IN THE SUPREME COURT OF MISSISSIPPI
Cause 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 (As to Lawrence County Nursing Center)

Appellants/ Plaintiffs

v.

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 to the Wrongful Death Beneficiaries of Bobby Martin

Appellee/ Defendant

APPEAL FROM THE CIRCUIT COURT
OF LAWRENCE COUNTY, MISSISSIPPI

Reply Brief of the Appellants, Comm-Care Mississippi and Monticello Community Care Center, LLC;

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Janet Peyton, Appellee/Defendant
2. Juanita Brown, Sister and Wrongful Death Beneficiary of Bobby Martin
3. F. M. Turner, III, Attorney for Appellee/Defendant
4. Hon. Prentiss G. Harrell, Lawrence County Circuit Court Judge
5. Lynda C. Carter, Attorney for Appellants
6. Nicole Huffman, Attorney for Appellants
7. Mary Margaret Waycaster, Attorney for Appellants
8. James P. Streetman, III, Attorney for Appellants
9. John A. Stassi, II, Attorney for Appellants
10. Monticello Community Care Center, LLC, Appellant/Plaintiff
11. Comm-Care Mississippi, Appellant/Plaintiff
12. Wilkes and McHugh, PA, Former Counsel for Appellee/Defendant
13. Hon. Michael Eubanks, Former Circuit Court Judge

Respectfully submitted this the 2nd day of December, 2008.

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I. REGARDLESS OF BOBBY MARTIN'S CAPACITY, HIS SISTER, JUANITA BROWN, HAD AUTHORITY TO ACT ON HIS BEHALF

A. Juanita Brown Possessed Apparent Authority Delegated to her by Janet Peyton and Bobby Martin

Plaintiff fails to distinguish Defendants' argument regarding the apparent authority exercised by Juanita Brown on behalf of her brother, Bobby Martin. Apparent authority is comprised of three basic elements: (1) acts or conduct of the principal indicating the agent's authority; (2) reasonable reliance on the acts by a third party; and (3) a detrimental change based on said reasonable reliance. *Eaton v. Potter,* 645 So.2d 1323, 1325 (Miss. 1994). As will be shown below, both Janet Peyton and Bobby Martin led the nursing home facility to believe that their sister, Juanita Brown, had authority to execute all types of documents, both financial and healthcare related, on Mr. Martin's behalf.

Both Peyton and Brown were intimately involved in Mr. Martin's nursing home residency, and both were Mr. Martin's Responsible Party and contact persons for the facility during his *entire* residency. More specifically, as testified by Janet Peyton, Brown signed all the admission documents during Mr. Martin's initial admission in 1997, and continued to sign numerous documents throughout his years as a resident. (TR. 2006 at 16-17, 29) (RE 93-94, 96). Mr. Martin's consent to his sisters' actions was reflected both in his General Power of Attorney and the Durable Power of Attorney for Healthcare. As such, it is reasonable that the facility came to rely on Brown to continue to act on Mr. Martin's behalf, just as she had done for the years prior.

By signing the 2001 Admission Agreement as Mr. Martin's Responsible Party, Brown simply acted as she had for the previous four or so years of Mr. Martin's residency; she held herself out generally and specifically as possessing the authority to

make decisions on behalf of Bobby Martin and to continue to engage the services of Lawrence County Nursing Center (LCNC) on his behalf. LCNC, acting reasonably and in good faith, believed Brown possessed authority to make decisions on behalf of her brother and continued to seek her execution of documents on behalf of Mr. Martin.

1. Juanita Brown Possessed Apparent Authority from Janet Peyton

a. The General Power of Attorney Covered Decisions to Arbitrate And Allowed Delegation

Despite Plaintiff's contentions to the contrary, the General Power of Attorney is not restricted to "only traditional forms of litigation." In fact, the General Power of Attorney clearly delegated authority to Bobby Martin's agent to act on his behalf regarding– without any specific limitation– claims and litigation and to compromise and settle all actions, and, further, to do all things with respect to Mr. Martin's affairs as he could "do in [his] own proper person." (R. at 906-09) (RE 29-32) While Plaintiff contends that there was only authority for healthcare decisions, but the evidence is clear that his agent had authority to execute financial documents as well as healthcare related documents. (R. at 906-09) (RE 29-32). Pursuant to the General Power of Attorney, Bobby Martin appointed Janet Peyton as his primary agent. Also pursuant to the General Power of Attorney, Janet Peyton was vested with "full and unqualified authority to delegate any or all of the forgoing powers [listed in the Power of Attorney] to any person whom [Janet Peyton] shall select." (R. at 906-09) (RE 29-32).

