IN THE SUPREME COURT OF MISSISSIPPI
CASE # 2008-CA-00925

MANHATTAN NURSING &
REHABILITATION CENTER, LLC **APPELLANT**

V.

LOUISE WILLIAMS, Individually and
on Behalf of WILLIE MAE HENDERSON **APPELLEE**

BRIEF OF APPELLEE

(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 Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Louise Williams, Mary Still and Willie Mae Henderson – Appellees
2. Manhattan Nursing & Rehabilitation Center, LLC – Appellants
3. John F. Hawkins, Esquire, W. Andrew Neely, Esquire, Hawkins, Stracener & Gibson, PLLC – Attorneys for Appellees
4. Darryl M. Gibbs, Esquire, Tabor, Chhabra & Gibbs – Attorney for Appellees
5. Rebecca Adelman, Esquire, Chase Pittman, Esquire, The Law & Mediation Offices of Rebecca Adelman, PLC – Attorneys for Appellants
6. The Honorable Winston Kidd, Hinds County Circuit Court Judge

W. Andrew Neely
Attorney of record for Appellee

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STATEMENT OF THE ISSUES

1. Did the trial court properly rule that because the Defendants failed to promptly schedule and notice a hearing on their Motion to Compel Arbitration, and because their conduct was otherwise inconsistent with timely enforcement of arbitration, that the Defendants had waived any right to enforce arbitration?

2. Should this Court determine that Defendants did not waive their right to enforce arbitration and remand the case to the trial court, should the Defendant be allowed to conduct discovery on arbitration related issues?

3. Should the Plaintiffs be equitably estopped from challenging the arbitration provision because they asserted a breach of contract claim despite their confession herein of said claim and despite the fact that the cases relied upon by the Defendants are, at their core, contract cases?

STATEMENT OF THE CASE

I. Underlying Facts

The underlying facts of this case involve the negligence of a nursing home, Defendant Manhattan Nursing and Rehabilitation Center (hereinafter "Defendants" or "Manhattan"), in rendering medial care and treatment to Plaintiff, Willie Mae Henderson (hereinafter "Plaintiff" or "Henderson"). (R. 3-12) Henderson was admitted to Manhattan on or about December 1, 2004. (R. 6) During her residency she suffered a broken arm that was recognized and untreated by staff. (R. 6) Likewise, Henderson suffered serious decubitus ulcers, one of which resulted in the amputation of a leg, and which was proximately caused by negligence and gross negligence of Manhattan and its agents. (R. 6-7) Thereafter, this cause of action was brought for Henderson's pain and suffering, medical bills and damages against Manhattan for the foregoing acts and omissions. (R. 11).

Prior to admission to Manhattan, Henderson suffered from and had been diagnosed with Alzheimer's Disease, and was incapable of rendering any decision on her own. (R. 155) Because of this condition, Mary Still, one of Henderson's daughters, accompanied Henderson to Manhattan to admit her into the facili ty. (R. 83-84, 155) Normally, Ms. Henderson would have been accompanied by another daughter, Louise Williams, who had been the primary caregiver and primary decision-maker for Henderson, but Williams was unavailable to do so because of health reasons. (R. 85-86, 155) Ms. Still was presented with multiple admission documents, one of which was an "Arbitration Agreement," to which she affixed her signature.[1] (R. 83-84, 155-156)

II. Procedural Facts

On January 31, 2007, Henderson brought suit in the Circuit Court of the First Judicial District of Hinds County and promptly served her Complaint on Defendants Manhattan, Laura

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[1]While the facts make clear that the "Arbitration Agreement" signed by Louise Williams would not be enforceable by a court of law, Plaintiffs will not belabor this Court with those details as they are not relevant to the narrow issues before the Court today.

