

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

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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

1. Defendants/Appellants Covenant Health and Rehab of Picayune, LP; and Covenant Dove, Inc.;
2. Plaintiff/Appellee 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;
3. John L. Maxey II, Esq.; Paul H. Kimble, Esq. - Attorneys for Appellants;
4. F.M. Turner, Esq. - Attorney for Appellee; and
5. The Honorable Prentiss G. Harrell, Pearl River County Circuit Court Judge


Paul H. Kimble

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants believe that oral argument would not aid the resolution of the appeal before this Court. The jurisprudence concerning the issues of the instant case has been ably examined and ruled upon by the Mississippi Supreme Court, and oral argument is not needed as the Court has previously stated the law surrounding the enforcement of arbitration agreements in nursing home admission contracts.

STATEMENT OF THE ISSUES

- I. Did the lower court err in denying the Motion to Compel Arbitration under the agreement between the parties?
- II. Is the admissions contract enforceable when the resident and her responsible party signed the agreement?
- III. Did the lower court err in finding the contract unconscionable?

STATEMENT OF THE CASE

On November 15, 2006, the 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 (sometimes hereinafter referred to as "Plaintiff"), filed suit against Covenant Health & Rehab of Picayune, LP, and Covenant Dove, Inc., (sometimes hereinafter collectively referred to as "Covenant"), alleging Mittie M. Moulds (sometimes hereinafter referred to as "Moulds") suffered personal injuries while a resident in the Picayune Convalescent Center. (R. at 5-6). Both Moulds and James Braddock (sometimes hereinafter referred to as "Braddock") – her son, responsible party, and health care surrogate pursuant to Miss. Code Ann. § 41-41-201 *et seq.* - signed a contract wherein all parties agreed to arbitrate any claim which arose from her stay at the facility, save those which concerned payment for service rendered or refunds due. (R. at 66). On December 11, 2006, Covenant filed a Motion to Dismiss or to Stay Proceedings and Compel Arbitration. (R. at 23-34). On July 2, 2007, the Circuit Court of Pearl River County found the arbitration agreement at issue was substantively unconscionable and refused to compel the parties to arbitrate their dispute (R. at 170-75). The trial court ruled that because the contract contained provisions it determined to be unconscionable, it found "contract as a **whole** unconscionable." (R. at 171) (emphasis in original). In addition, the trial court specifically found that a health care surrogate did not have the legal capacity to bind a principal to an arbitration agreement. (R. at 171-73). Aggrieved, the Defendants filed the instant appeal pursuant Miss. R. App. P. 4. This Court has recognized that "an appeal may be taken from an order denying a motion to compel arbitration." *Tupelo Auto Sales, Ltd. v. Scott*, 844 So.2d 1167, 1170 (Miss. 2003).

STATEMENT OF FACTS

Mittie Moulds was admitted to Picayune Convalescent Center on November 16, 2000. At admission, Braddock, Moulds' responsible party and health care surrogate pursuant to Miss. Code Ann. § 41-41-201 *et seq.*, executed a contract where he agreed "all claims disputes and/or controversies between [the Patient and Responsible Party] and the Facility shall be resolved by binding arbitration ..." (R. at 57). On April 24, 2002, another contract was executed – this time by both Braddock *and* Moulds – wherein the parties again agreed to arbitrate any dispute which arose out of Moulds' residency at the facility. (R. at 66). The April 24, 2002, contract states it "constitutes the entire agreement among the parties ... and supersedes all prior agreements, representations and all understanding of the parties." (R. at 64). The agreement to arbitrate was clearly and conspicuously placed. (R. at 66). The agreement was also signed by the facility's administrator – Keri Ladner – and witnessed by two other individuals. (R. at 66). The contract contained the following provision regarding arbitration:

The Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures. The Arbitration shall be heard and decided by one qualified to Arbitrate selected by mutual agreement of the Parties. Failing such agreement each Party shall select one qualified Arbitrator and the two selected shall select a third. The Parties agree that the decision of the Arbitrator(s) shall be final. The Parties further agree that the Arbitrators shall have all authority necessary to render a final, binding decision of all claims and/or controversies and shall have all requisite powers and obligations. If the agreed method of selecting an Arbitrator(s) fails for any reason or the Arbitrator(s) appointed fails or is unable to act or the successor(s) has not been duly appointed,

the appropriate circuit court, on application of the party, shall appoint one Arbitrator to arbitrate the issue. An Arbitrator so appointed shall have all the powers of the one named in this Agreement. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs of pursuing a timely resolution of a claim, dispute or controversy, should one arise. The Parties agree to share equally the costs of such arbitration regardless of the outcome..."