b. Janet Peyton Delegated her Power and knew of, and Continually Assented to, Juanita Brown's Repeated Execution of Various Documents at the Nursing Home

The testimony of Janet Peyton and Juanita Brown– elicited both at their respective depositions and at the live, March 10, 2006, hearing– evidence a clear intent to permit

Brown to sign documents and make decisions on behalf of Mr. Martin, which permission was delegated to Brown by Peyton.

Peyton testified that she was given a General Power of Attorney over her brother so that she could conduct healthcare **and** financial business for Mr. Martin. (R. at 603) (RE 42) (TR. 2006 at 7). It was her responsibility to ensure that he received the best of care. (TR. 2006 at 11) (RE at 90). The General Power of Attorney included various rights that were being conferred upon Peyton, including the right to contract and the right to delegate any of the powers listed within the General Power of Attorney. Peyton clearly delegated to Brown the authority to contract for Mr. Martin as Brown signed numerous documents on his behalf. (TR. 2006 at 16-17, 29) (RE 93-94, 96). Peyton knew this and **never objected** to Brown's actions and never attempted to renege any of Brown's actions. (R. at 212-21; RE 19-28), (R.at 605; RE 44) (TR. 2006 at 16-17, 29) (RE 93-94, 96). Perhaps most telling is that Brown even told Peyton that she signed the 2001 Admission Agreements and Peyton did not indicate any objection thereto. (TR. 2006 at 17) (RE 94). Clearly, Peyton's admitted knowledge of Brown's actions and of her signing of documents on Bobby Martin's behalf, combined with her lack of action to indicate to the nursing home facility that Brown was not permitted to do so, clearly evidences that Brown was acting within the delegation powers enumerated under the General Power of Attorney, and that the facility acted reasonable when continuing to seek Brown to execute documents on Mr. Martin's behalf.

Peyton was acutely aware were aware of the actions that Brown was taking on behalf of Mr. Martin during his residency at LCNC, yet did nothing at all to indicate that she disagreed or was unsatisfied with the actions taken by Brown. For instance, Peyton

testified that:

- Peyton knew Brown was signing paperwork and completing documents so that Mr. Martin could be admitted to LCNC. (TR. 2006 at 14, 16) (RE 91,93);
- Brown informed Peyton that she signed paperwork for Mr. Martin. (TR. 2006 at 14, 16) (RE 91,93);
- Brown, like Peyton, signed financial agreements, hospital paperwork, and the like for Mr. Martin. (TR. 2006 at 16) (RE 93);
- She knew that Brown signed documents on behalf of Mr. Martin, knew Brown signed the 2001 Admission Agreement and agreed that Brown's signature appeared on the 2001 Admission (R. at 605-06) (R. at 605) (RE 44-45)
- Peyton never told Brown not to sign any documents for Mr. Martin; (TR. 2006 at 17) (RE 94);
- Peyton never went back to the facility and tried to change or renege any documents signed by Brown. (TR. 2006 at 17) (RE 94);
- Peyton never told the facility not to accept Brown's signature on any documents. (TR. 2006 at 17) (RE 94);

Peyton's knowledge of Brown's execution of documents on Mr. Martin's behalf– combined with her continual assent to the same, clearly establishes that Brown was vested with the apparent authority, via delegation by Peyton, to act on their brother's behalf. As she never voiced objections, never objected to the executed documents, nor did she ever revoke any documents executed by Brown, Peyton led the facility into

believing that Brown has authority to act on behalf of Mr. Martin during his entire residency (not just during the signing of the 2001 Admission Agreement).

