IN THE SUPREME COURT OF MISSISSIPPI
CASE NO.: 2008-TS-00027

TRINITY MISSION HEALTH & REHAB OF HOLLY SPRINGS, LLC and JOHN DOES 1-20 — **APPELLANT**

V.

RUTH LAWRENCE, as Administratrix of the Estate of JAMES E. LAWRENCE, Deceased and on Behalf of the Wrongful Death Beneficiaries of James E. Lawrence, Deceased. — **APPELLEES**

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

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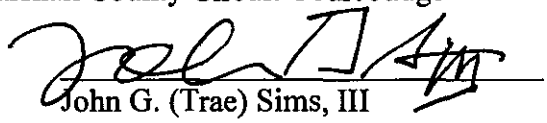
CERTIFICATE OF INTERESTED PERSONS

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. Defendant/Appellant Trinity Mission Health & Rehab of Holly Springs, LLC;
2. Plaintiffs/Appellees Ruth Lawrence, as Administratrix of the Estate of James E. Lawrence, deceased and on behalf of the Wrongful Death Beneficiaries of James E. Lawrence, deceased;
3. John L. Maxey, Esquire; Heather M. Aby, Esquire – Attorneys for Appellant;
4. John G. (Trae) Sims, III, Esquire – Attorney for Appellee; and
5. The Honorable Henry L. Lackey, Marshall County Circuit Court Judge



John G. (Trae) Sims, III

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STATEMENT OF THE CASE

Appellee is satisfied with procedural summary in the Statement of the Case provided by Trinity with one exception. It has been denied by Lawrence from the outset of the case that James Lawrence executed an Alternative Dispute Resolution Agreement or an Arbitration Agreement of any sort whatsoever. Appellee would re-state the description of the Arbitration Agreement sought to be enforced as one purporting to contain James Lawrence's "mark."

STATEMENT OF THE FACTS

1. James Lawrence was admitted to Trinity Mission Health & Rehab of Holly Springs, LLC on or about January 3, 2005. (R. 62).

2. Upon admission, Mr. Lawrence's wife, Ruth Lawrence, was presented with certain admissions paperwork to sign, Mr. Lawrence was unable to sign any documents, so Ruth Lawrence signed them, including an arbitration agreement. (R. 62-77, 80; Tr. 8-9)

3. Ruth Lawrence did not have any power of attorney, conservatorship, or other legal authority to waive her husband's right to a jury trial, and she did not witness her husband sign any document in her presence. (R. 81 , Tr. 8-9).

4. No witness was presented at the hearing to testify they saw Mr. Lawrence make his mark on the purported arbitration agreement, nor was an affidavit of a witness to Mr. Lawrence's purported mark provided for the Court's benefit. (R.142, Tr. 2-15).

5. No mark purporting to be Mr. Lawrence's appears on any of the other documents presented to him by Trinity, even though they, unlike the arbitration agreement are required to be reviewed and signed by Federal and State regulations. And no notary was used to verify it was he making the "mark" relied upon by Trinity as a signature. (R. 62-77, 81; Tr. 10, 12).

6. Mr. Lawrence was mentally competent at the time of his admission to Trinity. His chart shows that he was presented several documents for review, none of which was an arbitration agreement, and that he was unable to sign his name to them. The notes show that only Ruth Lawrence signed them. (R. 62-77, 81; Tr. 7-10).

ARGUMENT

I. STANDARD OF REVIEW

In determining whether parties should be compelled to arbitrate a dispute, district courts perform a two-step inquiry. "First, the Court must determine whether the parties agreed to arbitrate the dispute in question. This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." ***Am. Heritage Life Ins. Co. v. Beasley***, 174 F.Supp. 2d 450, 454 (N.D. Miss. 2001) (citing 9 U.S.C. §4). *See also*, ***Pre-Paid Legal Services, Inc. v. Battle***, 873 So.2d 79, 83 (Miss. 2004).

If the Court finds that the parties agreed to arbitrate, "it must then consider whether any federal statute or policy renders the claims non-arbitrable." ***Id.*** "[A] party seeking to avoid arbitration must allege and prove that the arbitration provision itself was a product of fraud or coercion; alternatively, that party can allege and prove that another ground exists at law or in equity that would allow the parties' contract or agreement to be revoked." ***Id.*** (citing ***Sam Reisfeld & Son Import Co. v. S. A. Eteco***, 530 F.2d 679, 680-681 (5th Cir. 1976)).

