IN THE SUPREME COURT OF MISSISSIPPI

Case No.: 2007-TS-01250

Covenant Health and Rehabilitation of Picayune, LP; Covenant Dove, Inc.; and Unidentified Entities 1 through 10 (as to Picayune Convalescent Center, now known as Covenant Health and Rehabilitation Center of Picayune) — APPELLANTS

v.

Estate of Mittie M. Moulds, by and through James Braddock, Administrator, for the use and benefit of the Estate and Wrongful Death Beneficiaries of Mittie M. Moulds — APPELLEES

REPLY BRIEF OF APPELLANTS

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I. A Health Care Surrogate Has the Authority to Execute an Admission Agreement Containing Agreement to Arbitrate

The Plaintiff incorrectly claims no one with legal capacity to bind the Plaintiff executed the admission agreement. Disregarding the fact that Mittie Moulds (sometimes hereinafter referred to as "Moulds") signed the agreement herself – and that the Plaintiff has not met the burden of proving her incompetence – James Braddock (sometimes hereinafter referred to as "Braddock") had the statutory authority under Miss. Code Ann. § 41-41-211 to agree to arbitrate any claims which arose out of his mother's residency at Covenant Health and Rehab of Picayune, LP. The Plaintiff conceded both before the trial court and on appeal that Braddock acted as Moulds' health care surrogate pursuant to the statute. (R. at 70; App. Brief Pg. 3).

The Defendants, in their principal brief, quoted at length from two Mississippi Supreme Court cases which have analyzed the exact agreement at issue in the instant case – *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507 (Miss. 2005), and *Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007). The Plaintiff claims these cases are distinguishable from the instant case in that the arbitration provision was not part of the consideration for Moulds' admission to the facility. While the Defendants will address this issue more fully below, the Defendants would state to the Court that the admission agreements – and the facility's policy against requiring accession to the arbitration provision as a condition of admission – are the exactly the same in *Stephens* and *Brown* and in the instant case.

The Plaintiff also argues that the execution of an admission agreement containing

an arbitration agreement is not within the authority of health care surrogate – apparently requesting that this Court overturn *Covenant Health and Rehab, L.P. v. Brown*. However, both the Mississippi legislature and the Mississippi Supreme Court have indicated that health care surrogates can enter into contracts to bind patients. 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). Despite this provision, the Plaintiff complained at the trial court level that allowing a health care surrogate to do what an appointed guardian or conservator could not is "patently absurd." In the Defendants' view, the absurd result would be to permit a surrogate to make decisions about whether a patient receives potentially life-saving medical treatment – such as through a do not resuscitate order – but to not permit them to enter into contracts giving effect to their health care decisions. The Supreme Court also ruled that health care surrogates have the power to enter into a contract which requires the resident to arbitrate any claims she may have which arise out of the treatment. *Brown*, 949 So. 2d at 737. The Supreme Court stated a health care surrogate's signature on a contract containing an arbitration agreement dictates that any dispute arising out of that contract be submitted to binding arbitration. *Id.* at 742. Therefore, pursuant to Mississippi statutes and case law, James Braddock possessed the authority to enter into an arbitration agreement on behalf of his mother, Mititie Moulds.

II. The Contract Does Not Fail for Lack of Consideration

The Plaintiff wrongly claims the arbitration clause is not supported by consideration. The Plaintiff relies on the fact that agreement to arbitrate is not required to gain admission to the facility. The parties entered into an agreement wherein the facility agreed to provide

health care, living assistance and domicile in return for payment. One of the terms of the agreement was the provision of an alternative forum for the speedy and cost-effective resolution of any disputes which arose from the residency. Just because a patient is not *required* to agree to arbitration does not mean it is not a valid part of the contract to by the facility and Moulds and Braddock. If that were true, **any** negotiable term in a contract would fail for lack of consideration if a party attempted to enforce it. Obviously, that would undermine the enforceability of most contracts. The Defendants suggest the bargained for arbitration agreement contained within the contract executed by both Mittie Moulds and James Braddock should be enforced.

The Plaintiff next claims the execution of an agreement on April 24, 2002, somehow changes the authority Braddock possessed as a health care surrogate to enter into a contract for the provision of health care to his mother.[1] The Plaintiff's suggestion the April 24, 2002, agreement is void is strange; obviously, parties to a contract can agree to new terms and execute a document memorializing their agreement. The Defendants provided the same consideration they offered in November 16, 2000, agreement – primarily health care, living assistance, and domicile. If there was sufficient consideration for the formation of a contract when the parties agreed to the November 16, 2000, agreement – and the Mississippi Supreme Court and the Court of Appeals of the State of Mississippi have previously ruled the provision of these services was sufficient in *Stephens*, *Brown*, and *Barber* – then there is adequate consideration to support the formation of a contract with

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[1]When Moulds was admitted on November 16, 2000, Braddock executed the admission agreement containing the arbitration provision. On April 24, 2002, both Braddock and Moulds executed another agreement.

the April 24, 2002, agreement. In any event, even if the April 24, 2002, agreement were void, Braddock, acting as health care surrogate, agreed to arbitration in the clearly valid November 16, 2000, agreement. Both Braddock and Moulds validly executed the contract which provided for the arbitration of any disputes which arose during Moulds' residency.