Clark, and Bobbie Blackard. (R. 3-12) On or about March 30, 2007, Defendants jointly filed a document styled Motion to Compel Arbitration or, Alternatively, Motion to Dismiss, and an accompanying memorandum brief. (R. 13-16, 17-79) Therein, Defendants asked for numerous grounds of relief from the Court including: a request to compel arbitration; dismissal of the Plaintiffs' Complaint with prejudice for failure to comply with Miss. Code Ann. 15-1-36(15); dismissal of Plaintiffs' claims against Defendants Blackard and Clark under *Howard v. Estate of Harper*, 947 So. 2d 854, 858 (Miss. 2006); dismissal of Plaintiffs' "breach of contract" claims; and dismissal of Plaintiffs' negligence per se claims. (R. 13-16, 17-79) Plaintiffs filed a response in opposition and accompanying memorandum to the Defendants' Motion on or about April 19, 2007. (R. 80-153, 154-173) Said response and memorandum included short affidavits by Henderson's daughters, Mary Still and Louise Williams, in addition to several other exhibits in opposition to the other bases asserted by the Defendants in their Motion to Dismiss. (R. 80-153, 154-173) In hopes of having the trial court resolve the arbitration issue in an expeditious manner, the Plaintiffs filed a Notice of Hearing on May 24, 2007, for hearing on the Motion to Compel Arbitration. (R. 172) Said hearing was set for August 16, 2007, nearing three (3) months after the hearing was noticed. (R. 172)

Contrary to assertions by Defendants in their Appellant's Brief, Plaintiffs did not unilaterally set their Response for hearing; rather, Plaintiffs consulted the trial court and defense counsel prior to noticing the hearing date as indicated by various pieces of correspondence between Plaintiffs and Defendants' counsel.[2] (R. 189, 191-192, 194-195, 197-98). Just after the Plaintiffs filed their Notice of Hearing, defense counsel requested the depositions of Plaintiff's daughters, Still and Williams,

[2]As the record reflects, at no time before June 28, 2007, did Defendants' counsel object to the August 16, 2007 hearing date.

and requested dates in June and July for their depositions.[3] (R 189) Per the request, Plaintiffs' counsel informed defense counsel that, with the exception of a few days, the Plaintiff's daughters could be made available for deposition at any time during those two months. (R. 191, 197-98, 207-08) Defense counsel never chose a date to depose Still and Williams despite the numerous dates provided. (R. 207-208) Then, on June 28, 2007, over one (1) month after the Plaintiffs had noticed the hearing on the arbitration matter, defense counsel informed Plaintiffs' counsel for the very first time that he could not be available for the August 16, 2007 hearing because of an alleged new conflict, namely a "court-ordered evidentiary hearing in Memphis." (R. 202-03) Yet one more month later, defense counsel filed with the trial court a document styled "[Notice] of Cancellation of Hearing." (R. 174-75) Defense counsel asserted that the hearing in the Tennessee court took precedent over the arbitration enforcement hearing in the present case. (R. 202-03) This was despite the fact that the Plaintiffs were never previously informed of the "hearing in Memphis,"and were never even given a style, cause number,[4] or justification for defense counsel's failure to inform the Tennessee court of his prior obligation in the Hinds County Circuit Court for the arbitration enforcement hearing.[5] Defense counsel simply stated that the "court ordered" hearing in the Tennessee court took precedent over the Hinds County Circuit Court hearing theorizing that, in this case, there was no order from the Hinds County Court scheduling the hearing and counsel therefore had no obligation to appear in Hinds County on August 16, 2007. (R. 202-203)

Defense counsel then began requesting an agreement from Plaintiffs' counsel to reset the

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[3]At times defense counsel requested that the scope of the daughters' depositions be limited to arbitration related matters only, and at other times defense counsel indicated that the wanted to depose the daughters' on both arbitration related issues as well as on the merits of the case. (R. 189, 194-95)

[4]On August 22, 2007, six days after the hearing, Plaintiffs were informed by counsel for the Defendants that they were obligated to attend a hearing before "Hon. Rita Sotts." Addendum at 1.

