IN THE COURT SUPREME COURT OF MISSISSIPPI

MANHATTAN NURSING & REHABILITATION CENTER, LLC, ET AL.	APPELLANTS,
V.	NO. 2008-CA-00925
LOUISE WILLIAMS, ET AL.	APPELLEES

BRIEF OF THE APPELLANTS

Appeal from the Circuit Court For Hinds County
The Hon. Winston L. Kidd Presiding
No. 251-07-108 CIV

THE LAW & MEDIATION OFFICES
OF REBECCA ADELMAN, PLC

Rebecca Adelman, [redacted]
Chase Pittman, [redacted]

Counsel of Record for Appellants
Manhattan Nursing and Rehabilitation Center, LLC
Bobbie Blackard and Laura Clark

545 South Main St., Suite 111
Memphis, Tennessee 38103
Tel., 901/529-9313
Fax., 901/529-8772
www.adelmanfirm.com

ORAL ARGUMENT IS REQUESTED

CERTIFICATE OF INTERESTED PERSONS

Manhattan Nursing and Rehabilitation Center, LLC, et al

v.

Williams, et al.

No. 2007-CA-00925

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the 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. Appellant Manhattan Nursing and Rehabilitation Center, LLC
2. Appellant Bobbie Blackard
3. Appellant Laura Clark
4. Appellee Louise Williams
5. The Hon. Winston L. Kidd

H. Chase Pittman, [redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in denying Appellants' Motions to Compel Arbitration on the ground that Appellants waived their right to compel arbitration?

II. Whether the Circuit Court erred in denying the Motions to Compel Arbitration upon an implicit finding that Louise Williams was not estopped from challenging the underlying Arbitration Agreement?

STATEMENT OF THE CASE

The case underlying this appeal is based upon allegations that Willie Mae Henderson sustained injury resulting from a deficient course of care rendered to her at Manhattan Nursing and Rehabilitation Center ("Manhattan"), a skilled-nursing facility in Jackson. Louise Williams, one of the daughters of Ms. Henderson, commenced this case in the Circuit Court for Hinds County with her Complaint, filed on January 31, 2007. (T.R.,[1] Vol. 1, p. 3). The first document filed by Appellants in responding to the Complaint was their Motion to Compel Arbitration. (T.R, Vol. 1, p. 13). The Motion was predicated upon an Arbitration Agreement contained with Ms. Henderson's greater contract for healthcare services. (T.R, Vol. 1, p. 66).

On April 19, 2007, Ms. Williams opposed the Motion to Compel Arbitration with *inter alia* the affidavits of both Ms. Williams, (T.R, Vol. 1, p. 85), and another daughter, Mary Still. (T.R, Vol. 1, p. 83). In the affidavits, Ms. Williams and Ms. Still testified to facts supporting their grounds for opposing the Motion. Roughly one month later, on May 25, 2007, after some discussions between counsel, Ms. Williams unilaterally set the Motion for hearing on the Circuit Court's next hearing date, August 16, 2007, (T.R, Vol. 2, p. 172), and on June 1, 2007, Appellants promptly requested the depositions of the affiants concerning their affidavit testimony. (T.R, Vol. 2, p. 189). As Appellants understood her counsel's sometimes confusing correspondence, Ms. Williams immediately took the position that merely because they sought to take any discovery relating to her grounds for opposing their Motion, Appellants had automatically waived their right to enforce the Arbitration Agreement. (T.R, Vol. 2, p. 191, 197). Thus, Ms. Williams argued, there was nothing left to be done but to bring the Motion for hearing where it could be promptly denied. (*Id.*).

[1] References to the technical record are denominated "T.R."

Appellants filed a notice cancelling the hearing of their Motion, (T.R, Vol. 2, p. 174), which they served upon the Circuit Court, (T.R, Vol. 2, p. 205), and Appellants renewed their efforts to move discovery relative to Ms. Williams' grounds for opposing the motion forward. (T.R, Vol. 2, p. 202). Although she knew that Appellants could not be available on the hearing date, Ms. Williams nevertheless appeared before the Circuit Court on August 16, 2007. (T.R, Vol. 2, p. 226). On August 22, 2007, the Circuit Court signed an order denying the Motion, ruling essentially that Appellants had waived their right to enforce the Arbitration Agreement. (T.R, Vol. 2, p. 176). Not knowing of the entry of the order, Appellants filed a motion for permission to take discovery limited to the enforceability of the Arbitration Agreement, (T.R, Vol. 2, p. 177-80), but the Circuit Court then entered a second order, correcting certain facts but maintaining the ruling that Appellants had waived their right to arbitrate. (T.R, Vol. 2, p. 181). From those orders, Appellants appealed. (T.R, Vol. 2, p. 182)

STATEMENT OF THE FACTS

Louise Williams, the appellee here, is a daughter of Willie Mae Henderson, (T.R, Vol. 1, p. 85), and she is and the plaintiff below. (T.R., Vol. 1, p. 3, at ¶1; p. 85). Mary Still is likewise a daughter of Ms. Henderson. (T.R., Vol. 1, p. 83). To admit her mother to Manhattan, Ms. Still signed a healthcare-services contract with Manhattan, the Admission Agreement, (T.R., Vol. 1, p. 53), and the Arbitration Agreement included therein. (T.R., Vol. 1, p. 67). When she was admitted to Manhattan, "Ms. Henderson suffered from and had been diagnosed with Alzheimer's disease at the time and was incapable of rendering any decision on her own." (T.R., Vol. 1, p. 155). Appellant Manhattan Nursing and Rehabilitation Center, LLC, is the entity operating Manhattan. (T.R., p. 4, at ¶9). Appellant Bobbie Blackard is the administrator of the facility, (T.R.., p. 3, at ¶4), and Laura Clark is the Director of Nursing at Manhattan. (T.R.., p. 3, at ¶3).

SUMMATION OF ARGUMENTS

Appellants respectfully submit herein three arguments:

First, they argue that the Circuit Court's conclusion that they waived their right to enforce the Arbitration Agreement is contrary to the applicable case law and should be reversed.

Second, they argue that this case should be remanded to the lower court so that discovery may proceed into Ms. Williams' evidentiary grounds for challenging the Arbitration Agreement.

Third, and alternatively, this Court should find that Ms. Williams is conclusively estopped from challenging the Arbitration Agreement and should further reverse and remand with instructions to enforce the Agreement.

ARGUMENTS

1. Appellants did not waive their right to enforce the Arbitration Agreement.

Again, the Circuit Court denied Appellants' Motion to Compel Arbitration on the premise that Appellants waived their right to enforce the underlying Arbitration Agreement. Appellants respectfully submit that the ruling of the lower court is contrary to Mississippi law and should be reversed.

The Supreme Court of Mississippi addressed the waiver doctrine in the landmark decision of *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006) ("*Horton*"). Laying the legal framework, the Supreme Court stated the fundamental premises that a waiver of the right to arbitrate is not favored and that the courts presume against that conclusion. *Horton*, 926 So.2d at 179 (¶39). The Supreme Court further articulated the bright-line rules determining whether a waiver has occurred: "a party who invokes the right to compel arbitration and pursues that right will not ordinarily waive the right simply because of involvement in the litigation process, and a party who seeks to compel arbitration after a long delay will not ordinarily be found to have waived the right where there has been no participation in, or advancement of, the litigation process." *Id.* at 180 (¶41). The Court further held: "where ... there is a substantial and unreasonable delay in pursuing the right, coupled with active participation in the litigation process, we will not hesitate to find a waiver of the right to compel arbitration." *Id.* at (¶42).