Furthermore, federal district courts in Mississippi have noted that the FAA's policy of favoring arbitration applies *only* after a valid arbitration agreement has been found. *See* Memorandum Opinion and Order denying Plaintiffs' Motion to Compel Arbitration, ***Mariner Health Care, Inc. v. Guthrie***, Civil Action No. 5:04cv218-DCB-JCS (U. S. Dist. Ct., S.D. Miss. West. Div.), p. 6, fn. 4, emphasis in original, citing ***Fleetwood Enters., Inc. v. Garkamp***, 280 F.3d 1069, 1070 & 1070 n.5 (5th Cir. 2002); *see also* similar Order in ***Rhodes***, Civil Action No. 5:04cv217-DCB-JCS. An agreement to arbitrate is treated like any other contract. ***Kresock v. Bankers Trust Co.***, 21 F.3d 176, 178 (7th Cir. 1994). A party cannot be forced to submit to

II. No Binding Arbitration Agreement Existed

A. Ruth Lawrence Lacked the Authority to Bind James Lawrence to Arbitration

In a recent line of cases with facts very similar to the case at bar, both this Court and the Federal District Courts in the Northern District of Mississippi have addressed the validity of arbitration agreements binding nursing home residents signed by family members without the legal capacity to do so.

Recently, this Court issued its opinion in ***Mississippi Care Center of Greenville, et al v. Hinyub***, 975 So.2d 211 (Miss. 2008). The case is directly on point as to the issue of whether Mrs. Lawrence's signature on the admission documents created a valid arbitration agreement. And it can be naturally extended to resolve the issue as to whether the Circuit Court was correct in finding Trinity's failure to produce evidence to rebut the Lawrence's denial that the mark on the document was Mr. Lawrence's. In ***Hinyub***, this Court considered the first prong of the well established two-prong test of whether the parties agreed to arbitrate, and found it unnecessary to consider the second prong when the first was not met. ***Id,*** at 217, 218. The present case falls in to the same category. In ***Hinyub***, Mississippi Care Center contended that Nancy Hinyub had authority to bind her father in health care matters, including the agreement to arbitrate. Mississippi Care Center relied upon a power of attorney executed by Hinyub's father, but not properly admitted into evidence or placed in to the record for this Court's review, and relied upon the Uniform Health Care Surrogate Statute, Miss.Code Ann. 41-41-211 (Rev. 2005). Because no power of attorney appeared in the record and because no information appeared in the

record that Hinyub's father lacked capacity to make his own health care decisions, this Court affimed the lower court's denial of Mississippi Care Center's Motion to Compel Arbitration.

In the present case, there is no power of attorney in the record authorizing Mrs. Lawrence to bind her husband. Nor is there any evidence presented that Mr. Lawrence lacked capacity to make his own health care decisions. In particular, there is no evidence that Mr. Lawrence's primary physician determined he lacked capacity. As well, there is no evidence that the signing of the arbitration agreement was a pre-condition of admission, thus taking the arbitration agreement outside of a health care decision and causing the surrogate statute to be inapplicable. As to Mrs. Lawrence's signature and the issue of whether she had authority to bind her husband, this Court should simply look to its clear reasoning in ***Hinyub*** and find Mrs. Lawrence's signature on the Admissions Documents to be of no consequence as regarding the issue of Arbitration.

In ***Hinyub***, it was undisputed that the father had never signed an arbitration agreement. In the present case, it is alleged by Trinity that Mr. Lawrence made his "mark" on the agreement, but this is denied by Mrs. Lawrence. Although on its face this fact is not analogous to the scenario in ***Hinyub***, the legal reasoning employed by the Court remains on point and applicable. Mississippi Care Center essentially lost its bid to compel arbitration in ***Hinyub*** because they failed to produce evidence establishing a valid arbitration agreement. In Judge Lackey's Order Overruling Binding Arbitration, Trinity lost its bid for the same reason. Trinity produced no evidence that the mark made on the Admissions Documents was Mr. Lawrence's. They could have brought witnesses to the hearing, they could have had a notary present for the purported "marking", or they could have at least presented an affidavit, but they did none of this. By failing to meet the "first prong"—that is, showing a valid agreement to arbitrate--they gave

Judge Lackey no chance to grant their motion or even to consider the underlying arguments of both sides as to procedural and substantive unconscionability.