2. Juanita Brown Possessed Apparent Authority from Bobby Martin

Clearly, as shown above, Peyton delegated her powers under the General Power of Attorney to Brown. This delegation was mirrored by the apparent authority flowing to Brown from Bobby Martin himself. Throughout his *entire* residency, Mr. Martin accepted the terms of the documents Brown executed. Mr. Martin never objected to the same, receiving nursing home care and related service from the facility. Moreover, Mr. Martin allowed Brown to sign as his Responsible Party throughout his *entire* residency at LCNC, even in his presence– Brown testified that she signed documents in his room while visiting. As such, Mr. Martin (just as Peyton) led the facility into reasonably relying on Brown was his agent. (R. at 805)(R.E. at 68). Furthermore, the fact that Mr. Martin made Brown an alternate on his Durable Power of Attorney for Health Care contemporaneously with her signing the first Admission Agreement clearly demonstrates his entrustment of Brown and her decisions and supports LCNC's actions in relying upon Brown as having authority. (R. at 212-16; RE 19-23; (R. at 910-11; RE 33-34).

Brown, supporting Peyton's earlier testimony that Brown acted on behalf of Mr. Martin, similarly testified:

- Brown felt like she had authority to sign on behalf of Mr. Martin because she was his sister. (R. at 807; RE 70) (TR. 2006 at 37; RE 104));
- Mr. Martin was aware that Brown was signing documents on his behalf. (TR. 2006 at 29) (RE 96)
- Mr. Martin knew Brown was signing documents on his behalf, and he was

comfortable with the same. (R. at 808) (RE 71) (TR. 2006 at 38) (RE 105).

- Brown signed numerous documents on behalf of Mr. Martin in 1997, 1998, 1999 and 2001. (TR. 2006 at 30-36) (RE 97-103);
- Peyton knew and was in agreement with Brown signing documents on behalf of Mr. Martin. (TR. 2006 at 38) (RE 105);
- Further, Mr. Martin never told Brown– nor did Brown ever get the feeling– that Mr. Martin was not comfortable with Brown signing Admission Agreements on his behalf. (R. at 808) (RE 71).

Once again, Mr. Martin's conduct, as did the conduct of his sister, Janet Peyton, clearly demonstrated that Brown had authority to act on his behalf. Regardless of any authority that existed via the delegation of the Durable Power of Attorney, the facts remain that Mr. Martin's actions confirmed the authority of Brown– Mr. Martin and Peyton both knew that Brown was acting on Mr. Martin's behalf, which led LCNC to believe that she was authorized to act as neither never objected to Brown singing on Mr. Martin's behalf, never rescinded any signed documents, and/or never acted in any way to indicate otherwise. As such, it was reasonable for LCNC to rely on Brown's actions to their detriment, and, consequently, LCNC is entitled to enforce the 2001 Admission Agreement, and the arbitration provision contained therein, against the instant Plaintiff.

B. Alternatively, if Bobby Martin Lacked Capacity, Juanita Brown Still had Authority to act on his Behalf

Although Plaintiff now contends that there was no evidence that Bobby Martin lacked capacity, Plaintiff's previous actions in this case indicate otherwise. In fact, the questioning of Juanita Brown by Plaintiff's counsel at the March 2006 hearing

demonstrated Plaintiff's position that Bobby Martin lacked the capacity to handle his own affairs. To wit, the following questioning occurred by Plaintiff's *own counsel* during the hearing:

Q: (by Mr. Turner) And during the entire time he was at the Nursing Home, he wasn't capable of making decisions about his business; was he?

A: No.

(TR. 2006 at 46).

Q: Ms. Carter pointed out that after his stroked [sic] in November of 2000, Bobby was – Bobby's mind was impaired; right?

A: Yes.

Q: He really couldn't make decisions; could he?

A: No.

Q: Okay, and he wasn't in a position to understand what was going on about complex things like taking care of his business or making contracts; right?

A. No.

Q: Okay, and he was never able to do that the rest of his life; was he?

A: No.

Q: Okay. So in February of 2001, he was not capable of understanding and making a decision about waiving arbitration; was he?

A: No.

(TR. 2006 at 50-51).

Arguably, during the 2006 hearing, it was admitted that Bobby Martin lacked capacity. Even so, due to the General Power of Attorney being durable, the apparent

authority flowing from Peyton to Brown remained unchanged. Moreover, in the event that Mr. Martin became incapacitated, the provisions under the Durable Power of Attorney for Healthcare that he executed upon his admission to LCNC became active, allowing Brown to act on his behalf. (TR. 2006 at 18; RE 95)) (R. at 910-11; RE 33-34).

