background: Patient, through her husband and next friend, filed suit against **nursing home**, seeking damages for personal injuries that allegedly occurred during her stay at its facility. **Nursing home** moved to compel **arbitration**. The Circuit Court, Pearl River County, Prentiss Greene Harrell, J., refused to compel **arbitration**, and **nursing home** appealed.

Holdings: The Court of Appeals, Ishee, J., held that:
(1) there was sufficient consideration to support the **arbitration** clause in the **nursing home** admissions agreement; and
(2)**arbitration** clause in **nursing home** admissions agreement was meant to apply to any dispute, regardless of its nature, that arose between the facility and patient, and consequently, patient's negligence and malpractice claims fell within the scope of the **arbitration** clause.

Reversed and remanded.

Myers, P.J., and Irving, J., dissented.

[1] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards of Review. Most Cited Cases
Appellate court reviews orders denying motions to compel **arbitration** de novo.

[2] Alternative Dispute Resolution 25T 116

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(A) Nature and Form of Proceeding
25Tk116 k. What Law Governs. Most Cited Cases

Commerce 83 80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. **Arbitration**. Most Cited Cases
Since the **arbitration** clause was a part of the **nursing home** admissions agreement, evidencing in the aggregate economic activity affecting interstate commerce, the Federal **Arbitration** Act was applicable, and thus, the **arbitration** agreement was governed by the Act. 9 U.S.C.A. § 2.

[3] Alternative Dispute Resolution 25T 137

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk136 Construction
25Tk137 k. In General. Most Cited Cases
To determine whether the parties agreed to **arbitration**, courts simply apply contract law.

[4] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk141 k. Persons Affected or Bound. Most Cited Cases
A health-care surrogate, acting under the provisions of the Uniform Health-Care Decisions Act, is capable of binding his or her patient to **arbitration** . Miss.Code Ann. §§ 41-41-201 et seq.

[5] Contracts 95 ⚷54(1)

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k54 Sufficiency in General
95k54(1) k. In General. Most Cited Cases
Simply because one party to a contract later admits that the other party could have successfully bargained for more beneficial terms at the time the contract was formed does not mean that the element of the contract not bargained for is void for lack of consideration.

[6] Contracts 95 ⚷51

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k51 k. Benefit to Promisor. Most Cited Cases

Contracts 95 ⚷52

95 Contracts
95I Requisites and Validity
95I(D) Consideration
95k49 Nature and Elements
95k52 k. Detriment to Promisee. Most Cited Cases
In any contract, all that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promisor or a detriment to the promisee; if either of these requirements exist, there is a sufficient consideration.

[7] Evidence 157 ⚷397(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(1) k. In General. Most Cited Cases
Written contract cannot be varied by prior oral agreements.

[8] Evidence 157 ⚷397(1)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k397 Contracts in General
157k397(1) k. In General. Most Cited Cases
As an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible.

[9] Alternative Dispute Resolution 25T ⚷134(2)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(2) k. Consideration. Most Cited Cases
There was sufficient consideration to support the **arbitration** clause in the **nursing home** admissions agreement; both parties undertook duties towards one another under the admissions agreement, **nursing home** promised to provide care and assistance to patient, patient promised to pay it for its service, **arbitration** clause was one portion of that exchange, and it obligated both parties to **arbitrate** any dispute between them, and the mutuality of exchange found throughout the admissions agreement provided ample evidence that there was sufficient consideration to support the **arbitration** clause.

[10] Alternative Dispute Resolution 25T ⚷143

25T Alternative Dispute Resolution
25TII**Arbitration**

25TII(B) Agreements to **Arbitrate**
25Tk142 Disputes and Matters **Arbitrable** Under Agreement
25Tk143 k. In General. Most Cited Cases
Court must determine that the dispute between the parties falls within the scope of the **arbitration** agreement in order to compel **arbitration**, and to do so, courts look to the language of the **arbitration** clause itself.

[11] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk142 Disputes and Matters **Arbitrable** Under Agreement
25Tk143 k. In General. Most Cited Cases
The **arbitration** clause in **nursing home** admissions agreement was meant to apply to any dispute, regardless of its nature, that arose between the facility and patient, and consequently, patient's negligence and malpractice claims fell within the scope of the **arbitration** clause; **arbitration** clause stated that 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**.

[12] Contracts 95 94(1)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k94 Fraud and Misrepresentation
95k94(1) k. In General. Most Cited Cases
As a contract defense, fraud in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract.

[13] Alternative Dispute Resolution 25T 134(3)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(3) k. Validity of Assent. Most Cited Cases
Patient did not establish fraud in the inducement as a contract defense so as to invalidate the **arbitration** clause in the **nursing home** admissions agreement; the admissions agreement itself did not contain any false information, and instead, it simply contained terms that could have been altered had patient's daughter attempted to do so, and fact that patient's daughter failed to bargain for those terms did not constitute fraud any more than it constituted a lack of consideration, and therefore, daughter was not fraudulently induced into signing the admissions agreement.

[14] Alternative Dispute Resolution 25T 134(3)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(3) k. Validity of Assent. Most Cited Cases
The defense of fraud in the inducement could be appropriately raised if administrator for **nursing home** facility had made material misrepresentations to patient's daughter when daughter signed the admissions agreement, and those misrepresentations had been meant to, and did, induce patient's daughter to sign the admissions agreement which contained **arbitration** clause.

[15] Alternative Dispute Resolution 25T 140

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk140 k. Severability. Most Cited Cases

Health 198H 276

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk276 k. **Nursing Homes**. Most Cited

Cases
Certain clauses in **nursing home** admissions agreement contained unconscionable language, and the offending language would be stricken, and admissions agreement, absent offending language, was substantively conscionable and parties were bound by it, including its **arbitration** clause, and the language which would be stricken included: (1) language requiring forfeiture by resident for all claims except those for willful acts; (2) language waiving liability for the criminal acts of individuals; (3) grievance resolution process language; (4) language limiting recovery of actual damages; (5) language limiting recovery of punitive damages; (6) language requiring resident to pay all costs if resident attempts to avoid or challenge grievance resolution process; and (7) language that purported to change statute of limitations.

Pearl River County Circuit Court, Hon. Prentiss Greene Harrell, J.
John L. Maxey, Paul Hobart Kimble, attorneys for appellants.
F.M. Turner, attorney for appellee.

Before KING, C.J., BARNES and ISHEE, JJ.

ISHEE, J., for the Court.
*1 ¶ 1. Nellie Lumpkin, through her husband and next friend Fred Lumpkin, filed suit against Covenant Health and Rehabilitation of Picayune (Covenant Health) seeking damages for personal injuries that allegedly occurred during her stay at its facility. Covenant Health subsequently moved to compel arbitration of the case based on the arbitration clause found in its standard admissions agreement. The trial court refused to compel arbitration, finding the admissions agreement substantively unconscionable and void as a matter of law. Aggrieved, Covenant Health appeals, seeking enforcement of the arbitration provision. Lumpkin asks us to affirm the decision of the trial court, and find that either (1) no arbitration agreement was ever created, because Lumpkin's daughter lacked capacity to bind Lumpkin to arbitration or, in the alternative, that the arbitration clause fails for lack of consideration; or (2) the arbitration clause is void due to fraud in the inducement and substantive unconscionability.

