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

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

ORAL ARGUMENT REQUESTED

Lynda C. Carter MSBN [redacted]
Nicole Huffman MSBN [redacted]
Wise, Carter, Child and Caraway
2781 C. T. Switzer Sr. Drive, Suite 307
Biloxi, MS, 39531
(228) 385-9390

James P. Streetman, III MSBN [redacted]
Mary Margaret Waycaster MSBN [redacted]
Scott, Sullivan, Streetman & Fox, P.C.
725 Avignon Drive
Ridgeland, Mississippi 39157
(601) 607-4800

John Stassi, II, MSBN [redacted]
601 Poydras, Suite 2300
New Orleans, LA 70130
(504) 324-8950

ATTORNEYS FOR APPELLANTS

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**

vs.

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**

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 25 day of July, 2008.

Lynda C. Carter MSBN [redacted]
Nicole C. Huffman MSBN [redacted]
Mary Margaret Waycaster MSBN [redacted]
James P. Streetman MSBN [redacted]
Attorneys of Record for Appellant,
Monticello Community Care Center,
LLC,

John A. Stassi, II MSBN [redacted]
Attorney of Record for
Comm-Care Mississippi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument would aide in the resolution of the issue before the Court. As such, Appellants respectfully request oral argument.

STATEMENT OF THE ISSUE

Did the Circuit Court Err in Denying the Motion to Compel Arbitration?

STATEMENT OF THE CASE

Nature of Case and Course of the Proceedings Below

The Complaint in this matter was filed on December 23, 2004 against the Defendants for the alleged personal injuries and wrongful death of Bobby Martin while he was a resident at Lawrence County Nursing Center ("LCNC"), a nursing home that was operated by Monticello Community Center, LLC at the time of his death. Bobby Martin's sister and personal representative, Janet Peyton ("Peyton") filed this lawsuit on behalf of Mr. Martin's estate and on behalf of all of the wrongful death beneficiaries of Bobby Martin. (R. at 18-49[1]). Thereafter, on January 5, 2005, the Defendants properly filed a Motion to Dismiss, or in the Alternative, to Stay Proceedings and Compel Arbitration and Amended Answer and Defenses of Defendants, Monticello Community Care Center, LLC; John Stassi, III; and Linda S. Davis. (R. at 129-151). Comm-Care Mississippi had filed its similar Motion on or about December 13, 2004. (R. at 81-101). On March 14, 2005, a hearing was held before the Honorable Judge Pritchard on the Defendants' motion. As a result of that hearing, Judge Pritchard ordered that the parties participate in "arbitration-related discovery" for the purpose of assisting the Court in making a determination on the enforceability of the arbitration clause that existed in the 2001 Admission Agreement signed by Bobby Martin's sister, health care surrogate, and alternative power of attorney, Juanita Brown ("Brown"). (R. at 336-38). Thus, discovery

[1]References to the records will be designated as "R." References to record excerpts will be designated as "RE" References to transcript pages will be designated "TR."

ensued and the depositions were taken of the key "players" surrounding the 2001 Admission Agreement and the arbitration clause contained therein. Defendants deposed Mr. Martin's sisters, Brown and Peyton. Likewise, Plaintiffs deposed the individual defendant administrator, Linda Davis; individual defendant licensee, John Stassi; and social services coordinator of the nursing home, Jalove Calhoun.[2] Judge Pritchard ordered that live testimony be taken at the hearing which was held on April 26, 2005. However, during the hearing, Judge Pritchard realized that he personally knew one of the sisters (Peyton) and, therefore, recused himself immediately. Thereafter, this case was transferred to the Honorable Judge Eubanks.

A second hearing, with live testimony, was held on March 10, 2006. (TR. 2006). An Opinion and Order was issued denying the Defendants' motion on May 8, 2006. (R. at 1639-48) (RE 9-18). In this opinion, Judge Eubanks found that the arbitration clause was unenforceable due to the fact that Brown lacked the authority under the Uniform Healthcare Decisions Act to bind Bobby Martin to the provisions of the 2001 Admission Agreement. (R. at 1639-48) (RE 23-28). After this denial, the parties proceeded to conduct written discovery, but no trial date was ever set, no further depositions taken, and, in fact, Plaintiff missed multiple docket calls set in this matter. Meanwhile, this case was transferred to the Honorable Judge Harrell. (R. at 1-6).

On February 22, 2007, the Mississippi Supreme Court issued a ruling in *Covenant Health Rehab of Picayune, L.P. v. Brown,* regarding the issue of arbitration agreements

---

[2]Both Mr. Stassi and Ms. Davis were later dismissed from this case and are not a part of this appeal. (R at 1747-48).

in a nursing home setting that gave the Defendants new legal grounds on which to move to compel arbitration. 949 So.2d 732 (Miss. 2007). Accordingly, the Defendants properly filed their Motion to Reurge Motion to Stay all Proceedings and Discovery and Compel Arbitration. (R. at 1739-84). Following the hearing before Judge Harrell on Defendants' Motion to Reurge Motion to Stay Proceedings and Compel Arbitration, Judge Harrell ordered the parties to submit supplemental briefs on the effects of the *Brown* decision and also re-exploring the issue of enforcement of the arbitration provision. Additionally, during this time, the Mississippi Court of Appeals issued an opinion in *Trinity Mission v. Barber*, regarding the enforcement of arbitration provisions in nursing home admission agreements against third-party beneficiaries, which opinion reinforced Defendants' argument that they were entitled to arbitration in the instant matter. – So.2d –, WL 2421720, No. 2005-CA-02199-COA (Miss. Ct. App. August 28, 2007). Defendants brought this case to the attention of the trial court through a Supplemental Submission of Law. (R. at 2109-62).

After multiple hearings on the Motion to Reurge, Judge Harrell denied the Motion in a non-detailed Order entered on November 19, 2007. (R. at 2181) (RE 7-8). It is from this Order that the Defendants now appeal, which appeal was timely filed on November 29, 2007.

Statement of the Facts

The named Plaintiff, Janet Peyton ("Peyton"), is the sister of Bobby Martin ("Mr. Martin") and Juanita Brown ("Brown"). Both, Peyton and Brown were Mr. Martin's "Responsible Party" during his entire residency at LCNC. (TR. 2006 at 15; RE 92)) (R. at 604; RE 43). In other words, the nursing home had authority to contact *either* Brown

or Peyton to discuss Mr. Martin's care and condition.

Prior to Mr. Martin's admission to LCNC, on or about November 1, 1996, Bobby Martin executed a General Power of Attorney which gave Peyton the authority to control his financial and business affairs and the "full and unqualified authority to delegate any or all of the foregoing powers to any person whom my attorney in fact [Janet Peyton] shall select." General Power Of Attorney, (R. at 906-09) (RE 29-32). This General Power of Attorney was also, later, provided to LCNC (R. at 604) (RE 43). Peyton handled Mr. Martin's affairs during the two and a half years prior to his admission when he resided with her. In late 1997, Mr. Martin was living with Peyton, who had decided to admit Mr. Martin to LCNC. (R. at 602) (RE 41). Mr. Martin agreed to the admission, as did his sister, Brown, and the other family members. (R. at 601-02) (RE 40-41). Both Peyton and Brown were involved with his admission to LCNC, which took place on or about December 29, 1997 (R. at 603) (RE 42). It was Brown who executed all of the admission paperwork, including the two Admission Agreements on behalf of Mr. Martin, and both Peyton and Mr. Martin were aware that she was signing documents on his behalf and never objected. (R. at 212-21; RE 19-28)), (R. at 605; RE 44) (TR. 2006 at 16-17, 29; RE 93-94; 96). The following day, on December 30, 1997, Bobby Martin executed a Durable Power of Attorney for Health Care which gave Peyton and Brown the authority to make health care decisions on his behalf. Healthcare Power of Attorney, (R. at 910-11) (RE 33-34).