As noted above, Mississippi Federal Courts have used the same reasoning as this Court in several cases in recent years. In ***Mariner Healthcare, Inc. v. Green,*** 2006 WL 1626581 (N.D. Miss), the District Court determined that agreements signed by family members without legal capacity to do so are only binding if the signor has been given agency authority to act on behalf of the resident. ***Id.*** Such agency authority can be express, implied, apparent or given by statute, and the existence of such agency must be proven by the nursing home defendant. ***Id.*** The nursing home defendants in ***Green*** did not meet their burden with regards to express or implied authority, as they provided no evidence that Green conveyed to her daughter any express or implied grant of authority. Although the nursing home defendants did provide evidence of past agreements signed by Green's daughter, the Court reiterated the ruling in prior cases that "apparent authority is to be determined only from the acts of the principal and requires reliance and good faith on the part of the third party." ***Id.*** With regards to statutory authority, Miss. Code Ann. § 41-41-211, the "Surrogate Statute", does grant surrogates the power to make "health-care decisions" for the resident. However, courts have determined that the signing of an arbitration agreement is not a "healthcare decision" that qualifies under the statute. ***Id.*** See also ***Guthrie,*** Civil Action No. 5:04cv218-DCB-JCS.

The "Surrogate Statute" states that "A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available." Miss. Code Ann. §41-41-211. So for the statute to apply and for Mrs. Lawrence to have had authority to bind Mr. Lawrence to the arbitration agreement, there

must be evidence of a determination made by Mr. Lawrence's primary physician that he was mentally incompetent.

To date, no proof on the issue of Ruth Lawrence's authority as an agent of James Lawrence has been presented. Mrs. Lawrence's signature should therefore be treated as a nullity, and this Court should use only Mr. Lawrence's acts and intentions in analyzing the enforceability of the arbitration agreement.

There is ample authority for the proposition that where an agent does not have authority to bind a party to an arbitration agreement, or where the party otherwise does not sign the agreement, the party cannot be bound by its terms. *See* ***AT&T Technologies, Inc. v. Communications Workers***, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (to require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the "first principle' of arbitration that "a party cannot be required to submit [to arbitration] any dispute which she has not agreed so to submit."); ***Volt Info. Sciences, Inc. v. Board of Trustees***, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); ***Chastain v. The Robinson-Humphrey Company, Inc.***, 957 F.2d 851 (11th Cir. 1992); ***Goldberg v. Bear, Stearns & Co.***, 912 F.2d 1418 (11th Cir. 1990) (per curiam); ***Cancannon v. Smith Barney, Harris, Upham & Co.***, 805 F.2d 998 (11th Cir. 1986) (per curiam); ***Three Valleys Municipal Water District v. E. F. Hutton & Company, Inc.***, 925 F.2d 1136 (9th Cir. 1991); **Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.**, 636 F.2d 51 (3rd Cir. 1980); ***N & D Fashions, Inc. v. DHJ Indus., Inc.***, 548 F.2d 722 (8th Cir. 1976); ***Smith Wilson Co. v. Trading & Dev. Establishment***, 744 F.Supp. 14 (D.D.C. 1990); ***Ferreri v. First Options, Inc.***, 623 F.Supp. 427 (E.D. Pa. 1985); ***Sphere Drake Insurance Ltd. V. All American Ins. Co.***, 256 F.3d 587 (7th Cir. 2001); ***Sandvik AB v. Advent International Corp.***, 220 F.3d 99 (3rd Cir. 2000); ***Raiteri v. NHC Healthcare/Knoxville, Inc.***,

No. 2-791-01, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003).

B. Trinity Has Produced No Evidence To Establish That The "Mark" On The Admissions Documents Was Mr. Lawrence's

At the time Mr. Lawrence entered Trinity, he was mentally competent, but physically limited. He was able to walk a little according to his wife. The social worker's notes indicate he could move himself in his wheelchair. He knew his name, knew the current season, knew that nursing home staff was not his family, and was aware that he was in a nursing home in Holly Springs, Mississippi. He was able to reminisce about his childhood. And he could make his own decisions related to everyday life. He was illiterate except that he knew how to sign his name, though on the date of admission he was unable to sign documents according to both his wife and the social worker notes.

