IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NO. 2007-CA-02158

COMM-CARE CORPORATION;
COMM-CARE MISSISSIPPI, A NON-PROFIT
CORPORATION; MONTICELLO COMMUNITY
CARE CENTER, LLC; JOHN A. STASSI, II; LINDA S. DAVIS;
JOHN DOES 1 THROUGH 10; AND UNIDENTIFIED
ENTITIES 1 THROUGH 10 — APPELLANTS

VERSUS

THE ESTATE OF BOBBY MARTIN,
BY AND THROUGH JANET PEYTON,
INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF BOBBY MARTIN
AND ON BEHALF OF AND FOR THE
USE AND BENEFIT OF THE WRONGFUL DEATH
BENEFICIARIES OF BOBBY MARTIN — APPELLEE

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal:

1. Comm-Care Corporation, Defendant/Appellant;
2. Comm-Care Mississippi, a non-profit corporation, Defendant/Appellant;
3. Monticello Community Care Center, LLC, Defendant/Appellant;
4. John A. Stassi, II, Defendant/Appellee and attorney for Defendants/Appellants
5. Linda S. Davis, Defendant/Appellant;
6. Estate of Bobby Martin, deceased, Plaintiff/Appellee;
7. Janet Peyton, Administratrix of the Estate of Bobby Martin, Plaintiff/Appellee, heir-at law and wrongful death beneficiary of Bobby Martin;
8. Juanita Brown, heir-at law and wrongful death beneficiary of Bobby Martin;

9. Laura Jean Martin Eley, heir-at law and wrongful death beneficiary of Bobby Martin;

10. Henrietta Brown, heir-at law and wrongful death beneficiary of Bobby Martin;

11. David Martin, heir-at law and wrongful death beneficiary of Bobby Martin;

12. Walter Martin, heir-at law and wrongful death beneficiary of Bobby Martin;

13. Lynda C. Carter, attorney for Defendants/Appellants;

14. Nicole C. Huffman, attorney for Defendants/Appellants;

15. Wise, Carter, Child & Caraway, attorneys for Defendants/Appellants;

16. Mary Margaret Waycaster, attorney for Defendants/Appellants;

17. James P. Streetman, attorney for Defendants/Appellants;

18. Scott, Sullivan, Streetman & Fox, PC, attorneys for Defendants/Appellants;

19. F. M. Turner, III, attorney for Plaintiff/Appellee;

20. Wilkes & McHugh, PA, former attorneys for Plaintiff/Appellee;

21. Hon. Prentiss G. Harrell, Circuit Judge; and

22. Hon. Michael R. Eubanks, Senior Circuit Judge.

Respectfully submitted,

THE ESTATE OF BOBBY MARTIN, et al.

F. M. Turner, III (MB#[redacted])

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STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully suggests that oral argument would be helpful to the Court in exploring the issues presented in this appeal, which raise important questions wherein there appear to be conflict between decisions of the Supreme Court and the Court of Appeals in this important and evolving area of the law.

SUMMARY OF THE ARGUMENT

Bobby Martin was a resident of Lawrence County Nursing Center from December 30, 1997, until June 21, 2002, when he was transferred to Lawrence County Hospital, where he later died. Janet Peyton and Juanita Brown are the sisters of Bobby Martin.

Defendants/Appellants argue that the Court should enforce the arbitration provisions contained in a purported Admission Agreement dated February 12, 2001, which was signed solely by Juanita Brown, based either on Ms. Brown's alleged authority as a delegate of Janet Peyton, who held Bobby Martin's power of attorney, or based on Ms. Brown's authority under a durable power of attorney for health care or her status as a health care surrogate under the Uniform Health-Care Decisions Act, Miss. Code Ann. §41-41-201 *et seq.* None of these positions is supported by a preponderance of credible evidence.

On November 1, 1996, Bobby Martin executed a General Power of Attorney appointing Janet Peyton as his true and lawful attorney-in-fact "to act with respect to the following specific matters to the extent that I am permitted by law to act through and agent," one of those specific matters being "claims and litigation." (R. 906-909, R.E. 29-32). The Power of Attorney gave Janet Peyton authority "to ask, demand[,] sue for, recover and receive all manner of ... money and demands whatsoever, due or hereafter to become due and owing, ... and to make, give and execute acquittances, receipts, releases, satisfactions, or other discharges for the same ...;" (R. 906, R.E. 29) "... to commence and prosecute any suits or actions or other legal or equitable proceedings for the recovery of ... debts, duties, demands, causes or things, due or to become due or belonging to me, and to prosecute, maintain and discontinue the same ...;" (R. 907, R.E. 30) and "... to compromise, settle and

adjust ... all actions, accounts, dues and demands, ... in such manner as my said attorney shall think proper." (R. 907, R.E. 30). Nowhere is Janet Peyton given the power to consent to arbitration or to waive Bobby Martin's right to a jury trial. In fact, the power of attorney clearly contemplates only traditional forms of litigation.

Juanita Brown was not given any power to act as Bobby Martin's general attorney-in-fact. That power was held only by Janet Peyton. The evidence is undisputed, and the Circuit Court so found, after an evidentiary hearing, that Janet Peyton never delegated any authority to Juanita Brown to exercise any power under the general power of attorney. (R. 1646, R.E. 16).

On December 30, 1997, Bobby Martin executed a durable power of attorney for health care. (R. 910-911, R.E. 33-34). That durable power of attorney for health care appointed Janet Peyton as his attorney in fact to make health care decisions "in the event I [Bobby Martin] become unable to give informed consent with respect to a health care decision." Juanita Brown was designated to act in Janet Peyton's place if Peyton "is not available or is unable to act as my attorney in fact."

Defendants argue that Juanita Brown had the authority to bind her brother in health care matters, either pursuant to a durable power of attorney for health care or as a health care surrogate under the Uniform Health-Care Decisions Act, Miss. Code Ann. §41-41-201 *et seq.*, and that this authority extended to the execution of the arbitration provision of the February 12, 2001, Admission Agreement.