[5]Likewise, defense counsel never gave an explanation as to why his co-counsel in this case could not be present to represent their clients in the instant matter.

arbitration enforcement hearing to a date in late October. (R. 202-03) To avoid the prejudice of any further delay, Plaintiffs' counsel did not agree to a continuation of the hearing and again informed defense counsel that Still and Williams could be made available for deposition on short notice prior to the hearing. (R. 207-08) Subsequently, several letters were sent to the trial court by each party's counsel asking that the arbitration hearing either remain on the trial court's docket as scheduled (Plaintiff), or that the hearing be continued to late October (Defendants). (R. 213, 215-16, 221, 223). In addition to requesting that the August 16, 2007 hearing take place as scheduled for over two (2) months at that point, Plaintiffs' counsel suggested to the trial court that there be either a telephonic hearing or that the trial court simply rule on the briefs and exhibits on file. (R. 221) Defendants' counsel responded via letter to the court that neither suggestion was acceptable and that he would only agree to have the hearing reset in late October. (R. 223-24) The trial court, apparently seeing that no agreement could be reached between the parties as to alternative dates or methods on which the court could rule, left the August 16, 2007 arbitration motion hearing on its docket. (R. 228) As the matter was still on the trial court's docket, Plaintiff's counsel attended the hearing; defense counsel did not. (R. 228)

On August 22, 2007 and August 27, 2007, the trial court entered an Order and a subsequent Amended Order denying the Defendants' motion to compel arbitration.[6] (R. 176, 181) In its order, the trial court ruled that the Defendants had waived their right to assert the alleged Arbitration Agreement, stating:

> "[A]lthough the defendant[s] filed the herein Motion to Compel Arbitration, they have failed to promptly schedule and notice a hearing on said motion. The Court further finds that the plaintiff duly noticed the Defendants'

[6]The original Order Denying Defendants' Motion to Compel Arbitration or Alternatively, Motion to Dismiss, was amended by the trial court after the Plaintiffs informed the trial court of its inadvertent error in stating that the original Order that the defendant[s] noticed the motion hearing on August 16, 2007 when, in fact, the Plaintiffs had noticed the August 16, 2007 hearing. (R. 176, Addendum

> motion so this matter could move forward. The defendants indicated they were not available for hearing. Therefore, the Court chose to rule on this matter without a hearing. After a review of this matter, the Court finds that the defendants' conduct is inconsistent with timely enforcing the arbitration agreement. *See Century 21 Maselle and Associates v. Smith*, ---So.2d----, 2007 Miss LEXIS 448, 2007 WL 2325271 (Miss 2007).[7] Therefore, the Defendants' Motion to Compel Arbitration or, Alternatively Motion to Dismiss is not well taken and should be denied.

(R. 181)

Meanwhile, on August 29, 2007, Defendants, for the first time, filed a motion with the trial court styled "Motion for Permission to Take Discovery Limited to Enforceability of Arbitration Agreement."[8] (R. 177-80) After the trial court entered its Amended Order Denying Defendants' Motion to Compel Arbitration or, Alternatively, Motion to Dismiss, the Defendants filed their Notice of Appeal on September 21, 2007. (R. 182-83) Defendants' Statement of the Issues on Appeal asks that this Court determine whether the trial court erred in denying the Appellants' Motion to Compel Arbitration; specifically, whether the trial court erred in finding that the Appellants' had waived any right to compel arbitration; andm whether the trial court erred in denying the Appellants' Motion to Compel Arbitration "on the ground that the Plaintiff/Appellee is not estopped from challenging the underlying Arbitration Agreement." (R.184-85)

SUMMARY OF THE ARGUMENT

The Appellees would submit that the trial court should be affirmed as it correctly ruled that under *Century 21 Maselle and Associates v. Smith*[9], the Defendants waived their right to enforce

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[7]The Southern Reporter citation for this case is *Century 21 Maselle and Associates v. Smith*, 965 So.2d 1031 (Miss. 2007).

[8]Defendants state in their brief that at the time they served this Brief they did not know of the Order entered by the Court on August 22, 2007, denying their Motion to Compel Arbitration or, Alternatively, Motion to Dismiss. Appellant's Brief at 6. Though Plaintiffs have no reason to doubt this assertion, Defendants' motion was clearly "made moot" or "mooted" by the trial court's August 22, 2007 Order denying the Defendant's Motion.

[9] 965 So.2d 1031, 1038-39 (Miss. 2007).

arbitration by not promptly scheduling and noticing a hearing on their Motion to Compel and otherwise conducting themselves in a manner inconsistent with the enforcement of arbitration.