In November 2000, Monticello Community Care Center became the operator of LCNC. As a result, the Admission Agreements were revised to reflect the new operator

and were presented to the residents and/or Responsible Parties for execution. On February 12, 2001, Brown, once again, freely executed the new Admission Agreement on behalf of Mr. Martin[3]. (R. at 216-21; RE 23-28))(R. at 807; RE 70)). It was this 2001 Admission Agreement that contained the arbitration clause that is at the basis of Defendants' Motion to Compel Arbitration.

Brown had clear authority– actual, apparent, and statutory authority– to enter into both the 1997 Admission Agreements and the 2001 Admission Agreement on behalf of Bobby Martin. The General Power of Attorney gave Peyton full authority to govern his business affairs. (R. at 909) (RE 29-32). Specifically, the General Power of Attorney vested Peyton with the authority to act as an agent for Bobby Martin with respect to claims and litigation, estate transactions, personal affairs, etc. Moreover, included in these powers was the authority "to execute and deliver all contracts . . . and writings", and more importantly, the power to "compromise, settle and adjust, with each and every person or persons, all actions . . . and in such manner as my said attorney shall think proper." (R. at 906-09) (RE 29-32). Significantly , the General Power of Attorney provided Peyton with "full and unqualified authority to delegate any or all of the foregoing powers to **any person** whom my attorney in fact shall select." (R. at 906-09) (RE 29-32).

Peyton and Brown were **both** involved in Mr. Martin's admission to LCNC. (R. at 603) (RE 42). This dual involvement is also reflected in the social history kept by LCNC, which indicated that Mr. Martin was admitted by Brown **and** Peyton. (R. at 2156).

---

[3] While Peyton has disputed her signature on the 2001 Admission Agreement, such dispute is inconsequential as it is undisputed that Brown signed the A was vested with full authority to sign on behalf of Mr. Martin.

Although both were involved in the admission process, only Brown executed all of the admission documents, including the two initial Admission Agreements and the 2001 Admission Agreement in controversy. (R. at 212-21; RE 19-22))(R. at 799-823; RE 23-28)). In addition, Brown actually executed numerous documents on Mr. Martin's behalf throughout his residency– in 1997, 1998, 1999, and 2001. (TR. 2006 30-36) (RE 97-103). In so executing these documents as Mr. Martin's Responsible Party, Brown was acting under the authority delegated to her by Peyton under the General Power of Attorney. Clearly, Peyton *knew and assented* to Brown's action taken on Bobby Martin's behalf and never objected. (TR. 2006 16-17, 29; RE 93-94, 96) (R. at 605; RE 44)). Peyton even testified that she knew Brown was involved and was signing documents on Bobby Martin's behalf and she never told Brown **not** to sign for Mr. Martin or to cease signing; she never told the nursing home not to accept Brown's signature, and she never went to the facility to try to change or renege the documents Brown signed. (TR. 2006 at 15-17; RE 92-94).[4]

However, it was not only Peyton who authorized Brown's actions taken on behalf of Bobby Martin– Mr. Martin himself was aware of Brown's execution of documents on his behalf, and he was comfortable with the same (R. at 808)(RE 71)(TR. 2006 at 29, 38) (RE 96, 105). Brown continued to execute documents throughout his residency, including in 1997, 1998, 1999 and 2001. (TR. 2006 at 36, 38) (RE 103, 105). As such,

---

[4]The Healthcare Power of Attorney listing both Peyton and Brown is further evidence that Mr. Martin intended both of his sisters to have agent authority for his healthcare decisions. This, coupled with the unqualified authority given to Ms. Peyton to delegate her duties to other individuals clearly demonstrates that Ms. Brown had clear agent authority to act on Mr. Martin's behalf.

there can be no question that Ms. Brown acted with nearly unfettered authority with respect to Bobby Martin's residency at LCNC, specifically with respect to the execution of the Admissions Agreement and various other paperwork on her brother's behalf. At no time did Mr. Martin ever object or tell Brown **not** to sign for him (R. at 808) (RE 71) (TR. 2006 at 29, 38) (RE 96, 105).

The 2001 Admission Agreement, executed by Brown, contained a binding arbitration provision which is a separately titled paragraph identified as section "E," which stated:

> E. ARBITRATION
>
> Any controversy, dispute or disagreement arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in (City, State) in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the arbitration, shall be binding not only on all parties to the Agreement, but on any other entity controlled by, in control of or under common control with the party to the extent that such affiliate joins in the arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

(R. at 220) (RE 27). The above arbitration provision was written in clear, unambiguous terms such that it would be easily noticed and easily and understood by anyone reading the Admission Agreement. Acting within the same authority she had been vested with throughout Mr. Martin's residency, Brown executed the Admission Agreement by signing, again, as Mr. Martin's Responsible Party. (R. at 221) (RE 28). By executing the 2001 Admission Agreement, all future disputes, whether raised by her, Mr. Martin, Plaintiff or any other individual or the facility, would be submitted to

arbitration. The 2001 Agreement provided a right of rescission, but Brown never exercised that right[5] nor did Peyton attempt to renege the execution. (TR. 2006 at 17) (RE 94).

In short, Brown admitted that she signed the 2001 Agreement which contains the arbitration clause, but the Plaintiff now attempts to take advantage of the terms of the Admission Agreement, but reject the one portion she no longer finds favorable– the arbitration provision, by ignoring the controlling precedent favoring enforcement of arbitration agreements. However, when examining the current, and now voluminous, precedent in favor of the enforcement of arbitration provisions, it is clear that the trial court erred in denying the Motion to Compel.

SUMMARY OF THE ARGUMENT

With respect to arbitration agreements found within the pages of a Nursing Home Admission Agreement, the Mississippi Supreme Court has found that, if proper, they will be enforced. In so considering, the Mississippi Supreme Court has held that since the arbitration clause is part of a contract (the nursing home admissions agreement) evidencing in the aggregate economic activity affecting interstate commerce, the Federal Arbitration Act is applicable and [the Court should then proceed] with [its] discussion concerning whether the relevant contract and arbitration clause were unconscionable. *Vicksburg Partners, L.P. v. Stephens,* 911 So.2d 507, 516 (Miss. 2005).

---

[5]Paragraph D(2) goes on to state that "Any Party hereto may terminate this Agreement on thirty days written notice and upon discharge of the Resident. . . Additionally, the Resident or Responsible Party may terminate this Agreement at any time during the first business day following the day of execution of this Agreement ("Termination Period") by providing written notice of said termination to the facility. . ." (R. At 220) (RE 27).