Here, contrary to the lower court's ruling, the record simply fails to overcome the presumption against Appellant's alleged waiver of their right to arbitrate. First, Appellants did not delay in "pursuing" their right to compel arbitration. The *very first* document filed by Appellants in responding to Ms. Williams Complaint was their Motion to Compel Arbitration. Thereafter, because Ms. Williams' submission of affidavits created an evidentiary burden to

which Appellants needed to respond, they pursued their right to enforce the [illegible] Agreement by seeking discovery limited to Ms. Williams' grounds for opposing the [illegible] Second, from the filing of that motion until the date when the lower court entered its [illegible] denying the motion, Appellants did nothing to "advance" or participate in litigation [illegible] merits of the underlying case – they served no written discovery relating to Ms. [illegible] claims, they did not notice Ms. Williams' deposition in order to discover her reasons for [illegible] they filed no motions for summary judgment on her claims, they did not enter into a [illegible] order, etc. Appellants were well within and sheltered by the foregoing bright-line [illegible] articulated in *Horton*.

Appellants acknowledge of course that they sought to depose Ms. Williams and [illegible] the affiants whose affidavits Ms. Williams submitted to oppose Appellants' Motion [illegible] Arbitration. But to find a waiver on that basis is to misunderstand both their purpose [illegible] and the applicable law. Appellants requested their depositions not to gain evidence pertaining [illegible] *merits* of the case but rather only to the *grounds of opposition* to the Arbitration Agreement. [illegible] case is thus distinct from the precedential cases in which the courts found a waiver [illegible] importantly the proponent for arbitration was taking discovery apparently relating to the merits of the underlying claims and defenses thereto in the case. See *Horton*, 926 So.2d at [illegible] (defendant insurance companies waived right to arbitrate where they "substantially engaged in the litigation process by consenting to a scheduling order, engaging in written discovery, and conducting Horton's deposition."); *Pass Termite and Pest Control v. Walker*, 904 So.2d 1031, 1035 (¶15) (Miss. 2004) (advancing of discovery after jury demand, and through motion and delay in moving to enforce arbitration agreement, resulted in waiver). Approached from this angle, this case simply shows no waiver.

Here, the Circuit Court relied upon *Century 21 Maselle and Associates, Inc. v. Smith*, 965 So.2d 1031 (Miss. 2007) ("*Century 21*") for its conclusion that Appellants waived their right to arbitrate. Appellants respectfully submit that the lower court misapplied that case.

There, the defendant initially responded to the plaintiff's complaint with an answer, which included a motion to compel arbitration (among other defenses) but which also demanded a jury trial, and he noticed a hearing of the motion roughly 2 months after service of the complaint on him. *Century 21*, 965 So.2d at 1034 (¶4). But, the defendant also served on the plaintiff written discovery, which he did not pursue. *Id.* The circuit court denied the motion, reasoning that the service of the discovery, together with the jury demand, resulted in a waiver of the right to arbitrate. *Id.* at (¶4).

On appeal, the Supreme Court reversed the lower court's decision. *Id.* at 1039 (¶14). The Supreme Court began its analysis by observing its precedents on point, particularly *Horton*. *Id.* at 1036 (¶8). The Court held: "In summary, either active participation or substantial invocation of the litigation process which results in detriment or prejudice to the other party, or engaging in conduct inconsistent with timely enforcing the arbitration agreement, constitutes waiver." *Id.* But, the Court emphasized that the party "claiming waiver must offer sufficient evidence at a hearing to overcome the presumption in favor of arbitration," and the Court concluded that the plaintiffs had failed to present such evidence. *Id.* at 1036-37 (¶8).

Turning to the demand for a jury trial, the Court held that it alone was not sufficient to result in a waiver, noting that the concurrent motion to compel arbitration mitigated the jury demand and that "request for a jury trial did not delay resolution of the controversy, did not add to the expense of litigation, and did not substantially invoke the judicial process." *Id.* at 1037 (¶9). The Court then turned to the defendant's service of discovery, observing that service of

discovery is traditionally a factor weighing in favor of a waiver. *Id.* at 1037-38 (¶10). But, the Court declined to find a waiver, observing that the plaintiff offered no proof in the record establishing any prejudice resulting from the defendant's conduct. *Id.* at 1038-39 (¶12).

Preliminarily, Appellants note the several distinctions between the case *sub judice* and *Century 21*. The first and more minor distinction is that here Appellants never demanded a jury trial. Second, although Appellants requested of Ms. Williams' counsel dates for the depositions of the affiants whose affidavits she used to oppose the Arbitration Agreement, they never actually filed notices of deposition or served written discovery, unlike the defendant in *Century 21*. Third, whereas the defendant's discovery there was apparently intended to probe and litigate the merits of the case, here Appellants' proposed discovery would have probed only Ms. Williams' grounds for opposing the Arbitration Agreement. Importantly, the *only* similarity between this case and *Century 21* is that in *neither* case did the opponent of arbitration, there the defendant and here Ms. Williams, come forward with evidence establishing on the record *any* meaningful prejudice to the opponent from the proponent's, here Appellants', conduct.

More to the point, the Circuit Court relied on *Century 21* for the proposition that Appellants alleged failure to schedule and notice promptly a hearing of their Motion to Compel Arbitration resulted in a waiver. Again, though, Appellants reason for not bringing their Motion for hearing earlier was their need to take discovery relating to Ms. Williams' grounds for opposing the Arbitration Agreement. In Mississippi, it is not mere delay but "unreasonable" delay that weighs in favor of a waiver of the right to arbitrate. *Horton*, 926 So.2d at 180 (¶42). And, even under *Century 21*, the fact that Appellants sought to depose the affiants only to discover their grounds for opposing the Arbitration Agreement, not their grounds for bringing their underlying claims, is consistent with the holding of that case.

Two rulings from *Century 21* are pertinent. First is the following: "Given the presumption in favor of arbitration ... in the absence of prejudice or invocation of the court's jurisdiction for a purpose other than the declaration of arbitrability *vel non,* the circuit court either clearly erred in denying the motion to compel arbitration..." *Id.* at 1038 (¶12). In referring to the "invocation of the court's jurisdiction for a purpose other than the declaration of the arbitrability," the Supreme Court recognized that some invocation of the judicial process is a practical necessity for proponents of arbitration. In other words, so long as the proponent of arbitration invokes the trial court's jurisdiction in order to obtain a declaration of arbitrability, the proponent as a matter of law cannot be deemed to have waived the right to arbitrate. The second is as follows: "Discovery, a procedural implement of the courts, should not be initiated as its use may be deemed active participation in a court proceeding and inconsistent with the right to arbitration." *Id.* at 1039 (¶12). Notably, the Supreme Court did not draw a bright-line rule turning the undertaking of any discovery into an automatic waiver of the right to arbitrate. The Court used the exhortative "should not" rather than the mandatory "shall not" in referring to the initiation of discovery. And, instead of ruling that discovery shall always be deemed active participation in the judicial process inconsistent with the right to arbitrate, the Court ruled only that discovery "may" be so deemed, meaning that the lower courts would be permitted, but not required, to find a waiver in that regard.