¶ 2. Finding that Lumpkin's daughter possessed the capacity to bind her mother to arbitration, that there existed sufficient consideration to support the creation of the arbitration clause, that Lumpkin's daughter was not fraudulently induced into signing the admissions agreement, and that the admissions agreement and the arbitration clause are substantively conscionable, we reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶ 3. On April 11, 2003, Lumpkin was admitted to the Picayune Convalescent Center (owned and operated by Covenant Health). She was accompanied by her daughter, Beverly McDaniel. Due to several illnesses, including Parkinson's disease, psychosis, and dementia, that prevented Lumpkin from fully participating in the admissions process, McDaniel filled out all the admissions paperwork and signed the admissions agreement. That agreement contained, among other things, an arbitration clause requiring both parties to submit to arbitration in the event any dispute arose between them.

¶ 4. Lumpkin left the Picayune Convalescent Center on December 23, 2004. In November 2006, she filed suit against Covenant Health, alleging negligent treatment and malpractice during her stay at the center. On December 11, 2006, Covenant Health filed its motion to compel arbitration, based on the arbitration clause contained in the admissions agreement used at the time Lumpkin was admitted to the Picayune Center. In March 2007, the trial court denied Covenant Health's motion to compel arbitration, and it is from this ruling that Covenant Health now appeals.

DISCUSSION AND ANALYSIS

[1][2]¶ 5. This Court reviews orders denying motions to compel arbitration *de novo*. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 513(¶ 9) (Miss.2005). Although not directly raised by either party in this case, as a threshold issue this Court must determine whether the Federal Arbitration Act (FAA) controls the arbitration agreement presented here. Our supreme court has previously held that "singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce."*Id.* at 515(¶ 16). In this case, as in *Vicksburg Partners*,"since the **arbitration** clause is a part of a

contract (the **nursing home** admissions agreement) evidencing in the aggregate economic activity affecting interstate commerce, the Federal **Arbitration** Act is applicable...."*Id.* at 515-16(¶ 18).

*2 ¶ 6. Having made the determination that the **arbitration** agreement in this case is governed by the FAA, we must next determine if that **arbitration** agreement is valid. Again we are guided by the supreme court, which has stated that "[i]n determining the validity of a motion to compel **arbitration** under the Federal **Arbitration** Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid **arbitration** agreement and (2) whether the parties' dispute is within the scope of the **arbitration** agreement."*East Ford, Inc. v. Taylor,* 826 So.2d 709, 713(¶ 9) (Miss.2002). The second prong involves an inquiry into "whether legal constraints external to the parties' agreement foreclosed **arbitration** of those claims."*Id.* at 713(¶ 10) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

[3]¶ 7. 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). Regarding this prong of our inquiry, Lumpkin asserts that her daughter, McDaniel, lacked the capacity to consent to arbitration as her health-care surrogate and, in the alternative, that the arbitration clause is void because it lacked sufficient consideration. We address each of these issues below.

1. Beverly McDaniel possessed the capacity to bind her mother to arbitration.

¶ 8. Lumpkin asserts that her daughter, Beverly McDaniel, did not have the capacity to bind her to arbitration while acting as her health-care surrogate under the Uniform Health-Care Decisions Act. Miss.Code Ann. §§ 41-41-201 to 41-41-229 (Supp.2006). Lumpkin does not dispute that McDaniel was, in fact, acting as her health-care surrogate for the purposes of that section when she was admitted to the Picayune Convalescent Center.

¶ 9. Our supreme court recently addressed this very issue in *Covenant Health Rehab of Picayune, L.P. v. Brown,* 949 So.2d 732 (Miss.2007). In *Brown,* the plaintiffs, as administrators of the estate of their deceased mother, filed a wrongful death suit against the nursing home in which their mother resided prior to death. *Id* . at 735(¶ 1). An adult daughter of the deceased signed the admissions agreement as the "responsible party" for her mother upon admission to the facility. *Id.* The defendants filed a motion to compel arbitration based on the admissions agreement, and the trial court denied that motion. On appeal, the supreme court held that the adult daughter of the patient, acting as a health-care surrogate, had the authority to contractually bind her mother in health-care matters under our Uniform Health-Care Decisions Act. *Id.* at (¶ 3).

[4]¶ 10.In reversing the trial court's denial of the motion to compel arbitration in *Brown,* the supreme court implicitly held that the surrogate's authority to bind the patient extended to the arbitration clause in the admissions agreement. In this case, because Lumpkin does not dispute that her daughter was acting as her health-care surrogate for the purposes of the Uniform Health-Care Decisions Act, we see no reason to depart from the supreme court's holding in *Brown.*Therefore, we find that a health-care surrogate, acting under the provisions of the Uniform Health-Care Decisions Act, is capable of binding his or her patient to arbitration. Accordingly, we find that Lumpkin's argument on this issue is without merit.

2. *The arbitration clause does not fail for lack of consideration.*

*3 ¶ 11.Lumpkin also asserts that the arbitration clause should fail for lack of consideration. She relies solely on the affidavit of Keri Ladner, the facility administrator for Covenant Health, in making this argument. Lumpkin points to Ladner's statement that Lumpkin would not have been refused admission to the facility had she objected to the arbitration agreement as evidence that the arbitration clause lacked consideration, and that therefore the arbitration clause should be stricken from the admissions agreement.

[5][6]¶ 12.We first note that Ladner's statements are irrelevant to the issue of consideration. The only thing her statements represent is an admission that, in retrospect, Lumpkin's daughter could have entered into a more beneficial contract for her mother had she bargained for it. Simply because one party to a

contract later admits that the other party could have successfully bargained for more beneficial terms at the time the contract was formed does not mean that the element of the contract not bargained for is void for lack of consideration. In any contract, "[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration."*Theobald v. Nosser,* 752 So.2d 1036, 1040(¶ 15) (Miss.1999).

[7][8]¶ 13.Second, even if Ladner's statements were relevant to this issue, this Court would be prevented from considering them by the parol evidence rule. It is a well-settled principle of contract law that "a written contract cannot be varied by prior oral agreements. Moreover, as an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible."*Carter v. Citigroup, Inc.,* 938 So.2d 809, 818(¶ 41) (Miss.2006) (quoting *Stephens v. Equitable Life Assurance Soc'y of the United States,* 850 So.2d 78, 83(¶ 14) (Miss.2003). Although parol evidence is sometimes admissible when there has been, among other things, a showing that a contract contains ambiguous language, here there has been no such showing. Neither party has even suggested that there is any ambiguity in the agreement.