(R. at 66).

The arbitration provision at issue is clearly marked in bold type, with its own subheading entitled "**ARBITRATION.**" (R. at 66). The provision itself was typed in equal size to the rest of the print in the contract, and above the signature line was an all caps, block paragraph, reminding the parties of the arbitration provision contained in the agreement. (R. at 66). Furthermore, the arbitration provision was also referred to in Section E., Other Important Provisions "6" and "12". (R. at 65). Also, in Section E., Provision "13" specifically reminds the party signing the admission agreement "All Parties hereto are hereby waiving all rights to a jural (sic) trial." (R. at 65). Additionally, at the end of the last page, in a separate indented paragraph, directly above the signature line, in all caps and bold font, the contract 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 AND PROVISIONS.**" (R. at 66). In conjunction with the above conspicuous language, the agreement encourages the resident and the responsible party to seek legal counsel prior to signing the agreement – even going so far as to suggest that they do so during the termination period after the resident is housed at the facility. (R. at 64).

Moulds allegedly suffered personal injuries while being cared for at the Picayune Convalescent Center, and the Plaintiff filed suit, claiming the Defendants were responsible for the injuries she purportedly sustained. (R. at 5-6). In response, the Defendants filed a Motion to Dismiss or to Stay Proceedings and Compel Arbitration. (R. at 22-35). The Circuit Court of Pearl River County denied Covenant's Motion, finding the contract to be substantively unconscionable (R. at 174-75) and holding that health care surrogates do not have the power to contractually bind nursing home residents in health care matters. (R. at 171-73).

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court has repeatedly made clear that there is a preference for the enforcement of arbitration agreements. Nursing homes and long term care facilities affect interstate commerce in such a way as to invoke the provisions of 9 U.S.C. § 1 *et seq.*, (the Federal Arbitration Act). Agreements between long term care facilities and their patients, when taken in the aggregate, affect interstate commerce. In addition, the provisions of the arbitration agreement bear some reasonable relationship to the risks and needs of the business.

The parties entered into a valid, enforceable contract. Both Moulds and Braddock, identified in the contract as Moulds' Responsible Party and in court filings as Moulds' health care surrogate, signed the contract. (R. at 66, 70). Braddock also executed many other documents on behalf of Moulds. Braddock held himself out to have the authority to bind his mother, Moulds, and to engage the services of Picayune Convalescent Center. (R. at 61-6). Braddock acted as Moulds' agent and represented through his actions that he had the authority to enter into contracts on Moulds' behalf. In addition, as the Plaintiff acknowledged, "[d]ue to Mrs. Moulds' physical and mental impairments, the Admission Agreement was signed by James Braddock, Mrs. Moulds' son, as her **health care surrogate pursuant to Miss. Code Ann. § 41-41-201 et seq.** As her **health care surrogate**, Mr. Braddock had the authority to make health-care decisions for Mrs. Moulds, including selecting a nursing home and agreeing to payment for health-care services." (R. at 70) (emphasis added).

The arbitration agreement at issue in the case at bar is substantively conscionable.

The Mississippi Supreme Court has already examined this identical form of arbitration agreement in *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507 (Miss. 2005), and found that the arbitration provision at issue must be enforced. Obviously, the rulings of the Mississippi Supreme Court reversing a trial court's denial of a motion to compel arbitration in *Stephens* are likewise applicable here where the same arbitration agreement was used. The arbitration agreement was not oppressive, as it provided the Plaintiff with a fair process in which to pursue claims. The arbitration provision merely provides a mutually agreed-upon forum for the parties to litigate their claims and has no effect on the ability to pursue potential actions.

