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

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**

v.

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

REPLY BRIEF OF APPELLANT

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I. This matter is ripe for arbitration.

James Lawrence was admitted to Trinity Mission Health & Rehab of Holly Springs, LLC ("Trinity Mission") on December 27, 2006. At that time, both he and his wife, Ruth Lawrence ("Lawrence"), executed an Alternative Dispute Resolution Agreement and an Admission Agreement. R. 62-77. The first page of the Alternative Dispute Resolution Agreement provided, "IMPORTANT NOTICE":

> THIS ALTERNATIVE DISPUTE RESOLUTION AGREEMENT IS A LEGALLY BINDING DOCUMENT. THE RESIDENT AND RESPONSIBLE PARTY UNDERSTAND THAT THEY HAVE CHOICES AND OPTIONS OTHER THAN PLACEMENT OF THE RESIDENT IN THIS FACILITY. 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. BEFORE SIGNING THIS AGREEMENT PLEASE READ IT CAREFULLY. IF YOU HAVE ANY QUESTIONS, PLEASE BRING THEM TO FACILITY'S ATTENTION. YOU HAVE THE RIGHT AND ARE ENCOURAGED TO SEEK THE ADVICE OF LEGAL COUNSEL BEFORE SIGNING.

R. 71. (Capitalization in original).

Section B. of the Agreement, aptly entitled "**AGREEMENT TO SUBMIT DISPUTES TO ADR**" set forth the scope of disputes subject to alternative dispute resolution:

> **Disputes subject to ADR.** The Parties agree that any legal controversy, dispute, disagreement or claim of any kind (collectively "Dispute") now existing or occurring in the future between the parties arising out of or in any way relating to this Agreement, the Admission Agreement or the Resident's stay at the Facility shall be resolved through an ADR process (as defined

> herein) including, but not limited to, all Disputes based on breach of contract, negligence, medical malpractice, tort, breach of statutory duty, resident's rights, any departure from accepted standards of care, and all allegations of fraud in the inducement or requests for rescission of this Agreement. This includes any Dispute involving a claim against the Facility, its employees, agents, officers, directors, any parent, subsidiary or affiliate of the Facility or any Dispute involving a claim against the Resident, the Resident's Legal Representative or Responsible Party or family member.

R. 72.

The language of the above provision is clear – *any legal controversy, dispute or disagreement now existing or occurring in the future . . . shall be resolved through arbitration.* The contract entered into on December 27, 2006 covers the allegations set forth in Complaint; thus, the lower court erred in refusing to order arbitration.

Because this is an issue of contract construction, as such, simple contract principles apply. Mississippi had long followed the four-corners rule when interpreting a contract. The goal of a court is to give effect to the intent of the parties. *Heartsouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105 (Miss.2003). "'The general rule is the intention of the parties must be drawn from the words of the whole contract, and if, viewing the language used, it is clear and explicit, then the court must give effect to this contract unless it contravenes public policy.'" *Id.* (quoting *Jones v. Miss. Farms Co.*, 116 Miss. 295, 76 So. 880, 884 (1917)).

In looking to the four-corners to interpret a contract, "'the court's concern is not nearly so much with what the parties may have intended but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning the meaning with fairness and accuracy.'" *Id.* (quoting *Warwick v. Gautier Utility District*, 738 So. 2d 212, 214 (Miss.

1999)). "Contracts must be interpreted by objective, not subjective standards, therefore '[c]ourts must ascertain the meaning of the language actually used, and not some possible but unexpressed intent of the parties.'" *Id.* (quoting *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 105 (Miss. 1998)). It is the duty of a court to construe an instrument as written. *Thornhill v. System Fuels, Inc.*, 523 So. 2d 983, 998 (Miss. 1988).

The facts before the Court are akin to those presented in *Community Care Center of Vicksburg, LLC v. Mason.* 966 So. 2d 220 (Miss. Ct. App. 2007):

> On the day of her admission of April 18, 2003, Mrs. Mason signed numerous admission documents in her room. One such document was an admission agreement, which contained an arbitration provision. The seven page admission agreement was properly executed by Mrs. Mason on page six. . . .
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> ****
>
> The signature was witnessed by "D. Rogers," who is a social worker at Heritage House. Below this area is a section entitled "Witness Acknowledgment (to be executed when agreement signed by resident)." Here there was a place for the resident and a witness to sign. This area was not filled out or signed; however, the signatures of the resident and witness were placed in the area above it.
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> ****
>
> The evidence points to a valid arbitration provision between Mrs. Mason and Heritage House and that she intended to be bound by arbitration. We do not find her failure to initial the arbitration provision invalidates the arbitration agreement or the contract as a whole. Nor do we find that the misplaced signatures on the last page of the agreement invalidate it. There is not evidence of an intent to invalidate the arbitration agreement. Therefore, we find there was a valid arbitration agreement between Mrs. Mason and Heritage House.