Despite all of this, he was not presented any of the paperwork for review to "mark" in the presence of his wife nor the social worker. The arbitration agreement produced by the Defendant shows a mark on the line where Mr. Lawrence's signature was indicated. Another mark with a substantially different appearance appears on the Admission Agreement. Mrs. Lawrence did not witness either of these purported signatures and no notary was present to verify them. No witness to the signatures was produced to testify at the hearing on Trinity's Motion to Compel. No other document produced by the Defendant, including those required by Federal and State Law, bear any purported mark from Mr. Lawrence whatsoever.

The complete lack of evidence that Mr. Lawrence "marked" any document in the face of Mrs. Lawerence's challenge was and is fatal to Trinity's ability to establish that a valid arbitration agreement existed by virtue of Mr. Lawrence's assent.

The remaining legal arguments in this brief pertain only to the issues of Procedural and Substantive Unconscionability. Because Judge Lackey correctly denied Trinity's Motion to Compel Arbitration for failing to meet the first prong of the two-prong test, there is no need for this Court to address these issues. However, in an abundance of caution, the issues are addressed in the event the Court finds it necessary to extend its review beyond the purview of Judge Lackey's decision.

C. The Purported Arbitration Agreement is Procedurally Unconscionable in that it Does Not Evidence that there was a Knowing and Voluntary Waiver of the Right to a Jury Trial, nor has such Proof been Presented; Thus, The Court Should Have Denied the Motion Even if a Valid Arbitration Agreement was Found to have Existed.

The law indulges every presumption against waiver of a right to trial by jury. ***Hodges v. Easton***, 106 U.S. 408, 412, 1 S.Ct. 307, 311 (1882). The Mississippi Supreme Court stated in ***Vicksburg Partners, L.P. v. Stephens***, 911 So.2d 507, 2005 WL 2298855, No. 2004-CA-01345-SCT, at p. 14 (Miss. 2005):

> In general, 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." [*citations omitted*]... Notably, we review all questions concerning unconscionability under the circumstances as they existed at the time the contract was made. [*citations omitted*].

Id.

Here, at the time the purported contract was made, The Lawrence's were under the impression that Mrs. Lawrence had to sign the documents presented by the nursing home in order to be admitted and the allowed to stay in the nursing home. The lack of any choice (take it or leave it) creates the unmistakable atmosphere of unconscionability and that renders the purported agreement void. Additionally, the contract terms and the contract itself unreasonably favor the nursing home defendants. Defendants ostensibly prefer arbitration over state circuit

court suits, believing that compensatory and punitive awards will be less, that an arbitration will create less unfavorable press than a jury trial, that an arbitration will be less expensive to defend than a jury trial, etc. They also know that their corporate and insurance clients will have greater familiarity with arbitrators, much more contact in the past and future, with both the arbitrator forum and the arbitrator, and this will exert greater influence on the arbitrator, and the arbitrator forum who have a vested interest in continuing to be selected by nursing home litigants. Conversely, the Plaintiff will almost assuredly never be in a position to select an arbitrator again, and will therefore be unable to financially reward or penalize the arbitrator based on his performance.

The standard for waiver of the constitutional right to jury trial in Mississippi is that the waiver must be made "willingly, knowingly and voluntarily." ***Id.*** at 31 ("Both 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."); ***D. H. Overmyer Co. v. Frick Co.***, 405 U.S. 174, 185-86, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972); ***B. C. Rogers Poultry, Inc. v. Wedgeworth***, 911 So.2d 483, 2005 WL 2234777, *3 (Miss. 2005) ("This Court remains unconvinced, as the law requires, that Wedgeworth knowingly, intelligently, and voluntarily waived his fundamental right to a jury trial."); ***Sullivan v. Protex Weatherproofing, Inc.***, 913 So.2d 256, 2005 WL 729536, *8 (Miss. 2005); *see also* ***Vicksburg Partners, L.P. v. Stephens***, *supra*, at p. 31 (knowing and voluntary waiver on behalf of both the agent and the principal are necessary).