As referenced above, on December 30, 1997, Bobby Martin executed a Durable Power of Attorney for Health Care which provided that Peyton was his attorney-in-fact, but also provided that Brown may serve as alternate. The execution of this document by Mr. Martin further solidified the fact that Mr. Martin consented to Brown's making decisions on his behalf. (R. at 910-11) (RE 33-34). This authority is further confirmed by Brown's execution of "numerous" documents on Mr. Martin's behalf and with his knowledge. (TR. 2006 at 30-36) (RE 97-103). As such, it is clear and unequivocal that Mr. Martin trusted Brown, his sister, to make decisions on his behalf and, that he vested her with the authority to so act in the event that he became incapacitated. Moreover, the Durable Power of Attorney's "alternate" provision, which applied in the event that Peyton was "not available," was applicable here as Peyton was unavailable at the time of the signing of the 2001 Admission Agreement. (R. at 807; RE at 70 and R. at 910-11; RE at 33-34). (Brown testified that the facility "said they couldn't get ahold [sic] of Janet. So I was there.")[1].

Further, and as was fully set forth in Defendants' Initial Brief, once Mr. Martin lacked capacity, as testified by the Plaintiff here, even without a power of attorney, Brown, as an adult sister, had authority to act as a surrogate and to make healthcare

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[1] As more fully set forth in Defendants' Initial Brief, the Durable Power of Attorney for Healthcare provided Brown with actual authority to act on her brother's behalf.

decisions for Mr. Martin under Miss. Code Ann. § 41-41-211. "Healthcare decisions" includes a decision made by a surrogate regarding "the individual's healthcare, including: (1) selection and discharge of healthcare providers and institutions." Miss. Code Ann. §41-41-203(h) (emphasis added). The Mississippi Legislature has specifically provided that a "health care decision made by a surrogate is effective without judicial approval." Miss. Code Ann. § 41-41-211(7). Moreover, pursuant to *Covenant Health & Rehab of Picayune, LP v. Brown*, Juanita Brown, as her brother's statutory healthcare surrogate, had the power to enter into a contract with the new nursing home operator requiring that he arbitrate any claims he may have arising out of the treatment while at the facility. 949 So. 2d 732, 737 (Miss. 2007).

In short, regardless of Mr. Martin's capacity, or lack thereof, Brown was authorized via delegation of authority from Peyton, apparent authority from Mr. Martin, the Durable Power of Attorney for Healthcare, and/or under the surrogate statutes to act on behalf of Martin in signing the 2001 Admission Agreement. As such, Plaintiff is now bound by the arbitration provision contained therein.

II. PLAINTIFF IS EQUITABLY ESTOPPED FROM ARGUING THAT THE ARBITRATION AGREEMENT IS NOT ENFORCEABLE AS BOBBY MARTIN WAS A THIRD PARTY BENEFICIARY OF THE ADMISSION AGREEMENT

The doctrine of equitable estoppel is "the principal 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 a denial or contrary assertion was allowed." *Compere's Nursing Home, Inc. v. Farish,* 982 So.2d 382, 385 (Miss. 2008)(*citing Koval v. Koval*, 576 So.2d 134, 137 (Miss. 1991)(emphasis supplied by Court). While this standard sounds

somewhat similar to apparent authority as discussed earlier in this brief, rather than being based upon agency principles, "the doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon." *Koval*, 576 So.2d at 137 (*citing* 28 Am. Jur. 2d 647, §§ 27 and 28).

In the instant case, as previously discussed, both Mr. Martin and Peyton led LCNC and its employees into believing that Brown was authorized by Mr. Martin to sign documents, including the 2001 Admission Agreement, on Mr. Martin's behalf. They both knew Brown was executing documents on Mr. Martin's behalf– which execution sometimes took place in front of Mr. Martin. (R. at 805)(RE at 68). Brown signed numerous documents, each year, on behalf of Mr. Martin. (TR. 2006 at 6, 30-36; RE at 93, 97-103). Based on Brown's longstanding history of executing the documents related to Mr. Martin's residency, Plaintiff should now be estopped from arguing that one of the provisions of the admission agreements– the arbitration provision contained in the 2001 Admission Agreement– is now invalid, particularly in light of the fact that Plaintiff has *never* sought to invalidate any other documents signed on Mr. Martin's behalf by Brown. As a result, the trial court erred in refusing to enforce the arbitration provision.