¶ 14.Without such a showing, we must look to the agreement of the parties in order to determine whether there was sufficient consideration. Again, in any contract, "[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration."*Theobald,* 752 So.2d at 1040(¶ 15).

[9]¶ 15.Here, there is quite clearly sufficient consideration to support the arbitration agreement. Both parties undertook duties towards one another under the admissions agreement. Covenant Health promised to provide care and assistance to Lumpkin. Lumpkin promised to pay it for its service. The arbitration clause was one portion of that exchange, and it obligated both parties to arbitrate any dispute between them. The mutuality of exchange found throughout the admissions agreement provides ample evidence that there was sufficient consideration to support the arbitration clause; therefore, we find that the arbitration clause does not fail for lack of consideration.

3. The dispute is within the scope of the arbitration clause.

*4[10][11]¶ 16.Although not directly addressed by either party in this appeal, under our standard of review in this case, this Court must determine that the dispute between the parties falls within the scope of the arbitration agreement in order to compel arbitration. To do so, we look to the language of the arbitration clause itself. In this case, that language is very clear. The arbitration clause states that "[t]he 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...." Clearly, the arbitration clause was meant to apply to any dispute, regardless of its nature, that arose between the facility and Lumpkin, including her current claims of negligence and malpractice. Consequently, we find that the dispute between Lumpkin and Covenant Health falls within the scope of the arbitration clause.

4. The arbitration clause does not violate any external legal constraints.

¶ 17.Having determined that a valid arbitration agreement exists, and that the current dispute falls within the scope of that agreement, we now turn to the second prong of the test set out in *East Ford,* which involves an inquiry into "whether legal constraints external to the parties' agreement foreclose arbitration of those claims."*East Ford,* 826 So.2d at 713(¶ 10) (quoting *Mitsubishi Motors Corp.,* 473 U.S. at 626. The supreme court has stated that, under the second prong of the *East Ford* test, "applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act."*Id.*

¶ 18.Lumpkin specifically asserts two of the defenses listed above, fraud and substantive unconscionability, in her argument to sustain the ruling of the trial court and void the arbitration clause.

A. McDaniel was not fraudulently induced into signing the admissions agreement.

[12][13]¶ 19.Lumpkin argues that her daughter, McDaniel, was fraudulently induced into signing the admissions agreement. She again relies on the affidavit of Ladner, the facility administrator, and the fact that Ladner stated that acceptance of the arbitration clause was not a necessary precondition to her admittance to the facility. This statement does not give rise to a defense of fraud. As a contract defense, "[f]raud in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract."*Lacy v. Morrison,* 906 So.2d 126, 129(¶ 6) (Miss.Ct.App.2004).

[14]¶ 20.The defense of fraud in the inducement would be appropriately raised if, for instance, Ladner had made material misrepresentations to McDaniel when she signed the admissions agreement, and those misrepresentations had been meant to, and did, induce McDaniel to sign the agreement. However, the facts indicate that this is not what happened. As we noted above, all that Ladner's statements demonstrate is that McDaniel could have potentially bargained for a better deal from the facility, i.e. one that did not include the arbitration clause. However, the admissions agreement itself did not contain any false information, it simply contained terms that could have been altered had McDaniel attempted to do so. The fact that she failed to bargain for those terms does not constitute fraud any more than it constitutes a lack of consideration, and therefore McDaniel was not fraudulently induced into signing the admissions agreement.

B. The arbitration clause is substantively conscionable.

*5 ¶ 21.We come now to the final issue raised in this appeal. Lumpkin asserts that the admissions agreement contains several provisions that have previously been found unconscionable by our supreme court and, as a consequence, this Court should void the entire admissions agreement. In the alternative, Lumpkin argues that the terms of the arbitration clause itself are unconscionable and that we should strike the arbitration clause from the admissions agreement. Although this Court has serious misgivings about the language included in the admissions agreement, we are compelled to confirm the substantive conscionability of the admissions agreement and the arbitration clause.

[15]¶ 22.Lumpkin correctly points out that the admissions agreement her daughter signed contains several clauses that have exactly the same language as clauses in other nursing home admissions agreements that our supreme court has explicitly held are unconscionable. In fact, the admissions agreement in this case appears to be identical to the one at issue in *Brown,* discussed above.[FN1] Specifically, (1) the language in section C5 requiring forfeiture by the resident for all claims except those for willful acts, (2) the language in section C8 waiving liability for the criminal acts of individuals, (3) the "grievance resolution process" set out in sections E5 and E6, (4) the language limiting the recovery of actual damages in section E7, (5) the language limiting the recovery of punitive damages in section E8, (6) the language in section E12 requiring the resident to pay all costs if the resident attempts to avoid or challenge the grievance resolution process, and (7) the language of section E16 that purports to change the statute of limitations were all held to be unconscionable in *Brown.*Moreover, the last line of the arbitration clause itself contains language identical to language the supreme court struck from the arbitration clause that was at issue in *Brown.*Seeing no reason to depart from the supreme court's findings in *Brown,* we agree with Lumpkin's assertion that these clauses in her admissions agreement contain unconscionable language as well. We therefore strike the offending language of clauses C5, C8, E5, E6, E7, E8, E12, and E16, as well as the last line of the arbitration clause from the admissions agreement.

¶ 23.We cannot, however, agree with the remainder of Lumpkin's argument, that because of these unconscionable provisions we must void the entire contract, or that the arbitration clause as a whole should be voided. In *Brown,* when faced with exactly the same unconscionable language, the supreme court chose to merely sever the unconscionable portions of the admissions agreement and the offending portion of the arbitration clause, and enforce the remaining sections, including compelling the parties to arbitrate. Given the striking similarity of these two cases, including the fact that they involve substantially identical admissions agreements, we are compelled to do the same here as the supreme court did in *Brown.*Accordingly, we find that the admissions

agreement, absent the offending language, is substantively conscionable and the parties are bound by it, including its arbitration clause.

*6 ¶ 24.**THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

KING, C.J., LEE, P.J., CHANDLER, GRIFFIS, BARNES, ROBERTS AND CARLTON, JJ., CONCUR. MYERS, P.J. AND IRVING, J., DISSENT WITHOUT SEPARATE WRITTEN OPINION.

FN1.*See Brown,* 949 So.2d at 737-41 (¶¶ 14-25) for an exhaustive discussion of why these particulars aspects of the admissions agreement are unconscionable, including the language of the offending clauses. *See also Vicksburg Partners,* 911 So.2d at 525(¶ 48) and *Pitts v. Watkins,* 905 So.2d 553, 555-58 (¶¶ 9-20) (Miss.2005) for discussions of the unconscionability of similar terms found in other admissions agreements.

Miss.App.,2008.
Covenant Health & Rehabilitation of Picayune, LP v. Lumpkin ex rel. Lumpkin
--- So.2d ----, 2008 WL 306008 (Miss.App.)