Id. at 223, 229.

Such is true in the instant matter. On December 27, 2006, James Lawrence executed both the Admission and Alternative Dispute Resolution Agreements. There is no evidence of exigency or undue influence in the record.[1] This Court has found such agreements to ". . . not be oppressive but, rather, to provide the plaintiffs with a fair process through which to pursue their claims." *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 741 (Miss. 2007) (citing *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 521 (Miss. 2005)). Thus, in light of well-established jurisprudence, the lower court erred in refusing to construe the contract in favor of Trinity Mission.

II. The December 27, 2006 Alternative Dispute Resolution Agreement does not constitute additional consideration.

Lawrence's argument execution of the Alternative Dispute Resolution Agreement constituted additional consideration is misplaced. The provisions referenced merely provide that a facility may not bill a Medicaid resident charges beyond what is paid by Medicaid on behalf of the resident. This relates to reimbursement regulations applicable to Medicaid recipients and providers of Medicaid services. The agreement to arbitrate benefits both parties. Further, since both parties are required to arbitrate under the agreement, any rights relinquished are relinquished by all parties.

In *Sanford v. Castleton Health Care Center*, the Indiana Appeals Court, when faced with

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[1]Lawrence made a blanket assertion to the lower court and again on appeal that there is no evidence James Lawrence executed the Alternative Dispute Resolution Agreement. This statement, however, is not supported by any record evidence affidavit or otherwise; thus, it is pure conjecture and respectfully, should not be considered by the Court in ruling on the present issue. *See Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 217 (Miss. 2008) (quoting *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So. 2d 417, 428 (Miss. 2007) (citing *Atlantic Horse, Ins., Co. v. Nero*, 66 So. 780 (Miss. 1914)). ("'This Court is limited to consideration of the facts in the record, while reliance on facts only discussed in the briefs is prohibited.'").

this precise issue, ruled:

> Employing the doctrine of *ejusdem generics*, we hold that the general phrase "other consideration," when followed by a specific enumeration of the terms gift, money, or donation, ***does not encompass an arbitration agreement.*** In fact, we note that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitrable forum. . . .

813 N.E.2d 411, 419 (Ind. Ct. App. 2004). (Emphasis supplied). Lawrence's contention as to consideration lacks merit and is nothing more than an attempt to divert the Court's attention from the main issue – enforcement of a binding agreement to arbitrate. In fact, in *Gulledge v. Trinity Mission Health & Rehab of Holly Springs*, Judge Mills found this identical argument unpersuasive, holding:

> Not fazed by the logic pronounced by Indiana, Alabama, and Tennessee, the Plaintiff argues that Mississippi case law holds that extinguishing one's right to bring suit is consideration. *See Estate of Lexis Louis Sadler v. Lee*, 98 So. 2d 863 (Miss. 1957). However, this rule does not apply to the present case. First logic dictates, the proper interpretation of section 1396r [the Medicaid statute] is that it refers only to types of consideration that are similar to gifts or money donations. An arbitration agreement is not financial consideration and thus not contemplated by the statute. The Mississippi cases dealing with extinguishing the right to sue, deal with the total loss of any ability to adjudicate claims. This factual scenario is not before this Court. ***Here the parties have simply chosen another forum in which to bring their grievance.*** The arbitration agreement is not in violation of Section 1396r.

2007 WL 3102141,* 4 (N.D. Miss. 2007). (Emphasis supplied). Trinity Mission respectfully urges the Court to adopt the reasoning of the United States District Court for the Northern

District of Mississippi in likewise declining to apply Lawrence's theory regarding consideration in the context of the facts before the Court.