The arbitration agreement at issue was also examined – and held to conscionable – in *Covenant Health and Rehab, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007). Just as with *Stephens*, the arbitration agreement at issues in *Brown* is identical to the one executed by the parties in the instant case. In *Brown*, the Mississippi Supreme Court reiterated its approval of the arbitration provision of the admission agreement Braddock and Moulds signed. *Id.* at 742. The Court stated “[t]his description of the facts, including the location and format of the arbitration provision in the agreement in *Vicksburg Partners* is identical to the provision in this case, thus controlling in the case at bar.” *Id.* at 737. Restated, in *Brown*, the Mississippi Supreme Court notes that the admission agreement was identical to the agreement in *Stephens*, and, therefore, held the agreement was conscionable as a matter of law. In the instant case, the admission agreement, and the arbitration provision contained therein, are identical to the agreements in *Stephens* and *Brown*; therefore, the arbitration provision at issue in the instant case is likewise conscionable as a matter of law.

Brown also is significant in that it held responsible parties acting as health care surrogates had the authority to contractually bind residents in matters of health care. *Brown*, 949 So.2d at 737. In *Brown* – just as in the case at bar – both the resident and the responsible party signed the agreement but then argued that the arbitration provision should not be enforced because the resident was incapable of making a knowledgeable and voluntary agreement to arbitrate and her health care surrogate did not possess the authority to enter into such an agreement on her behalf. *Id.* at 736. The Mississippi Supreme Court rejected the Plaintiff's arguments and held "the trial court erred in denying the nursing home's motion to compel, and that judgment is reversed and the case remanded to the Circuit Court of Pearl River County with directions to compel the parties to submit to arbitration." *Id.* at 742. The Defendant's respectfully suggest the decision of the Circuit Court of Pearl River County should be reversed and this case should be remanded with directions to compel the parties to submit to arbitration.

In addition, other Mississippi case law demands the enforcement of the subject arbitration provision. *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007). The Court enforced the arbitration agreement because the resident was a third-party beneficiary of the contract containing the arbitration provision. *Id.* at 5. 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 Moulds benefit through the receipt of health care, living assistance, and food and lodging. Under the clear holding in *Barber*, 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 Moulds' residency at the facility.

ARGUMENT

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

II. The Lower Court Erred in Refusing to Compel Arbitration.

The Federal Arbitration Act (sometimes hereinafter referred to as "FAA") provides: "A written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable, save upon such ground, as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, a threshold determination must be made as to whether the subject admission agreement falls within the provisions of the FAA. The Mississippi Supreme Court has specifically held, in analyzing the exact arbitration agreement at issues in the case at bar, that these circumstances "clearly [fall] within the broad purview of the Federal Arbitration Act...[S]ingular agreements between

care facilities and care patients, when taken in the aggregate, affect interstate commerce.” *Stephens*, 911 So.2d at 515. Restated, in examining the exact contract at issue in the instant case – and a contract where both the resident and her responsible party signed the admission agreement just as in the case at bar – the Mississippi Supreme Court conclusively held that the provision of the contract should be enforced and reversed a trial court’s refusal to compel arbitration. *Id.* at 525.

“Nursing homes through general practice, which includes basic daily activities like receiving supplies from out of state vendors and payments from out-of state insurance companies or the federal Medicare program affect interstate commerce.” *Id.* at 515. These circumstances also exist in the case at bar; the defendant nursing home receives supplies from out-of-state sellers and gets payments from Medicare and Medicaid. (R. at 60). “Thus, since the arbitration clause is a part of the contract (the nursing home agreement) evidencing in the aggregate economic activity affecting interstate commerce the Federal Arbitration Act is applicable...” *Id.* at 515-16. Restated, the Mississippi Supreme Court has previously found that a nursing home’s admission agreement – the one used in the instant case – concerns interstate commerce. Admission agreements like the one in the case at bar, when taken in the aggregate, clearly affect interstate commerce; therefore, the FAA applies and close attention should be paid to the strong federal and state policy of favoring the enforcement of agreements to arbitrate.