In the present case, though the Defendants filed a Motion to Compel Arbitration, they also simultaneously filed a Motion to Dismiss the Plaintiffs' Complaint in its entirety, as to certain parties, and as to various claims made by the Plaintiff, straying from requesting merely a disposition on the Arbitration Agreement, and invoking the judicial process for relief on other matters. In invoking the trial's courts jurisdiction with its Motion to Dismiss, the Defendants prejudiced the Plaintiffs by forcing them to take potentially binding positions on numerous matters not relating to arbitration, creating the potential for inconsistent rulings between a court of law and an arbitral forum. Further, the Defendants then sought to invoke the judicial process by engaging in discovery, to wit: requesting the Plaintiffs' daughters' depositions, at times for arbitration related matters and at other times, as to the merits of the case also. Lastly, despite the fact the Plaintiffs made Ms. Henderson's daughters available for deposition on numerous occasions, and despite the fact that the Plaintiffs noticed the arbitration Motion for hearing, the Defendants failed to bring their Motion to Compel Arbitration before the court in a timely manner. Defendants even attempted to unilaterally cancel the hearing on their own motion, refused to work with counsel and the Court as to reasonable alternatives to being heard in person before the Court and then failed to attend the hearing on August 16, 2007 on their own motion. As such delay created prejudice to the Plaintiffs' ability to reach the merits of the case, the finding of a waiver was warranted.

The Defendants' request that this case should be remanded for further discovery should this court determine that the trial court's finding of waiver was improper is likewise without merit. The Defendants cite to little authority for their proposition that they should be allowed to use a litigation tool in support of their Motion to Compel Arbitration. Rather, Mississippi law dictates that

discovery should not be used in this situation as it is deemed to be active participation in the judicial process and inconsistent with the right to arbitrate.

Finally, the Defendants' argument that the Plaintiffs are equitably estopped from challenging the Arbitration Agreement is irrelevant to this Appeal and substantively, should not be well-taken. Because the trial court did not rule – nor did it even address – the Defendants' argument that the Plaintiffs should be estopped from challenging the Arbitration Agreement, as a procedural matter, this Court need not address it. Moreover, and alternatively, as the Defendants have stated in prior briefing, the Plaintiffs' breach of contract claim against the Defendants is not proper. As is clear, the Plaintiffs' claim is a negligence claim for medical and nursing negligence — a tort claim. As such, Plaintiffs do not intend to pursue their breach of contract claim originally brought and would hereby confess said claim. Finally, irrespective of whether this Court accepts Plaintiffs' confession of their breach of contract claim, the authority cited by the Defendants for their proposition that equitable estoppel should apply is distinguishable from and inapposite to the present case. The cases cited by Defendants are, at their core, contract cases, not tort cases. Therefore, the Defendants' estoppel argument should either denied on its merits or denied as moot.

ARGUMENT

STANDARD OF REVIEW

The grant or denial of a motion to compel arbitration is reviewed de novo. *Century 21 Maselle*, 965 So.2d at 1035; *East Ford, Inc., v. Taylor*, 826 So.2d 709, 713 (Miss. 2002); *Webb v. Investacorp, Inc.*, 89 F.2d 252, 256 (5th Cir. 1996).

I. Th trial court's finding that the Defendants waived their right to compel arbitration is in accord with Mississippi case law and should be affirmed

The trial court held that because the Defendants "failed to promptly schedule and notice a

set their Motion for hearing.[10] Seeing that the Defendants had no intentions of timely seeking enforcement of their Arbitration Agreement, and because the Plaintiffs did not want to suffer from any unnecessary delay, on May 24, 2007, the Plaintiffs noticed the Defendants' Motion to Compel Arbitration for hearing. (R. 172) Said hearing was set for August 16, 2007, nearly three (3) months after the hearing was noticed.[11] (R. 172)

At this point, the Defendants began to request discovery from the Plaintiffs, namely, depositions of the Willie Mae Henderson's daughters, Mary Still and Louise Williams. (R. 189) At times, defense counsel requested depositions of Still and Williams with the scope of the depositions limited to arbitration issues only; at other times, defense counsel offered to take their depositions without limitations in scope. (R. 189, 194-95) Plaintiffs agreed to allow the Defendants to depose Still and Williams and informed defense counsel that, aside from one or two days days, Still and Williams could be made available for deposition at any point during the months of June and July. (R. 191) For one month, Plaintiffs received no response from the Defendants regarding Still's and Williams' depositions. Then, on June 28, 2007, defense counsel informed Plaintiffs' counsel that he wanted to have the August 16, 2007 hearing date continued to a later date. (R. 197-198) The Plaintiffs did not agree to any continuance as they intended to avoid any further prejudice by the Defendants' delay. (R. 197-98) One month after that, the Defendants responded to the Plaintiffs via letter, charging the Plaintiffs with unilaterally setting the August 16, 2007 hearing date two months prior. (R. 202) Likewise, Defendants' counsel accused the Plaintiffs of not providing them with