D. <u>The Purported Arbitration Agreement Constitutes Illegal Additional Consideration, in Violation of 42 U.S.C. §1396r(c)(5)(A)(iii), and Should Not Be Enforced</u>.

It is unquestionable that Mississippi considers the waiver of a right to be consideration.

Estate of Lexie Louis Sadler v. Lee, 98 So.2d 863, 867 (Miss. 1957). By attempting to require James Lawrence to waive his right to a jury trial, Trinity Mission Health & Rehab of Holly Springs, LLC sought to extract consideration in addition to his agreement to pay for services at that facility.

Nursing homes that require arbitration agreements of their residents violate federal law by requiring additional consideration from the resident in exchange for continued stay at the nursing home. Where an individual is entitled to medical assistance through Medicare or Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money donation, or **other consideration** as a precondition of admitting... the individual to the facility or as a requirement for the individual's **continued stay** in the facility.

42 U.S.C. §1396r(c)(5)(A)(iii). Furthermore, federal regulations provide as follows:

> In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, **or other consideration** as a precondition of admission, expedited admission or **continued stay in the facility.**

42 C.F.R. §483.12(d)(3) (emphasis added).

Requiring this resident to waive his constitutional right to a jury trial for continued stay at this nursing home is additional consideration that is violative of the law. The defendant's purported arbitration agreement should be struck as illegal.

E. The Purported Arbitration Agreement in the Nursing Home Context Should be Void as Against Public Policy.

With regard to nursing home admission agreement, Mississippi Minimum Standard for Institutions for the Aged or Infirm §404.3(b) provides:

> **No agreement** or contract **shall be entered** into between the licensee and the resident or his responsible party arbitration agreement **which will relieve** the licensee of responsibility for the **protection of the person and of the rights** of the individual admitted to the facility for care, as set forth in these regulations. *(emphasis added).*

The Residents' Rights set forth in the Minimum Standards at §408.2 state that a nursing home resident:

> is encouraged and assisted, throughout his period of stay, to exercise his rights as a resident and as a citizen, and to this end may voice grievances, has a **right of action for damages** or other relief for deprivations or infringements of his right to adequate and proper treatment and care established by an applicable statute, rule, regulation or contract, and to recommend changes in policies and services to facility staff and/or to outside representatives of his choice, **free from** restraint, **interference, coercion**, discrimination, or reprisal....
>
> is assured of exercising his **civil** and religious **liberties**, including the right to independent personal decisions and knowledge of available choice. The facility shall **encourage and assist in the fullest exercise of these rights**. *(emphasis added).*

Additionally, the federal OBRA regulations provide that a nursing home must protect and promote the rights of each resident, including each resident's rights as a United States citizen. *See* 42 C.F.R. §483.10(a)(1). These Mississippi Minimum Standard and federal regulations clearly provide that nursing homes cannot infringe upon the rights of their residents, nor can they contract away the rights of the their residents.

With this backdrop, as a policy matter, adhesion contracts regarding health care should be unenforceable. While Mississippi courts have yet to address this issue, other states have. *See* ***Howell v. NHC Health Care - Ft. Sanders, Inc.***, 109 S.W.3d 731 (Tenn. Ct. App. 2003), ***Broemmer v. Abortion Services of Phoenix, Ltd.***, 173 Ariz. 148, 840 P.2d 1013 (1992), ***Obstetrics and Gynecologists William G. Wixted, Patrick M. Flanagan, William Robinson, Ltd. V. Pepper***, 101 Nev. 105, 693 P.2d 1259 (1985), ***Miner v. Walden***, 101 Misc.2d 814, 422

N.Y.S.2d 335 (1979), ***Wheeler v. St. Joseph Hospital***, 63 Cal. App.3d 345 (1976). In determining that hospital admission contracts were contracts of adhesion, the Fourth District Court of Appeals for the State of California wrote:

> The would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement, to find another hospital. The admission room of a hospital contains no bargaining table where, as in the private business transaction, the parties can debate the terms of their contract. As a result, we cannot but conclude that the instant agreement manifested the characteristics of the so-called adhesion contract.

Wheeler, 63 Cal.App.3d at 357 *(internal citations omitted)*.