Thus, taken all together, these rulings leave the door open to some invocation of the judicial process in the way of discovery without the result of a "waiver." And where, as here, the opponent of arbitration opposes arbitration with evidence creating an evidentiary burden on the proponent to respond to and rebut the same, discovery limited strictly to that narrow purpose, the very kind sought here by Appellants, is consistent with the rulings of *Century 21.*

2. The case should be remanded for discovery.

In turn, Appellants submit next that this Court should remand this case [illegible] further proceedings to obtain the necessary declaration of arbitrability, namely some discov[illegible] strictly limited to Ms. Williams' grounds for opposition to the Arbitration Agreement. Courts [illegible] other jurisdictions have allowed discovery relating to the enforceability of an arbitration agr[illegible]ent to proceed where material factual issues cannot be resolved without discovery. See *Ad[illegible]ns v. National Health Corp.*, No. M2005-01272-SC-R11-CV, 2007 WL 3284669, at *11 [illegible] Tenn. Nov. 8, 2007) (remanding nursing-facility case for discovery into whether arbitration [illegible]ment was unconscionable as contract of adhesion).[2] Others have relied upon the evide[illegible]en in limited discovery to determine the enforceability of an arbitration agreem[illegible] *verly Enterprises-Mississippi, Inc. v. Powell*, No. 06-60468, 2007 WL 2228537 (5th Cir. Au[illegible]2007) (remanding nursing-facility case for resolution of conflicting depositional evide[illegible]n in discovery concerning enforceability of arbitration agreement).[3]

Here, again, fundamental fairness requires that Appellants be allowed som[illegible]very into Ms. Williams' grounds for challenging the Arbitration Agreement. Ms. Williams [illegible]ged the Arbitration Agreement with her submission of two affidavits (and other evid[illegible]tting forth facts from which she intended the lower court to hold the Arbitration [illegible]ment unenforceable. Yet, when Appellants sought to take the depositions of the affiants [illegible]ited purpose of rebutting her proof, Ms. Williams argued that Appellants' request for such [illegible]ry resulted in a waiver of the right to arbitrate, whereupon nothing was left for the lower [illegible]do but to deny arbitration. Ms. Williams cannot have it both ways. Either she should not [illegible]n allowed to submit evidence, or she must be required to offer her affiants for depo[illegible]

[2] A copy of this opinion is attached as Exhibit 1.
[3] A copy of this opinion is attached as Exhibit 2.

submit their testimony and then to bar Appellants from examining the witnesses who offer proof against Appellants is fundamentally wrong. Appellants therefore submit that this case should be remanded for discovery, strictly limited to Ms. Williams' grounds for opposing the Arbitration Agreement, to proceed.

3. Alternatively, Ms. Williams is estopped from challenging the Arbitration Agreement.

Alternatively, if the Court is not inclined to remand for discovery to proceed, this Court should reverse the lower court because Ms. Williams was estopped from challenging the Arbitration Agreement, and the Court should further remand with instructions to enforce the Arbitration Agreement. Namely, because Ms. Williams sued for breach of Ms. Henderson's Admission Agreement, the contract containing the Arbitration Agreement, she is estopped from challenging the latter instrument.

In her Complaint, Ms. Williams twice alleges that Ms. Henderson had a contract for healthcare services with Appellants. (T.R., Vol. 1, p. 5, at ¶15; p. 9, at ¶36). She further alleges that by virtue of their medical negligence in rendering health care to Ms. Henderson, Appellants breached the healthcare-services contract, (T.R., Vol. 1, p. 10, at ¶37), whereby Ms. Henderson suffered injury, (T.R., Vol. 1, p. 10, at ¶38), entitling Ms. Williams to recover monetary damages. (T.R., Vol. 1, p. 11, at ¶43).

Clearly, when Ms. Williams' allegations refer to a contract for healthcare services by Appellants to Ms. Henderson, she means the Admission Agreement, which her sister, Ms. Still, signed for Ms. Henderson's course of care at Manhattan. The legal significance of these allegations cannot be understated. Having made them, Ms. Williams is now bound under the pertinent case law to the Arbitration Agreement contained within the Admission Agreement.

Under the Federal Arbitration Act, courts hold that a party is forbidden to take the benefit of a contract, particularly by suing to enforce it, but then simultaneously to deny that he is bound to the contract's provisions for arbitration. *Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260, 268 (5th Cir. 2004); *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 418 (4th Cir.2000)("[A plaintiff] cannot seek to enforce those contractual rights and avoid the contract's requirement that "any dispute arising out of" the contract be arbitrated."). Mississippi has adopted this rule of law as well. *Terminix Intern., Inc. v. Rice*, 904 So.2d 1051, 1058 (¶28) (Miss. 2004) ("*Rice*") ("'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'").

In the *Rice* case, Mr. Rice made a contract with Terminix for the provision of services to safeguard the Rices' home from termite damage, and the contract contained an arbitration clause. *Rice*, 904 So.2d at 1053 (¶2). After they discovered termite damages, Mr. and Mrs. Rice sued Terminix, bringing claims of negligence and breach of contract, to which Terminix responded with a motion to compel arbitration. *Id.* at (¶3). The circuit court denied the motion, and Terminix appealed. *Id.* at 1053-54 (¶¶4, 5).

Among other issues in the appeal, the Supreme Court considered the argument of Mrs. Rice that she could not be deemed bound to the arbitration clause because her husband, not she, signed the contract with Terminix. *Id.* at 1057-58 (¶27). The Supreme Court turned to *Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260 (5th Cir. 2004), in which another wife made the same argument, and the Court observed the Fifth Circuit's holding that "'nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary

principles of contract and agency.'" *Id.* at 1058 (¶27) (quoting *Bailey*). The Supreme Court emphasized the Fifth Circuit's reasoning on point:

> "'In the arbitration context, the doctrine [of estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'"

Rice, 904 So.2d at 1058 (¶28) (quoting *Bailey*). Adopting the quoted analysis as the law for Mississippi, the Supreme Court thus held that Mrs. Rice was just as bound to the arbitration clause as her husband. *Id.* at (¶29).

Here, again, Ms. Williams sued for breach of the contract providing for Ms. Henderson's health care at Appellants' facility, the Admission Agreement. Having so sued for breach of the Admission Agreement, Ms. Henderson is now estopped under *Rice* from challenging the Arbitration Agreement contained therein. Accordingly, the circuit court erred in failing to compel arbitration on this basis and should be reversed.

CONCLUSION

Appellants again respectfully submit for all foregoing reasons that the Circuit Court erred in denying their Motion to Compel Arbitration. Appellants pray that this Court reverse the lower court's orders denying the Motion and remand this case with instructions for further proceedings, including discovery limited to Ms. Williams' grounds for challenging the Arbitration Agreement. Alternatively, Appellants pray that the Court reverse and render here on the basis that Ms. Williams is estopped from challenging the Arbitration Agreement. Appellants pray for such other and general relief as this Court may deem proper.

Respectfully submitted,

THE LAW & MEDIATION OFFICES OF REBECCA ADELMAN, PLC
Counsel of Record for Appellants

REBECCA ADELMAN, [redacted]
H. CHASE PITTMAN, [redacted]
545 South Main St., Suite 111
Memphis, Tennessee 38103
Tel., 901/529-9313
Fax., 901/529-8772
www.adelmanfirm.com

CERTIFICATE OF SERVICE

I hereby certify, as required by M.R.A.P. 25(a), that I served the Appellants' original Brief, as well as 3 copies of the same, upon the following clerk of court via FedEx delivery:

Betty W. Sephton
CLERK OF THE APPELLATE COURTS
Gartin Justice Building
450 High Street
Jackson, MS 39201

And, I further certify that I served a true copy of the Brief via U.S. Mail, first class, postage prepaid, upon the following counsel of record and circuit judge:

John F. Hawkins, Esq.
W. Andrew Neely, Esq.
HAWKINS, STRACENER, & GIBSON, PLLC
129B S. President Street
P.O. Box 24627
Jackson, MS 39225-4627

The Hon. Winston L. Kidd
HINDS COUNTY CIRCUIT COURT
P.O. Box 327
Jackson, MS 39205

On this 18th day of September, 2008.

Chase Pittman

Owens v. National Health Corp.
Tenn.,2007.
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Tennessee,at Nashville.
Dorothy OWENS, as Conservator of Mary Francis King, an incapacitated person
v.
NATIONAL HEALTH CORPORATION et al.
No. M2005-01272-SC-R11-CV.

June 6, 2007 Session.
Nov. 8, 2007.
Order Granting in part and Denying in partAppellees' Petition to Rehear Feb. 7, 2008.