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[10]At no point during the five (5) month period between the time that Defendants filed their Motion to Compel Arbitration or Alternatively, Motion to Dismiss, did the Defendants Notice their Motion to Hearing for hearing.

[11]As Plaintiffs note *supra* in the "Procedural Facts" section of this Brief, Plaintiffs consulted the trial court and defense counsel prior to noticing the hearing date as indicated by various pieces of correspondence between Plaintiffs and Defendants' counsel. (R. 189, 191-192, 194-195, 197-98).

dates for the Still and Williams depositions,[12] despite the fact that Plaintiffs' counsel had made Still and Williams available for deposition at any point – but for a few days – during the months of June and July. (R. 191, 202-03) (R. 202-03) Further, defense counsel filed a curious pleading styled "[Notice] of Cancellation of Hearing" purporting to cancel the hearing which had previously set (with defense counsel's knowledge) for over two months. (R. 174-75) Defense counsel likewise informed Plaintiffs emphatically that he would not appear in the Hinds County Circuit Court on August 16, 2007, with the following rationale:

> I have a conflict with that date – namely a court-ordered evidentiary hearing in Memphis for which I must be present. Significantly, unlike my case in Memphis, there is no order from the Court in this case scheduling any hearing on August 16th, and thus I am under no binding obligation to appear in Hinds County Circuit Court on August 16, 2007.

(R. 202) Of course, such justification was unacceptable as the Plaintiffs were never given a style, cause number, or justification for defense counsel's failure to inform the Tennessee court of his prior obligation in the Hinds County Circuit Court for the arbitration enforcement hearing. This was merely another delaying tactic by the Defendants, to the ultimate detriment of the Plaintiffs.

Still hoping to avoid further delay by fault of the Defendants, the Plaintiffs offered to seek to have the matter heard te lephonically on several occasions in order to accommodate the Defendants' counsel. (R. 208, 213, 221) Likewise, Plaintiffs' counsel suggested to the trial court that there was sufficient evidence before it – briefs, pleadings, and exhibits, and correspondence – to rule on the Defendants' motion. (R. 221) Defendants informed the Court that the matter was not yet ripe for hearing, telephonically or otherwise, hoping to delay the matter even further by asserting that

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[12] Defense counsel incorrectly addressed the issue as follows: "Concerning the depositions, I have asked you on several occasions to give me dates when Mary Still and Louise Williams may be available to be deposed in relation to the issues that you raised concerning the enforceability of the Arbitration Agreement that is before the Court. You are yet to respond with any such dates." (R. 203)

they could not move forward until Still and Williams were deposed.[13] (R. 223)

As the August 16, 2007 arbitration enforcement hearing was never cancelled, Plaintiffs' counsel attended the hearing. (R. 226) Defendants' counsel failed to attend.[14] (R. 226, 228) The Court therefore decided to rule on the Motion on the pleadings, briefs, exhibits, and correspondence before it. (R. 226, 228). In the meanwhile, *Century 21 Maselle* was handed down by this Court, mandating that a party who seeks to enforce arbitration yet fails to promptly notice and bring his Motion to Compel Arbitration before the court, risks waiving enforcement of the arbitration agreement. *Century 21 Maselle*, 965 So.2d at 1038. As is evidenced by its ruling, the trial court clearly found that by the Defendants' failure to *ever* notice and schedule their Motion to Compel Arbitration for hearing; their attempts to unjustifiably continue the hearing noticed by the Plaintiffs; their attempts to engage in discovery; and their refusal to attend the hearing on their own motion, that the Defendants' conduct was inconsistent with timely enforcement of an arbitration agreement. (R. 181)

Under *Century 21 Maselle* and its progeny, the trial court was correct in its ruling that the Defendants had waived their right to enforce arbitration. (R. 181) The Defendants *never* scheduled or noticed their Motion to Compel Arbitration for hearing; it was noticed by the Plaintiffs. (R. 172) The Defendants engaged in substantial litigation with their Motion to Dismiss, a motion that forced that forced the Plaintiffs to respond with binding legal positions on non-arbitration related issues. (R. 13-16, 17-79) The Defendants then asked for depositions, a litigation tool provided for by the

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[13]By this point, defense counsel sought to depose Still and Williams on arbitration related matters only.