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EXHIBIT 6

Forest Hill Nursing Center, Inc. v. McFarlan
Miss.App.,2008.
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Mississippi.
FOREST HILL NURSING CENTER, INC., Long Term Care Management, LLC, Hugh Franklin, Scott A. Lindsey and Rhonda Bounds, Appellants
v.
Mary Louise McFARLAN and Patricia Mathews, Appellees.
No. 2007-CA-00327-COA.

April 1, 2008.

Background: Patient filed suit against **nursing home** based on alleged personal injuries that she sustained at **home**. **Nursing home** filed a motion to compel **arbitration**. The Circuit Court, Hinds County, Bobby Burt Delaughter, J., denied motion, and **home** appealed.

Holdings: The Court of Appeals, Griffis, J., held that:
(1) patient's granddaughter did not have the authority to act as patient's health-care surrogate;
(2) patient's granddaughter who signed **nursing home's** admissions paperwork, which included **arbitration** agreement, did not have the authority to enter into the **arbitration** agreement on patient's behalf under the principles of agency law;
(3) patient was an intended **third-party beneficiary** of the admissions agreement, which included **arbitration** clause, signed by **nursing home** and patient's granddaughter, and thus, patient was bound by the terms of the contract; and
(4)**arbitration** clause contained in **nursing home's** admissions agreement was not procedurally unconscionable.

Reversed and remanded.

Lee, P.J., concurred in part and dissented in part and filed opinion in which Myers, P.J., joined.

[1] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards of Review. Most Cited Cases
Appellate courts apply 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.

[2] Alternative Dispute Resolution 25T 114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases

Commerce 83 80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases
Federal Arbitration Act (FAA) governs contracts evidencing a transaction involving commerce, which include nursing home admission agreements. 9 U.S.C.A. § 2.

[3] Alternative Dispute Resolution 25T 119

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding

25Tk118 Matters Which May Be Subject to Arbitration Under Law
25Tk119 k. In General. Most Cited Cases

Alternative Dispute Resolution 25T 134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases

Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In General. Most Cited Cases
In determining the validity of a motion to compel arbitration under the Federal Arbitration Act (FAA), courts generally conduct a two-pronged inquiry, and the first prong has two considerations, namely whether there is a valid arbitration agreement and whether the parties' dispute is within the scope of the arbitration agreement; the second prong of the inquiry is whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. 9 U.S.C.A. § 2.

[4] Alternative Dispute Resolution 25T 134(3)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(3) k. Validity of Assent. Most Cited Cases

Alternative Dispute Resolution 25T 134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Only generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate arbitration provisions or agreements governed by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

[5] Health 198H 912

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk912 k. Incompetent Persons in General. Most Cited Cases
Uniform Healthcare Decisions Act does not apply to those persons who are competent. Miss.Code Ann. §§ 41-41-201 et seq.

[6] Health 198H 912

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk912 k. Incompetent Persons in General. Most Cited Cases
Under Uniform Health-Care Decisions Act, a health-care surrogate may make health-care decisions for a patient only after the patient is found to be incapacitated by a physician. Miss.Code Ann. § 41-41-211(1).

[7] Health 198H 912

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk912 k. Incompetent Persons in General. Most Cited Cases
Intake form at nursing home did not meet the statutory requirement that a physician determine that patient was incapacitated at the time of her admission, and because there was insufficient proof that patient was incapacitated within the meaning of Uniform Health-Care Decisions Act, providing that health-care surrogate may make health-care decisions for patient only after the patient is found to be incapacitated by a physician, patient's granddaughter did not have the authority to act as patient's health-care surrogate.

Miss.Code Ann. § 41-41-211(1).

[8] Principal and Agent 308 ⚿112

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k112 k. Submission to Arbitration. Most Cited Cases

Patient's granddaughter who signed nursing home's admissions paperwork, which included arbitration agreement, did not have the authority to enter into the arbitration agreement on patient's behalf under the principles of agency law; there was no indication in the record that any type of agreement existed between patient and her granddaughter that would give granddaughter the authorization to act on patient's behalf, and similarly, there was no indication that an implied agency relationship existed, and because there was no indication of any actions on the part of patient, granddaughter did not have apparent authority to bind patient to the arbitration agreement.

[9] Principal and Agent 308 ⚿19

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k18 Evidence of Agency
308k19 k. Presumptions and Burden of Proof. Most Cited Cases

The burden of proving an agency relationship rests squarely upon the party asserting it.

[10] Principal and Agent 308 ⚿96

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k95 Express Authority
308k96 k. In General. Most Cited Cases

An express agent is one who is in fact authorized by the principal to act on their behalf.

[11] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases

Implied agency requires that the principal give the agent actual authorization to perform acts which reasonably lead third parties to believe that an agency relationship exists.

[12] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases

The existence of an implied agency is proved by facts and circumstances of the particular case, including words and conduct of the parties, and the focus is on whether the agent reasonably believes, because of the principal's conduct, that the principal desired the agent so to act.

[13] Principal and Agent 308 ⚿99

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases

Apparent authority of an agent only binds the principal when the plaintiff can show acts or conduct of principal indicating agent's authority, reasonable reliance upon those acts by third person, and detrimental change in position by third person as result of that reliance.

[14] Alternative Dispute Resolution 25T ⚿141

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk141 k. Persons Affected or Bound. Most Cited Cases

Patient was an intended **third-party beneficiary** of the admissions agreement, which included **arbitration** clause, signed by **nursing home** and patient's granddaughter, and thus, patient was bound by the terms of the contract, including the agreement to **arbitrate** any legal disputes related to the contract; patient was named at the top of the agreement as the resident to be admitted to **nursing home**, benefits of

residing at **nursing home** flowed directly to patient as a result of the agreement, and by the terms of the contract, **nursing home** incurred a legal duty to care for patient and provide services directly to her including room, board, linens and bedding, **nursing** care, and certain personal services.

[15] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII **Arbitration**
25TII(B) Agreements to **Arbitrate**
25Tk142 Disputes and Matters **Arbitrable** Under Agreement
25Tk143 k. In General. Most Cited Cases
Patient's claim for personal injuries that she allegedly sustained while a resident at **nursing home** arose out of the relationship between patient and **nursing home** created by the admissions agreement and, consequently, fell within the scope of the **arbitration** clause contained in the admissions agreement; **arbitration** clause in admissions agreement stated that the parties agreed that any legal dispute, controversy, demand or claim that arose out of or related to the admissions agreement or any service or health care provided by **nursing home** would be resolved exclusively by binding **arbitration**, and patient's claims arose out of circumstances related to her care while a resident at **nursing home** .

[16] Appeal and Error 30 169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases
Appellate courts refuse to review issues raised for the first time on appeal.

[17] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
"Unconscionability" is 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, and there are two types of unconscionability-procedural and substantive.

[18] Contracts 95 1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Procedural unconscionability exists when there is a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms; courts must look beyond the actual terms of the agreement and focus on the circumstances surrounding the overall formation of the contract.