It is undisputed that Bobby Martin did not sign the February 12, 2001 Admission Agreement; it was signed solely by Juanita Brown. (R.221, R.E. 28) Although Janet Peyton's

name appears on that page, the Circuit Court, after an evidentiary hearing, found that the signature was not that of Janet Peyton. (R. 1646, R.E. 16) Unless Bobby Martin lacked capacity to make or communicate a health-care decision on February 12, 2001, when the Admission Agreement was executed, neither Juanita Brown nor Janet Peyton had any power to act on his behalf either as his health-care attorney-in-fact or health-care surrogate. Under both Miss. Code Ann. §41-41-205 and §41-41-211, the question of capacity is an issue of fact to be determined by the patient's treating physician. Defendants presented *no evidence* to the Circuit Court to establish that Mr. Martin lacked capacity at the time Juanita Brown executed the Admission Agreement on February 12, 2001.

In Mississippi, the burden is on the one relying on an agent's authority to prove the authority of that alleged agent. See *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 872 (Miss. 1995); *Woods v. Nichols*, 416 So. 2d 659, 664 (Miss. 1982); *Highlands Ins. Co. v. McLaughlin*, 387 So. 2d 118 (Miss. 1980); and *Cue Oil Co. v. Fornea Oil Co., Inc.*, 45 So. 2d 597 (Miss. 1950). The Defendants failed to offer evidence of the issue critical to Juanita Brown's authority – the capacity of Bobby Martin – and that failure is fatal to their position.

Defendants argue, relying upon the Court of Appeals decisions in *Trinity Mission of Clinton, LLC v. Barber*, No. 988 So. 2d 910 (Miss. App. 2007), *cert.* granted, 977 So. 2d 1144 (Miss. 2008)(appeal subsequently dismissed), and *Forest Hills Nursing Center, Inc. v.* McFarlan, Docket No. 2007-CA-00327-COA, 2008 WL 852581 (Miss. App. 2008)(petition for certiorari pending), that the arbitration provision is enforceable against Mr. Martin because he was a third-party beneficiary of the contract executed by Juanita Brown. That position is contradicted by the decision of the Supreme Court in *Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So. 2d 382 (Miss. 2008).

In addition to the arbitration provision, the Admission Agreement in this action also contains provisions found to be substantively unconscionable in *Covenant Health and Rehab, L.P. v. Brown*, 924 So. 2d 732, 739 (Miss. 2007), and *Covenant Health and Rehabilitation of Picayune, L.P. v. Lambert*, 984 So.2d 283 (Miss. App. 2006), *cert. denied*, 984 So.2d 277 (Miss. 2008).

Finally, the Admission Agreement of February 12, 2001, calls for arbitration under the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. Those rules require a post-dispute agreement to arbitrate, in the absence of which the arbitration provision is unenforceable. *Magnolia Healthcare, Inc. v. Barnes*, Docket No. 2006-CA-00427-SCT, 2008 WL 3101737 (Miss. 2008).

The decision of the Circuit Court of Lamar County should be affirmed.

ARGUMENT

I. Is this appeal timely?

Bobby Martin was a resident of Lawrence County Nursing Center from December 30, 1997, until June 21, 2002, when he was transferred to Lawrence County Hospital, where he later died. At the time of his admission to the nursing home in December, 1997, two admission agreements were signed by Juanita Brown, his sister, but not by Bobby Martin himself. (R. 212-215, R.E. 19-22)

This civil action was commenced on August 12, 2004. (R. 18-49). Defendants/Appellees originally filed motions to dismiss or in the alternative to stay proceedings and compel arbitration on December 14, 2004 (R. 81-101) and January 6, 2005 (R. 128-161). Defendants' motions to compel arbitration were based on a purported Admission Agreement (R. 216-221, R.E. 23-28) dated February 12, 2001, which was signed solely by Juanita Brown, a sister of Bobby Martin. It is undisputed that Bobby Martin did not sign this purported Admission Agreement. While a signature purporting to be that of Janet Peyton appears on this agreement, the Circuit Court found, after an evidentiary hearing, that this was apparently a forgery and was not the signature of Janet Peyton or placed there with her authority.

This action was initially assigned to Circuit Judge R. I. Prichard, III, but was reassigned to Circuit Judge Michael R. Eubanks on January 25, 2006, after Judge Prichard felt it necessary to recuse himself in the matter. Judge Eubanks received written submissions on the motion and conducted an evidentiary hearing on March 10, 2006, at which oral testimony and numerous exhibits were received. Following the hearing, Judge Eubanks took

the matter under advisement and, on May 8, 2006, issued an opinion containing detailed findings of fact and an order denying the Defendants' motions to compel arbitration. (R. 1638-1648, R.E. 9-18). In its opinion and order the Court found that:

a. Bobby Martin was a resident of Lawrence County Nursing Center ("LCNC") from December 30, 1997, until June 21, 2002, when he was removed from LCNC to a hospital and later died. At the time of admission, two Admission Agreements were signed on Mr. Martin's behalf by Juanita Brown, one of his sisters. These Admission Agreements did not include any provision for arbitration.

b. On November 1, 1996, Mr. Martin had executed a General Power of Attorney which gave Janet Peyton, another of his sisters, the authority to control Mr. Martin's financial and business affairs.

c. In February, 2001, after a change in LCNC's operator, a new Admission Agreement was tendered to residents of LCNC, which contained the arbitration provision now at issue. The new Admission Agreement was signed by Juanita Brown on February 12, 2001.

d. Although the February 12, 2001, Admission Agreement was purportedly signed by Janet Peyton, in fact Janet Peyton did not sign this agreement or any other Admission Agreement. The purported signature of Janet Peyton that appears on the February 21, 2001, Admission Agreement is not the signature of Janet Peyton.

e. Janet Peyton, as attorney in fact for Bobby Martin, never delegated her authority to her sister Juanita Brown to execute an arbitration agreement or deal with the financial matters of Bobby Martin.

f. Juanita Brown was never given the authority to make financial decisions in behalf of Bobby Martin.