[14]As the record reflects, Defendants intimated on several occasions that they were concerned about the Plaintiffs' alleged *ex parte* conduct with the Court. (R. 230-31, 237-38) Clearly, this was not the case. Plaintiffs counsel merely were present for the hearing that had been scheduled for nearly three (3) months. In open court, the trial court stated that as defense counsel was not present for the hearing it would simply rule on the pleadings and briefs already before it. That the foregoing would constitute prohibited *ex parte* conduct is patently absurd.

Mississippi Rules of Civil Procedure. (R. 189) Despite the Plaintiffs making the putative deponents available, the Defendants delayed, never noticing Williams and Stills' depositions, and then subsequently attempted to unilaterally cancel the arbitration hearing that had been set for over two (2) months. (R. 174-75) All the while, the Plaintiffs merely attempted to bring the Arbitration matter to the court in the most expeditious manner possible, asking the trial court to hear the matter telephonically or, to simply rule on the materials it already had before it. (R. 221, 224). Defendants refused to be heard on their own motion. Thus, the trial court properly found that the actions and inactions of the Defendants were inconsistent with the timely enforcement of arbitration. Moreover, the Defendants actions and inactions resulted in prejudice to the Plaintiffs in their legal positions taken and in the substantial delay in bringing the arbitration matter on for resolution.

In accordance with *Century 21 Maselle*, this Court should affirm the trial court's ruling that the Defendants waived their right to seek enforcement of arbitration.

II. Arbitration related discovery is not proper

Defendants argue that should this Court reverse the trial court, it should remand for discovery on arbitration related matters. First and foremost, this case should be affirmed on the waiver issue. Second, Plaintiffs would submit that so-called "arbitration related discovery" was not proper when the Defendants were previously requesting it in the lower court and, moreover, what the lower court should do upon remand is not an issue that is properly before this Court at this juncture.

As this Court has previously stated, *"The [Federal Arbitration Act] does not provide for discovery."* *Century 21 Maselle*, 965, So.2d 1037, 1038 (emphasis added). Further, this Court stated the following:

Pursuing discovery, a litigation tool, creates the danger of incongruent

> determinations by lower courts regarding whether such action constitutes active participation in, or substantial invocation of, the litigation process. From this day forward, the advice of *Phillips*[15] and caveat of *Walker*[16] are the mandate of this Court, in accord with the FAA. Parties seeking to enforce arbitration are to file a "Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration" immediately upon discovery that the controversy or suit is subject to an arbitration agreement. **All proceedings, including the filing of responsive pleadings (answer or otherwise) and discovery, in prospective cases involving an arbitration agreement shall be suspended** upon the timely filing and notice of a "Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration."

Id at 1038 (emphasis added). This Court made absolutely clear as demonstrated *supra* that all proceedings, *including discovery*, shall be suspended upon the filing of a Motion to Compel Arbitration. *Id.* Notably, the Court in *Century 21 Maselle* did not provide that parties should be allowed to engage in "arbitration related discovery." Of course, this is in sound keeping with the dual principles of prohibiting litigation proceedings when a party is attempting to enforce arbitration and preventing unreasonable delay to the ultimate detriment and prejudice of the party opposing arbitration. *Id.*

The Defendants argue that "fundamental fairness requires that Appellants be allowed some discovery into Ms. Williams' grounds for challenging the Arbitration Agreement." Appellant's Brief at 14. The Defendants claim that the Williams and Still affidavits attached to the Plaintiffs' response to the Defendants' Motion to Compel Arbitration somehow entitle the Defendants to a round of discovery. Appellant's Brief at 14. While the affidavits may, indeed, create an evidentiary issue for the moving party to oppose, it does not *ipso facto* entitle a party to discovery on the issue. Rather, as this Court stated, when a party moves to Compel Arbitration, the proper procedure is that all litigation proceedings should be stayed and a hearing should be promptly scheduled and noticed.