[19] Alternative Dispute Resolution 25T 134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Arbitration clause contained in nursing home's admissions agreement was not procedurally unconscionable; arbitration clause was found in section "E" on page five of eight-page document, the section heading was in bold-faced type and read "ARBITRATION-PLEASE READ CAREFULLY," wording of the document was not presented in complex legalistic language, paragraph written in bold-faced letters drew attention to fact that parties were giving up their constitutional right to have claim decided before a judge and jury, and agreement also stated that the party had right to seek legal counsel, the signing of agreement was not a precondition to admission, and the contract could be rescinded within thirty days.

[20] Alternative Dispute Resolution 25T 134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Substantive unconscionability exists when the arbitration agreement is found to be oppressive.

[21] Contracts 95 ⚿1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
When reviewing a contract for substantive unconscionability, courts look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, contracting parties; language of the contract must greatly alter the legal rights of the parties or severely limit the damages available.

[22] Alternative Dispute Resolution 25T ⚿134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability. Most Cited Cases
Arbitration clause contained in nursing home's admissions agreement was not substantively unconscionable; arbitration clause neither significantly altered patient's legal rights nor severely limited the damages available to her, and instead, it merely provided for a mutually agreed-upon forum for the parties to litigate their claims and was benign in its effect on the parties' ability to pursue potential actions, and there was no required grievance resolution process, no limit on the amount of damages, no waiver of punitive damages, and no requirement to compensate nursing home's staff for their involvement in a dispute.

Hinds County Circuit Court, Hon. Bobby Burt Delaughter, J.
Steven Mark Wann, Paul Hobart Kimble, Heather Marie Aby, attorneys for appellants.
Susan Nichols Estes, Douglas Bryant Chaffin, Kenneth L. Connor, attorneys for appellees.

Before MYERS, P.J., IRVING, GRIFFIS and ISHEE, JJ.

GRIFFIS, J., for the Court.
***1** ¶ 1. Mary Louise McFarlan filed suit against Forest Hill Nursing Center ("Forest Hill") based on alleged personal injuries that she sustained while a resident at Forest Hill. In response to her complaint, defendants filed a motion to compel arbitration which was denied by the circuit court. Forest Hill now appeals arguing that the court should have compelled arbitration according to the agreement between the parties. We find the denial of the motion to compel arbitration to be in error. We reverse and remand for further proceedings consistent with this opinion.

FACTS

¶ 2. Mary Louise McFarlan was admitted to Forest Hill in Jackson on July 28, 2003. McFarlan's granddaughter, Patricia Mathews, signed the admission paperwork as McFarlan's "responsible party." The admission agreement, signed by Mathews, included section E entitled "ARBITRATION-PLEASE READ CAREFULLY." Mathews also initialed this specific section regarding arbitration. McFarlan did not sign any part of the agreement.

¶ 3. McFarlan filed suit on August 25, 2004, alleging that Forest Hill was responsible for personal injuries she sustained while a resident at Forest Hill. Forest Hill filed a motion to dismiss or, in the alternative, a motion to compel arbitration. The circuit court refused to compel arbitration finding that Mathews's authority was limited to the areas of health care and business affairs which do not include the ability to bind McFarlan to an arbitration agreement.

STANDARD OF REVIEW

[1][2]¶ 4. We apply 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). The Federal Arbitration Act ("FAA") governs contracts "evidencing a transaction involving commerce" which include nursing home admission agreements. *Id.* at 514-15 (¶¶ 13, 16-18) (quoting 9 U.S.C. § 2 (2000)). Therefore, we must apply the policy of the FAA to "rigorously enforce agreements to arbitrate." *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713(¶ 11) (Miss.2002) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (U.S.1987)).

[3][4]¶ 5."In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement."*Id.* at 713(¶ 9). The second prong of the inquiry is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims."*Id.* at 713(¶ 10) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). Further, "only generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate arbitration provisions or agreements" governed by the FAA.*Stephens*, 911 So.2d at 514(¶ 11).

ANALYSIS

1. Whether a valid arbitration agreement exists between the parties.

***2** ¶ 6. Forest Hill argues that the arbitration clause contained in the admission agreement is valid because: (1) Mathews had the authority to bind McFarlan to the agreement as her health-care surrogate under Mississippi Code Annotated section 41-41-211 (Rev.2005), (2) Mathews had the authority to bind McFarlan to the agreement under the principles of agency, (3) McFarlan was a third-party beneficiary to the agreement between Mathews and Forest Hill, and (4) the agreement is not unconscionable.

a. Uniform Health-Care Decisions Act

¶ 7. First, Forest Hill contends that Mathews's signature on the admission agreement bound McFarlan to the arbitration clause because Mathews was acting as McFarlan's health-care surrogate under the Uniform Health-Care Decisions Act. Miss.Code Ann. §§ 41-41-201 through 229 (Rev.2005). The Act provides 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(1) (Rev.2005) (emphasis added). The circuit court found that waiving a person's right to a jury trial by signing an arbitration agreement is not included in the purview of health-care decisions which the statute authorizes a surrogate to make. However, it is unnecessary for us to reach that issue here because the statute is inapplicable to this case.

[5][6][7]¶ 8."The Uniform Healthcare Decisions Act does not apply to those persons who are competent."*Grenada Living Ctr., LLC v. Coleman*, 961 So.2d 33, 38(¶ 18) (Miss.2007). It is clear from the language of the statute that a surrogate may make health-care decisions for a patient only after the patient is found to be incapacitated by a physician. *See*Miss.Code Ann. § 41-41-211(1). There is no evidence in the record that McFarlan was incapacitated at the time that the admission agreement was signed. Forest Hill argues that the assessment form completed when McFarlan was admitted shows that she was moderately impaired, had problems with her memory, had periods of altered perception and was unable to maintain basic hygiene without assistance. However, this intake form does not meet the statutory requirement that a physician determine that she was incapacitated at the time of her admission. Because there is insufficient proof that she was incapacitated within the meaning of section 41-41-211(1), Mathews did not have the authority to act as her health-care surrogate.

¶ 9. Our finding is consistent with the supreme court's decision in *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732 (Miss.2007). In *Brown*, the court held that a surrogate had the authority to bind Brown to agreements concerning matters of health-care, but only after Brown's "admitting

physician at the hospital found that she did not have the mental capacity to manage her affairs."*Id.* at 737(¶ 10). Brown's physician determined that she was incapacitated; thus, she was legally capable of having her health-care decisions made by a surrogate. *Id.*

*3 ¶ 10.Because there is no evidence that a physician found McFarlan to be incapacitated, we hold that Mathews did not have the authority to bind McFarlan to the admission agreement as her health-care surrogate. Accordingly, this issue has no merit.