In any event, the Mississippi Supreme Court has previously examined this same factual scenario when evaluating this exact admissions agreement. The admission agreement in *Stephens* and the case at bar are virtually identical. In *Stephens*, both the

resident and the responsible party signed the admission agreement. 911 So.2d at 510. Both the resident, Moulds, and the responsible party, Braddock, signed the agreement at issue here – just as did the resident and responsible party in *Stephens*. (R. at 66).

The Mississippi Supreme Court noted in *Stephens* that by both signing the admission agreement, “[b]oth the patient, as well as the person responsible for him, willingly, knowingly and voluntarily agreed to have future disputes decided by a mutually selected arbitration panel.” *Id.* at 525-26. Both parties signed the admission agreement in the instant case and did not express any lack of understanding concerning any contract term. (R. at 59). The Mississippi Supreme Court reversed the refusal of the trial court to enforce the arbitration agreement which both the resident and responsible party had signed, remanded the case back to the trial court, and ordered the trial about to compel the parties to participate in arbitration. *Id.* at 526. The Defendants respectfully suggest that this Court should follow the precedent established in evaluating the admission agreement at issue in the instant case and reverse the Pearl River Circuit Court’s refusal to compel the parties to participate in arbitration.

At the risk of repetitiveness, the factual scenario in the instant case is exactly the same as the one before the Court in *Stephens* case. The same arbitration agreement is at issue in both cases. (R. at 61-66). In both cases, the resident *and* the responsible party signed the admission agreement. The *Stephens* opinion is the classic “all fours” decision which is applicable to the instant case. The legal analysis concerning the applicability of the arbitration provision is the same in each case, the same agreement was used in each case, and all parties signed the agreement in each case. This case is indistinguishable

or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority may act as surrogate (a) the spouse, unless legally separated; (b) an adult child; (c) a parent; or (d) an adult brother or sister.

Braddock is an adult child of Moulds and was entitled under the statute to act as a health care surrogate. (R. at 180). Therefore this admission agreement is a valid and enforceable written contract. 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 Mississippi legislature recognized that citizens of this state would be subjected to unnecessary expense, delay, and bureaucratic red tape if family members were required to pursue judicial approval before entering into contracts concerning the health care their parents or spouses need. Instead, the legislature codified the ability of family members to enter into just such contracts at issue in the case at bar.

While the Plaintiff described such an interpretation of Miss. Code Ann. § 41-41-211 as "patently absurd" (R. at 75), the Mississippi Supreme Court adopted that reasoning in *Covenant Health and Rehab, L.P. v. Brown*. The Court stated that as the resident was incapacitated, "[h]er adult daughter, [the responsible party], was an appropriate member of the classes from which a surrogate could be drawn, and thus, [the responsible party] could contractually bind [the resident] in matters of health care." *Brown*, 949 So.2d at 737. Moulds' adult son, Braddock, was an appropriate member of the classes from which a surrogate could be drawn, and, thus, Braddock was empowered to contractually bind Moulds in health care matters. The Mississippi Supreme Court has clearly held health care surrogates are empowered to enter into contracts concerning health care on behalf of

persons lacking the capacity to make those decisions, and the Plaintiff concedes that James Braddock acted as Nellie Mittie Moulds' health care surrogate. (R. at 70, 74, 75, 161). Therefore, pursuant to Mississippi law, Braddock validly entered into the contract with Picayune Partners, L.P., on Moulds' behalf, and the arbitration provision contained therein is enforceable.

In addition, other Mississippi case law demands the enforcement of the subject arbitration provision. The Mississippi Court of Appeals enforced an arbitration provision in *Trinity Mission of Clinton, LLC v. Barber*, 2007 WL 2421720 (Miss.App. 2007). 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 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). It also agreed to help Moulds become acquainted with their surroundings and to make available to her recreational and social activities. (R. at 63). 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 64). 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 Braddock and the facility was entered into for the benefit of Moulds; therefore, she is a third-party beneficiary under the contract. Under the clear holding in *Barber*, even if Moulds' signature on the contract is meaningless, she 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 Moulds' residency at the facility.