Background: Conservator of nursing home patient brought action against owner, operator, and manager of nursing home for negligence, gross negligence, wilful, wanton, reckless, malicious and/or intentional conduct, medical malpractice, and violations of the Adult Protection Act. Defendants filed motion to compel arbitration based upon terms of nursing-home contract signed by patient's attorney-in-fact. The Circuit Court, Rutherford County, Robert E. Corlew, Chancellor, denied the motion. Defendants appealed. The Court of Appeals, Alan E. Highers, J., 2006 WL 1865009, reversed. Plaintiff filed application for permission to appeal.

Holdings: The Supreme Court, Janice M. Holder, J., held that:
(1) arbitration agreement in nursing-home contract was governed by state Uniform Arbitration Act;
(2) durable power of attorney for health care authorized attorney-in-fact to enter into arbitration agreement;
(3) arbitration agreement was not unenforceable on the ground that a material term of the agreement was incapable of performance;
(4) arbitration agreement did not violate federal law;
(5) remand for further proceedings on question of whether arbitration agreement was an unconscionable and, thus, unenforceable contract of adhesion was warranted;
(6) a pre-dispute arbitration agreement in a nursing-home contract is not per se invalid as against public policy; and
(7) arbitration agreement was not unenforceable on ground that requiring patient to sign an arbitration agreement breached a purported fiduciary duty owed to patient by defendants.

Judgment of Court of Appeals affirmed in part, vacated in part, and remanded.

[1] Health 198H ⚿916

198H Health
198HVI Consent of Patient and Related Judgment
198Hk913 Terminal Illness; Removal of Life Support
198Hk916 k. Competent Patients; Living Wills and Other Prior Indications. Most Cited Cases
A "living will" is a written statement of a person's own health care decisions regarding his or her medical care in the event he or she has a terminal condition and becomes incompetent; in such circumstances, health care providers may rely upon the living will and implement the patient's decisions set out in the instrument. West's T.C.A. § 32-11-103(3).

[2] Principal and Agent 308 ⚿51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred
Principal and Agent
308k51 k. Construction of Powers of Attorney. Most Cited Cases
A durable power of attorney for health care is a document authorizing another person, an attorney-in-fact, to make health care decisions on behalf of the patient in the event he or she is incapacitated. West's T.C.A. §§ 34-6-201 et seq.

[3] Health 198H 916

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk913 Terminal Illness; Removal of Life Support
198Hk916 k. Competent Patients; Living Wills and Other Prior Indications. Most Cited Cases

Principal and Agent 308 10(1)

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k7 Appointment of Agent
308k10 Letters or Powers of Attorney Under Seal
308k10(1) k. In General. Most Cited Cases
Given their different purposes, a person may execute a living will, a durable power of attorney for health care, or both. West's T.C.A. §§ 32-11-103(4), 34-6-201 to 34-6-218.

[4] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Supreme Court reviews questions of law de novo without a presumption of correctness afforded to the trial court's conclusions.

[5] Alternative Dispute Resolution 25T 116

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk116 k. What Law Governs. Most Cited Cases
Arbitration agreement in nursing-home contract was governed by state Uniform Arbitration Act, rather than Federal Arbitration Act, where agreement expressly provided that "this agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed," and it was undisputed that nursing home was licensed in state. 9 U.S.C.A. § 1 et seq.; West's T.C.A. § 29-5-301 et seq.

[6] Alternative Dispute Resolution 25T 191

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk190 Stay of Proceedings Pending Arbitration
25Tk191 k. In General. Most Cited Cases
Where the requisite connection with commerce is present, the Federal Arbitration Act generally requires a court to stay the proceedings so the parties can resolve the dispute according to the terms of the arbitration agreement. 9 U.S.C.A. §§ 2, 3.

[7] Alternative Dispute Resolution 25T 116

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk116 k. What Law Governs. Most Cited Cases
Parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate, and a contract that might ordinarily be governed by the Federal Arbitration Act may provide that it will be governed by a particular state's arbitration act. 9 U.S.C.A. § 1 et seq.

[8] Principal and Agent 308 112

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k112 k. Submission to Arbitration. Most Cited Cases
Durable power of attorney for health care authorized attorney-in-fact to enter into an arbitration agreement as part of a contract admitting the principal to a nursing home and thereby to waive the principal's right to trial by jury, where power of attorney authorized attorney-in-fact to make health care

decisions for principal if she was incapacitated or otherwise unable to make such decisions for herself, granted attorney-in-fact the power to execute on principal's behalf any document which might be necessary in order to implement the authorized health care decisions, and provided that all terms used in the instrument would have the meanings set forth for such terms in the Durable Power of Attorney for Health Care Act. U.S.C.A. Const.Amend. 7; West's T.C.A. §§ 34-6-201(3), 34-6-204(b).

[9] Alternative Dispute Resolution 25T 199

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk199 k. Existence and Validity of Agreement. Most Cited Cases
Contract formation questions were to be decided by the court, not by an arbitrator, where arbitration agreement was to be interpreted in accordance with state Uniform Arbitration Act, rather than Federal Arbitration Act. 9 U.S.C.A. § 1 et seq.; West's T.C.A. § 29-5-301 et seq.

[10] Health 198H 910

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk910 k. Substituted Judgment; Role of Guardian or Others in General. Most Cited Cases

Principal and Agent 308 51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
Under the Durable Power of Attorney for Health Care Act, the decision to admit principal to a nursing home clearly constituted a "health care decision." West's T.C.A. § 34-6-201(2, 3).

[11] Health 198H 910

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk910 k. Substituted Judgment; Role of Guardian or Others in General. Most Cited Cases

Principal and Agent 308 51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
Nursing home patient's durable power of attorney for health care had to be construed in accordance with the Durable Power of Attorney for Health Care Act. West's T.C.A. § 34-6-201 et seq.

[12] Health 198H 912

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk912 k. Incompetent Persons in General. Most Cited Cases

Principal and Agent 308 51

308 Principal and Agent
308II Mutual Rights, Duties, and Liabilities
308II(A) Execution of Agency
308k49 Authority Conferred as Between Principal and Agent
308k51 k. Construction of Letters or Powers of Attorney. Most Cited Cases
Absent a limitation in the durable power of attorney for health care, an attorney-in-fact can make exactly the same types of health care decisions that the principal could make if he or she had the mental capacity to do so. West's T.C.A. § 34-6-204(b).

[13] Principal and Agent 308 112

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent

308k98 Implied and Apparent Authority
308k112 k. Submission to Arbitration. Most Cited Cases
An attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing-home contract that contains an arbitration provision because this action is necessary to consent to health care. West's T.C.A. §§ 34-6-201(3), 34-6-204(b).

[14] Alternative Dispute Resolution 25T 178

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk178 k. In General. Most Cited Cases
Although the two arbitration organizations mentioned in arbitration provision of nursing-home contract allegedly no longer conducted arbitrations under the terms of pre-dispute arbitration agreements in health care cases, it appeared that at least one of the specified organizations would conduct such an arbitration if ordered by a court to do so, and thus arbitration agreement was not unenforceable on the ground that a material term of the agreement was incapable of performance.

[15] Alternative Dispute Resolution 25T 134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases
Provision of nursing-home contract requiring patient to agree to arbitrate a dispute with the nursing home was not equivalent to charging an additional fee or "other consideration," within meaning of federal law and regulation prohibiting a nursing facility that participates in federal Medicaid program from, in the case of an individual who is entitled to medical assistance for nursing facility services, charging, in addition to any amount otherwise required to be paid under State plan, any other consideration as a precondition of admission. Social Security Act, § 1919(c)(5)(A)(iii), 42 U.S.C.A. § 1396r(c)(5)(A)(iii); 42 C.F.R. § 483.12(d)(3).

[16] Alternative Dispute Resolution 25T 137

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk137 k. In General. Most Cited Cases
The "Healthcare Due Process Protocol" adopted by the American Arbitration Association does not apply to nursing-home contracts; by its express terms, it applies only in the context of disputes arising between patients and their private managed-care plans.