In order to determine the enforceability of an arbitration provision, the Court must perform a two-pronged inquiry. *Gulf Ins. Co. v. Neel-Schaffer, Inc.* 904 So.2d 1036, 1042 (Miss. 2004). The first prong, whether the parties agreed to arbitrate the dispute in question, has two considerations: (1) whether a valid written agreement to arbitrate exists; and (2) whether the dispute in issue falls within the scope of the arbitration agreement. *Gulf Ins.*, 904 So.2d at 1042. (Citing *Gatlin,* 848 So.2d at 842). The second prong considers "whether legal constraints external to the parties' agreement foreclose arbitration of those claims." *Id.*

In applying the first prong of the *East Ford* test to the instant case, the Defendants first must demonstrate that the person signing on Mr. Martin's behalf– Brown– had clear authority to do so. In the instant matter, it is clear that Brown possessed actual authority via a Durable Power of Attorney for Healthcare signed by Mr. Martin. Moreover, a General Power of Attorney executed by Mr. Martin named Peyton, his other sister, as his attorney-in-fact and permitted Peyton to delegate her authority to handle Mr. Martin's affairs, including the execution of contracts, to a third party. Peyton, through her clear and consistent actions spanning nearly half a decade, delegated this authority to Brown.

Further, both the actions of Mr. Martin and Peyton, and the reasonable reliance of the facility on these actions, vested Brown with the apparent authority to act on Mr. Martin's behalf. All throughout his residency, Brown signed documents pertaining to Mr. Martin– which signing both Mr. Martin and Peyton were aware of and assented to. As such, when the 2001 Admission Agreement containing the valid and binding arbitration

provision was executed by Brown– just as she had executed numerous documents in the past– the facility, as they had done for years prior without incident, accepted Brown's signature. It is her signature that now binds Mr. Martin, his estate, and his wrongful death beneficiaries to arbitrate the instant claims. As a result of this apparent authority, Mr. Martin is clearly a third party beneficiary to the 2001 Admission Agreement (and, in fact, all of the nursing home documents/ agreements). As a result, the arbitration provision contained therein is directly enforceable.

In addition, to the extent that the Plaintiff may, despite the overwhelming testimony to the contrary, argue that Mr. Martin lacked the capacity to make his own decisions, the arbitration provision remains enforceable. Under Miss. Code Ann. §41-41-211, an adult brother or sister of the patient may act as a surrogate and make healthcare decisions for a nursing home resident. In this instance, in late 2000, a new operator took over the nursing home. In accordance therewith, the operator offered the residents the new 2001 Admission Agreement, which agreement contained more detailed information and additional reciprocal promises than the earlier admission agreements under the former operator. As a result, Brown (with the assent and consent of Peyton and Martin) chose to continue Mr. Martin's residency at LCNC under the new operator and to avail Mr. Martin of this new admission agreement and the additional promises contained therein, including the reciprocal arbitration provision now being disregarded by the Plaintiff, but which, as will be shown through extensive argument, is valid and enforceable.

With respect to the actual language of the Arbitration Provision, it has never been

found to be unconscionable– either procedurally or substantively– by any of the trial court judges. Specifically, the Admission Agreement at issue is six pages long, including signatures. It is logically divided into six (6) principal paragraphs labeled "A" through "F." As stated above, the Admission Agreement contains an arbitration provision in Paragraph "E," styled "ARBITRATION," which is conspicuously contained in the Admission Agreement. All paragraphs are in the same size typeface with the headings in large capital letters, i.e., "E. ARBITRATION." (R. at 220) (RE 27). In fact, Brown was reminded *again* of the arbitration provisions in the final unnumbered paragraph directly above her signature, and, in further support of the arbitration provision's enforceability, Brown had the opportunity to review the Agreement and study its terms, or to let their attorney or others study the terms, with the right to terminate. More specifically, Paragraph F(3) states that "The Resident and Responsible Party availed themselves of the opportunity, if they deemed it desirable, to have had third party advice and legal counsel regarding this Agreement prior to its execution or will during the Termination Period set forth in Article D(2). (R. at 220) (RE 27).

Similarly, the agreement and arbitration clause in this case are not substantively unconscionable. "Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive." *East Ford* v. Taylor, 826 So.2d at 709, 714 (Miss.2002); *United Credit* Corp. v. Hubbard, 905 So.2d 1176, 1179 (Miss.2004) *See also Terminix* Int'l, Inc. v. Rice, 904 So.2d 1051, 1057 (Miss.2004). "This issue can be decided by looking at the plain language of the agreement." *United Credit,* 905 So.2d at 1179.

In the instant case, the parties to the agreement were all "guaranteed the same rights" with respect to the arbitration provision. Each party could equally demand and enforce the provision. In addition, Paragraph D(2) of the Admission Agreement allows for termination of the contract by *either* party. With the right to terminate the agreement, either Party could place itself into the same position it had been before the Admission Agreement had been entered into. As such, the agreement and arbitration provision are substantively conscionable. *See Forest Hill Nursing Center v. McFarland,* – So.2d –, 2008 WL 852581, 2007-CA-00327-COA, ¶ 36 (Miss. Ct. App. April 1, 2008)(". . . the arbitration clause in [the] admission agreement neither significantly alters the legal rights or severely limits the damages available. . . 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.'").

As to the second consideration in the first prong– an arbitrable issue exists. An issue is arbitrable if it falls within the scope of the contract between the parties. The arbitration provision within the 2001 Admission Agreement applies to "[a]ny controversy, dispute or disagreement arising out of or relating to this [a]greement, the breach thereof, or the subject matter thereof..." Providing nursing home care to Bobby Martin was the "subject matter" of the Admission Agreement. Therefore, the claims alleged in Plaintiff's Complaint are arbitrable issues.

Plaintiff's only possibility for avoiding the arbitration provision is to prove that the Admission Agreement is invalid under Mississippi contract law-- "prong two"of the inquiry. See *East Ford*, supra. In this case, however, no defenses are available that would

invalidate this contract. Adhesion goes to the procedural unconscionability of the contract. As will be more clearly set forth in the following argument, the admission agreement and arbitration clause are procedurally conscionable, and thus, Plaintiff's argument is erroneous.

Finally, by executing the 2001 Admission Agreement, Brown bound herself and her sister, as wrongful death beneficiaries, as well as Bobby Martin's Estate, to arbitration of the instant claims. "The United States Supreme Court has held '[i]t is a presumption of law that the parties to a contract bind not only themselves but their personal representatives:" *Brown,* 949 So. 2d at 738 (quoting *United States ex rel Wilhelm v. Chain*, 300 U.S. 31, 35 (1937)). Furthermore, "[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. Dept. of Corrections*, 860 So. 2d 1187, 1192 (Miss. 2003) (citing *Wickline v. U.S. Fid. & Guar. Co.*, 530 So. 2d 708, 715 (Miss. 1988)).

STANDARD OF REVIEW

"The decision to grant or deny a motion to compel arbitration is reviewed by this Court *de novo.*" *Equifirst Corp. v. Jackson*, 920 So. 2d 458, 461 (Miss. 2006) (citing *Doleac v. Real Estate Professionals, LLC*, 911 So. 2d 496, 501 (Miss. 2005)); *see also East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). "This Court has consistently recognized the existence of a 'liberal federal policy favoring arbitration agreements.'" *Terminix International, Inc. v. Rice*, 904 So. 2d 1051, 1054-55 (Miss. 2004) (quoting *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002). Arbitration is firmly embedded in both our federal and state laws. *Pass Termite & Pest Control, Inc. v. Walker*, 904 So. 2d 1030, 1032-33 (Miss. 2004) (citing *Russell*, 826 So. 2d 719; *East*

Ford, 826 So. 2d 709; *and IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998)).