Based on these facts, the Court found that there was no agreement to arbitrate between Bobby Martin and LCNC due to Juanita Brown's lack of authority to bind Bobby Martin to the provisions of the arbitration requirement included in the February 12, 2001, Admissions Agreement.

Denial of a motion to compel arbitration is a final order appealable as of right. *United Credit Corp. v. Hubbard*, 905 So. 2d 1176, 1177 (Miss. 2004); *Tupelo Auto Sales, Ltd. v. Scott*, 844 So.2d 1167, 1170 (Miss. 2003). Defendants made an election not to appeal the Circuit Court's decision, and the time to do so expired.

Following the retirement of Hon. Michael R. Eubanks as Circuit Judge, Hon. Prentiss G. Harrell was elected to succeed him, taking office in January, 2007. On May 18, 2007, more than a year after the denial of their original motions, Defendants filed what was denominated a "re-urged" motion to compel arbitration. (R. 1749-1834). The "re-urged" motion cited no new grounds for the motion, other than the intervening decision in *Covenant Health and Rehab, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007), which was alleged to have "clarified" the legal authority of a health-care surrogate to execute arbitration agreements in nursing home admission contracts. The "re-urged" motion was in fact a collateral attack on the prior, unappealed order.

Hon. Prentiss G. Harrell undertook to review the prior findings and decision of Judge Eubanks, conducted several hearings at which arguments, but no additional evidence, were received, and received and considered additional briefing on the matter. Then, on November 15, 2007, Judge Harrell entered an order denying the "re-urged" motion to compel arbitration. It is from this latter order that Defendants allegedly appeal.

The Supreme Court has stated that "as a general rule, a successor judge is precluded from correcting errors of law made by his predecessor or changing the latter's judgment or order on the merits, but this rule does not apply where the order or judgment is not of a final character." *Mauck v. Columbus Hotel Co.,* 741 So.2d 259, 268(¶ 27) (Miss.1999) (quoting 48A C.J.S. *Judges* § 68, at 654 (1981)). A successor judge in an inferior position does not have the authority to vacate the order of a prior judge granting a new trial. *Amiker v. Drugs for Less, Inc.,* 796 So.2d 942, 948(¶ 22) (Miss.2000). As noted above, denial of a motion to compel arbitration is a final order appealable as of right. *United Credit Corp. v. Hubbard,* 905 So. 2d 1176, 1177 (Miss. 2004); *Tupelo Auto Sales, Ltd. v. Scott,* 844 So.2d 1167, 1170 (Miss. 2003). Defendants made an election not to appeal the Circuit Court's original decision, and then, upon a change of personnel, attempted to relitigate the original decision. This collateral attack on the prior, final order is not permitted.

Rule 4(a), Mississippi Rules of Appellate Procedure, states:

> Except as provided in Rules 4(d) and 4(e) [neither relevant here], in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.

The Circuit Court's original order denying the Defendants' motions to compel was entered on May 8, 2006. (R. 1639-1648, R.E. 9-18). The notice of appeal was not filed until November 29, 2007, more than 17 months after the appeal time expired.

The instant appeal is not timely and should be dismissed.

II. Juanita Brown lacked actual authority to bind Bobby Martin to the arbitration provision of the Admission Agreement of February 12, 2001.

Defendants/Appellants argue that the Court should enforce the arbitration provisions contained in the purported Admission Agreement dated February 12, 2001, based on Ms. Brown's alleged authority as a delegate of Janet Peyton, who held Bobby Martin's power of attorney.

On November 1, 1996, Bobby Martin executed a General Power of Attorney appointing Janet Peyton as his true and lawful attorney-in-fact "to act with respect to the following specific matters to the extent that I am permitted by law to act through and agent," one of those specific matters being "claims and litigation." (R. 906-909, R.E. 29-32). The Power of Attorney gave Janet Peyton authority "to ask, demand[,] sue for, recover and receive all manner of ... money and demands whatsoever, due or hereafter to become due and owing, ... and to make, give and execute acquittances, receipts, releases, satisfactions, or other discharges for the same ...;" (R. 906, R.E. 29) "... to commence and prosecute any suits or actions or other legal or equitable proceedings for the recovery of ... debts, duties, demands, causes or things, due or to become due or belonging to me, and to prosecute, maintain and discontinue the same ...;" (R. 907, R.E. 30) and "... to compromise, settle and adjust ... all actions, accounts, dues and demands, ... in such manner as my said attorney shall think proper." (R. 907, R.E. 30). Nowhere is Janet Peyton given the power to consent to arbitration or to waive Bobby Martin's right to a jury trial. In fact, the power of attorney clearly contemplates only traditional forms of litigation.

Juanita Brown was not given any power to act as Bobby Martin's general attorney-in-fact. That power was held only by Janet Peyton. The evidence is undisputed, and the Circuit

Court so found, after an evidentiary hearing, that Janet Peyton never delegated any authority to Juanita Brown to exercise any power under the general power of attorney. (R. 1646, R.E. 16).

Questions of law are reviewed by the Supreme Court using a *de novo* standard. *A & F Props., LLC v. Madison County Bd. of Supervisors,* 933 So.2d 296, 300 (Miss.2006); *Harrah's Vicksburg Corp. v. Pennebaker,* 812 So.2d 163, 170 (Miss.2001). Here, however, the question of Juanita Brown's authority is a question of fact, which the Circuit Court decided after hearing live testimony, reviewing deposition testimony, and considering oral and written arguments of counsel.