[17] Alternative Dispute Resolution 25T 134(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(1) k. In General. Most Cited Cases
A pre-dispute arbitration agreement in a nursing-home contract is not per se invalid as against public policy.

[18] Alternative Dispute Resolution 25T 213(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(6) k. Determination and Disposition. Most Cited Cases
Limited factual record precluded Supreme Court from resolving question of whether arbitration agreement in nursing-home contract was an unconscionable and, thus, unenforceable contract of adhesion, and thus remand for further proceedings, including, in trial court's discretion, discovery, on that question, was warranted.

[19] Contracts 95 ⚿1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
A contract may be unconscionable if the provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice.

[20] Contracts 95 ⚿1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of the particular case.

[21] Alternative Dispute Resolution 25T ⚿134(3)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(3) k. Validity of Assent. Most Cited Cases
Arbitration agreement in nursing-home contract was not unenforceable on the ground that requiring potential patient to sign an arbitration agreement breached a purported fiduciary duty owed to such patient by nursing home owner, operator, and manager.

John B. Curtis, Jr. and Bruce D. Gill, Chattanooga, Tennessee, for the appellees, National Health Corporation d/b/a NHC Healthcare, Murfreesboro; National Healthcorp, L.P.; National Health Realty, Inc.; NHC, Inc. a/k/a NHC, Inc.-Tennessee; and NHC/OP, L.P.
Richard E. Circeo, Deborah Truby Riordan, and Carey L. Acerra, Nashville, Tennessee, and Brian G. Brooks, Greenbrier, Arkansas, for the appellant, Dorothy Owens, as Conservator of Mary Francis King.
F. Laurens Brock, Jacob C. Parker, and T. Ryan Malone, Chattanooga, Tennessee, and Christopher C. Puri, Nashville, Tennessee, for the amicus curiae, Tennessee Health Care Association.

JANICE M. HOLDER, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and CORNELIA A. CLARK and GARY R. WADE, JJ., joined.

JANICE M. HOLDER, J.
*1 In this appeal, the primary issue is whether a durable power of attorney for health care authorized the attorney-in-fact to enter into an arbitration agreement as part of a contract admitting the principal to a nursing home and thereby to waive the principal's right to trial by jury. The case also presents secondary issues relating to the arbitration agreement, including whether this case is governed by the Tennessee Uniform Arbitration Act or the Federal Arbitration Act. We hold that the arbitration agreement is to be interpreted pursuant to the Tennessee Uniform Arbitration Act and that the power of attorney authorized the attorney-in-fact to enter into the arbitration agreement on behalf of the principal. In addition, we reject the plaintiff's arguments that: 1) the arbitration agreement is unenforceable because a material term of the agreement is incapable of performance; 2) the arbitration agreement violates federal law; and 3) pre-dispute arbitration agreements in nursing-home contracts violate public policy. However, we remand the case to the trial court for further proceedings on the question of whether the arbitration agreement is an unconscionable, and thus unenforceable, contract of adhesion.

OPINION

FACTS AND PROCEDURAL HISTORY

[1][2][3] On August 5, 2003, Mary Francis King ("King") executed a Durable Power of Attorney for Health Care ("the power of attorney") naming Gwyn C. Daniel ("Daniel") and William T. Daniel as King's attorneys-in-fact. The power of attorney authorized the attorneys-in-fact "to ASSIST me in making health care decisions, and to make health care decision [sic] for me if I am incapacitated or otherwise unable to make such decisions for myself."The power of attorney then set out two paragraphs that are based substantially upon similar provisions in the statutory form for a living will. *See*Tenn.Code Ann. §

32-11-105 (2001). Those two paragraphs provide directions to King's attorneys-in-fact concerning her care in the event she were to have "a terminal condition, or be in an irreversible coma or permanent vegetative state."[FN1]

The power of attorney further provided:

> At any time, my Attorney-in-Fact shall have the right to examine my medical records and to consent to their disclosure whether I am incapacitated or not. I grant to my Attorney-in-Fact the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my Attorney-in-Fact to assist me to make, or to make on my behalf.
>
> This instrument is to be construed and interpreted as a Durable Power of Attorney for Health Care and is intended to comply in all respects with the provisions of Tennessee Code Annotated, § 34-6-201 *et seq.*; and all terms used in this instrument shall have the meanings set forth for such terms in the statute, unless otherwise specifically defined herein.

On August 26, 2003, three weeks after executing the power of attorney, King was admitted to NHC Healthcare, Murfreesboro, a nursing home owned, operated, and managed by the various defendants. The Admission and Financial Contract listed "Gwen [sic] Daniel" as "Legal Representative" and indicated that the "Type" of legal representative was "Power of Attorney." The contract was signed by Daniel and by John Willie Smith ("Smith"), King's brother. Smith is not named in the power of attorney, and no other document in the record authorizes him to make decisions on behalf of his sister.

*2 Section H of the eleven-page contract is entitled "DISPUTE RESOLUTION PROCEDURE (WHICH INCLUDES JURY TRIAL WAIVER)." Section H, which is one-and-one-half pages long, contains three numbered provisions. Section H(1) sets out an "INITIAL GRIEVANCE PROCEDURE" and states that "[t]he parties agree to follow the Grievance procedures described in the Patient Rights Booklet for any claim, controversy, dispute or disagreement arising out of or in connection with the care rendered to Patient by Center and/or its employees."Section H(2) is entitled "MEDIATION AT PATIENT'S REQUEST," and it provides that the patient may request mediation of "any claim, controversy, dispute or disagreement arising out of or relating to ... this contract or breach thereof or any tort claim."The mediation provision further provides that "[f]ailure by the Patient to request or pursue mediation prior to activation of the arbitration process shall terminate Patient's right to mediation."

Section H(3) of the contract is entitled "BINDING ARBITRATION." This section of the contract provides, in pertinent part:

> **BINDING ARBITRATION:** Any claim, controversy, dispute or disagreement initiated by either party prior to written notice of mediation, shall be resolved by binding arbitration administered by either the American Arbitration Association (AAA) or the American Health Lawyers Association (AHLA), as selected by the party requesting arbitration. In the event that the selected arbitration service is unwilling or unable to serve as arbitrator, the other named service shall be utilized. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
>
> ....
>
> This agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed....
>
> **BY AGREEING TO ARBITRATION OF ALL DISPUTES, BOTH PARTIES ARE WAIVING A JURY TRIAL FOR ALL CONTRACT, TORT, STATUTORY, AND OTHER CLAIMS.**

Section H concludes with a separate signature box containing the following text:

> **I hereby agree to the arbitration provisions described above in Section H, including the use where applicable of the AAA Defined "Consumer-Related Disputes." The provisions of Section H have been explained to me prior to my signature below and I also understand that I waive my right to trial by jury.**

Following that text are signature lines for "Patient Signature" (left blank in this contract), "Legal Representative Signature" (signed by Daniel), "Additional Signature (if applicable)" (signed by Smith), and "Date" (written as "8/26/03").

The last section of the contract, Section L ("ACKNOWLEDGEMENT" [sic]), is followed by a signature line for a representative of the nursing home and signature lines for the patient and "Other Persons Signing on Behalf of Patient."The patient's signature line on King's contract was left blank, and Daniel and Smith signed on the two signature lines provided for "Other Persons Signing on Behalf of Patient."

*3 On February 10, 2005, Dorothy Owens ("the plaintiff"), as conservator of King, filed suit against National Health Corporation d/b/a NHC Healthcare, Murfreesboro; National Healthcorp, L.P.; National Health Realty, Inc.; NHC, Inc. a/k/a NHC, Inc.-Tennessee; and NHC/OP, L.P. (collectively, "the defendants"). The complaint alleges that King suffered injuries as the result of the acts or omissions of the defendants while a patient in the nursing home. The complaint asserts causes of action for negligence; gross negligence; wilful, wanton, reckless, malicious and/or intentional conduct; medical malpractice; and violations of the Tennessee Adult Protection Act, Tennessee Code Annotated sections 71-6-101 to -122. The complaint asks for an unspecified amount of compensatory and punitive damages and "demands a trial by jury on all issues herein set forth."