ARGUMENT

THE ARBITRATION PROVISION FOUND IN THE 2001 ADMISSION AGREEMENT IS VALID AND ENFORCEABLE

I. THE FEDERAL ARBITRATION ACT MANDATES THAT PLAINTIFF'S CLAIMS ARE SUBJECT TO ARBITRATION BECAUSE THE "TWO PRONG TEST IS SATISFIED"

Mississippi's preference for arbitration is clear: "[A]greements to arbitrate, and awards thereon, are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and *every reasonable presumption will be indulged in favor of the validity of arbitration proceedings.*" *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So.2d 96, 107 (Miss. 1998)(emphasis added)(quoting *Hutto v. Jordan*, 204 Miss. 30, 36 So.2d 809, 812 (Miss. 1948)). Mississippi public policy favors arbitration, as "Mississippi courts have long observed a policy of favoring agreements to arbitrate." *IP Timberlands,* 726 So.2d at 107.

With respect to arbitration agreements found within the pages of a Nursing Home Admission Agreement, the Mississippi Supreme Court has found that, if proper, they will be enforced. In so considering, the Mississippi Supreme Court has held that since the arbitration clause is part of a contract (the nursing home admissions agreement) evidencing in the aggregate economic activity affecting interstate commerce, the Federal Arbitration Act is applicable and [the Court should then proceed] with [its] discussion concerning whether the relevant contract and arbitration clause were unconscionable.

Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 516 (Miss. 2005). As a result, a court must perform a two-pronged inquiry when deciding whether to grant a motion to compel arbitration. *Gulf Ins. Co. v. Neel-Schaffer, Inc.* 904 So.2d 1036, 1042 (Miss. 2004)(citing *East Ford*, 826 So.2d at 713, *See also Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 841-42 (Miss. 2003) (Cobb, J., dissenting).

The first prong, whether the parties agreed to arbitrate the dispute in question, has two considerations: (1) whether a valid written agreement to arbitrate exists; and (2) whether the dispute in issue falls within the scope of the arbitration agreement. *Gulf Ins.*, 904 So.2d at 1042. (Citing *Gatlin,* 848 So.2d at 842). The second prong considers "whether legal constraints external to the parties' agreement foreclose arbitration of those claims." *Id.* In other words, the second prong looks to see whether any defenses available under Mississippi contract law "may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act." *East Ford,*. 826 So.2d at 713.

A. APPLICATION OF THE FIRST PRONG

1. Ms. Brown Possessed Authority to Execute the 2001 Admission Agreement

In applying the first prong of the *East Ford* test, we first note that it is undisputed that Mr. Martin did not sign the arbitration agreement. As such, the Defendants now offer multiple theories under which the agreement can be enforced: actual authority, apparent authority, third party beneficiary, and health-care surrogate authority. *See Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So.2d 382, 385 (Miss. 2008). Each of these will be discussed in turn.

a. Ms. Brown Had Actual Authority to Sign the 2001 Admission

Agreement Containing the Valid and Binding Arbitration Provision

In the instant case, the paramount issue is whether or not Brown possessed the requisite authority to execute the 2001 Admission Agreement on behalf of her brother, Bobby Martin, so as to bind his estate and wrongful death beneficiaries to arbitrate the instant claims. As will be shown below, the answer is a resounding "yes."

There is no dispute that Mr. Martin vested Peyton with actual authority via a General Power of Attorney, which General Power of Attorney vested Peyton with the clear authority to delegate her powers[6]. This Court addressed the fact that an Arbitration provision does not attach only to one who personally signed the written arbitration provision in *Mississippi Care Center of Greenville v. Hinyub*, 975 So. 2d 211, 216 (Miss. 2008). Although the ultimate outcome in the *Hinyub* case was to deny the enforcement of the arbitration provision, the Court's analysis is helpful in the case at bar. *Citing Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 266 (5th Cir. 2004), the Hinyub Court noted that a non-signatory party may be bound to the arbitration agreement if so dictated by the ordinary principles of contract and agency. *Id.* Accordingly, the Court noted that the resident could be bound by the arbitration provision if the daughter had authority under these general principles of contract and agency. *Id.* Unlike in the *Hinyub* case, the Defendants have offered two durable powers of attorney into the record which clearly give both sisters, Peyton and Brown, the authority to bind Mr. Martin and his estate.

---

[6]The authority flowing from Mr. Martin to Peyton under the General Power of Attorney was actual authority, while the power from Peyton to Brown was, as will be discussed in detail, apparent authority.

To wit, on or about November 1, 1996, Bobby Martin executed a General Power of Attorney which gave Peyton the authority to control Bobby Martin's financial and business affairs and the "full and unqualified authority to delegate any or all of the foregoing powers to any person whom my attorney in fact [Janet Peyton] shall select." (R. at 906-09) (RE 29-32). Undeniable is the fact that the "person" to whom Peyton selected to delegate her authority was her sister, Juanita Brown.

At the time of his admission to LCNC, Mr. Martin discussed his admission with both Peyton and Brown and the rest of his siblings. (R. at 608) (RE 47). In accordance with their decision, Brown signed as Mr. Martin's Responsible Party, admitting him to LCNC. (R. at 212-15) (RE 19-22). During Mr. Martin's residency, Peyton visited her brother every other day and testified that her role was to "ensure that Bobby Martin received the best of care" (TR. 2006 at 11) (RE 90). In addition, Brown also testified that she visited Mr. Martin several times per week. (R. at 604, 802; RE 43, RE 65)). This dual involvement is also reflected in the social history kept by LCNC, which indicated that Mr. Martin was admitted by Brown **and** Peyton. (R. at 2156). Peyton even acknowledged that both she and Ms. Brown were the contact persons for Bobby Martin throughout his residency, meaning that they both could call and ask questions and/or be informed of his status. (R. at 604) (RE 43) (TR. 2006 at 15) (RE 92). Further, both Peyton and Brown had the authority to make healthcare decisions for Mr. Martin as admitted by Peyton, and as confirmed via the Durable Power of Attorney for Healthcare. (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– this act further solidified the fact that Mr. Martin was consenting to Brown making decisions on his behalf. (R. at 910-11) (RE 33-34). This authority is further solidified 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.

As previously referenced, Brown was Bobby Martin's attorney-in-fact pursuant to the authority delegated to her by Peyton through the General Power of Attorney as well as through the 1997 Durable Power of Attorney for Healthcare, both of which were executed by Mr. Martin. (R. at 906-11) (RE 33-34). "Generally speaking, our law regards as valid and enforceable as a power of attorney any written instrument signed by the principal and 'expressing plainly the authority conferred.'" *Kountouris v. Varvaris*, 476 So. 2d 599 (Miss. 1985) (quoting Mississippi Code Annotated § 83-3-7)). "A designated power of attorney is nothing more than one form of a principal-agency relationship." *Clark v. Ritchey*, 759 So. 2d 516, 518 (Miss. Ct. App. 2000) (citing *McKinney v. King*, 498 So. 2d 387, 388-89 (Miss. 1986)).