Further, the Tennessee Court of Appeals has made the following statement when addressing the issue of enforcing arbitration agreements in nursing home admission contracts:

> [C]ourts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden... and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment.

Howell, 109 S.W.3d 731 *(internal citations omitted)*.

In ***Buraczynski v. Eyring***, 919 S.W.2d 314 (Tenn. 1996), the Tennessee Supreme Court held that an arbitration agreement between a doctor and a patient was a contract of adhesion where it was presented to the patient well after his course of treatment had begun. Emphasizing the special doctor-patient relationship, the court noted that if the patient declined to sign, she would have suffered an interruption in care and lost the opportunity to continue treatment with the physician whom she had come to know and trust. *See* ***Buraczynski***, 919 S.W.2d at 320.

It is questionable whether any policy favoring arbitration has the same force in cases such as this one as it does in the typical case involving an arbitration clause. The vast majority of

cases dealing with arbitration agreements deal with those agreements that occur in commercial settings. Such agreements are borne out of negotiations between two sophisticated parties who are simply bargaining for the opportunity to resolve their disputes in a certain forum. In those instances the parties are aware of the types of disputes that may arise, particularly since any dispute would be based on the contract that was negotiated between those parties. It is quite natural that courts and legislatures would recognize a "policy" favoring arbitration in such settings.

A case involving personal injury, particularly in the medical care setting, is far different. Typically, as in the case at bar, there is no negotiation between the parties as to the terms of the agreement; the parties are typically of dramatically different levels of sophistication; and inherently, if a person, or especially an infirm elderly parent, needs medical care, he will sign whatever is necessary. This is exactly what occurred in this case. The American Health Lawyers Association has indicated their disfavor of arbitrating medical care claims based on pre-dispute agreements. Public policy should bar these defendants from seeking arbitration as well, and their motion should be denied.

F. The Arbitration Agreement Should Be Stricken Based on Lawrence's Defenses to Enforcement of the Contract Based in Law and Equity

Should the Court find all of the above arguments unpersuasive, Lawrence has yet other compelling defenses to the enforcement of the arbitration agreement grounded in our Contract jurisprudence. The United States Supreme Court has repeatedly pointed out that "generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate arbitration provisions or agreements contemplated under section 2 of the FAA". ***Doctor's Assocs., Inc. v. Casarotto***, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed. 2d 902 (1996). See ***Allied Bruce, Inc. v. Dobson***, 513 U.S. 265, 281, 115 S.Ct. 834, 843 130 L.Ed. 2d

753 (1995); ***Rodriguez de Quijas v. Shearson/Am. Exp., Inc.***, 490 U.S. 477, 483-484, 109 S.Ct. 1917, 1921-1922, 104 L.Ed.2d 526 (1989); ***Shearson/Am. Exp. Inc. v. McMahon***, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987). Though other contract defenses are not specifically named, the use of the phrase "such as" indicates clearly the Court's intention that all contract defenses are available. The Mississippi Supreme Court has also recognized the availability of these defenses repeatedly, notably in ***East Ford vs. Taylor,*** 826 So. 2d 709, 713 (Miss. 2002). The arbitration agreement sought to be enforced by Trinity in the current case should not be enforced based on Mr. Lawrence's defenses of Breach of Contract, Illusory Consideration, and Ambiguity.

G. Trinity is in Material Breach of it's Promises Made in Consideration for Plaintiff's Purported Consent to Arbitrate.

In the purported arbitration agreement, Trinity includes the following phrase on the first page of the contract, in all bold and capital lettering:

> THIS AGREEMENT CONTAINS SEVERAL PROVISIONS INTENDED TO REDUCE THE COST OF NON-CARE RELATED EXPENSES SUCH AS LEGAL FEES, SETTLEMENT COSTS, ADMINISTRATIVE TIME AND SIMILAR EXPENSES IN ORDER THAT THE FACILITY MAY SPEND MORE MONEY IN OTHER AREAS THAT MAY BE OF GREATER BENEFIT TO THE RESIDENT.

To reiterate the importance of this exchange of promises, on page two of the agreement, under the heading "STATEMENT OF PURPOSE", the facility promises that:

> Avoiding the substantial expense of litigating disputes in a courtroom setting allows the Facility to spend its money in other areas that may be of greater benefit to the Resident."