III. THE ARBITRATION AGREEMENT WAS A VALID AND ENFORCEABLE CONTRACT DESPITE PLAINTIFF'S SUPPOSED "ROADBLOCKS" TO ARBITRATION

A. An Arbitration Agreement is not a Form of Improper Consideration

Plaintiff makes another futile attack on the Arbitration provision stating that the Arbitration provision constitutes additional consideration, and thus, invalidates the

arbitration clause. Defendants submit that it was not consideration for continued care and treatment, but rather, a mutual and authorized agreement to resolve any future claims through Arbitration. In other words, there was a mutual exchange of both parties forgoing court intervention in favor of any disputes being resolved by and through binding Arbitration.

Many courts have addressed Plaintiff's argument, finding no merit in the claim. A Florida appellate court held that "[w]e have found no authority from any jurisdiction which holds that an arbitration clause constitutes 'consideration' in this sense nor do we believe that the federal regulation was intended to apply to such a situation." *Gainesville Health Care Ctr. Inc. v. Weston,* 857 So.2d 278,288 (Fla. 1st Dist. Ct. App. 2003). One of our sister states, Alabama, has also tackled this argument. The Alabama Supreme Court held that an Arbitration provision does not equate to additional consideration in that "an arbitration agreement sets a forum for future disputes; both parties are bound to it and both receive whatever benefits and detriments accompany the arbitral forum." *Owens v. Coosa Valley Heath Care, Inc.,* 890 So. 2d 983 (Ala. 2004). The Court went on to explain that if it were to hold the arbitration agreement to be additional consideration, "virtually any contract term [Plaintiff] decided she did not like could be construed as requiring "other consideration" in order to gain admittance to the nursing home and thus, be disallowed by the statute. [Plaintiff's] argument . . . is without merit." *Id.* Finally, even CMS (Centers for Medicare and Medicaid) does not preclude arbitration agreements, providing that as long as patient care is not compromised, arbitration agreements are a matter of state law. *See,* CMS letter dated January 9, 2003 (R. at 594).

More recently, the Mississippi Court of Appeals held that an arbitration provision in

a nursing home admission agreement was proper and did not constitute improper consideration. *Covenant Health and Rehab. Of Picayune, LP v. Lumpkin,* 2007-CA-00449-COA, 2008 WL 306008 (Miss. Ct. App. 2008). Specifically, the Court noted that the duties the parties undertook with respect to the admission agreement constituted sufficient consideration for the arbitration provision to be enforced. *Id.* At ¶ 15. As such, and since multiple Mississippi Courts have enforced similar arbitration provisions, Plaintiff's contention is without merit.

B. The Arbitration Agreement is Substantively Conscionable- any Unconscionable Provisions May be Stricken allowing the Remainder to be Enforced

Plaintiff attempts to avoid the arbitration provision by arguing that there are various portions of the arbitration agreement that have been found to be unconscionable. (Ap'ee. B. at 27). Although Defendants maintain that the interpretation of this provision is outside of this Court's jurisdiction, Defendants feel compelled to respond so as to demonstrate that this provision does not affect a Plaintiff's right to justified damages. Nursing homes cannot, nor are they required to, provide 24 hour a day, one-on-one care. Invariably, some incidents occur, through no fault of the facility and/or its employees, in the absence of 24 hour a day, one-on-one supervision. Paragraph C(5) merely informs the parties of reasonable expectations in nursing home environments. Specifically, Paragraph C(5) provides:

> The Resident and Responsible Party, (other than the Facility), agree to be responsible for and assist the Facility in providing the level of care and attention desired by the Resident and/or Responsible Party if said level of care or attention exceeds that provided by the Facility. As set forth in Section B.1., the Facility does not provide one-on-one care 24 hours a day; therefore, the Resident and/or Responsible Party (other than the facility) agree 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 (other than the facility) believes the resident's condition so requires. The Resident and Responsible Party acknowledge that there are risks of injury or harm in ambulating, moving, eating and otherwise living, which exist in any environment including the Facility and that such risks can be reduced with supplemental private duty nursing. The Resident and Responsible Party also acknowledge that the quality of care provided can be improved through such supplemental private duty nursing. The Resident and Responsible Party agree, therefore, to hold harmless the Facility for injury or harm to the Resident when said injury or harm could have been avoided had supplemental private duty nursing been provided by the Resident or Responsible Party.