Brown, acting as her brother's agent, possessed the authority to make decisions for Bobby Martin, which included executing an the 2001 Admission Agreement containing an agreement to arbitrate. Mr. Martin never revoked this authority, either expressly or impliedly. (R. at 808) (RE 71) (T.R. 2006 at 29, 38). Likewise, Peyton never revoked Brown's authority and/or told LCNC to refuse or renege any agreements.

(R. at 212-21; RE 19-28) (R.at 605; RE 44) (TR. 2006 at 16-17, 29) (RE 93-94, 96).

Although no case law is on point in Mississippi, an appellate court in California has upheld an arbitration provision contained within an admission agreement executed by a family member, acting as a resident's attorney-in-fact. In *Hogan v. Country Villa Health Services*, a California appellate court found a resident's designation of her daughter in a durable power of attorney for health care authorized the daughter to enter into a binding arbitration agreement with a nursing home. 148 Cal. App. 4th 259 (2007). The *Hogan* court held the lower court erred in denying the facility's motion to compel arbitration:

> The decedent had signed a Probate Code section 4701 health care power of attorney that authorized her daughter to make health care decisions for her, including the selection of health care providers. This authorization impliedly included the power to execute contracts of admission when having the decedent admitted to a long-term health care facility. ***Inasmuch as the decedent had not elected to restrict the powers of the daughter as her agent so as to exclude the power to enter into arbitration agreements, the daughter had the power to execute arbitration agreements when presented to her by the long-term health care facility as part of the package of admissions documents.***

Id. at 262. (Emphasis supplied). Brown's actions were consistent with authority conferred via the Durable Power of Attorney for Healthcare and as further conferred by Peyton via the General Power of Attorney. Thus, it was error by the trial court to deny arbitration. (R. at 906-11) (RE 29-34).

b. Ms. Brown Had Apparent Authority to Sign the 2001 Admission Agreement Containing the Valid and Binding Arbitration Provision

In addition to the above actual authority held by Brown, she further acted with

apparent authority in entering into the updated 2001 Admission Agreement. A principal will be bound by the acts of an agent under the doctrine of apparent authority 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.'" *Barber,* 2007 WL 2421720, No. 2005-CA-02199-COA (*citing Eaton v. Porter,* 645 So.2d 1323, 1325-26 (Miss. 1994)(citations omitted).

An agent is one who stands in the shoes of his principal; he is his principal's alter ego. *Bailey v. Worton*, 752 So. 2d 470, 474 (Miss. Ct. App. 1999). An agent is one who acts for and in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by his authority. *Id.* In *Bailey,* the Mississippi Court of Appeals further explained:

> This Court has defined apparent authority and found that the extent to which it binds the principal is predicated upon the perception of the third party in his dealings with the agent:
>
> Apparent authority exists when a reasonably prudent person, having knowledge of the nature and the usages of the business involved would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have.

Id. (quoting *Eaton v. Porter*, 645 So. 2d 1323, 1325 (Miss. 1994)).

i. The Acts and Conduct of Mr. Martin and Peyton Evidence that Brown was authorized to Act on Behalf of Mr. Martin

As previously stated, the 2001 Admission Agreement containing the provision to arbitrate now before the Court was executed by Brown, who acted with express and implied authority from both Bobby Martin and Peyton. (R. at 216-

21) (RE 23-28). The testimony of Peyton and Brown– elicited both at their respective depositions and at the live, March 10, 2006, hearing– evidences a clear intent to permit Brown to sign documents and make decisions on behalf of Mr. Martin.

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 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 Ms. 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). Instead, Peyton continued to allow Brown to be involved in Mr. Martin's affairs.

Both Peyton and Brown signed hospital papers and financial agreements on behalf of Mr. Martin. (R. at 604; RE 43) (TR. 2006 at 17-18; RE 94-95). Likewise, both Peyton and Brown were the contact persons for LCNC, meaning that they could **both** call and ask questions and be informed of his status. Moreover, **both** were involved in the admission process, and **both** had the authority to make healthcare decisions on Mr. Martin's behalf. (R. at 603-604) (RE 42-43) (TR.

2006 at 15, 18) (RE 92; 95). Moreover, both Peyton and Brown testified that Mr. Martin and Peyton were aware of the actions that Brown was taking on behalf of Mr. Martin during his residency at LCNC. 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);

Brown, supporting Peyton's earlier testimony, 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).

It in anticipated that Plaintiff's counsel may argue, as he did at the hearing that, contrary to the testimony of Peyton Brown, that Mr. Martin lacked the capacity to consent or authorize Brown's actions. However, the testimony of Brown and Peyton, who saw their brother almost daily at the nursing home, demonstrates otherwise. Peyton spoke to her brother regarding his admission to LCNC and he knew that he was being admitted and was agreeable to the same. (R. at 601) RE 40). During his admission to LCNC, Peyton would "read to [Mr. Martin], and he never stopped . . . thinking for himself. . . . He could always comprehend whatever." (R. at 609) (RE 48). Further, Mr. Martin retained his sense of thought, which sense did not change any before he passed away. (R. at

602) (RE 41). Brown, who visited her brother three to four times a week, likewise felt that Mr. Martin's ability to think was good, even up to the time that he passed away. (R. at 802) (RE 65). As a result, Mr. Martin's actions in permitting Brown to sign on his behalf were knowing and willful.

In summary, Brown's signing numerous nursing home documents on behalf of Bobby Martin was done with the consent and knowledge of both Mr. Martin and Peyton and, more notably, without the objection of either.

ii. LCNC Reasonably Relied, to its Detriment, on Brown's Actions

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, 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. Mr. Martin accepted the terms of the documents Brown executed, including the 2001 Admission Agreement, by not objecting to the same, receiving health care from the Facility, and through his conduct allowing 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.

(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 contemporaneous with her signing the first Admission Agreement clearly demonstrates his entrustment of Brown and her decisions and supports LCNC's actions in relying upon Br. (R. at 212-16; RE 19-23; (910-11; RE 33-34).

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 and 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 LCNC on his behalf. LCNC, acting reasonably and in good faith, believed Ms. Brown possessed authority to make decisions on behalf of her brother. It has been recognized that to allow a plaintiff to claim the benefit of a contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Federal Arbitration Act. *Mississippi Fleet Card, LLC v. Bilstat, Inc.*, 175 F. Supp. 2d 894, 903 (S.D. Miss. 2001). As such, Brown's actions in agreeing to and signing the contract as her brother's Responsible Party created an express agency, or alternatively, an implied agency was created and was a relationship LCNC could rely upon to request Brown to execute documents on behalf of Mr. Martin.

American Jurisprudence, 2d Edition explains the creation of an express or implied agency:

> While the creation of an agency relationship, so far as the principal and agent are concerned, arises from their consent and usually as the result

> of contract, it is not essential that the actual contract exist. The agency and the assent of the parties thereto may be either express or implied. Further, an agency may be informally created.
>
> An express agency is an actual agency created as a result of the oral or written agreement of the parties, and the implied agency is also an actual agency, the existence of which as a fact is proved by deductions or influence from the other facts and circumstances of the particular case, including words and conduct of the parties.