Furthermore, Braddock possessed the apparent authority to enter into a contract on Moulds' behalf. The arbitration provision and the admission agreement now before the Court is signed by Braddock, Moulds' son, who held himself out to the facility as Moulds' Responsible Party and health care surrogate. Braddock signed the admission agreement, as well as numerous other documents, in which he further asserted the authority to act on

Moulds behalf. Moulds accepted the terms of the contract in the admission agreement by becoming a resident of the facility, receiving health care from the facility, and through her actions authorizing Braddock to sign as her Responsible Party. Moulds did, in fact, sign the contract and agree to all terms which it contained. (R. at 66).

By signing the admission agreement as Moulds' Responsible Party, Braddock held himself out to have the authority to bind Moulds and to engage the services of Picayune Convalescent Center. Picayune Convalescent Center acting in good faith, reasonably believed Braddock had authority to bind Moulds, since he signed the admission agreement and other admitting documents. Moulds received services from the Defendants based on the terms and conditions of the admission agreement and, therefore, benefitted from the agreement.

Braddock's actions in agreeing to and signing the contract as Moulds' Responsible Party, and Moulds' ratification of those actions, created an express agency, or alternatively, an implied agency. American Jurisprudence, 2d Edition, aptly explains the creation of an expressed or implied agency:

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

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.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.* The *Bailey* Court further explained that:

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)).

When Braddock came to Picayune Convalescent Center, he read, signed, and agreed to the terms of the admission agreement, and he held himself out as "a substitute, a deputy, appointed by the principal, with the power to do things which the principal may or can do." *Id.* (citing 2 C.J.S. Agency § 1(c) (1936)). In fact, it is Picayune Convalescent Center's policy that Braddock, as the Responsible Party, **must** be present at Moulds' admission. (R. at 58-9). Picayune Convalescent Center required that Braddock fill out all the necessary paperwork in person prior to admitting Moulds into the facility. (R. at 59). Moulds' subsequent actions ratifying the contractual agreement Braddock made - signing the contract and receiving the benefits of the contract and care at the Picayune Convalescent Center - reinforces the agency which she granted to Braddock. Employees of the Picayune Convalescent Center believed, just as would the archetypal reasonable, prudent person, that Braddock had the authority to act on Moulds' behalf.

Also, it is incongruous at the very least to give credence to Braddock's argument that the arbitration agreement should not apply given the fact that he admits he signed the contract containing the arbitration agreement and that he and Moulds received benefits resulting from the formation of the contract – as determined by the *Barber* decision discussed above. The Plaintiff is estopped from asserting that contract is invalid because Braddock benefitted by Moulds' receipt of health care and domicile at the Picayune Convalescent Center. "Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a ... contract ... which he might have rejected or contested." *Heritage Cablevision v. New Albany Electric Power System*, 646 So.2d 1305, 1310 (Miss. 1994). "[A party] cannot accept the benefit under this contract and also repudiate its obligations." *Id.* "Such estoppel operates to prevent the party thus benefitted from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him, or, in other words, it *precludes one who accepts the benefits from repudiating the accompanying or resulting obligation.*" *Id.* (emphasis is original). The Plaintiff accepted the benefits of the contract - i.e. health care and living assistance. However, Braddock now seeks to avoid a bargained for material term contained within that contract. Estoppel prevents the Plaintiff from reaping the benefits of the contract and then avoiding the terms contained therein. Therefore, the principles of estoppel dictate that the arbitration provision contained within the admission agreement must be enforced.

Based on the above case law and Mississippi statutes it is obvious and apparent that James Braddock, as an adult child of Mittie Moulds, had statutory authority to make

health care decisions and enter into contracts to effectuate those decisions, had apparent authority to sign as a Responsible Party of Mittie Moulds, and that Moulds was a third party beneficiary of the contract and, as a result, is bound by its terms. Therefore, the Plaintiff should be bound to the arbitration provision contained within the admission agreement.