Though important particulars are notably absent, as will be discussed more fully below, it is apparent that the Mr. Lawrence was offered the promise of heightened care and support in

exchange for the high cost of waiving his constitutional right to trial by jury. Therefore, the only way Trinity can enforce the purported promise of Mr. Lawrence to arbitrate disputes is to show that it has performed as promised in the contract. If a party has committed a material breach, the contract should be terminated. ***UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.,*** 525 So. 2d 746, 756 (Miss. 1987). A material breach occurs when there "is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, **or if there is such a breach as substantially defeats its purpose."** ***Gulf South Capital Corp. v. Brown***, 183 So. 2d 802, 805 (Miss. 1966). ***(Emphasis added)*** Trinity made it easy for the Court to see the contract's "PURPOSE" in including the language recited above by including it under the heading "STATEMENT OF PURPOSE." The "PURPOSE" of the arbitration agreement was to exchange heightened benefits to the patient in exchange for lower legal bills for Trinity. Trinity absolutely failed in its promise to Mr. Lawrence and in fact provided such substandard care, contrary to the established standard of care, that he suffered grievous injuries including double leg amputation and painful bed sores.

Discovery must be conducted in this case to prove what Lawrence already knows based on information and belief: that substantial sums of money have been accumulated by Trinity and its corporate hierarchy by forcing its residents to sign arbitration agreements and thus allow the company to avoid the expense of litigation, reasonable settlement amounts and jury awards resulting from its negligent acts; and that the savings thus accrued were never used for the benefit of the facility's residents and Mr. Lawrence in particular.

It is a rebuttable presumption that consideration recited in a contract actually existed. ***Daniel v. Snowdoun Ass'n***, 513 So. 2d 946, 950 (Miss. 1987). However, "the presumption does not preclude the defendant from putting on proof designed to show that the consideration was not

actually paid..." The rebuttal must be made by a clear preponderance of the evidence and the issue must be resolved by the trier of fact. ***Daniel***, 513 So. 2d at 950. Lawrence will rebut the presumption that Trinity kept its promise if given an opportunity to go forward with discovery.

The Mississippi Supreme Court recently reiterated the law as it applies to a party who has failed to uphold their end of a bargain in ***R.K. v. J.K.*** 946 So. 2d 764, 774 (Miss. 2007). "[T]he principles of equity and righteous dealing [are] the purpose of the very jurisdiction of the [chancery] court to sustain." ***Shelton v. Shelton***, 477 So.2d 1357, 1358-59 (Miss.1985). It is one of the oldest and most well known maxims that one seeking relief in equity must come with clean hands or face refusal by the court to aid in securing any right or granting any remedy. ***Id.; See also Cole v. Hood***, 371 So.2d 861, 863-64 (Miss.1979) (those who seek equitable relief must do so with clean hands); ***Thigpen v. Kennedy***, 238 So.2d 744, 746 (Miss.1970) (same); ***Taliaferro v. Ferguson***, 205 Miss. 129, 143, 38 So.2d 471, 473 (1949) (same). In other words, whenever a party seeks to employ the judicial machinery in order to obtain some remedy and that party has violated good faith or some other equitable principle, "the doors of the court will be shut against him" and "the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." ***Shelton***, 477 So.2d at 1359.

In failing to further their own purported "PURPOSE" of the arbitration agreement, Trinity exposed its unclean hands, and must not now be allowed to obtain the benefit of the very contract it violated.

H. The promise to spend more money to the benefit of Mr. Lawrence was illusory and thus the arbitration agreement is unenforceable.