> On the other hand, "[w]henever this Court considers on appeal a trial judge's findings of fact, we appropriately afford deferential treatment. Even though we quite often review circuit court cases based upon judgments entered after a jury trial, whenever we are called upon to consider the findings of fact of a circuit judge sitting without a jury, that circuit judge is entitled to the same deference concerning his/her findings of fact as is afforded to a chancellor, who almost always sits, without a jury." *City of Greenville v. Jones,* 925 So. 2d 106, 109 (Miss.2006) (citing *City of Jackson v. Perry,* 764 So. 2d 373, 376 (Miss.2000); *Puckett v. Stuckey,* 633 So. 2d 978, 982 (Miss.1993)). In other words, if the trial judge's findings of fact are supported by substantial, credible and reasonable evidence, we must afford deference to these findings on appeal, and thus, we will not disturb the trial judge's findings of fact "unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Perry,* 764 So. 2d at 376 (citing *Puckett,* 633 So.2d at 982; *Bell v. City of Bay St. Louis,* 467 So. 2d 657, 661 (Miss.1985)).

Upchurch Plumbing, Inc. v. Greenwood Utilities Commission, 964 So. 2d 1100, 1107-08 (Miss. 2007).

In this case, it is undisputed that only Janet Peyton held a power of attorney granting express authority to act for Bobby Martin. Juanita Brown, it is alleged, had actual authority

by virtue of being a delegate of Janet Peyton. However, there was no evidence presented to establish an express delegation by Janet Peyton to Juanita Brown. In fact, both of them denied any such delegation occurred.

> Q. Ms. Peyton, if we could look at the third page of the Power of Attorney document, down in – the paragraph that begins "And generally" and then has an "a" after it, a little "a".
> A. Yes, I see it.
> Q. Okay, the last clause of that sentence reads "With full and unqualified authority to delegate any or all of the foregoing powers to any person who my attorney in fact shall select." My question is, did you ever delegate to anybody else authority to execute an Arbitration Agreement on behalf of Bobby Martin?
> A. No.
> Q. Did Mr. Martin in his lifetime ever sign any other Powers of Attorney which you are aware of?
> A. No.
> Q. To deal with financial affairs?
> A. I'm not aware of any.
> Q. Okay. Other than yourself, did anybody have authority to sign a contract on behalf of Bobby Martin?
> A. No.

(Transcript, March 10, 2006, p. 8).

Janet Peyton was aware that Juanita Brown signed documents on Mr. Martin's admission to Lawrence County Nursing Center in December, 1997. (Transcript, March 10, 2006, p. 15). However, she did not understand Juanita Brown to be making decisions about Mr. Martin's business or financial affairs, like an arbitration agreement.

> Q. And the decisions that you understood that you – that Juanita was making related to health care questions only; right?
> A. Yes.
> Q. Okay, she never paid his bills?
> A. No.
> Q. She didn't keep his bank account?
> A. No.
> Q. She didn't spend his money?
> A. No.

Q. That was just you?
A. That was me.
Q. And you were the only person who has that kind of authority?
A. Yes, sir.
Q. Okay. Now, looking at the Power of Attorney where Ms. Carter was asking you some questions, it doesn't say in that Paragraph A to ask, demand, sue for or arbitrate any claims; does it?
A. No, sir.
Q. And back on Paragraph D on the second page where it talks about executing and delivering contracts.
A. Yes, sir.
Q. It goes down – that fourth line, it say, "and for me and my name to commence and prosecute any suits or actions or other legal or equitable proceeding." It doesn't even say anything about arbitration; does it?
A. No, sir.
Q. Okay, and most importantly, nobody ever asked you at this Nursing Home to sign an agreement to arbitrate Bobby Martin's claims; right?
A. No, sir.
Q. And nobody ever asked you to sign an agreement to arbitrate your claims; did they?
A. No, sir.
Q. Any you never did?
A. I never did.

(Transcript, March 10, 2006, p. 8).

Juanita Brown testified that she had no authority to deal with Bobby Martin's financial and business affairs.

Q. Okay. You were familiar with – were you familiar with the Power of Attorney that is marked as Exhibit 1 that you've got up there with you?
A. I knew she had power of attorney, but as far as knowing all about it, no.
Q. Okay. Was she [Janet Peyton] the only person who had Mr. Martin's power of attorney?
A. Yes.
Q. Okay, did you ever have his power of attorney?
A. No.
. . .

Q. Okay, to your knowledge, are you aware of his [Bobby Martin] having told anybody at the Nursing Home that you had authority to make financial decisions on his behalf?

A. No.

Q. Okay, did you ever manage his money?

A. No.

Q. Did you ever keep his bank account?

A. No.

Q. Did you ever pay his bills?

A. No.

Q. Did you ever have authority to do any of those things?

A. No.

Q. Okay. Now, did you have authority to make decisions or sign documents for him relating to his health care?

A. I don't know if I had authority to do it, but I did sign some papers.

Q. Okay, what kind of papers would you sign or did you sign?

A. Oh, just papers they pushed in my face.

Q. Okay.

A. And I was the only one there, and so I signed.

(Transcript, March 10, 2006, pp. 22-24).

Q. Had Mr. Martin ever given you authority to do anything regarding his business?

A. No.

Q. Okay, and to your knowledge, he's never told the Nursing Home that you had any authority to handle any of his business; right?

A. No.

(Transcript, March 10, 2006, p. 29).

Q. Matter of fact, none of these pages that you signed, until you get to the February 2001 Agreement, ever dealt with anything about arbitration; did it?

A. No.

Q. It dealt with Mr. Martin's care in the facility; didn't it?

A. Correct.

Q. Okay. Now – and to your knowledge, Mr. Martin himself was never asked to sign any of these documents?

A. Not to my recollection.

(Transcript, March 10, 2006, p. 45).

> Q. Okay. And nobody in your presence ever asked Mr. Martin whether you had authority to handle his business; did they?
> A. No.

(Transcript, March 10, 2006, p. 47).

The Defendants offered no testimony of other witnesses or other evidence to contradict this testimony. They made no assertion, and offered no evidence, that either Janet Peyton or Bobby Martin had ever expressly stated that Juanita Brown had authority to handle Mr. Martin's business affairs and nothing to indicate that any of them ever contemplated her as having authority to bind him to an arbitration agreement.