On March 17, 2005, the defendants filed a motion to compel arbitration and stay proceedings. The defendants' motion asked the trial court to compel arbitration based upon the terms of the nursing home contract signed by Daniel as King's attorney-in-fact, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-316 (1999), Tennessee Code Annotated section 29-5-217 (2000), and the Tennessee Uniform Arbitration Act, Tennessee Code Annotated section 29-5-303 (2000).

Responding to the defendants' motion to compel arbitration, the plaintiff asserted, in summary, that Daniel was not authorized by the power of attorney to enter into an arbitration agreement on King's behalf; that the arbitration agreement cannot be enforced because the two identified arbitration organizations no longer perform this type of arbitration; that requiring Daniel, on behalf of King, to sign the arbitration agreement amounts to a breach of the defendants' alleged fiduciary duty to King; that the arbitration agreement is unconscionable; and that the arbitration agreement violates federal law. In the alternative, the plaintiff asserted that she should be permitted to conduct discovery concerning the issues arising from the arbitration agreement.

The trial court denied the defendants' motion to compel arbitration and stay the proceedings. The trial court concluded that the power of attorney does not authorize the attorneys-in-fact to make "legal decisions for Ms. King" and found "that the Durable Power of Attorney for Healthcare should not be so broadly construed as to be considered a Power of Attorney for legal care."

The defendants filed a timely notice of appeal of the trial court's ruling to the Court of Appeals. The defendants' notice of appeal states that the matter is being appealed pursuant to Tennessee Code Annotated section 29-5-319. [FN2]

The Court of Appeals reversed the trial court's ruling, concluding that the power of attorney authorized Daniel to make health care decisions on behalf of King and that the decision to admit King to a nursing home is a health care decision. The intermediate appellate court concluded that the arbitration provision of the nursing-home contract was merely part of the overall contract that Daniel was authorized to execute on behalf of King. The Court of Appeals also rejected the plaintiff's various other arguments and remanded the case to the trial court with instructions to enter an order compelling arbitration.

*4 We granted the plaintiff's application for permission to appeal. For the reasons stated below, we affirm in part and vacate in part the judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

DISCUSSION

[4] The plaintiff raises six issues for the Court's review. Those six issues may be restated as follows: 1) whether this case is governed by the state or federal arbitration act; 2) whether King's durable power of attorney for health care authorized her attorneys-in-fact to bind King to arbitration and to

waive her right to trial by jury; 3) whether the arbitration agreement is enforceable even though a material term of the agreement is incapable of performance; 4) whether the arbitration agreement violates federal law; 5) whether pre-dispute arbitration agreements in nursing-home contracts violate public policy; and 6) assuming arguendo that the power of attorney authorizes Daniel to sign the arbitration agreement on behalf of King, whether the Court of Appeals erred in failing to remand the case for discovery regarding the plaintiff's assertions that the agreement is unenforceable on breach-of-fiduciary-duty and unconscionability grounds. The issues in this case are questions of law, which we review de novo without a presumption of correctness afforded to the trial court's conclusions. *See* Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn.1993). We will address each of these issues in turn.

A. Federal or State Law

[5][6] The first question we must consider is whether this case is governed by the Federal Arbitration Act or the Tennessee Uniform Arbitration Act. The defendants argue that this case is governed by the federal act because the contract involves interstate commerce. *See*9 U.S.C. § 2 (1999). Where the requisite connection with commerce is present, the federal act generally requires a court to stay the proceedings so the parties can resolve the dispute according to the terms of the arbitration agreement. *See*9 U.S.C. § 3 (1999). The record contains an affidavit of a nursing-home administrator detailing the various ways in which interstate commerce is involved, e.g., the nursing home uses supplies and goods procured from outside Tennessee, admits residents of states other than Tennessee, and participates in the federally funded Medicare and Medicaid programs.

[7] The plaintiff argues in response that even if interstate commerce is involved, the terms of the nursing-home contract provide that the arbitration agreement is to be governed by the Tennessee act. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Under *Volt*, parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate, and a contract that might ordinarily be governed by the federal act may provide that it will be governed by a particular state's arbitration act. *Id.* at 479, 109 S.Ct. 1248.

*5 We need not belabor our analysis on this point because Section H(3), the arbitration provision within the nursing-home contract, expressly provides that "this agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed."It is undisputed that NHC Healthcare, Murfreesboro is licensed in Tennessee. Therefore, that language does not merely provide that issues of substantive law are to be determined by reference to Tennessee law; it clearly provides that the arbitration agreement itself "shall be governed by and interpreted" in accordance with the laws of Tennessee. Applying *Volt*, we must conclude that this case is governed by the Tennessee Uniform Arbitration Act and not the Federal Arbitration Act.

B. Scope of Authority Granted To Attorneys-In-Fact

[8][9] The question of whether the contract is governed by the state or federal arbitration act is not an academic one. The resolution of that question generally determines whether certain issues concerning the arbitration agreement are to be decided by an arbitrator or by a court. *See* Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79 (Tenn.1999). Because this arbitration agreement is to be interpreted in accordance with the Tennessee act, contract formation questions are to be decided by the court, not by an arbitrator. *Id.* at 85.Consequently, we next consider whether King's power of attorney authorizes Daniel to sign an arbitration agreement on King's behalf and to waive King's right to trial by jury. The plaintiff argues that the decision to sign an arbitration agreement and to waive a jury trial is a *legal* decision, not a *health care* decision. Accordingly, she asserts that the power of attorney does not authorize Daniel to bind King to arbitration. We begin our analysis with an examination of the language of King's power of attorney.

King's power of attorney authorizes her attorneys-in-fact "to make health care decision [sic] for me if I am incapacitated or otherwise unable to make such decisions for myself" and also grants her attorneys-in-fact "the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the

health care decisions that this instrument authorizes my Attorney-in-Fact to assist me to make, or to make on my behalf."Additionally, the power of attorney provides that it

> is to be construed and interpreted as a Durable Power of Attorney for Health Care and is intended to comply in all respects with the provisions of Tennessee Code Annotated, § 34-6-201 et seq.; and all terms used in this instrument shall have the meanings set forth for such terms in the statute, unless otherwise specifically defined herein.

[10]Tennessee Code Annotated section 34-6-201(2) (2001) defines "[h]ealth care" to mean "any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition, and includes medical care as defined in § 32-11-103(5)."Section 34-6-201 then defines "[h]ealth care decision" to mean "consent, refusal of consent or withdrawal of consent to health care."Tenn.Code Ann. § 34-6-201(3) (2001). Under these two statutory definitions, the decision to admit King to the nursing home clearly constitutes a "health care decision."

*6 Section 34-6-204(b) (2001) provides:

> Subject to any limitations in the durable power of attorney for health care, the attorney in fact designated in such durable power of attorney may make health care decisions for the principal, before or after the death of the principal, *to the same extent as the principal* could make health care decisions for such principal if the principal had the capacity to do so....

(emphasis added).

[11] As stated in *American Jurisprudence,*"[p]owers of attorney are to be construed in accordance with the rules for the interpretation of written instruments generally; in accordance with the principles governing the law of agency, and, in the absence of proof to the contrary, *in accordance with the prevailing laws relating to the act authorized.*" 3 Am.Jur.2d Agency, § 27 (2007) (emphasis added) (footnotes omitted). In this case, King's power of attorney must be construed in accordance with the foregoing provisions of the Tennessee Durable Power of Attorney for Health Care Act.