¶ 11.We note that the dissent relies on the recent supreme court decision in *Mississippi Care Center of Greenville, LLC v. Hinyub,* 2005-CA-01239-SCT (¶¶ 16-17) (Miss. Jan. 3, 2008) for the proposition that the execution of an arbitration agreement is considered a health-care decision, within the authority of a health-care surrogate, only when that arbitration provision is required for admission to the nursing home. However, the supreme court's ruling in *Hinyub* is not at odds with our decision in this case. In fact, in *Hinyub,* the court similarly found that there was no evidence of the patient's incapacity as required by the health-care surrogate statute. *Id.* at (¶ 15). The supreme court held exactly as we do here-the party who entered into the admissions agreement with the nursing home did not have the authority to bind the patient to the arbitration agreement as a health-care surrogate under the Uniform Health-Care Decisions Act.[FN1]*Id.* at (¶¶ 15, 17).

b. Agency Principles

[8]¶ 12.Forest Hill next argues that Mathews had the authority to enter into the arbitration agreement on McFarlan's behalf under the principles of agency law. First, it argues that Mathews's signing the contract as McFarlan's responsible party created an express agency or, alternatively, an implied agency relationship. Second, Forest Hill argues that Mathews possessed the apparent authority to bind McFarlan to the agreement.

[9][10]¶ 13."The burden of proving an agency relationship rests squarely upon the party asserting it."*Highlands Ins. Co. v. McLaughlin,* 387 So.2d 118, 120 (Miss.1980). It is clear that Forest Hill has not shown that Mathews had an express agency relationship with McFarlan. "An express agent is one who is 'in fact authorized by the principal to act on their behalf.' " *McFarland v. Entergy Miss., Inc.,* 919 So.2d 894, 902(¶ 25) (Miss.2005) (quoting *Cooley v. Brawner,* 881 So.2d 300, 302(¶ 10) (Miss.2004)). There is no evidence in the record that any type of agreement existed between McFarlan and Mathews that would give Mathews the authorization to act on McFarlan's behalf.

[11][12]¶ 14.Similarly, there is no evidence to show that an implied agency relationship existed. Implied agency requires that the principal give the agent actual authorization to perform acts which reasonably lead third parties to believe that an agency relationship exists. *Capital Associates, Inc. v. Sally Southland, Inc.,* 529 So.2d 640, 644 (Miss.1988). The existence of an implied agency is proved by "facts and circumstances of the particular case, including words and conduct of the parties."3 Am.Jur.2d *Agency* § 16 (2004). The focus is on "whether the agent reasonably believes, because of the principal's conduct, that the principal desired the agent so to act."*Id.* at § 72. Forest Hill offers no evidence of any words or conduct on the part of McFarlan to imply that Mathews was her agent or had any authority to act on her behalf by signing the admissions agreement. Its argument is solely based on the actions of Mathews alone which are insufficient to show an implied agency relationship.

*4[13]¶ 15.Finally, there is insufficient evidence to prove that Mathews had apparent authority to bind McFarlan to the arbitration agreement. Forest Hill specifically argues that Mathews had apparent authority because "by signing the admission agreement as McFarlan's Responsible Party, Mathews *held herself out* generally and specifically to have the authority to bind McFarlan and to engaged the services of Forest Hill."However, "[a]pparent authority of an agent only binds the principal when the plaintiff can show '*acts or conduct of principal* indicating agent's authority, *reasonable* reliance upon those acts by third person, and detrimental change in position by third person as result of that reliance.' " *McFarland,* 919 So.2d at 902(¶ 26) (quoting *Eaton v. Porter,* 645 So.2d 1323, 1325 (Miss.1994) (emphasis added)).

¶ 16.Here, Forest Hill argues only that Mathews held herself out as an agent of McFarlan. There is no proof of any action taken by McFarlan, as principal, to show that an agency relationship existed when Mathews signed the agreement. Therefore, no evidence of

apparent authority is shown here because the acts or conduct indicating the authority of the agent must be made by the principal. *See* Eaton, 645 So.2d at 1325. Mathews is the only person who signed the admission agreement. In fact, McFarlan was not present at the time of the signing. Because there is no evidence of any actions on the part of McFarlan, Mathews did not have apparent authority to bind McFarlan to the agreement.

¶ 17.There is no indication in the record that Mathews had the authority under the principles of agency to bind McFarlan to the admissions agreement. Thus, this issue has no merit.

c. Third-party Beneficiary

[14]¶ 18.Forest Hill further argues that McFarlan received the benefits and services flowing from the admission agreement but now seeks to avoid the burdens of the contract thereby disregarding equity and contravening the purposes underlying the FAA. *See* Miss. Fleet Card, L.L.C. v. Bilstat, Inc., 175 F.Supp.2d 894, 903 (S.D.Miss.2001). In response, McFarlan contends that no contract exists between Mathews and Forest Hill; thus, the third-party beneficiary theory is inapplicable. However, McFarlan offers no legal or factual basis for this proposition. The admission agreement was signed by both Mathews and a representative of Forest Hill. Based on the record, we have no reason to conclude that anything other than a valid contract exists between Mathews and Forest Hill. Thus, we will consider whether McFarlan is a third-party beneficiary of that agreement.

¶ 19.While it is generally true that a party may not be forced to arbitrate a claim unless the party has agreed to do so, the supreme court has recognized the exception that "arbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary."*Adams v. Greenpoint Credit, LLC*, 943 So.2d 703, 708 (¶¶ 14-15) (Miss.2006) (citing *Smith Barney, Inc. v. Henry*, 775 So.2d 722, 727 (¶¶ 18-20) (Miss.2001)). Consequently, if McFarlan is a third-party beneficiary, she is bound by the arbitration agreement contained in the admission agreement.

*5 ¶ 20.The supreme court ruled on the issue of third-party beneficiaries in *Adams v. Greenpoint Credit, LLC*, 943 So.2d 703 (Miss.2006). There, the court considered whether Beth Brown was a third-party beneficiary to a contract between BankAmerica Housing Services and Brown's father, Eddie Adams. The contract was later assigned to Greenpoint who Brown sued based on a unauthorized draft on her account. Greenpoint moved to compel arbitration; however, the court held that Brown was not a third-party beneficiary and she could not be forced to arbitrate her claim. *Id.* at 708(¶ 15).

¶ 21.In so holding, the court set forth factors to consider to determine whether someone is a third-party beneficiary.

> *[T]he contracts* between the original parties must have been *entered 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 promisee to such third person beneficiary. The 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.*17A C.J.S. *Contracts* 519(4) (1963).

Id. at 708-09(¶ 15) (quoting *Burns v. Wash. Sav.*, 251 Miss. 789, 796, 171 So.2d 322, 325 (1965)). We must look to see if it was the clear intent of the parties to create a third-party beneficiary. *Id.*

¶ 22.Looking at these factors, the court determined that Brown was not a third-party beneficiary. Nothing in the language of the contract indicated that she was intended as a beneficiary, she did not sign the contract, she received no benefits from the contract, and her right to bring suit did not spring from the terms of the contract itself. She was "effectively a stranger to the contract."*Id.*

¶ 23.The outcome is clearly different when we apply these factors to the agreement between Forest Hill and Mathews. Although McFarlan did not sign the admission agreement, many other factors indicate that she is a third-party beneficiary to the agreement. She is named at the top of the agreement as the resident to be admitted to Forest Hill. The plain language of the contract refers numerous time to benefits and responsibilities of both the resident and the

responsible party. The benefits of residing at Forest Hill flow directly to McFarlan as a result of the agreement. By the terms of the contract, Forest Hill incurred a legal duty to care for McFarlan and provide services directly to her including "room, board, linens and bedding, **nursing** care, and certain personal services."