In light of this testimony, during which the Circuit Court had the opportunity to view and assess the credibility of the witnesses, the Circuit Court clearly had "substantial, credible and reasonable evidence" on which to base its findings of fact and the same cannot be said to be "manifestly wrong [or] clearly erroneous." *City of Jackson v. Perry,* 764 So. 2d 373, 376 (Miss.2000). The decision of the Circuit Court should be affirmed on this issue.

III. Juanita Brown did not have authority as a health-care attorney in fact or health-care surrogate.

Defendants argue that Juanita Brown had the authority to bind her brother in health care matters, either pursuant to the durable power of attorney for health care or as a health care surrogate under the Uniform Health-Care Decisions Act, Miss. Code Ann. §41-41-201 *et seq.*, and that this authority extended to the execution of the arbitration provision of the February 12, 2001, Admission Agreement.

On December 30, 1997, Bobby Martin executed a durable power of attorney for health care. That durable power of attorney for health care appointed Janet Peyton as his

attorney in fact to make health care decisions "in the event I [Bobby Martin] become unable to give informed consent with respect to a health care decision." Juanita Brown was designated to act in Janet Peyton's place if Janet Peyton "is not available or is unable to act as my attorney in fact." (R. 910-911, R.E. 33-34).

According to the Uniform Health-Care Decisions Act:

> "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition.
>
> "Health-care decision" means a decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including:
>
> (i) *Selection and discharge of health-care providers and institutions*;
>
> (ii) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
>
> (iii) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

Miss. Code Ann. §41-41-203(g)-(h) (emphasis added).

Pursuant to Miss. Code Ann. §41-41-205(2),

> An adult or emancipated minor may execute a power of attorney for health care, which may authorize the agent to make any health-care decision the principal could have made while having capacity. The power remains in effect notwithstanding the principal's later incapacity and may include individual instructions.

Miss. Code Ann. §41-41-205 goes on to provide that:

> (5) Unless otherwise specified in a power of attorney for health care, *the authority of an agent becomes effective only upon a determination that the principal lacks capacity*, and ceases to be effective upon a determination that the principal has recovered capacity. (emphasis added)

The power of attorney for health care executed by Bobby Martin did not contain any exception to the general rule and thus was only effective if and while Mr. Martin lacked capacity to make his own health care decisions. Pursuant to Miss. Code Ann. §41-41-205(6):

> Unless otherwise specified in a written advance health-care directive, *a determination that an individual lacks* or has recovered *capacity*, or that another condition exists that affects an individual instruction or the authority of an agent, *must be made by the primary physician.* (emphasis added).

Alternatively, Defendants argue that Juanita Brown had authority to execute the Admission Agreement as her brother's "health-care surrogate." The health-care surrogate statute, Miss. Code Ann. §41-41-211(1) provides:

> 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. (emphasis added)

"Capacity" is a defined term in the Uniform Health-Care Decisions Act meaning "an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision." Miss. Code Ann. §41-41-203(d).

It is undisputed that Bobby Martin did not sign the February 12, 2001 Admission Agreement; it was signed solely by Juanita Brown. (R. 221, R.E. 28). Unless Bobby Martin lacked capacity to make or communicate a health-care decision on February 12, 2001, when the Admission Agreement was executed, Juanita Brown had no power to act on his behalf either as his attorney-in-fact or health-care surrogate. Under both sections 41-41-205(6) and 41-41-211(1), the question of capacity is an issue of fact to be determined by the patient's

treating physician. Defendants presented *no evidence* to the Circuit Court to establish that Mr. Martin lacked capacity at the time Juanita Brown executed the Admission Agreement.

This exact issue was raised in the unanimous decision of the Supreme Court in *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So. 2d 211 (Miss. 2008). There, the Defendants alleged that the Plaintiff had acted as the health-care surrogate of her father in executing an arbitration agreement. However, the Defendants produced no evidence from the resident's primary physician, which the Court found a condition precedent to Plaintiff's authority to act as a surrogate.

> Again, the record is devoid of information to properly determine if Hinyub could act as Wyse's health care surrogate. *According to the statute, Wyse's primary physician would first have to determine that Don Wyse lacked capacity to make his own health care decisions.* "Capacity" is defined in Miss.Code Ann. § 41-41-203(d) as "an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision." *No such evidence is contained in the record before us. Neither party presents a declaration by Wyse's primary physician stating that Wyse was incapable of managing his affairs prior to Hinyub's signing the admissions agreement with the arbitration agreement.* (emphasis added).

Id. at 217-218. In the absence of such a declaration, the Court found that there was no basis to hold that the surrogate had authority to act. That same absence of proof pervades the Defendants' position here.

Additionally, the durable power of attorney for health care appointed *Janet Peyton* as Bobby Martin's attorney in fact to make health care decisions. Juanita Brown was only designated as a backup agent to act in Janet Peyton's place if Peyton "is not available or is unable to act as my attorney in fact." (R. 910-911, R.E. 33-34). Janet Peyton testified that, during the time in question, she worked as a Deputy Chancery Clerk of Lawrence County, at

the courthouse in Monticello, where the nursing home is located. (Transcript, March 10, 2006, p. 4). Defendants presented no evidence that Ms. Peyton was not available to them to sign the Admission Agreement of February 12, 2001.

Further, Bobby Martin was a resident of Lawrence County Nursing Center from December 30, 1997, until June 21, 2002. On February 12, 2001, he had already been a resident of the facility for over three years. On February 12, 2001, Bobby Martin was not being admitted or readmitted to Lawrence County Nursing Center. There was no medical urgency or necessity concerning the execution of a new Admission Agreement such that Ms. Peyton's immediate presence would be required and in her absence it would be necessary for Ms. Brown to act. In fact, Defendants do not even attempt this argument.