(emphasis added).

Paragraph C(5) does nothing more than state the obvious. In Paragraph C(5) the facility acknowledged that there are risks of injury or harm in "ambulating, moving, eating and otherwise living, which exist in any environment including the Facility and that such risks can be reduced with supplemental private duty nursing." The facility further reminds the Resident and Responsible Party that the facility does not provide one-on-one care 24 hours a day. Thereafter, Paragraph C(5) provides that if the Resident and/or Responsible Party "desire" a higher level of care than that provided by the facility, Resident and/or Responsible Party agree to arrange for private duty nursing. Finally, Paragraph C(5) provides that if the Resident or Responsible party believed that an injury or harm could have been avoided had supplemental private duty nursing been provided, then the facility is to be held harmless for such injury or harm. As clearly demonstrated, Paragraph C(5) is not a limitation on damages or recovery; instead, it sets the reasonable expectations of a nursing home environment along with principles of the laws of comparative negligence.

In addition, with respect to provision F(4) regarding payment of all costs for enforcement of the arbitration provision and to the extent that F(6) is read as an attempt

to reduce the statute of limitations, such provisions, if improper, may be stricken and the remainder of the admission agreement be enforced and referred to arbitration. *Covenant Health and Rehab, L.P. v Brown*, 949 So.2d 732, 741 (Miss. 2007)(noting that enforcement of the remainder of the admission agreement was proper after unconscionable clauses were stricken).

C. Should this Case be Ordered to Arbitration, the AHLA will Administer the Same

Plaintiff has argued that the arbitration provision is unenforceable by its own terms. Such a statement is misleading. While, Plaintiff correctly notes that the AHLA rules have been amended to provide that the AHLA will no longer administer cases involving consumer healthcare liability claims unless a post dispute arbitration agreement has been entered. However, Plaintiff incorrectly concludes that it is impossible to comply with the arbitration provision of the Admission Agreement.

Defendant's submit that the arbitration provision directs arbitration in accordance with the Service Rules of Procedure, and does not necessarily confine the parties to the use of the AHLA ADR Service to administer the arbitration. In other words, the Service Rules are portable, and may be utilized by a mutually agreeable arbitrator. Plaintiff overlooks this portability, and argues that only the AHLA may administer the arbitration. Defendants submit that this is not the case.

If the Court orders arbitration, it is left with two alternatives. The first is for the Court to recognize the portability of the Service Rules and direct the parties herein to find a mutually agreeable arbitrator who will then administer the dispute according to the Service Rules. The other alternative is to order the parties to arbitrate this dispute *through* the actual AHLA ADR Service. If the latter is so ordered, the AHLA, contrary to

Plaintiff's assertions, *"will agree to administer the arbitration* even thought the parties have not executed a post-dispute arbitration Agreement." Affidavit of Peter M. Leibold, Esq., Chief Executive Officer of the American Health Lawyers Association. (R. at 652 - 53)(emphasis added). Simply put, enforcement of the terms of the arbitration clause is not only a legal possibility, it is required whether it be via use of the Rules themselves or submission of the matter, pursuant to an Order directing the parties to arbitration through the AHLA, to the AHLA itself.

IV. NEW CASE LAW APPLIES RETROACTIVELY TO PENDING ACTIONS, AS SUCH, THE APPEAL IS TIMELY

Contrary to Plaintiff's assertions, Defendants' Reurged Motion is proper as it is based upon new developments in Mississippi Jurisprudence, which new authority is retroactive. *Thompson v. City of Vicksburg,* 813 So.2d 717, 721 (Miss. 2002). "Retroactive application [of new case law] is not limited to pending appeals . . . but also applied to cases awaiting trial," such as the instant case. *Id.*

Defendants' reurged Motion likewise finds support in Miss. R. Civ. P. 60(b)(6), in seeking relief from Judgment. A Motion pursuant to Rule 60 is but one of *three* ways in which to "reopen, amend and/or alter a final judgment entered by a court of competent jurisdiction," the other two ways being a direct appeal and a Rule 59 Motion to Amend or Alter a Judgment. *Adcock v. Van Norman,* 917 So.2d 86, 89 (Miss. 2005). Since Defendants herein did not appeal the initial ruling, and since it had been more than 10 days since the Order Denying the Motion to Compel Arbitration, Defendants "Reurged" Motion is the proper avenue to revisit this Court's May 2006 Order pursuant to Miss. R. Civ. P. 60(b)(6), which allows for relief from judgment for other justifying reasons.