[12][13] The phrase "to the same extent as the principal" as used in section 34-6-204(b) clearly indicates that, absent a limitation in the power of attorney, an attorney-in-fact can make exactly the same types of health care decisions that the principal could make if he or she had the mental capacity to do so. That statute, read in light of the statutory definitions mentioned above, leads to the conclusion that an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing-home contract that contains an arbitration provision because this action is necessary to "consent ... to health care." Tenn.Code Ann. § 34-6-201(3). Because King herself could have decided to sign the nursing-home contract containing the arbitration provision had she been capable, section 34-6-204(b) leads us to conclude that Daniel was authorized to sign the arbitration provision on King's behalf. As a result, the plaintiff's argument that the power of attorney did not authorize Daniel to sign the arbitration agreement is without merit.

The plaintiff's argument on this issue is faulty in at least one other respect. Her purported distinction between making a legal decision and a health care decision fails to appreciate that signing a contract for health care services, even one without an arbitration provision, is itself a "legal decision." The implication of the plaintiff's argument is that the attorney-in-fact may make one "legal decision," contracting for health care services for the principal, but not another, agreeing in the contract to binding arbitration. That result would be untenable. Each provision of a contract signed by an attorney-in-fact could be subject to question as to whether the provision constitutes an authorized "health care decision" or an unauthorized "legal decision." Holding that an attorney-in-fact can make some "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by attorneys-in-fact that likely would have negative effects on their principals. Such a holding could make it more difficult to obtain health care services for the principal. And in some cases, an attorney-in-fact's apparent lack of authority to sign an arbitration agreement on behalf of the principal presumably could result in the principal being unable to obtain needed health care services. For example, a mentally incapacitated principal could be caught in "legal limbo." The principal would not have the capacity to enter into a contract, and the

attorney-in-fact would not be authorized to do so. Such a result would defeat the very purpose of a durable power of attorney for health care.

*7 Our holding on this issue is necessarily based upon both the language of King's power of attorney and the provisions of the Tennessee Durable Power of Attorney for Health Care Act. Our holding, however, is consistent with cases from other jurisdictions considering the issue. *See, e.g.*, *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661 (Ala.2004); *Hogan v. Country Villa Health Servs.*, 148 Cal.App.4th 259, 55 Cal.Rptr.3d 450, 453-55 (2007) (citing *Garrison v. Superior Court of Los Angeles County*, 132 Cal.App.4th 253, 33 Cal.Rptr.3d 350 (2005)); *Sanford v. Castleton Health Care Ctr., L.L.C.*, 813 N.E.2d 411 (Ind.Ct.App.2004).*But see Texas Cityview Care Ctr., L.P. v. Fryer*, Nos. 2-06-373-CV, 2-06-426-CV, 2007 WL 1502088, *5 (Tex.App.-Fort Worth May 24, 2007) (stating "nothing in the medical power of attorney indicates that it was intended to confer authority on [the attorney-in-fact] to make legal, as opposed to health care, decisions for [the principal], such as whether to waive [the principal's] right to a jury trial by agreeing to arbitration of any disputes").

For the reasons stated above, we must reject the plaintiff's argument that King's power of attorney does not authorize Daniel to sign the arbitration agreement and thereby to waive King's right to trial by jury. We hold that Daniel was authorized to sign the nursing-home contract, including its arbitration provision. This holding, however, does not resolve the plaintiff's other issues as to whether the arbitration agreement is enforceable.

C. Impossibility of Performance of a Material Term

[14] The plaintiff asserts that the arbitration provision of the nursing-home contract is unenforceable because the two arbitration organizations mentioned in Section H(3), the American Arbitration Association and the American Health Lawyers Association, no longer conduct arbitrations in which the agreement to arbitrate predates the dispute which is the subject of the claim ("pre-dispute arbitration agreement"). The defendants apparently do not dispute the plaintiff's assertion that the two organizations no longer conduct arbitrations under the terms of pre-dispute arbitration agreements in health care cases. They argue, however, that both the federal and state arbitration acts provide for instances in which an arbitrator specified in the arbitration agreement is unavailable to conduct the arbitration. *See*9 U.S.C. § 5 (1999); Tenn.Code Ann. § 29-5-304 (2000).

The Court of Appeals rejected the plaintiff's argument and agreed with the defendants' position, citing Tennessee Code Annotated section 29-5-304. That section provides:

> If the arbitration agreement provided a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

***8** As the Court of Appeals correctly concluded, section 29-5-304 provides for the very contingency illustrated by the facts of this case. When an agreed-upon arbitrator is unavailable, the court may appoint one or more arbitrators to conduct the arbitration.

The plaintiff asserts in this Court that the intermediate appellate court misconstrued her argument on this issue. Notwithstanding section 29-5-304, the plaintiff argues that the specification of the two arbitration organizations was such a material term of the contract that the contract itself must fail if neither of those organizations is available to conduct the arbitration.

The plaintiff's argument on this issue is without merit. First, there simply is no factual basis for the plaintiff's assertion that the specification of the two organizations was so material to the contract that it must fail if they are unavailable. Second, it appears that at least one of the two specified organizations *will* conduct the arbitration *if ordered by a court to do so. See* AHLA Dispute Resolution Service Important Rules Amendment, American Health Lawyers Association, http://www.healthlawyers.org/Template.cfm?Section=About-Arbitration-and-Mediation-Services (follow hyperlink "Important Rules Amendment") (last visited August 1, 2007) (stating, in footnote 2, "[i]f a

judge gives a written order that the AHLA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHLA ADR Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter."); *Owens v. Nexion Health at Gilmer, Inc.*, No. 2:06-CV-519-DF, 2007 WL 841114, *3 (E.D.Tex. Mar. 19, 2007) ("[T]he AHLA rules specifically provide that the AHLA Dispute Resolution Service *will* administer a consumer health care liability claim if 'a judge orders that the Service administer an arbitration under the terms of a pre-injury arbitration agreement.'Therefore, this Court may enforce the Arbitration Agreement as written."). Thus, the plaintiff's argument is based upon the false factual premise that neither organization is available to conduct an arbitration in this case. It appears that the AHLA will conduct the arbitration if ordered by a court to do so.

For the foregoing reasons, the plaintiff's argument that the contract is void because a material term is incapable of performance is without merit.

D. Violation of Federal Law

[15] The plaintiff argues that the arbitration agreement in the nursing-home contract violates federal law. Her argument is based upon both a federal statute and a federal regulation.

Section 1396r(c)(5)(A)(iii) of title 42 of the United States Code provides that a nursing facility that participates in the federal Medicaid program must,

> in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money, donation, *or other consideration* as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

*9 42 U.S.C. § 1396r(c)(5)(A)(iii) (Supp.2007) (emphasis added). Similarly, section 483.12(d)(3) of title 42 of the Code of Federal Regulations provides:

> 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) (2006) (emphasis added).

The plaintiff argues that the waiver of a right to trial by jury constitutes a form of "other consideration" prohibited by the federal statute and regulation. The plaintiff therefore contends that it is illegal to require a patient to sign an arbitration agreement waiving the right to a jury trial as a precondition for being admitted to a nursing home.

Courts in several other jurisdictions have rejected this argument. In *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983 (Ala.2004), the Alabama Supreme Court stated:

> [R]equiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance. Rather, an arbitration agreement sets a forum for future disputes; *both* parties are bound to it and *both* receive whatever benefits and detriments accompany the arbitral forum. If we were to agree with [the plaintiff], virtually any contract term [the plaintiff] decided she did not like could be construed as requiring "other consideration" in order to gain admittance to the nursing home and thus be disallowed by statute.