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[15] *University Nursing Associates, PLLC v. Phillips*, 842 So.2d 1270 (Miss. 2003).

[16] *Pass Termite and Pest Control v. Walker*, 904 So.2d 1030 (Miss. 2004).

Id at 1038. Of course, this does not mean that the party moving for arbitration – here, the Defendants – are treated unfairly. Indeed, the Defendants here were entitled to require that Williams and Still provide testimony at the August 16, 2007 hearing in regards to their affidavits.

As is demonstrated in the present case though, the requested discovery – the depositions of Still and Williams – proved only to be a delay tactic. Because the Defendants had the opportunity to challenge the affidavits at an evidentiary hearing, there was no unfairness to the defendants not allowing discovery creates no unfairness towards the Defendants. Therefore, Plaintiffs would respectfully submit that the Defendants were not entitled to "arbitration related discovery." Defendants were not prejudiced in any manner, but rather refused to reasonably and timely address their own dispositive issue.

III. Plaintiffs are not equitably estopped from challenging arbitration

Defendants claim that because the Plaintiffs alleged breach of contract in their Complaint, they should be equitably estopped from challenging the Arbitration Agreement asserted by the Defendants. Appellant's Brief at 15. As an initial matter, the Court need not reach this question should it find, as the trial court did, that the Defendants waived their right to enforce arbitration. Moreover, as the trial court did not even address the issue in its ruling, as a procedural matter, this Court need not address it now on Appeal.

Alternatively, should this Court determine that the issue must be addressed, the Plaintiffs would assert that, first and foremost, the gravamen of this case is medical and nursing negligence – a case sounding in tort, not contract. As such, the Plaintiffs have no intent to pursue this case as a breach of contract case. Therefore, to the extent that Plaintiffs have not done so already, Plaintiffs would hereby confess their breach of contract claim.

Should this Court not accept the Plaintiffs' confession of their breach of contract claim, the

Plaintiffs would submit that the present case is distinguishable from the cases cited by the Defendants for the proposition that the Plaintiffs are equitably estopped from challenging the arbitration agreement. The two cases cited by the Defendants, *Washington Mutual Finance Group, LLC v. Bailey*[17], and *Terminix Intern., Inc. v. Rice*[18], are, at their core, breach of contract cases. In *Terminix*, the plaintiffs had entered into a contract with Terminix for protection of their home against termites and termite damage. *Terminix*, 904 So.2d at 1053. When the plaintiffs discovered termite damage to their home, they filed suit against Terminix, alleging gross negligence, intentional misrepresentation, grossly negligent misrepresentation, fraud, tortious breach of contract, and fraudulent inducement, all of which centered around the circumstances and terms of the contract made between the two parties. *Id.* The Court held that because the one of the plaintiffs, Cynthia Rice, had asserted that certain provisions of the contract should be held enforceable while, at the same time, the arbitration provision should be held unenforceable, that she was equitably estopped from opposing the arbitration provision. *Id* at 1058.

Likewise, in *Washington Mutual*, the plaintiffs and the defendants entered into several contracts involving loans and insurance, alleging primarily that their were sold and charged for certain insurance they neither wanted not needed. 364 F.3d at 262-63, As in *Terminix*, the Fifth Circuit Court of Appeals held that, under principles of contract law, the plaintiffs were equitably estopped from challenging the arbitration provision. *Id* at 267-68. Critically, the *Washington Mutual* court noted that *all of* the plaintiffs' claims against the defendants arose directly from loans and insurance purchased directly through the loans, the *contracts* at issue. *Id* at 267. As such, the plaintiffs could not maintain that while certain provisions of the contracts were enforceable, the

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[17]364 F. 3d 260 (5th Cir. 2004).

[18]904 So.2d 1051 (Miss. 2004).

arbitration provision of the contract was not. *Id* at 267-68.