3 Am. Jur. 2d Agency § 16 (2004).

It is clear that Mr. Martin and Peyton were aware that Ms. Brown was signing documents on Mr. Martin's behalf at the time of, and after, placing him into the nursing home. At no time did Mr. Martin or Peyton tell the facility or Ms. Brown that she was no longer permitted to act on his behalf. (TR. 2006 at 16-17, 29) (RE 93-94, 96). Clearly, both Mr. Martin and Peyton continually permitted Brown to sign agreements and make decisions on his behalf and assented the actions taken by her without any objections or any attempts to renege 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). Since the facility reasonably relied on these representations, and, in reliance thereupon, continued to contact and work with Brown and continued to provide services in accordance with the documents executed, Defendants are now entitled to enforcement of the arbitration provision contained in the 2001 Admission Agreement as executed by Brown.

c. Bobby Martin was a Third Party Beneficiary to the Admission Agreement

The third-party beneficiary doctrine can be relied upon where the signatory has been vested with apparent authority. *Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So.2d 382, 385 (Miss. 2008). As discussed above, Ms. Brown was clearly vested

with ample authority such that the third-party beneficiary analysis is fully applicable.

"'[A]rbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary." *Barber*, – So.2d– , 2007 WL 2421720, No. 2005-CA-02199-COA at ¶ 21 (quoting *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006)). This Court has held that, with regard to a third-party beneficiary – such as Bobby Martin– to a contract:

> 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 promisee 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 Savings., 251 Miss. 789, 171 So. 2d 322, 325 (Miss. 1965).

In *Barber*, the Mississippi Court of Appeals held, in analyzing a resident's admission to a nursing home:

> 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*, 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.

Barber, 2007 WL 2421720, No. 2005-CA-02199-COA at *6.

In the instant matter, it is without question that the Admission Agreements executed by Brown were for the services, care and treatment to be provided to Mr. Martin by the nursing home facility, and as such, were for the benefit of Mr. Martin. The 1997 Admission Agreements were both very short, nearly identical agreements (one was Medicare Agreement, the other, Medicaid) that very briefly outlined the reciprocal responsibilities of the facility and the Responsible Party. (R. at 212-15) (RE 19-22). When the 2001 Admission Agreement was presented, it was far more comprehensive, outlining the reciprocal duties in greater detail and placing additional duties on the facility than the previous Admission Agreements. (R. at 216-21) (RE 23-28).

The 2001 agreement related to how the resident would be cared for. It specifically set out how payment would be made, and it set out, in detail, the facility's responsibilities. The 2001 agreement imposes a duty upon an entirely different entity than the 1997 agreement, in that the 2001 agreement binds Monticello Community Care, as opposed to Lawrence County Nursing Center. Clearly, that distinction is relevant, as it is Monticello Community Care Center that is the party to these very proceedings, as opposed to Lawrence County Nursing Center.

Further, the 2001 agreement addresses, specifically, the duties that the facility agrees to undertake vis-a-vie the resident, whereas the 1997 agreement offers general and vague provisions. For example, in section "B," paragraph 2, of the 2001 agreement, the facility agrees to:

> "orient the Resident to the Facility, its services and personnel, the type and level of nursing home care given and the rights and privileges of the Resident and the

> Responsible Party [, and] to help the resident become acquainted with their surroundings and to make available a program of recreation/social activities".

The 1997 agreement has no such counterpart. Instead, in the 1997 agreement, the facility only agrees :

> "to furnish room, board, linens and bedding, nursing care, and such personal services as may be required for the health safety, and well-being of the resident."

Clearly, the 2001 agreement places upon the facility a greater and more specific duty regarding its responsibility to its residents. Moreover, the 2001 Agreement, section "B," "paragraph 5" requires family notification under numerous circumstances. (R. at 216-21) (RE 23-28). The 1997 agreement only requires family notification if the resident is transferred to a hospital. (R. at 212-215) (RE 19-22). Notably, however, is the fact that in both the 2001 Admission Agreement and the earlier 1997 Agreements, Brown is listed, and signed as, Mr. Martin's Responsible Party. (R. at 212-221) (RE 19-28).

As such, based on the language of the 2001 Admission Agreement executed by his Responsible Party, Brown, Mr. Martin became a third party beneficiary of the Admission Agreements. Thus, as articulated by the Court in *Barber*, Mr. Martin should be "bound by the arbitration provision contained in the admission agreement, notwithstanding [his] status as a non-signatory to the agreement." *Id.* at ¶ 26. It follows that Mr. Martin's wrongful death beneficiaries, as in *Barber*, are likewise bound as wrongful death suits are "derivative action[s] by the beneficiaries, and those beneficiaries, therefore, stand in the position of their decedent." *Id.* at ¶ 2. (citation omitted). Further, the Court of Appeals has held that arbitration provisions in amended admission agreements are valid and enforceable under the third party beneficiary

analysis. *Trinity Mission Health and Rehabilitation of Clinton v. Scott,* – So.2d –, 2007 WL 73682, No. 2006-CA-01053-COA (Miss. Ct. App. January 8, 2008).

d. Ms. Brown had Statutory Authority to Act on Behalf of Bobby Martin

As Plaintiff's counsel attempted to argue at the hearing, it is anticipated that Plaintiff will contend that, despite the overwhelming testimony to the contrary, Mr. Martin lacked the capacity to make his own decisions. (T.R. July and November 2007). If so, even without a power of attorney, under Miss. Code Ann. §41-41-211, an adult brother or sister of the patient may act as a surrogate and make healthcare decisions for the patient. "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). By enacting this Statute, the Legislature recognized Mississippi citizens would be subjected to unnecessary expense, delay and bureaucratic red tape if family members were required to seek judicial approval prior to entering into contracts concerning the health care of their loved ones. Rather than allow that scenario to play out, the Legislature codified the ability of health care surrogates, like Brown, to enter into contracts such as the one before the Court.

In *Covenant Health & Rehab of Picayune, LP v. Brown*, the Court applied the Statute in the long-term care context, finding a surrogate had the power to enter into a contract requiring the resident arbitrate any claims he may have arising out of the

treatment while at the Facility. 949 So. 2d 732, 737 (Miss. 2007). The Court found a health care surrogate's signature on a contract containing an arbitration agreement dictated any dispute arising out of that contract be submitted to binding arbitration. *Id.* at 742.

Based upon the clear language of the Statute, as well as the Court's ruling in *Brown*, it is clear that Brown acted as her brother's health care surrogate throughout his residency at LCNC. She stepped into this role and contractually bound him in matters of health care, including the agreement to arbitrate "any controversy, dispute or disagreement arising out of or relating to" his residency at LCNC. (R. at 220) (RE 27).

Brown acted as Mr. Martin's Responsible party, with authority, in December of 1997 when Peyton and Mr. Martin decided, together, that Mr. Martin was to be placed at LCNC. All decisions made by Brown were done in accordance with, and under the authority of §41-41-211 and 41-41-203(h). As part of the selection of LCNC, Brown was required to execute an Admission Agreement before Mr. Martin could be admitted to LCNC. Min. Std §404.3. Thus, Brown clearly had the authority to execute the Admissions Agreement under state law. Under this same statute, Brown had the authority to execute the 2001 Admission Agreement with the new nursing home operator and Defendant herein–she had the authority to decide to continue Mr. Martin's residency under the control of another operator, Monticello Community Care Center, LLC., a defendant herein. Further, under federal law, Brown also had authority to exercise her brother's Resident Rights. 42 C.F.R. 483.10(a)(4). Part of those rights was the right to execute the 2001 Admission Agreement, which contract provided for arbitration to be the

sole method of dispute resolution among the parties. *See,* Admission Agreements dated 1997 and 2001. (R. at 212-221) (RE 19-28).