In Mississippi, the burden is on the one relying on an agent's authority to prove the authority of that alleged agent. See *Ciba-Geigy Corp. v. Murphree*, 653 So. 2d 857, 872 (Miss. 1995); *Woods v. Nichols*, 416 So. 2d 659, 664 (Miss. 1982); *Highlands Ins. Co. v. McLaughlin*, 387 So. 2d 118 (Miss. 1980); and *Cue Oil Co. v. Fornea Oil Co., Inc.*, 45 So. 2d 597 (Miss. 1950). The Defendants failed to offer evidence of two issues critical to Juanita Brown's authority – the capacity of Bobby Martin and the availability of Janet Peyton – and those failures are fatal to their position. The decision of the Circuit Court should be affirmed on this issue.

IV. The arbitration agreement cannot be enforced against Bobby Martin as a third party beneficiary.

Defendants argue, relying upon the Court of Appeals decisions in *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910 (Miss. App. 2007), *cert.* granted, 977 So. 2d 1144 (Miss. 2008)(appeal subsequently dismissed), and *Forest Hills Nursing Center, Inc. v.*

McFarlan, Docket No. 2007-CA-00327-COA, 2008 WL 852581 (Miss. App. 2008)(petition for certiorari pending), that the arbitration provision is enforceable against Mr. Martin because he was a third-party beneficiary of the contract executed by Juanita Brown. That position is contradicted by the decision of the Supreme Court in *Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So. 2d 382 (Miss. 2008).

In *Barber* decision, the resident's son had executed an admission agreement on her behalf. The admission agreement contained an arbitration provision, the terms of which are not stated in the court's opinion. The nursing home argued that Mr. Barber had acted either on apparent authority or as his mother's health-care surrogate, similar to the positions argued by the Defendants here. The Court of Appeals rejected both arguments, finding that the defendants had failed to establish a basis for apparent agency or the underlying conditions for Mr. Barber to act as a health-care surrogate. Thus, there was no basis to find that any contract ever came into existence.

The Court of Appeals then took a sudden turn. Despite the fact that Mr. Barber had no authority to act for Mrs. Barber to execute a contract, they found that the arbitration provision was nonetheless enforceable against her as a third-party beneficiary of the *non-existent* contract. In doing so, the Court of Appeals relied upon the fact that "Mrs. Barber's care was the *sine qua non* of the contract." 988 So. 2d at 919 (¶ 25).

> 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." ... 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." (citations omitted)

Id. The Court of Appeals is silent, however, on whether the terms of the admission agreement in *Barber* made the arbitration provision a part of the consideration for the provision of those services by Trinity such that acceptance of those services would bind the resident. Their reasoning only makes logical sense if it did so or they prsumed that it did.

Forest Hills Nursing Center, Inc. v. McFarlan, Docket No. 2007-CA-00327-COA, 2008 WL 852581 (Miss. App. 2008)(petition for certiorari pending), contains the same baffling logic as *Barber.* The Court of Appeals again found that the person signing the admission agreement had no authority to act for the resident under either agency principles of the Uniform Health-Care Decisions Act. The Court nonetheless enforced the agreement against the resident on the theory that she was bound as a third party beneficiary to the non-existent contract.

Here, however, as the Circuit Court found, execution of the arbitration agreement was not a condition for Bobby Martin's admission to the facility or the receipt of services there. As the Circuit Court has found, Bobby Martin was a resident of Lawrence County Nursing Center from December 30, 1997, until June 21, 2002. On February 12, 2001, he had already been a resident of the facility for over three years. On February 12, 2001, Bobby Martin was not being admitted or readmitted to Lawrence County Nursing Center. The medical records of LCNC establish that Bobby Martin was a resident of LCNC continuously from November 30, 2000, until August 23, 2001, when he was transferred to Lawrence County Hospital for a brief stay and then returned to LCNC.

The basic rule concerning third-party beneficiaries to contracts addresses the right of the third-party beneficiary to bring an action on the contract. That rule has no application here. Instead, the question is the right to enforce terms of the contract *against* the third party. There are only four Mississippi cases that discuss this issue: *Adams v. GreenPoint Credit, LLC*, 943 So. 2d 703 (Miss. 2006); *Holman Dealerships, Inc. v. Davis*, 934 So. 2d 356 (Miss. App. 2006); *Terminix International, Inc. v. Rice*, 904 So. 2d 1051 (Miss. 2004); and *Smith Barney, Inc. v. Henry*, 775 So. 2d 722 (Miss 2001). None of the four cases deals with enforcing terms of a contract not conditioned upon the provision of goods or services received by the third party against the third party.

Terminix International, Inc. v. Rice does not support the argument made by the Defendants in this action. Terminix entered into a termite protection contract with David Rice for treatment of the home jointly owned by David Rice and his wife, Cynthia Rice. The contract contained an arbitration provision. Upon discovery of termite damage, David and Cynthia Rice filed suit in Circuit Court and Terminix filed a motion to enforce the arbitration provision. Cynthia sought to avoid the arbitration requirement because she was not a signatory to the contract. The Supreme Court cited the then-recent decision of the U.S. Court of Appeals for the Fifth Circuit in *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 266 (5th Cir. 2004), for the following:

> [We have made] clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency.

904 So. 2d at 1058. In deciding the case, the Supreme Court relied upon the doctrine of equitable estoppel, again citing *Washington Mutual Finance Group, LLC v. Bailey*, finding that under the circumstances, Mrs. Rice was estopped to deny the validity of the contract.

The Supreme Court adopted this statement from *Washington Mutual Finance Group, LLC v. Bailey*:

> In the arbitration context, the doctrine [of estoppel] recognizes that a party may be estopped from asserting that the lack of a 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.

364 F.3d at 268; 904 So. 2d at 1058. A significant distinction is apparent. There was no claim that Mrs. Rice was aware of the contract or incapable of contracting on her own behalf. There is no evidence in this case that Mr. Martin was even aware of the arbitration provision.