¶ 24.McFarlan's care was not incidental to the contract, but instead was the essential purpose of the agreement. We find that she is an intended **third-party beneficiary** of the agreement between Forest Hill and Mathews; thus, she is bound by the terms of the contract, including the agreement to **arbitrate** any legal disputes related to the contract.

*6 ¶ 25.We note that McFarlan also argues that the supreme court's decision in *Grenada Living Ctr., LLC v. Coleman,* 961 So.2d 33 (Miss.2007), prohibits us from holding that she is bound by the arbitration agreement. However, that case is distinguishable from the present matter. In *Coleman,* the court specifically held that the case "does not stand for the proposition that non-signatories to a contract containing an arbitration clause can never be bound by arbitration."961 So.2d at 38(¶ 17). There, the trial court specifically made a finding that no one had the authority to speak for Coleman except himself. That finding was not made here; therefore, we will continue to follow binding precedent that non-signatories may be bound by an arbitration agreement if they are determined to be a third-party beneficiary. *See id.* at 38 (¶¶ 16-17) (citing *Henry,* 775 So.2d at 727(¶ 20); *Terminix Int'l, Inc. v. Rice,* 904 So.2d 1051, 1058(¶ 29) (Miss.2004)).

2. Whether the parties' dispute is within the scope of the arbitration agreement.

[15]¶ 26.McFarlan argues that her complaint does not assert a claim arising under the admission agreement. However, after reviewing the record, we do not find this argument convincing. The arbitration clause in the admission agreement states that the parties agree that "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 to the Resident, shall be resolved exclusively by binding arbitration pursuant to the Federal Arbitration Act...." Each of McFarlan's claims arise out of circumstances related to her care while a resident at Forest Hill.

[16]¶ 27.McFarlan further argues that her claims do not fall under the arbitration agreement by its own terms. The arbitration clause incorporates the rules and procedures of the American Health Lawyers Association which state that cases with pre-dispute arbitration agreements cannot be arbitrated. However, this issue was never brought before the circuit court and we refuse to review issues raised for the first time on appeal. *Tate v. State,* 912 So.2d 919, 928(¶ 27) (Miss.2005); *Cleveland v. Mann,* 942 So.2d 108, 116(¶ 24) (Miss.2006).

¶ 28.We find that the dispute between the parties certainly arises out of the relationship between resident and facility created by the admission agreement and consequently falls within the scope of the arbitration clause.

3. Unconscionability

¶ 29.Having found that McFarlan is bound by the arbitration agreement, we now turn to the second prong of *East Ford* to see if any general contract defenses exist to invalidate the agreement itself. *East Ford,* 826 So.2d at 713(¶ 9). McFarlan argues that she should be allowed to conduct discovery related to the enforceability of the arbitration clause in order to determine whether the clause is unconscionable. However, as Forest Hill correctly argues, neither the supreme court nor this Court has determined that such discovery is necessary before an analysis of unconscionability may be conducted. *See Brown,* 949 So.2d at 736-41 (¶¶ 9-25); *Mann,* 942 So.2d at 113-17 (¶¶ 14-33); *Stephens,* 911 So.2d at 516-25 (¶¶ 20-48); *East Ford,* 826 So.2d at 713-17 (¶¶ 11-22); *Cmty. Care Ctr. v. Mason,* 966 So.2d 220, 229-31 (¶¶ 23-33) (Miss.Ct.App.2007). Likewise, we find that no further discovery on this issue is needed and now turn to whether the arbitration clause is unconscionable.

*7[17]¶ 30.Unconscionability is 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."*East Ford,* 826 So.2d at 715(¶ 17) (citations omitted). There are two types of unconscionability-procedural and substantive.

a. Procedural Unconscionability

[18]¶ 31.Procedural unconscionability exists when there is "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms."*Id.* at 714(¶ 13) (quoting *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F.Supp.2d 655, 657 (S.D.Miss.2000)). We must look beyond the actual terms of the agreement and focus on the circumstances surrounding the overall formation of the contract. *Stephens*, 911 So.2d at 517 (¶¶ 23-24).

¶ 32.In *Stephens*, the supreme court reviewed the circumstances surrounding the signing of a nursing home admission agreement which contained an arbitration clause. The court held that a contract of adhesion is not unconscionable per se. It is essential that the evidence show a "lack of knowledge or voluntariness by the weaker party."*Id.* at 520(¶ 32). In concluding that the contract was not procedurally unconscionable, the court noted the following facts:

> there 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 indicating that section "F" was about "Arbitration;" the provision itself was printed in bold-faced type of equal size or greater than 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 admissions agreement.

Id. at (¶ 33). Under those facts, the court held that there was no evidence of a lack of knowledge or voluntariness on the part of the weaker party. Instead, the parties were "competent individuals signing a well-marked, highly visible agreement which indicated very clearly that dispute resolution would be accomplished by way of arbitration."*Id.*

[19]¶ 33.The facts in this case closely resemble those in *Stephens*.The arbitration clause is found in section "E" on page five of an eight-page document. The section heading is in bold-faced type and reads "ARBITRATION-*PLEASE READ CAREFULLY.*" This was the only section in the agreement that Mathews was required to initial. The wording of the document is not presented in complex legalistic language. A paragraph written in bold-faced letters draws attention to the fact that the parties are giving up their constitutional right to have a claim decided before a judge and jury. The agreement also states that the party has a right to seek legal counsel, the signing of the agreement is not a precondition to admission, and the contract may be rescinded within thirty days.

***8** ¶ 34.There is no evidence in the record to show that any exigent circumstances surrounded Mathews' signing of the admission agreement. Because of the foregoing reasons, we find that the agreement is not procedurally unconscionable.

b. Substantive Unconscionability

[20][21]¶ 35.Substantive unconscionability exists when the arbitration agreement is found to be oppressive. *East Ford*, 826 So.2d at 714(¶ 14)."When reviewing a contract for substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, contracting parties."*Stephens*, 911 So.2d at 521(¶ 35). The language of the contract must greatly alter the legal rights of the parties or severely limit the damages available. *Id.* at (¶ 38).