2. The Arbitration Provision on Its Face is Valid and Enforceable[4]

Now that it has been established that Brown possessed the requisite authority to execute the 2001 Admission Agreement, the inquiry now turns to the agreement itself and the language contained therein to determine whether a valid agreement to arbitrate exists and whether this dispute falls within the scope of the arbitration provision.

a. The Arbitration Provision is Conscionable

The Admission Agreement at issue is six pages long, including signatures. It is logically divided into six (6) principal paragraphs labeled "A" through "F." As stated above, the Admission Agreement contains an arbitration provision in Paragraph "E," styled "ARBITRATION," which provides:

> E. ARBITRATION
> Any controversy, dispute or disagreement arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in (City, State) in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the arbitration, shall be binding not only on all parties to the Agreement, but on any other entity controlled by, in control of or under common control with the party to the extent that such affiliate joins in the arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

---

[4]With respect to the provision regarding recoupment of fees for having to move to enforce the arbitration, Defendants conceded that such provision is specifically not enforceable and do not seek enforcement of that particular provision. *Covenant Health Rehab of Picayune, LP,* 949 So.2d 732, 739 (Miss. 2007).

(R. at 220) (RE 27).

Plaintiff is bound to abide by the Admission Agreement and the provisions contained therein as evidenced by the signature of Brown – as Responsible Party -- under the paragraph which states:

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

(R. at 221) (RE 28).

The agreement in this case is both valid and binding on all parties. As such, it is both procedurally and substantively conscionable. "Procedural unconscionability may be prove[n] by showing 'a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in the 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. *See also Russell,* 826 So.2d at 725; *Terminix*, 904 So.2d at 1056; and *United Credit Corp. v. Hubbard,* 905 So.2d 1176, 1178-79 (Miss. 2004). Substantive unconscionability may be proven by "showing the terms of the arbitration agreement to be oppressive." *East Ford*, 826 So.2d at 714; *United Credit,* 905 So.2d at 1179; *See also Terminix,* 904 So.2d at 1057. Plaintiff cannot prove unconscionability; the agreement, on its face, demonstrates a conscionable agreement. (R.at 1639-49).

The fact that Brown signed an Admission Agreement containing the arbitration

provision is undisputed. (R. at 605; RE 44)) (R. at 805; RE 68)). Having signed the agreement, it will not be heard to complaint the she had know knowledge of the arbitration provision. *Barber*, – So.2d –, 2007 WL 2421720, No. 2005-CA-02199-COA at ¶ 37, *citing MS Credit Center, Inc. v. Horton,* 926 So.2d 167, 177 (Miss. 2006). Consequently, since Brown signed the admission agreement, she voluntarily acknowledged the terms contained there, including the arbitration provision. *See United Credit,* 905 So.2d 1178. Thus, by signing the agreement, Ms. Brown is prohibited under Mississippi law from arguing lack of knowledge and/or lack of opportunity to study the contract and inquire about the contract terms.

In *Vicksburg Partners,* the Court discussed the conscionability of a nursing home arbitration agreement, examining the language thusly:

> [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.

Vicksburg Partners, 911 So.2d at 520; *Barber*, – So.2d– , 2007 WL 2421720, No. 2005-CA-02199-COA at ¶ 21

In this case, as shown above, there is no inconspicuous print in the Admission

Agreement. All paragraphs are in the same size typeface with the headings in large capital letters, i.e., "E. ARBITRATION." (R. at 220) (RE 27). In fact, Brown was reminded *again* of the arbitration provisions in the final unnumbered paragraph directly above her signature which states, in all capital letters: "THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS AGREEMENT, INCLUDING THE ARBITRATION PROVISION . . . AND THAT EACH OF THEM VOLUNTARY CONSENTS TO AND ACCEPTS ALL OF ITS TERMS." (R. at 220) (RE 27). The agreement and the arbitration clause are clear and conspicuous. Thus, the arbitration clause is clearly not procedurally unconscionable.

In further support of the arbitration provision's enforceability, Brown had the opportunity to review the Agreement and study its terms, or to let their attorney or others study the terms, with the right to terminate. More specifically, Paragraph F(3) states that "The Resident and Responsible Party availed themselves of the opportunity, if they deemed it desirable, to have had third party advice and legal counsel regarding this Agreement prior to its execution or will during the Termination Period set forth in Article D(2). (R. at 220) (RE 27). Further D(2) provides the resident and/or responsible party the choice to terminate the agreement and/or execute a later, different agreement. Specifically:

> Any Party hereto may terminate this Agreement on 30 days written notice and upon discharge of the Resident. Otherwise, this Agreement will remain effective until a different agreement is executed or discharge of the Resident. This article shall not mean that the Resident will be forced to remain in the Facility against his/her will for any length of time. Additionally, the Resident or Responsible Party may terminate this Agreement anytime during the first business day following the day of execution of this

> Agreement ("Termination Period") by providing written notice of said termination to the Facility, paying all amounts then due and by discharging the Resident. Notwithstanding any other provisions set forth herein, the hold harmless and Indemnification provisions set forth in this Agreement shall survive the termination for any reason of this Agreement.

In summary, Ms. Brown and Ms. Peyton chose to initially place, and continue to leave Bobby Martin at LCNC. Mississippi law charges Ms. Brown with reading and understanding the clear, direct, and concise language of the six-page Admission Agreement. Further, the arbitration provision is clearly visible to anyone reading the agreement. The agreement and the Arbitration provision are undoubtedly procedurally conscionable. *Vicksburg Partners,* 911 So.2d at 516-21; *Barber*, –So.2d –, 2007 WL 2421720, No. 2005-CA-02199-COA at ¶ 32-39.

Similarly, the agreement and arbitration clause in this case are not substantively unconscionable. "Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive." *East Ford*, 826 So.2d at 714; *United Credit*, 905 So.2d at 1179; *See also Terminix*, 904 So.2d at 1057. "This issue can be decided by looking at the plain language of the agreement." *United Credit,* 905 So.2d at 1179.

In our case, as in *United Credit*, the parties to the agreement were all "guaranteed the same rights" with respect to the arbitration provision. Each party could equally demand and enforce the provision. In addition, Paragraph D(2) of the Admission Agreement allows for termination of the contract by *either* party. With the right to terminate the agreement, either Party could place itself into the same position it had been before the Admission Agreement had been entered into. As such, the agreement and arbitration provision are substantively conscionable. *See Forest Hill Nursing Center v.*

McFarland, – So.2d –, 2008 WL 852581, No. 2007-CA-00327-COA, ¶ 36 (Miss. Ct. App. April 1, 2008)(". . . the arbitration clause in [the] admission agreement neither significantly alters the legal rights or severely limits the damages available. . . 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.'").

b. Complaint fall within the scope of the arbitration agreement[5].

As to the second consideration in the first prong– an arbitrable issue exists. An issue is arbitrable if it falls within the scope of the contract between the parties. The arbitration provision within the 2001 Admission Agreement applies to "[a]ny controversy, dispute or disagreement arising out of or relating to this [a]greement, the breach thereof, or the subject matter thereof..." Providing nursing home care to Bobby Martin was the "subject matter" of the Admission Agreement. Therefore, the claims alleged in Plaintiff's Complaint are arbitrable issues.