III. The December 27, 2006 Alternative Dispute Resolution Agreement does not violate public policy.

Lawrence has urged the Court to affirm the lower court's denial of arbitration alleging the contract violates Mississippi's public policy. The *Gulledge* Court when faced with the exact issue, declined to apply the plaintiff's reasoning and correctly held:

> The Plaintiffs are correct in asserting that both federal and state law require nursing homes to protect the rights of their patients and to encourage the full exercise of those rights. 42 C.F.R. § 483.10(a)(1); Miss. Dept. of Health, *Rules, Regulations and Minimum Standards of Institutions for the Aged or Infirm*, Rules 404.3(b), 408.2. . . . ***[A]n arbitration agreement does not violate any right that a party may have. The agreement simply puts in writing the parties agreement to adjudicate their claims in a different forum. Certainly both parties have a right to a fair and impartial arbitration. However, an agreement to move to a different forum is not a violation of a party's right to recover damages or obtain other relief as may be warranted.***

Gulledge, 2007 WL 3102141, at *5. (Emphasis supplied). The reasoning of the *Gulledge* Court is similar to this Court's holdings in both *Stephens* and *Brown* with regard to an individual's ability to pursue his or her claims through arbitration. Accordingly, Trinity Mission requests the Court to apply this sound reasoning and reverse the lower court's denial of arbitration.

IV. The Alternative Dispute Resolution Agreement, although a contract of adhesion, is enforceable.

Lawrence further seeks affirmation of the lower court's holding by asserting the contractual defense of adhesion. "Adhesion contracts are agreements 'drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who has no real opportunity to bargain about its terms.'" *Gulledge*, 2007 WL 3102141, at *5 (citing *East*

Ford, Inc. v. Taylor, 826 So. 2d 709, 716 (Miss. 2002)). The *Gulledge* Court aptly found – in applying Mississippi jurisprudence:

> No matter of any such argument, the law is clear. There is a strong presumption in favor of arbitration. Additionally, Mississippi has adopted the majority rule, as discussed previously, that adhesion contracts are enforceable unless they are also unconscionable. Any change in this posture would have to come from the Mississippi legislature or Supreme Court. The arbitration agreement in the case before the Court is not in violation of public policy.

Id.

In *Stephens*, this Court held: "In line with U.S. Supreme Court precedent, we will review the arbitration agreements in this case, paying close attention to the strong federal policy of favoring the enforcement of agreements to arbitrate." 911 So. 2d at 516. "'The Court went on to state that absent a well-founded claim that an agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for revocation of any contract,' ***the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'***'" *Id.* (quoting *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)). (Emphasis supplied).

As a result of this Court's favored status of arbitration, there exists a presumption the arbitration provision is valid and binding. Lawrence has failed to prove otherwise. In *Brown*, the Court, following the dictate of *Stephens*, found it proper to sever sections waiving liability for criminal acts; requiring forfeiture of all claims except those for wilful acts; limitation of liability; shortened statute of limitations; waiver of punitive damages; as well as language requiring "the resident to pay all costs for enforcement of the agreement if the resident avoids or challenges either the grievance resolution process or an award therefrom. 949 So. 2d at 739. The Court in

Brown (and in *Stephens*) was able to strike these provisions due to a "savings clause" contained in the contract.

Such a clause exists in the record before the Court. Section F, ¶ 2 of the Alternative Dispute Resolution Agreements provides: "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." R. 76. Therefore, in accord with *Brown* and *Stephens*, the Court may strike any terms it considers unconscionable and enforce the remainder of the contract, *i.e.*, the agreement to arbitrate "***any legal controversy, dispute, disagreement or claim of any kind . . . now existing or occurring in the future between the parties arising out of or in any way relating to this Agreement, the Admission Agreement or the Resident's stay at the Facility***. . . ." R. 73. (Emphasis supplied).

In addition to arguing against enforcement of the agreement to arbitrate based upon the above-language, Lawrence urges the Court to uphold the lower court's denial of arbitration based upon the waiver of a jury trial. That argument, however, lacks merit. The Alternative Dispute Resolution Agreement provided clear notice of the waiver to James Lawrence in several sections of the contract:

> **A. STATEMENT OF PURPOSE**
> **. . . . While there are certain advantages to Grievance Resolution, Mediation and Arbitration, by signing this Agreement, the Resident and/or Responsible Party are giving up certain rights that they may consider important, for example the right to have your dispute heard by a judge or jury.** Therefore, should you have any questions while reading this Agreement, do not sign it until those questions have been answered to your satisfaction, either by someone at the Facility or

by your own attorney or legal advisor.