As is clear, *Terminix* and *Washinton Mutual*, the two cases cited by the Defendants for their proposition the Plaintiffs should be equitably estopped from challenging the Arbitration Agreement at issue, are distinguishable from the present case. As the Defendants pointed out in their briefing in the lower court[19], the crux of the Plaintiff's Complaint is one of medical negligence, not a contract claim. Critically, the Plaintiffs cannot prove a medical negligence claim by merely asserting breach of contract. Were plaintiffs able to prove medical negligence cases by merely proving breach of contract, the entire body of case-law surrounding medical malpractice cases would be completely eviscerated. Plaintiffs would no longer need to prove the existence of a duty, the breach thereof, causation, and damages, all with competent expert testimony. Rather, medical malpractice claims would revolve around principles of contract. Obviously, this is not the case.

Notably, in *Terminix* and *Washington Mutual*, in the absence of a contract between the parties, no legal claims could have existed at all, as the contract between the parties formed the core of operative facts of the case. Contrasted to the present case, the core of operative facts revolves around the negligent care and treatment rendered by the Defendants to the Plaintiff, Willie Mae Henderson. (R. 5-7) Even in absence of any purported contract between the Plaintiffs and Defendants, the Plaintiffs would have a claim against the Defendants for medical and/or nursing negligence – a case sounding in tort.

Because the core of this case is a negligence claim, not a contract claim, it is clearly distinguishable from cases such as *Terminix* and *Washington Mutual*, where the cases revolve around the existence of a contract. For this reason, and under the other bases cited *supra*, the

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[19]In the Defendants Motion to Compel Arbitration or, Alternatively, Motion to Dismiss, the Defendants moved to dismiss the Plaintiffs' breach of contract claims. (R. 28-29)

Defendants equitable estoppel argument is without merit.

CONCLUSION

For the foregoing reasons, the lower court should be affirmed. The trial court properly found that the Defendants waived their right to arbitration by failing to schedule and notice a hearing on their Motion to Compel Arbitration and, moreover, acting in a manner inconsistent with the right to enforce arbitration. Moreover, defendants are not entitled to arbitration related discovery. Finally, as the Plaintiffs confessed their breach of contract claim, the Defendants' equitable estoppel argument is moot. Moreover, it is without merit as the cases cited by the Defendants are clearly distinguishable from the present case.

Respectfully submitted, this the 22nd day of December, 2008.

LOUISE WILLIAMS, INDIVIDUALLY, AND ON BEHALF OF WILLIE MAE HENDERSON – APPELLEE

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CERTIFICATE OF SERVICE

I, W. Andrew Neely, attorney for Plaintiffs, certify that I have this day served via United States Mail, postage prepaid, a true and correct copy of the above to:

Rebecca Adelman, Esquire
Chase Pittman, Esquire
The Law & Mediation Offices of
Rebecca Adelman, PLC
545 South Main Street, Suite 111
Memphis, Tennessee 38103

This is the 22nd day of December, 2008.

W. ANDREW NEELY

ADDENDUM "1"

Bridget

From: John Scanlon
Sent: Friday, August 31, 2007 12:57 PM
To: Bridget
Subject: FW: Henderson v. Manhattan - Motion to Compel ADR

John P. Scanlon
Hawkins, Stracener & Gibson, PLLC
129B South President Street
Post Office Box 24627
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Tel: (601) 969-9692
Fax:(601) 914-3580
Email: jscanlon@hsglawfirm.net

From: Rebecca Adelman [mailto:rebecca@AdelmanFirm.com]
Sent: Wednesday, August 22, 2007 3:14 PM
To: John Scanlon
Cc: Chase Pittman; Emily Headley
Subject: Henderson v. Manhattan - Motion to Compel ADR

John – good afternoon. It is our understanding that your office had an attorney present in Court before Judge Kidd on our Motion to Compel ADR on 8-16. We advised your office that we were unavailable due to a hearing specially set in Memphis before the Hon. Rita Stotts on that same day. We also filed a cancellation of hearing and participated in the letter writing to the Judge and you. In light of the affidavits filed by Plaintiff, we believe we have the right to develop our proof through depositions and thus a hearing on our Motion to Compel ADR is premature. All of this information has been communicated to you and the Court.

Can you please advise who from your office appeared in Court and if there is a record?

Thanks.

Rebecca

Rebecca Adelman
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