Equitable estoppel is an exceptional remedy and should be used only in exceptional circumstances. *Eagle Management, LLC v. Parks*, 938 So.2d 899, 904 (¶12) (Miss. App. 2006); *Powell v. Campbell*, 912 So. 2d 978, 982 (¶12) (Miss. 2005); *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 206 (Miss. 1984). A party asserting a claim for equitable estoppel must establish three essential elements: (1) belief and reliance upon some representation by the opposing party, (2) change of position as a result thereof, and (3) detriment or prejudice caused by the change of position. *Eagle Management, LLC v. Parks*, 938 So.2d at 904 (¶13), *citing, Cothren v. Vickers*, 759 So. 2d 1241, 1249 (¶19). There is no evidence that Bobby Martin made any representation to the Defendants about the arbitration provision or any other term of the admission agreement. *See, Adams v. GreenPoint Credit, LLC*, 943 So. 2d at 709 (¶16).

To satisfy the remaining elements of equitable estoppel, the Defendants must assert (1) that they relied upon the arbitration provision of the admission agreement as a necessary condition for the provision of services to Bobby Martin, (2) that they admitted Bobby Martin

and provided services to him on the basis of the validity of the arbitration provision, and (3) that they suffered detriment or prejudice from the provision of such services. However, this position is directly contradicted by the fact that Bobby Martin was already a resident of the facility and already receiving services there. In fact, the Defendants could not have required Mr. Martin to leave the facility if he or his attorney in fact had refused to sign the agreement.

Paragraph D.3 of the Admission Agreement states:

> If the Resident and/or Responsible Party are unable to comply with the terms of this Agreement, the Facility reserves the right to discharge the Resident.

(R. 220, R.E. 27). The Defendants had no basis on which to impose any such condition. Federal regulations establish admission and discharge rights of residents. 42 CFR §483.12. The regulation sets forth six specific grounds for discharge of a resident and provides that unless one of those six grounds exists, the facility must permit the resident to remain in the facility. None of the six grounds includes requiring execution of a new admission agreement upon change of operator of the facility. This provision of the Admission Agreement is substantively unconscionable. Equitable estoppel simply does not apply.

The other Mississippi cases, *Adams* and *Holman*, specifically and solely rely upon *Smith Barney* as the basis for their holdings that arbitration provisions can be enforced against third party beneficiaries. *Adams* in fact found that the claimed third party beneficiary was a stranger to the contract and refused to enforce it against her. *Holman*, citing only *Smith Barney* as authority, reaches the opposite conclusion based on the facts before that court. However, *Smith Barney* itself did not itself turn on a third party beneficiary issue. In *Smith Barney*, the plaintiff, Henry, was the mother of the holder of a brokerage account with Smith Barney. The account holder died leaving a will that created a testamentary trust for

the benefit of her mother. The testamentary trust specifically contained the brokerage account. When the executrix, with the knowledge and assistance of Smith Barney's broker, misappropriated the trust funds, Henry sued Smith Barney. The account agreements between Smith Barney and its original customer, Henry's daughter, contained arbitration clauses, which Smith Barney attempted to enforce. Ms. Henry raised the issue of her status as a third party beneficiary, arguing that she was "a non-signatory, unintended, third-party beneficiary of the agreements and therefore not bound by the arbitration clauses." 775 So. 2d at 727 (¶18). The Supreme Court enforced the arbitration clause, not because Ms. Henry was a third-party beneficiary but because she was not.

> In the case at hand, we are dealing with an arbitration clause in which Henry is a successor under the terms of Hilliard's will, and as such, she is specifically covered by the agreement. According to the terms of the agreement, Henry is not required to be a signatory in order to be bound by the arbitration clause. As a successor of Hilliard, Henry is covered by the arbitration clause of the client agreements.

Id. at 727 (¶20). Bobby Martin was not a successor to any interest of Juanita Brown, the actual signatory to the contract, and therefore *Smith Barney* is inapplicable.

In *Holman Dealerships, Inc. v. Davis*, the facts were that Vera Davis purchased a car for her son and daughter-in-law, Paul and Catherine Davis. The sales contract contained an arbitration clause binding upon "the buyer/lessee and dealer and the officers, employees, agents and affiliated entities of each of them." Vera, Paul and Catherine joined in one suit against the dealership, which sought to enforce the arbitration clause. The Supreme Court, citing only *Smith Barney v. Henry*, found that as third part beneficiaries of the contract, Paul and Catherine were "affiliated entities" under the terms of the arbitration clause. As in *Terminix*, the arbitration clause was an essential part of the consideration for the sale.

Here, however, where arbitration was not a condition of admission or receipt of services, one must ask the question: What benefit, if any, flowed from the arbitration provision of the admission agreement to Bobby Martin to bind him as a third party beneficiary? Reading the arbitration provision, it is clear that – if enforced against him – Bobby Martin and his heirs would lose the constitutional right to an inexpensive public forum, instead of an expensive forum specifically selected by his opponent; the right to an independent judge; the right to even-handed Rules of Civil Procedure, including broad rights to discovery; the right to clear and binding Rules of Evidence; the constitutional right to a jury of her peers; and the right to appeal errors in the initial decision. What is also clear is that no benefit flowed to Bobby Martin or his heirs from the arbitration provision to offset the loss of these rights. Absent a benefit to him, he is by definition not a beneficiary.

The Supreme Court appears to have put this issue to rest in its decision in *Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So. 2d 382 (Miss. 2008). The Supreme Court was faced with the same three arguments discussed by Court of Appeals in *Barber* and *McFarlan* and raised by the Defendants here, that is, that Ms. Farish's grandson, who signed the admission agreement containing the arbitration provision, was acting either as an agent or health-care surrogate for the resident and that the resident was bound to the contract as a third party beneficiary. 982 So. 2d at 384. The Supreme Court found no evidence that Mrs. Farish had been determined by her primary physician to lack capacity. In addition, the Court found no evidence that Ms. Farish's living adult child, who had priority to serve as her surrogate, was unavailable or unwilling to act. *Id.* This is strikingly similar to the situation in the instant case. The Court further found no basis to hold that Ms. Farish's grandson had actual or apparent authority to act as her agent. The Court found no evidence in the record of any

act or conduct by Ms. Farish that would have misled anyone into believing that her grandson was her agent. *Id.* At 384-85. There is likewise no evidence in the record in this case to establish that Mr. Marting did or said anything that would have led anyone to believe that Juanita Brown was his agent.