Nursing homes are governed by both Federal and State regulations which set forth minimum levels of care and support which must be provided to residents. To make a

Resident believe their care will only be sufficient if they contract away their right to trial by jury is illusory. The Mississippi Supreme Court has relied on Professor Corbin's analysis of illusory promises as consideration, which states:

> By the phrase "illusory promise" is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all. . . . A prediction of future willingness is not an expression of present willingness and is not a promise. To see a promise in it is to be under an illusion. We reach the same result if B's reply to A is, "I promise to do as you ask if I please to do so when the time arrives." In form this is a conditional promise, but the condition is the pleasure or future will of the promisor himself. The words used do not purport to effect any limitation upon the promisor's future freedom of choice. They do not lead the promisee to have an expectation of performance because of a present expression of will. He may hope that a future willingness will exist; but he has no more reasonable basis for such a hope than if B had merely made a prediction or had said nothing at all. As a promise, B's words are mere illusion. Such an illusory promise is neither enforceable against the one making it, nor is it operative as a consideration for a return promise. *Krebs ex rel. Krebs v. Strange,* 419 So.2d 178, 182-83 (Miss. 1982) (quoting 1 Corbin, *Contracts,* § 145 (1 vol. ed. 1952)).

In the present case, the facility's promise is perfectly described by Professor Corbin. That is, the facility promises to spend money to improve "benefit" to the resident based on savings realized on future litigation expenses. What they actually promised, and what they actually did, was to "do as (I promise) if (I) please to do so when the time arrives." For Mr. Lawrence, the time never arrived and the facility did not "please to do so"-- that is spend litigation savings for Lawrence's benefit, at any time. As the promise was classically illusory in that no real promise/consideration was provided by Trinity, they can not now expect that the consideration demanded from the Lawrence's be provided. The arbitration agreement should not be enforced for this additional reason.

I. The contract should not be enforced because its material terms, specifically the consideration provided by Trinity in exchange for the agreement to arbitrate are ambiguous.

The Mississippi Supreme Court has stated that "In determining the meaning of contract terms, this Court reads the contract as a whole, gives contract terms their plain meaning, and construes any ambiguities against the drafter. ***Pursue Energy Corp. v. Perkins***, 558 So. 2d 349, 352-253 (Miss. 1990). "If contract language is susceptible of two or more reasonable interpretations, then ambiguity is present. ***Miss. Farm Bureau Cas. Ins. V. Britt***, 826 So. 2d 1261, 1265 (Miss. 2002). Citing the Perkins and Britt cases, the Mississippi Court of Appeals recently affirmed a trial court's finding of an unenforceable contract when the terms were ambiguous due to lack of specificity. ***Cain v. Cain*** 2005-CA-00251-COA. The offending phrases in Cain were "employees are valuable assets" and "personnel employed by (Quest)". "These terms are ambiguous because it is impossible to discern if they embraced all past, present, or future Quest employees, or only persons who were employed by Quest at the inception of the contract."

Id. In the present case, the ambiguity lies totally within the recital of consideration of the defendant and the lack of specificity is analogous to the facts addressed in ***Cain.*** It is completely unstated as to how much money will be saved as a corporation or by the local facility. It is unstated as to what benefit will be provided by the facility to the resident and how much additional money will be spent to provide the benefit. And finally, there is no way delineated in the contract terms to verify the keeping of the facility's promise. As such, the terms of the contract are impermissibly, non-specific, vague and ambiguous and for yet another reason, the contract should be deemed void and unenforceable.

CONCLUSION

Trinity failed to establish the foundation upon which any motion to compel arbitration must be built. They have not shown at any time that a valid arbitration agreement existed. For this reason and the others stated herein, Ruth Lawrence, as Administratrix of the Estate of James E. Lawrence, Deceased and on Behalf of the Wrongful Death Beneficiaries of James E. Lawrence, Deceased, respectfully requests this Court to AFFIRM the Marshall County Circuit Courts denial of Trinity's Motion to Compel Arbitration.

THIS, the 27th day of June, 2008.

Respectfully submitted,

RUTH LAWRENCE, as Administratrix of the Estate of JAMES E. LAWRENCE, Deceased and on Behalf of the Wrongful Death Beneficiaries of JAMES E. LAWRENCE, Deceased

By: _____
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CERTIFICATE OF SERVICE

I, John G. (Trae) Sims, III, hereby certify that I have this day filed a true and correct copy of the following via U.S. Postal service, first class, postage prepaid to the following:

Heather Aby, Esq.
Maxey Wann, PLLC
P. O. Box 3977
Jackson, MS 39207-3977

Honorable Henry L. Lackey
Circuit Court Judge
208 North Main Street
Suite 102 Lackey Building
Calhoun City, Mississippi 38916

This the 27th day of June, 2008.

John G. (Trae) Sims, III