IV. The Arbitration Agreement Signed by James Braddock and Mittie Moulds Is Not Unconscionable.

The doctrine of “unconscionability has been defined as ‘an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.’ ” *Entergy Miss. Inc. v. Burdette Gin Co.*, 726 So.2d 1202, 1207 (Miss. 1998) (citing *Bank of Indiana National Ass’s v. Holyfield*, 476 F.Supp. 104, 109 (S.D. Miss. 1979)). Meanwhile, a conscionable provision has been found to bear some reasonable relationship to the risks and needs of the business. *Id.* As the Mississippi Supreme Court recognized in *East Ford, Inc. v. Taylor*, the courts have identified “two types of unconscionability, procedural and substantive.” 826 So.2d 709, 714 (Miss. 2002) (quoting *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655 (S.D. Miss. 2000)). Procedural unconscionability concerns the overall formation of the contract in which the arbitration clause is contained, whereas substantive unconscionability is applicable only to the arbitration clause itself. *Stephens*, 911 So.2d at 517.

Procedural unconscionability looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract’s formation. *Blacks Law Dictionary* 1524 (6th ed. 1990). The Mississippi Supreme Court has stated that indicators of procedural unconscionability generally fall into two areas: (1) lack of knowledge, and (2) lack of voluntariness. *Burdette Gin Co.*, 726 So.2d at 1207. A lack of

knowledge is demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and a lack of opportunity to study the contract and inquire about contract terms. *Id.* A lack of voluntariness is demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all. *Id.* (citation omitted). The Mississippi Supreme Court has twice examined this exact admission agreement which had - just as in the instant case - been signed by both the resident and her responsible party; the Court held that the arbitration provision **must** be enforced. *Stephens*, 911 So.2d at 526; *Brown*, 949 So.2d at 742.

While the trial court did not find any procedural unconscionability involved in the contract at issue in the instant case, the Plaintiff has attacked the validity of the contract itself, which under the case law set out in *Russell vs. Toyota*, is an argument of procedural unconscionability. 826 So.2d 719 (Miss. 2002) (quoting *Rojhas vs. TK Communications*, 87 F.3d 745, 749-751 (5th Cir. 1996)). Specifically, the Plaintiff alleged Moulds was incapable of entering into a contract and that Braddock had no authority to bind Moulds. (R. at 70). The Fifth Circuit in *Rojhas* ruled that where a contract which contained an arbitration agreement is attacked as being procedurally unconscionable, the attack is an attack on the formation of the contract generally, not an attack on the arbitration clause itself. *Rojhas*, 87 F.3d at 749-51. Because the Plaintiff's claims relate to the entire

agreement, rather than just the arbitration clause, the FAA requires such claims be heard by an arbitrator. *Id.* Pursuant to the rulings above regarding procedural unconscionability, the issues raised by the Plaintiff concerning capacity should be decided by an arbitrator.

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*, 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. (R at 61-66). The Supreme Court has stated that in order to make a determination as to substantive unconscionability, only the contract itself need be reviewed; the arbitration agreement at issue has already been reviewed by the Mississippi Supreme Court and deemed enforceable.

The trial court found the agreement to be unconscionable. (R. at 182). The trial court noted it had held arbitration agreements from Covenant unconscionable several times in previous cases. (R. at 182). The trial court stated that the arbitration clause, "when coupled with the limitation of liability clause, the agreements (sic) as a whole becomes unconscionable." (R. at 182). In direct contravention to the trial court's holding in this and other cases, the *Stephens* opinion, which, again, reviewed the very arbitration agreement at issue in the case at bar, 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 Mississippi Supreme 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). This position was reaffirmed by the Supreme Court in *Brown* when it stated "*Vicksburg Partners* deemed the exact language that composed the entirety of [the arbitration provision] to be substantively conscionable. Accordingly, we reach the same result in this case." *Brown*, 949 So.2d at 741 (citation omitted). In *Stephens* and *Brown*, the Mississippi Supreme Court has deemed the exact language at issue in the instant case to be substantively conscionable.