III. Mittie Moulds and James Braddock Were Not Fraudulently Induced to Enter into the Contract

The Plaintiff makes a similarly curious argument that Moulds and her health care surrogate were induced by fraud to sign the contract. The basis for this statement apparently is the inclusion of the arbitration provision in the admission agreement while making it clear that agreeing to same was not a condition of admission. However, the premise upon which this claim is based is flawed; nowhere in the contract – or anywhere in the record – is there any proof that the facility represented that agreeing to the arbitration provision was a necessary part of the admission process. The Plaintiff cites section D.1, D.2, D.3, and D.4 as fraudulent statements intending to influence Moulds and Braddock to execute the contract. (App. Brief Pg. 12-13). Nowhere in these provisions is there any suggestion that agreeing to arbitrate is a requirement of admission. Section D.1 simply requires the parties to "read and complete the agreement" prior to being admitted. (R. at 64). Section D.2 provides that either party may terminate the contract with thirty (30) days notice. (R. at 64). Section D.3 allows the facility to discharge a resident if she represents a threat to herself and others or if the facility is unable to properly care for the resident. (R. at 64). Finally, section D.4 simply provides that terms of the contract will be enforceable upon the estate of the resident if she were to die. (R. at 64). If the Plaintiff's scenario is accepted, many printed contracts which include terms that were negotiable would

constitute fraudulent representations. Such tortured reasoning is repugnant to basic contract law and would open a great number contracts to attack and recision.

In any event, the Plaintiff's argument is not relevant at this stage as such a determination is properly made by an arbitrator. In *Holman Dealerships, Inc. v. Davis*, the plaintiffs claimed they were fraudulently induced to purchase an automobile. 934 So.2d 356, 357 (Miss.App. 2006). The plaintiffs claimed this fraudulent inducement meant they were entitled to avoid the agreed upon arbitration clause and proceed with their claim in circuit court. The Court held "the [plaintiffs] have not attacked the validity of the arbitration agreement. Instead, their attack is upon the fraudulent representations made to induce them to contract with [the defendant], and the failure to receive that for which they bargained and contracted. These things fall squarely within the scope of the arbitration agreement." *Id.* at 358. Similarly, in the instant case, the Plaintiff attacks the supposed fraudulent representations in the hope such will allow them to void the contract Moulds and Braddock signed. This argument was rejected by the *Holman* Court. "Because the fraudulent misrepresentation argument goes to the merits of the underlying dispute, the trial court should have ordered the claim to be submitted to arbitration. The court's decision to deny the motion to compel arbitration was in error." *Id.* Just as in the *Holman* case, the proper method for analyzing the Plaintiff's claims of fraudulent inducement is to refer such claims to an arbitrator.

IV. The Arbitration Agreement Is Not Substantively Unconscionable

The Plaintiff's next argument is that the instant contract is substantively unconscionable – despite the fact that this argument has been resoundingly rejected by

the Mississippi Supreme Court. To determine whether a contract is substantively unconscionable, a court should look within the four corners of the agreement in order to discover whether there are any terms which violate the expectations of, or cause gross disparity between, the contracting parties. *Stephens*, 911 So.2d at 521. In *Stephens* and *Brown*, the Mississippi Supreme Court examined the four corners of the same arbitration agreement at issue in the instant case and required the parties to submit to binding arbitration. *Id.* at 525; *Brown*, 949 So.2d at 742.

In reviewing the very arbitration agreement at issue in the case at bar, the *Stephens* opinion stated:

> **The arbitration clause in today's case is not oppressive.** It provides [the Plaintiff] with a fair process in which to pursue her claims. Moreover, it is typical of arbitration clauses endorsed by the [Federal Arbitration Act] and is conscionable because it bears "some reasonable relationship to the risks and needs of the business."

Id. at 521 (emphasis added) (citations omitted). The Court went on to state: "**[w]ithout doubt, the arbitration provision contained in the body of the parties' admissions agreement is enforceable**. It merely provides for a mutually agreed-upon forum for the parties to litigate their claims and is benign in its effect on the parties' ability to pursue potential actions." *Id.* at 522 (emphasis added). Restated, only the contract itself may be assessed to determine substantive unconscionability. The Mississippi Supreme Court has reviewed this exact agreement and found it substantively conscionable. Therefore, as a matter of law, this agreement is substantively conscionable.