Finally, the Supreme Court rejected the third party beneficiary argument, addressing the underlying doctrine of equitable estoppel.

> Finally, the defendants argue that Ms. Farish should be bound to the arbitration agreement under the doctrine of equitable estoppel, which is a
>
> > principle by which a party is precluded from denying any material fact, induced *by his own words or conduct* upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion would be suffered if such denial or contrary assertion was allowed.
>
> *Koval v. Koval,* 576 So.2d 134, 137 (Miss.1991) (emphasis supplied). As previously stated, the record provides no evidence that Ms. Farish said or did anything upon which misled the nursing home into believing that she had authorized Larry Farish to sign the agreement. Therefore, we cannot say the trial court abused its discretion in holding that Ms. Farish cannot be bound under the theory of equitable estoppel.

982 So. 2d at 385 (¶9) (emphasis in original).

As in *Farish*, there is no evidence in the record to establish that Bobby Martin induced the Defendants *by his own words or conduct* to change their position respecting him. As noted above, Mr. Martin was already a resident of the nursing home and could not be discharged from the nursing home for refusing to execute the new Admission Agreement. There is no evidence that Mr. Martin was ever aware of the existence of the new agreement or expressed any opinion thereon. The burden is on the person asserting the estoppel to

establish the basis for its application. There is simply no evidence to support the enforcement of a non-existent contract against Mr. Martin or his successors. The decision of the Circuit Court should be affirmed on this issue.

V. Provisions of the Admission Agreement are substantively unconscionable.

In addition to the arbitration provision, the Admission Agreement of February 12, 2001, also contains provisions found to be substantively unconscionable in *Covenant Health and Rehab, L.P. v. Brown*, 924 So. 2d 732, 739 (Miss. 2007), and *Covenant Health and Rehabilitation of Picayune, L.P. v. Lambert*, 984 So.2d 283 (Miss. App. 2006), *cert. denied*, 984 So.2d 277 (Miss. 2008).

Paragraph C.5 of the Admission Agreement alters the standard of care by requiring the Resident and Responsible Party to "arrange for and provide supplemental private duty nursing to help reduce the risk of injury or to improve overall care if the Resident or Responsible Party wish to reduce risks associated with the staffing provided by the Facility" and to "hold harmless the Facility for injury or harm to the Resident when said injury or harm could have been avoided had supplemental one-on-one private duty nursing been provided by the Resident or Responsible Party." (R. 219, R.E. 26).

Paragraph F.4 of the Admission Agreement requires the Resident to pay for all costs of enforcement of the agreement if the Resident avoids or challenges the arbitration provision or challenges the arbitrator's award. (R. 220, R.E. 27).

Paragraph F.6 of the Admission Agreement attempts to require a Resident's claim to be mediated "within 60 days of when the dispute arises," regardless of when the events were

or might reasonably have been discovered and regardless of the physical or mental competence of the Resident to bring such a claim. (R. 221, R.E. 28).

In the event that the Court finds the Admission Agreement to be enforceable, which it should not, these unconscionable provisions should be held to be void and unenforceable.

VI. The arbitration provision is unenforceable by its own terms.

Finally, the Admission Agreement of February 12, 2001, calls for arbitration under the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. In 2003, those rules were amended to require a post-dispute agreement to arbitrate. The Supreme Court addressed this precise issue on the motion for rehearing in *Magnolia Healthcare, Inc. v. Barnes*, Docket No. 2006-CA-00427-SCT, 2008 WL 3101737 (Miss. 2008). The Court quoted from the 2003 revision of the rules effective January 1, 2004, as follows:

> American Health Lawyers Association Alternative Dispute Resolution Service Rule of Procedure 1.01 © 1991 (Rev.2003) reveals the following:
>
> Applicability of Rules:
>
> > The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" under the Rules on or after January 1, 2004 *only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service* at the time the parties make a request for a list of arbitrators. For purposes of the Rules, a "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider

> or the manufacturer, distributor, supplier, or seller of a medical product.
>
> (Emphasis added).

Slip op. at 2 (¶8).

Finding no post-dispute agreement to have been executed, the Supreme Court in *Barnes* found the arbitration provision unenforceable.

> It is undisputed that the parties did not agree to arbitrate the claim after the injury occurred, as required by the rules which were incorporated into the admissions agreement at the behest of Magnolia. "The U.S. Supreme Court has stated that, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.'" *B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So.2d 483, 487-88 (Miss.2005) (quoting *AT & T Techs., Inc. v. Commc'ns. Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)).
>
> Finding that no agreement to arbitrate was entered into after January 15, 2005, for this Court to review, the inescapable conclusion is that there was no valid agreement to arbitrate.

Slip op. at 2-3 (¶¶10-11).

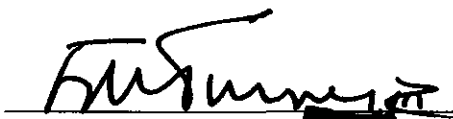
While the Court in *Barnes* discussed the amendment in terms of claims accruing after January 1, 2004, since the claims involved in that case arose after that date, there is nothing in the amended AHLA rule that limits the amendment to claims accruing after January 1, 2004. In fact, the clear intent of the rule is to require a post-dispute agreement to arbitrate any claim *commenced* after January 1, 2004. This civil action was filed on August 12, 2004, after the amendment to the rules became effective. Clearly, there is no post-dispute agreement to arbitrate, else we would not be before the Court. As in *Barnes*, absent a post-dispute agreement to arbitrate, under the very rules included in the agreement by the Defendants, there is no agreement to arbitrate the claims in issue in this civil action.

CONCLUSION

For all of the reasons set forth above, the decision of the Circuit Court denying Defendants/Appellants' various motions to compel arbitration should be affirmed.

Respectfully submitted,

THE ESTATE OF BOBBY MARTIN, et al.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following via First Class Mail, postage prepaid and properly addressed, this 16th day of October, 2008:

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