The Plaintiff complained at the trial court level that the admission agreement is unconscionable. In its analysis, the trial court, which realized it was "inviting reversal", held that the inclusion of provisions in the admission agreement which were unenforceable mandated the finding that the contract was substantively unconscionable as a whole. (R. at 182). The Mississippi Supreme Court has specifically refuted such a rationale for a refusal to enforce an arbitration provision. *Id.* at 742; *Stephens*, 911 at 521. In interpreting the exact contract at issue in the instant case, the Supreme Court invalidated clauses which it ruled improper (such as the monetary limitation on recovery and the bar against punitive damages) but held that the contract as whole - and in particular the arbitration agreement - still must be enforced. *Id.* at 525. The *Stephens* Court noted as particularly important that the admissions agreement in that case - just as in this one - contained a

“‘saving’ device [that] explicitly acknowledges the preferred remedy of striking unenforceable provisions as opposed to the draconian remedy of striking the entire agreed upon and otherwise valid contractual arrangements.” *Id.* at 524. The savings clause in *Stephens*, just as in the agreement at issue in the instant case, stated: “In 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.” *Id.* at 525. (R. at 64). The Court stated “our action today in finding a portion of the arbitration clause to be conscionable and otherwise enforceable, is consistent with our case law, statute, and basic principles of contract law.” *Id.* The Mississippi Supreme Court has directly rejected the Plaintiff’s argument – and the trial court’s ruling – that any invalid terms contained in the subject arbitration agreement should invalidate the agreement as a whole; the Supreme Court has stricken any unconscionable provisions and mandated the enforcement of this **exact** arbitration agreement.

In *Brown*, the Supreme Court again addressed this issue - and rejected the trial court’s reasoning even more firmly. The Court stated “it is well-established that when interpreting arbitration agreements, or any contract, ‘if a court strikes a portion of an agreement as being void, the remainder of the contract is binding.’ *Russell*, 826 So.2d at 724-25 (citing *Lawler v. Government Employees Ins. Co.*, 569 So.2d 1151, 1153 (Miss. 1990); *Plaza Amusement Co. v. Rothenberg*, 159 Miss. 800, 131 So. 350, 357 (1930) (‘If an illegal condition is annexed to a contract, it will not void the whole contract, but the illegal part will be treated as void’)). **Accordingly, we strike the unconscionable terms**

and leave the remainder of the agreement intact.” *Brown*, 949 So.2d at 741 (footnote omitted) (emphasis added). The Mississippi Supreme Court, following numerous precedents, has flatly rejected the trial court’s rationale for refusing to compel arbitration and has, instead, stated clearly that parties must submit to arbitration for disputes arising out of the subject admission agreement.

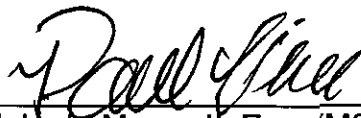
CONCLUSION

The arbitration agreement at issue in the instant case has already been reviewed and deemed enforceable by the Mississippi Supreme Court. Arbitration agreements in the nursing home field are subject to the Federal Arbitration Act as the operation of that industry has a significant impact on interstate commerce. The arbitration agreement was signed by both the resident and her responsible party. James Braddock possessed both statutory authority and apparent agency to enter into a contract on Mittie Moulds behalf. Mittie Moulds was a third party beneficiary of the contract, and its terms are therefore enforceable against her and her estate. The arbitration provisions are conspicuous and clearly marked. The arbitration agreement at issue simply provides a speedy, efficient, and cost-effective procedure in an alternative forum in which disputes between the parties can be heard. Therefore, the Appellants respectfully request that this Court reverse the trial court’s refusal to grant their Motion to Dismiss or to Stay Proceedings and Compel Arbitration and remand the case with instructions for the trial court to order the parties to submit to arbitration.

This the 18th day of October, 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:

The Honorable Prentiss G. Harrell, Esquire
Pearl River County Circuit Court Judge
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Dated this the 18th day of October, 2007.


Paul H. Kimble