The Plaintiff cites *Pitts v. Watkins*, 905 So.2d 553 (Miss. 2005), as support for his assertion that the Admission Agreement is substantively unconscionable. The Plaintiff

claims the provisions in the instant case and those in *Pitts* are "strikingly similar." However, the Plaintiff ignores the clear language of the Mississippi Supreme Court in *Stephens*. The Supreme Court stated the *Pitts* decision was "clearly distinguishable" from the substantive unconscionability analysis done regarding the *Stephens* admission agreement – which, again, contained the exact arbitration terms, limitations on recovery, and other purportedly unconscionable contractual restrictions as the case at bar. The Supreme Court stated, "[t]he language in the arbitration clause in today's case pales in comparison to the oppressive language contained in the arbitration clause in *Pitts*." *Stephens*, 911 So.2d at 525. The Mississippi Supreme Court has specifically distinguished *Pitts* and held it has no application to this admission agreement. Despite the Plaintiff's claims – and consistent with the Supreme Court's explicit ruling – *Pitts* has no application to the instant case. In any event, the Supreme Court has clearly indicated the proper course of action in dealing with the contract at issue in the case at bar is to strike any unconscionable provisions and enforce the arbitration agreement as there is a savings clause which operates to keep in effect the arbitration provision even if there are other clauses in the contract which are held to be unenforceable.

V. Mittie Moulds Was a Third Party Beneficiary of the Admission Agreement

The Plaintiff blithely dismisses *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007), simply because the case was decided by the Court of Appeals of the State of Mississippi rather than the Mississippi Supreme Court. The resident in *Barber*, just as in the instant case, received the benefit of the bargain entered into on her behalf. *Id.* at 5. "In order for the third person beneficiary to have a cause of action, the

contracts between the original parties must have been entered into for his benefit, or at least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promise to such third person beneficiary." *Id.* The Court noted "[t]he plain language of the admissions agreement indicates the clear intent of the parties to make [the resident] a third-party beneficiary." *Id.*

The clear language of the instant contract indicates the undeniable intent of the parties that Mittie Moulds benefit through the receipt of health care, living assistance, and food and lodging. As the Court put it, the resident's "care is the *sine qua non* of the contract." *Id.* "It is beyond dispute that the benefits of receiving [the facility]'s health care services outlined in the admissions agreement flowed to [the resident] as a 'direct result of the performance within the contemplation of the parties as shown by its terms.' " *Id.* (citation omitted). Just as in *Barber*, the facility agreed to furnish room, board, linens and bedding, nursing care and certain personal services. *Id.* (R. at 62). The facility undertook the contractual duty to orient Moulds to the facility, its services and personnel, the type of nursing care given, and the rights and privileges of the resident. (R. at 62). They also agreed to help Moulds become acquainted with their surroundings and to make available to her recreational and social activities. (R. at 62-3). The facility also agreed to coordinate treatment by a physician and transportation for the receipt of medical care not available at the facility. (R. at 63). In *Barber*, the Court found "that the contract between [the responsible party] and [the facility] was entered into for the benefit of [the resident] and that she is a third-party beneficiary under the contract. As such, she is bound by the arbitration

provision contained in the admissions agreement, notwithstanding her status as a non-signatory to the agreement." *Id.* The admission agreement executed by James Braddock, the responsible party and health care surrogate, was entered into for the benefit of Mittie Moulds, the resident; therefore, she is a third-party beneficiary under the contract. Under the clear holding in *Barber*, the Estate of Mittie Moulds is bound by the valid arbitration agreement contained within the contract. Once again, clear precedent demands the reversal of the trial court's decision and the enforcement of the valid agreement to arbitrate claims which arise out of Mittie Moulds' residency at the facility.

The Plaintiff argues Moulds was not a third party beneficiary as "no benefit flowed to Mittie Moulds or her heirs from the arbitration provision ..." (App. Brief at 27). Disregarding her receipt of the benefit of a less expensive and speedier resolution from the arbitration agreement, the Plaintiff again fails to recognize the arbitration provision is simply one term contained within a contract from which she received extremely significant benefits – health care, nursing care, living assistance, and a home. To suggest she received no benefit from the arbitration agreement is, first, incorrect, and, second, completely misses a basic tenet of contract law. Moulds received substantial benefits as the result of the formation of the contract. Even if the arbitration provision was unfavorable to Moulds rather than just be an alternative forum for dispute resolution, it is simply one term among many contained within the contract.