B. APPLICATION OF THE SECOND PRONG: There are no legal constraints external to the agreement to foreclose arbitration

Plaintiff's only possibility for avoiding the arbitration provision is to prove that the Admission Agreement is invalid under Mississippi contract law-- "prong two"of the inquiry. See *East Ford*, supra. In this case, however, no defenses are available that would invalidate this contract. Adhesion goes to the procedural unconscionability of the contract. As clearly shown above, the admission agreement and arbitration clause are procedurally conscionable, and thus, Plaintiff's argument is erroneous.

[5]It should be noted that none of the lower Courts ever ruled that the language of the Arbitration Provision was unconscionable. However, as this Court's review is de novo, Defendants' earlier argument is reasserted herein for clarity and continuity.

The facts of the case clearly support that this was not a contract of adhesion. Brown initially placed Bobby Martin at Lawrence County Nursing Home in 1997, and in 2001, Brown and Peyton chose to continue Mr. Martin's residency at Lawrence County Nursing Home under the hands of a new operator, Monticello Community Care Center, LLC., a defendant herein. The Plaintiff and her sister could have easily chosen another facility to provide care for Bobby Martin, but *chose* not to do so. *See Terminix*, 904 So.2d 1051. Certainly if Lawrence County Nursing Home was providing substandard care, it would make sense that Brown and Peyton would not continue to leave Bobby Martin at the facility. This is further bolstered by the fact that Mr. Martin's sister, Brown, did, in fact, sign a second admission agreement, the 2001 Admission Agreement, and thereby consented to arbitrate any disputes. Again, the Admission Agreement states in Paragraph F(3) that the Resident and Responsible Parties sought legal advice if they deemed it desirable. There exist no "legal constraints external to the parties' agreement [that would] foreclose arbitration" of Plaintiff's claims in this action. (R. at 220). As such, the trial court's denial of arbitration was in error and should be reversed.

II. MR. MARTIN'S ESTATE AND WRONGFUL DEATH BENEFICIARIES ARE BOUND BY THE ARBITRATION PROVISION

By executing the updated 2001 Admission Agreement, Brown bound herself and her sister, as wrongful death beneficiaries, as well as Bobby Martin's Estate, to arbitration of the instant claims. "The United States Supreme Court has held '[i]t is a presumption of law that the parties to a contract bind not only themselves but their personal representatives:" *Brown,* 949 So. 2d at 738 (quoting *United States ex rel Wilhelm v. Chain*, 300 U.S. 31, 35 (1937)). "This Court has held that arbitration agreements specifically are not invalidated by the death

of a signatory and may be binding on successors and heirs if provided in the agreement." *Id.* (citing *Cleveland v. Mann*, 942 So. 2d 108, 118 (Miss. 2006)). Furthermore, "[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. Dept. of Corrections*, 860 So. 2d 1187, 1192 (Miss. 2003) (citing *Wickline v. U.S. Fid. & Guar. Co.*, 530 So. 2d 708, 715 (Miss. 1988)). Further "because [Mr. Martin's] claims would have been subject to arbitration, the claims of his wrongful death beneficiaries [and Estate] are likewise subject [to] the arbitration provision. *Barber*, 2007 WL 2421720, No. 2005-CA-02199-COA.

CONCLUSION

Brown and Peyton certainly took special care of their brother, Mr. Martin– from allowing him to live in Peyton's home, to the sisters' ensuring that Mr. Martin was placed at LCNC and seeing to it that he received the "best care." In conjunction with that special care, Peyton and Brown worked closely with LCNC to admit Mr. Martin and to handle his affairs.

Brown was very involved in Mr. Martin's affairs during his residency at LCNC. She signed most, if not all, of the documents during his 4 and a half year residency, including all of the admission agreements. Brown has the actual and apparent authority allowing her to sign those documents and to bind Mr. Martin and his Estate through the Durable Power of Attorney for Healthcare, Peyton's delegation of authority through the General Power of Attorney, and by the conduct and actions of both Peyton and Mr. Martin.

It is undisputed that both Peyton and Brown were Mr. Martin's Responsible Party and contact persons for LCNC, and that both had authority to make healthcare decisions for Mr. Martin. It is also undisputed that prior to his residency at LCNC, Mr. Martin executed a General Power of Attorney naming Peyton, his other sister, as his attorney-in-fact and permitting Peyton to delegate her authority to handle Mr. Martin's affairs, including the execution of contracts, to a third party.

Although Plaintiff now contends, in an effort to strike the provision, that Peyton never delegated any authority to Brown, Peyton's conduct demonstrating the conveyance is undisputed. It is undisputed that Peyton was aware that Brown was signing documents on behalf of Mr. Martin, even the 2001 Admission Agreement in issue, that Peyton never objected to Brown doing so, and that Peyton never contacted the facility to stop them from seeking Brown's signature on the documents and/or to renege the documents already signed by Brown. It is also undisputed that Mr. Martin appeared to be comfortable with Brown's execution of the documents and that he never object to her doing so.

In accordance with the authority granted by Mr. Martin, and as delegated by Peyton, Brown signed the initial paperwork to admit Mr. Martin to LCNC and signed additional documents throughout his residency in 1997, 1998, 1999 and 2001. When a new operator assumed the helm of the facility, Brown, executed a new admission agreement– this 2001 Admission Agreement provided more detailed benefits to the residents and contained a binding arbitration provision. As with all the documents signed by Brown before the 2001 Admission Agreement, neither Mr. Martin nor Peyton objected to the signature of Brown nor ever attempted to renege the documents. In other words,

Mr. Martin continued to take advantage of the benefits of the documents and agreements, and, it was not until after his death that Peyton took any issue with any provisions of any documents signed by Brown.

Since the arbitration provision was conscionable, and since Brown was vested with clear authority to execute the admission agreement on Mr. Martin's behalf, the Circuit Court erred in denying Defendants Motion to Compel arbitration. As such, and 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 remand this case to proceed with arbitration.

Respectfully submitted this the 25 day of July, 2008.

Lynda C. Carter, MSBN [redacted]
Nicole C. Huffman, MSBN [redacted]
Mary Margaret Waycaster
Attorneys of Record for Appellant,
Monticello Community Care Center,
LLC

John A. Stassi, II [redacted]
Attorney of Record for
Comm-Care Mississippi

CERTIFICATE OF FILING

I hereby certify that I, Nicole Huffman, Counsel for the Appellants, on this the 25th day of July, 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' Brief;

Four (4) copies of Appellants' Record Excerpts; and

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

Nicole Huffman

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:

The Honorable Prentiss G. Harrell
15 St. Martin
Hattiesburg, MS 39402

F.M. Turner, Esq.
P. O. Box 15128
Hattiesburg, MS 39404-5128

John Stassi, Esq.
601 Poydras, Suite 2755
New Orleans, LA 70130

Mary Margaret Waycaster
James P. Streetman, III
SCOTT, SULLIVAN, STREETMAN & FOX, P.C.
725 Avignon Drive
Ridgeland, Mississippi 39157

This the 25 day of July, 2008.

NICOLE HUFFMAN