[22]¶ 36.We find that the arbitration clause in McFarlan's admission agreement neither significantly alters her legal rights or severely limits the damages available to her. Instead, it "merely provides for a mutually agreed-upon forum for the parties to litigate their claims and is benign in its effect on the parties' ability to pursue potential actions."*Id.* at 522(¶ 39). It contains none of the language previously held unconscionable by Mississippi courts. There is no required grievance resolution process, no limit on the amount of damages, no waiver of punitive damages, and no requirement to compensate Forest Hill's staff for their involvement in a dispute. *See id.* at 522-24 (¶¶ 39-43); *Brown*, 949 So.2d at 737-741 (¶¶ 14-25). Accordingly, we find that the arbitration agreement is not substantively unconscionable.

¶ 37.The *East Ford* test to determine whether an

arbitration agreement is valid has been satisfied in this case. A valid contract exists between McFarlan and Forest Hill through her status as a third-party beneficiary, the dispute between the parties falls within the scope of the arbitration agreement, and no general contract defenses exist to invalidate the agreement. Therefore, we reverse and remand with directions for the trial court to order arbitration in accordance with this opinion.

¶ 38.**THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND REMANDED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

KING, C.J., IRVING, CHANDLER, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR. LEE, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY MYERS, P.J.LEE, P.J., Concurring in Part, Dissenting in Part:

¶ 39.I must respectfully dissent. I cannot agree that McFarlan was bound to **arbitration** under the theory that she was a **third-party beneficiary** to the **nursing home** contract when no evidence was presented that she was incompetent, incapacitated, or otherwise unable to sign the contract herself.

¶ 40.McFarlan cannot be bound as a **third-party beneficiary** to **arbitration** because there was never a binding **arbitration** agreement. Mathews, McFarlan's granddaughter who signed the agreement, did not have power of attorney and was not her conservator. McFarlan was never deemed incompetent, and no evidence was presented that McFarlan ever saw the contract that is now being enforced against her and her wrongful death beneficiaries.

*9 ¶ 41.Since McFarlan was not shown to be incompetent or incapacitated and Mathews did not have power of attorney, Mathews only had the authority to make health-care related decisions for McFarlan under Mississippi Code Annotated section 41-41-211(2) (Rev.2005).Mississippi Code Annotated section 41-41-203(h) (Rev.2005) defines a health-care decision as:

> 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)[a]pproval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and (iii)[d]irections to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

¶ 42.The decision to arbitrate is neither explicitly authorized nor implied within section 41-41-203(h). However, in the recent case of *Mississippi Care Center of Greenville, LLC v. Hinyub,* 2005-CA-01239-SCT (¶¶ 16-17) (Miss. Jan. 3, 2008) [FN2], the supreme court found that the execution of an arbitration provision, when it is an essential part of the admissions agreement, is considered a health-care decision. *Id.* (citing *Covenant Health Rehab of Picayune, L.P. v. Brown,* 949 So.2d 732 (Miss.2007); *Vicksburg Partners, L.P. v. Stephens,* 911 So.2d 507 (Miss.2005)). In *Hinyub,* the execution of the **arbitration** provision was found to be a health-care decision because agreeing to its terms was a prerequisite to being admitted to the **nursing home**. *Id.*

¶ 43.In the case at hand, Mathews was not required to sign an **arbitration** provision to admit McFarlan to Forest Hill **Nursing Home**. The **arbitration** portion of the contract states, in part:

> 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.

(Emphasis added). Since the execution of the **arbitration** agreement was not a prerequisite to the furnishing of services, the **arbitration** provision was not a health-care decision. Since Mathews only had the authority to make health-care decisions, she did not have the legal authority to bind McFarlan or McFarlan's beneficiaries to an **arbitration** agreement that was not part of the health-care decision of admitting McFarlan to a **nursing home**. Because Mathews lacked authority to enter into the **arbitration** provision in the admissions agreement, I would agree with the reasoning of the supreme court in *Hinyub,* 2005-CA-01239-SCT (¶ 18), and find that the

arbitration agreement is invalid. The supreme court did not discuss the issue of whether Hinyub was a **third-party beneficiary** to the contract. Therefore, I would find that a discussion of whether or not McFarlan was a **third-party beneficiary** to the contract need not be reached.

***10** ¶ 44.Without some evidence that McFarlan was incompetent to sign the contract or that her granddaughter had authority to make legal decisions for her, Mathews did not have authority to waive McFarlan's constitutional right to a jury trial. I would affirm the decision of the trial court finding there was not a binding arbitration agreement.

MYERS, P.J., Joins this Separate Opinion.

FN1. The difference between the outcome of *Hinyub* and the outcome of the present case is due to the fact that, in *Hinyub,* the parties did not argue, and the supreme court did not address, the issue of whether the patient was a third party beneficiary to the admissions agreement. That issue is discussed in part c of this section, *infra.*

FN2. We note that the Mississippi Supreme Court denied the motion for rehearing filed in this case on March 6, 2008.

Miss.App.,2008.
Forest Hill Nursing Center, Inc. v. McFarlan
--- So.2d ----, 2008 WL 852581 (Miss.App.)

END OF DOCUMENT

HTrinity Mission Health & Rehabilitation of Clinton v. Estate of Scott ex rel. Johnson
Miss.App.,2008.
Only the Westlaw citation is currently available.

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Court of Appeals of Mississippi.
TRINITY MISSION HEALTH & REHABILITATION OF CLINTON and LPNH Holdings Limited, LLC, Appellants
v.
The ESTATE OF Mary SCOTT, by and Through Elzenia JOHNSON, Individually and as the Personal Representative of the Estate of Mary Scott, and on Behalf of and for the use and Benefit of the Wrongful-Death Beneficiaries of Mary Scott, Appellees.
No. 2006-CA-01053-COA.

Jan. 8, 2008.
Rehearing Denied April 15, 2008.

Background: Daughter of **nursing home** resident brought wrongful death action against the **home**, alleging that her mother suffered injuries at the **home** that caused her death. The Circuit Court, Hinds County, Winston L. Kidd, J., denied **home's** motion to stay proceedings and compel **arbitration**. **Nursing home** appealed.

Holdings: The Court of Appeals, King, C.J., held that:
(1) resident was a **third-party beneficiary** of admission agreement;
(2) daughter was subject to the **arbitration** provision because she stood in position of her mother;
(3) wrongful death claim fell within scope of **arbitration** agreement;
(4) Court would strike only unconscionable or illegal terms of admission agreement, leaving remainder of the agreement intact;
(5) three provisions were unconscionable and would be stricken;
(6) provision regarding amount of **nursing** care would not be stricken; and
(7) provision stating that **home** would attempt to notify responsible party in event of change in status would not be stricken.

Reversed and remanded.

[1] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards of Review. Most Cited Cases
The grant or denial of a motion to compel **arbitration** is reviewed de novo.

[2] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
25TII**Arbitration**
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and Standards of Review. Most Cited Cases

Commerce 83 80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. **Arbitration**. Most Cited Cases
On appeal from denial of **nursing home's** motion to compel **arbitration** of wrongful death action, the Court of Appeals would view **arbitration** agreement within the framework of the Federal **Arbitration** Agreement (FAA), given that **arbitration** agreements