VI. Arbitration Can Proceed as Mandated by the Contract.

The Plaintiff argues next that because the American Arbitration Association (sometimes hereinafter referred to as "AAA") has issued a statement that, because of "its caseload in the health care area," it is unwilling to arbitrate cases without a post-dispute

agreement to arbitrate, he should be allowed to avoid the arbitration agreement in the contract Braddock and Moulds executed. The American Health Lawyers Association (sometimes hereinafter referred to as "AHLA") implemented a similar rule. However, AHLA has indicated through its executive vice president/chief operating officer, Jeff Leibold, that the AHLA will administrate an arbitration which flows from a pre-injury arbitration agreement if arbitration has been ordered by a court of competent jurisdiction. It seems extremely likely the AAA will follow the AHLA's lead and administer an arbitration if such has been ordered by a court.

Also, a neighboring state has recently considered the impact of the AAA's decision to not hear cases in which a pre-dispute arbitration agreement has been signed. The Alabama Supreme Court enforced the arbitration agreement on other grounds, but went on to state,

> Even if we were to accept [the plaintiff]'s argument that the arbitration provision requires arbitration by an AAA arbitrator and that the AAA's Health Care Policy Statement precludes the AAA from providing an arbitrator, we would not be compelled to hold that Blue Cross's motion to compel arbitration was due to be denied on that basis. '**[W]here the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a different arbitrator.**'

Blue Cross Blue Shield of Alabama v. Rigas, 923 So.2d 1077, 1092 (Ala. 2005) (emphasis added) (quoting *Ex parte Warren,* 718 So.2d 45, 48 (Ala.1998)). "[T]he [policy] statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that [the plaintiff]'s claims are not arbitrable." *Id.* Such reasoning also applies to the instant case. The parties bargained for arbitration; the simple fact that the

AAA has adopted a policy concerning health care arbitrations does not mean that the claims made by the Plaintiffs are not arbitrable.

In fact, the arbitration clause, Section F, provides for such a possibility. "If the agreed method of selecting an Arbitrator(s) fails for any reason ... the appropriate circuit court, on application of a party, shall appoint one Arbitrator to arbitrate the issue." (R. at 66). Assuming without conceding the AAA's desire to arbitrate cases where a post-dispute arbitration agreement has been signed renders that portion of the arbitration clause impossible to perform, arbitration clause provides for a solution to such a situation. The agreement signed by Moulds and Braddock clearly states that if there are problems with the arbitrator, the circuit court will appoint an arbitrator to conduct the arbitration.

The agreement, as discussed in *Stephens*, also has a savings clause which states "[i]n the event any provision of this Agreement is held to be unenforceable for any reason, the unenforceability thereof shall not affect the remainder of this Agreement, which shall remain in full force and effect and enforceable in accordance with its terms." (R. at 64). The *Stephens* Court relied on this provision to enforce the arbitration provision while striking various terms it ruled unconscionable. *Stephens*, 911 So.2d at 524. Even if the clause containing the reference to AAA is stricken from the contract, there are other provisions wherein the parties agree to arbitrate any claims which arise. Section E.6, in bold print, states "the parties agree to arbitrate the dispute, claim and/ or controversy ..." (R. at 65). The agreement also makes clear, "[a]ll parties hereto are hereby waiving all rights to a jural trial." (R. at 65). The savings clause contained within the contract – along with repeated references to the parties agreement to arbitrate a claim – dictates that the

parties must be compelled to resolve any claim through the agreed upon arbitration.

CONCLUSION

Previous Mississippi Supreme Court decisions dictate the enforcement of the arbitration provision contained within the admission agreement. *Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007), *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007), and *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 522 (Miss. 2005), all mandate that the arbitration agreement be enforced given that the Plaintiff conceded that James Braddock acted as a health care surrogate on Mittie Moulds' behalf. The contract does not fail for lack of consideration as Moulds and Braddock received substantial benefits under the contract they signed. Braddock and Moulds were not fraudulently induced to enter into the admission agreement, but, even if they had been, such a determination is properly made by an arbitrator. In addition, Mittie Moulds was a third-party beneficiary under the contract as she received health care, lodging, and living assistance through the execution of the agreement. Indeed, the delivery of these benefits is the sole reason the contract exists. The arbitration could likely be performed by the American Arbitration Association pursuant to a court order. In any event, both Section F and the agreement as a whole contain clauses which operate to "save" the arbitration agreement.

This the 28th day of November, 2007.

Respectfully submitted,

Covenant Health & Rehabilitation, LP;
and Covenant Dove, Inc.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the above and foregoing document was caused to be served via U.S. mail on the following:

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Dated this the 28th day of November, 2007.

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