C. ALTERNATIVE DISPUTE RESOLUTION PROCEDURE

2. **Binding Effect.** The Parties agree that the arbitration shall have all the authority necessary to render a final, binding decision of all Disputes and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The decision of the arbitrator shall be binding on all parties to the Arbitration, and also on the successors and assigns, including the agents and employees of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including but not limited to, that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The Parties specifically agree that the decision of the Arbitrator shall be final and may not be appealed to a court of law or equity.

E. ACKNOWLEDGMENT OF RESIDENT

By signing this Agreement, the Resident expressly agrees and acknowledges the following:

4. **THIS AGREEMENT WAIVES THE RESIDENT'S RIGHT TO A TRIAL IN COURT AND A TRIAL BY JURY FOR ANY FUTURE CLAIMS RESIDENT MAY HAVE AGAINST THE FACILITY.**

R. 72-73, 74-76. (Emphasis in original). Further, this Court has recognized an individual's waiver of a jury trial ". . . has the same effect as signing an arbitration agreement." *Brown*, 949 So. 2d at 740. The Court in *Brown*, further found: "It is well established that this Court respects the ability of parties to agree to the means of a dispute resolution prior to a and enforces the plain meaning of a contract as it represents the intent of the parties." *Id.* (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 722 (Miss. 2002)). In the instant matter, as set forth *supra*, notice of the waiver of a jury trial is set forth throughout the Alternative Dispute Resolution Agreement; as such, argument regarding its unenforceability should be disregarded by the Court.

The alternative dispute resolution provisions are part of a fully enforceable contract and as the Court found in *Vicksburg Partners, L.P. v. Stephens*, "[arbitration is about a choice of forum - period." 911 So.2d 507, 525 (Miss. 2005). In "construing contracts, a general rule is to give effect to the mutual intentions of the parties contracting." *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170, 176 (Miss. 2007) (citing *Kight v. Sheppard Bldg. Supply Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989)). As such, Trinity Mission respectfully requests the Court honor this choice of forum and reverse the lower court's ruling.

V. Sections G-I of Lawrence's brief center around the merits of the claims against Trinity Mission, and therefore, should not be considered by the Court in ruling on the limited issue of arbitration.

Sections G - I of Lawrence's brief are underpinned with the same theme – the care James Lawrence did or allegedly did not receive while a resident of Trinity Mission and whether or not those allegedly broken promises and/or breach of terms render the arbitration agreement moot. Those issues clearly deal with the heart of the underlying tort claims and are not determinative in the Court's ruling on the limited issue of arbitration. This Court has long limited a lower court's role when considering an agreement to arbitrate. In *IP Timberlands Operating Co. v. Denmiss Corp.*, the Court also found the Federal Arbitration Act limited a court's role to determining whether a matter is referable to arbitration. 726 So. 2d 96, 103 (Miss. 1998). "Once that determination is made, the court may not delve further into the dispute." *Id.* "'***The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.***'" *Id.* (quoting *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960)). (Emphasis supplied). *See also, Primerica Life Ins. Co. v.*

Brown, 304 F.3d 469, 471 (5th Cir. 2002) ("court's inquiry on a motion to compel arbitration is limited"). The Fifth Circuit Court of Appeals has held that "arbitration is a matter of contract between the parties." *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998). Thus, Trinity Mission respectfully requests the Court disregard Lawrence's attempt to circumvent her husband's decision to enter into an agreement to have all disputes with Trinity Mission resolved through binding arbitration (an agreement she likewise executed) and find the lower court erred in denying Trinity Mission's Motion to Stay Proceedings and Compel Arbitration.

CONCLUSION

Based upon the reasoning set forth herein, and more fully in its principal brief, Appellant, Trinity Mission Health & Rehab of Holly Springs, LLC respectfully requests the Court overrule the lower court's findings, strike the provisions of the contract previously deemed unconscionable in *Vicksburg Partners, L.P. v. Stephens* and *Covenant Health Rehab of Picayune, L.P. v. Brown*, and enforce the remainder of the agreement.

Dated, this the 13th day of August, 2008.

Respectfully submitted,

TRINITY MISSION HEALTH &
REHABILITATION OF HOLLY SPRINGS, LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth herein, a true and correct copy of the above and foregoing ***Reply Brief of Appellant*** was mailed via First Class mail, postage prepaid on the following:

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Honorable Henry L. Lackey
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This the 13th day of August, 2008.

Heather M. Aby