An intervening change in case law has been recognized by the Supreme Court as

a valid reason for amending/ altering a judgment. *Boyles v. Schlumberger Technology Corp.*, 792 So.2d 262 (Miss. 2001). After the initial ruling in this matter, substantial changes and clarifications occurred with respect to Mississippi's treatment of arbitration agreements, including further examination as to equitable estoppel arguments, third party beneficiary and authority arguments, and healthcare surrogate authority arguments. As such, Plaintiff's argument that the instant appeal is untimely fails as the trial court has sufficient grounds on which to reconsider the earlier rulings. As a new order was handed down on these issues, the instant appeal was filed within 30 days of the date of the Order.

CONCLUSION

Simply put, Juanita Brown was vested with authority to sign documents on behalf of her brother, Bobby Martin. She possessed actual and apparent authority, as well as statutory authority to sign documents on her brother's behalf. Regardless of Bobby Martin's capacity, Brown was clothed with the authority to act on his behalf. Throughout the numerous years that Mr. Martin was a resident at LCNC, Brown signed several documents on his behalf, with his knowledge and consent, and some in his presence, and consent of Janet Peyton. Yet, **not once** did Mr. Martin or Peyton object to Brown's actions, attempt to rescind or renege the signed documents, or communicate to the facility that it was not to accept Brown's signature. The facility reasonably relied on the display of authority as shown by Mr. Martin and Janet Peyton and continued to seek Brown's approval and execution of numerous documents. As such, even if an agency argument fails, which Defendants contend would be improper, the notion of equity and justice demands that Plaintiff be estopped from arguing that Brown lacked authority to

sign based on the doctrine of equitable estoppel– Mr. Martin was a third party beneficiary of not only the 2001 Admission Agreement, but all of the documents executed by Brown.

With regards to the arbitration provision itself, it is enforceable through the AHLA by Order of this Court. Pursuant to Court Order, AHLA will take and administer the arbitration or, should the parties so elect, may use the portable AHLA rules with another arbitrator. As to the Plaintiff's contention that certain sections of the Admission Agreement are unconscionable, should the Court agree, those sections can be stricken and the remaining provisions, including the arbitration provision, can be enforced. Therefore, there remain no further obstacles to the arbitration of this matter.

WHEREFORE, PREMISES CONSIDERED, in accordance with the litany of Mississippi case law and the Federal Arbitration Act, Defendants respectfully request this Court to reverse the Circuit Court's denial and direct the Circuit Court to enter an Order compelling this matter to proceed with arbitration.

Respectfully submitted this the 2nd day of December, 2008.

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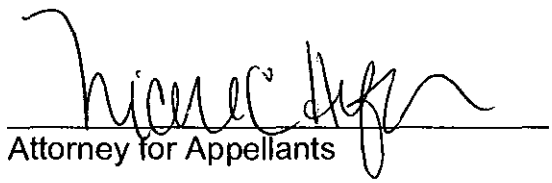
CERTIFICATE OF FILING

I hereby certify that I, Nicole Huffman, Counsel for the Appellants, on this the 2nd day of December, 2008, have caused to be sent via Federal Express to the Mississippi Supreme Court Clerk's Office the following:

The original and three (3) copies of the Appellants' Reply Brief; and

One disk containing an electronic copy of the Appellants' Reply Brief.



Attorney for Appellants

CERTIFICATE OF SERVICE

I, NICOLE HUFFMAN, do hereby certify that I have this day caused to be mailed, by United States Mail, first-class, postage pre-paid, a true and correct copy of the foregoing pleading to all counsel of record as follows:

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This the 2nd day of December, 2008.

NICOLE HUFFMAN