Id. at 989.*See also Sanford*, 813 N.E.2d at 419 (concluding that the general phrase "other consideration" within 42 U.S.C. § 1396r(c)(5)(A)(iii) did not include an agreement to arbitrate and that requiring a nursing-home admittee to agree to arbitrate did not violate the statute); *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So.2d 278, 288 (Fla.Dist.Ct.App.2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."); *Broughsville v. OHECC, L.L.C.*, No. 05CA008672, 2005 WL 3483777, *8 (Ohio Ct.App. Dec. 21, 2005) (stating that requiring a nursing-home admittee receiving Medicare or Medicaid to agree to arbitrate is not charging an additional fee or other consideration).

Relying on *Coosa Valley Health Care*, *Broughsville*, and *Sanford*, the Court of Appeals concluded that requiring a nursing-home admittee to agree to arbitrate a dispute with the nursing home is not equivalent to charging an additional fee or other consideration. We agree with the intermediate appellate court's analysis and hold that the arbitration agreement in King's nursing-home contract did not violate either the federal statute or the federal regulation.

E. Pre-Dispute Arbitration Agreements in Nursing-Home Contracts and Public Policy

***10** In *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn.1996), we held that arbitration agreements between physicians and patients are not per se invalid as a matter of public policy. The plaintiff in the pending case, however, asks us to hold that pre-dispute arbitration agreements in nursing-home contracts violate public policy. The plaintiff asserts that such a holding would not be inconsistent with *Buraczynski* because as we stated in that case:

> [C]ourts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden within other types of contracts 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, and when the agreements give the healthcare provider an unequal advantage in the arbitration process itself.

Id. at 321.The plaintiff asserts that three of the foregoing factors stated in *Buraczynski* are implicated in every nursing-home contract containing an arbitration clause.

In arguing that pre-dispute arbitration agreements in nursing home contracts violate public policy, the plaintiff relies primarily upon the "Heathcare Due Process Protocol" adopted by the American Arbitration Association. *See* "Healthcare Due Process Protocol," American Arbitration Association/American Bar Association/American Medical Association Commission on Healthcare Dispute Resolution, Final Report, July 27, 1998, *available at* http:// www.adr.org/sp.asp?id=28633 (last visited August 1, 2007). In support of her argument on this issue, the plaintiff quotes several portions of the Due Process Protocol that state that binding forms of alternative dispute resolution ("ADR") should be used only where the parties agree to do so *after* a dispute arises and that consent to use an ADR process should not be a requirement for receiving emergency care or treatment. The plaintiff goes on to assert that the admission of patients to nursing homes is analogous to "emergency care or treatment" and that consent to use arbitration therefore should not be a requirement for admission to a nursing home.

[16][17] The Due Process Protocol relied upon by the plaintiff does not apply to nursing-home contracts. By its express terms, the Due Process Protocol applies only in the context of disputes arising between patients and their *private managed-care plans*.Due Process Protocol, Paragraphs I ("Introduction") and II ("Summary of Recommendations"). Notwithstanding the limited scope of the Due Process Protocol, one could argue that one or more of the general principles stated in the Protocol might be equally applicable in health care settings other than the managed-care setting. None of those general principles, however, would support a holding that pre-dispute arbitration agreements in nursing-home contracts are per se invalid on public policy grounds. Such a holding would amount to a public-policy "exception" to the Tennessee Uniform Arbitration Act, a matter more properly within the purview of the General Assembly.

***11** For the foregoing reasons, we reject the plaintiff's assertion that pre-dispute arbitration agreements in nursing-home contracts are per se invalid because they violate public policy.

F. Remand for Discovery

[18] The trial court's ruling that the power of attorney does not authorize Daniel to bind King to arbitration pretermitted the issue of whether the nursing-home contract is a contract of adhesion and, if so, whether it is unenforceable on the ground that it is unconscionable. If this Court holds that the power of attorney authorized Daniel to sign the arbitration agreement, the plaintiff asserts that the Court of Appeals erred in not remanding the case to the trial court to permit the plaintiff to conduct discovery concerning this claim. She argues that the

determination of unconscionability is fact driven and that she should be permitted to develop the factual record before the court decides that issue. The plaintiff points out that the defendants have not yet responded to her previously filed discovery requests.[FN3]

[19][20] A contract may be unconscionable if the provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice. *Haun v. King*, 690 S.W.2d 869, 872 (Tenn.Ct.App.1984) (quoting *Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 274 S.E.2d 206, 210 (1981)). In making that determination, a court must consider all the facts and circumstances of a particular case. *Id.* The scant factual record in this case does not disclose the circumstances under which Daniel signed the arbitration agreement on behalf of King, including whether the arbitration agreement was offered on a "take it or leave it basis."*Buraczynski*, 919 S.W.2d at 320;*see generally Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn.Ct.App.2003) (reviewing the trial court's findings of fact and holding that an arbitration provision in a nursing-home contract was unconscionable and therefore unenforceable).

We are unable to resolve the question of whether the arbitration agreement is unconscionable due to the limited nature of the factual record. We therefore conclude that the case should be remanded to the trial court for further proceedings on that issue. The trial court, in its discretion, may allow the parties to conduct discovery.[FN4]*See Berger v. Cantor Fitzgerald Sec.*, 942 F.Supp. 963, 966 (S.D.N.Y.1996) (allowing discovery concerning arbitration agreement and enforceability issues). We express no opinion, however, as to the ultimate resolution of the unconscionability issue.

[21] The plaintiff also asserts in her brief that she should be permitted to conduct discovery on the question of whether the agreement is unenforceable because it allegedly constitutes a breach of fiduciary duty. The Court of Appeals rejected the plaintiff's argument that the agreement is unenforceable under her breach-of-fiduciary-duty theory. We agree with the result reached by the intermediate appellate court on that issue, albeit on different grounds.

***12** As the plaintiff argues in her brief, the breach-of-fiduciary-duty claim is based upon her assertion that "in obtaining Ms. Daniel's signature [on the arbitration agreement], Defendants breached fiduciary duties they owed to Mary King."The plaintiff's argument is based upon the implied premise that the nursing home owed King a fiduciary duty *prior to* the time she, through Daniel, signed the contract for admission to the nursing home.

Assuming solely for the purpose of argument that a fiduciary duty *might* arise following a patient's admission to a nursing home, the plaintiff has cited no authority for the finding that a fiduciary duty is owed to a *potential* patient of a nursing home. The record discloses no facts supporting a fiduciary relationship, contractual or otherwise, between King and the nursing home prior to the time King, through Daniel, signed the nursing-home contract. We therefore agree with the intermediate appellate court that the arbitration agreement is not unenforceable on the breach-of-fiduciary-duty ground asserted by the plaintiff. Given our holding that this issue is without merit, any discovery allowed by the trial court on remand should not include discovery on the breach-of-fiduciary-duty issue.

CONCLUSION

For the reasons stated above, we affirm the holdings of the Court of Appeals that the agreement is governed by the Tennessee Uniform Arbitration Act and that the power of attorney authorized Daniel to sign the arbitration agreement on behalf of King. We also affirm the intermediate appellate court's holding that the arbitration agreement is not unenforceable on the ground that a material term of the agreement is incapable of performance. We likewise affirm the Court of Appeals' holding that the arbitration agreement does not violate federal law. We further hold that a pre-dispute arbitration agreement in a nursing-home contract is not per se invalid as against public policy. In addition, we affirm the intermediate appellate court's holding that the agreement is not unenforceable on the ground that requiring King to sign an arbitration agreement breached a purported fiduciary duty owed to King by the defendants. We vacate, however, the Court of Appeals' judgment insofar as it holds that the arbitration agreement is not an unconscionable contract of adhesion, and we remand for further proceedings on that issue. In light of our remand for further proceedings on the unconscionability issue, we also vacate the

intermediate appellate court's instruction to the trial court to enter an order compelling arbitration.

The costs are taxed one-half to the plaintiff/appellant, Dorothy Owens, as Conservator for Mary Francis King, an incapacitated person, and one-half to the defendants/appellees, National Health Corporation d/b/a NHC Healthcare, Murfreesboro; National Healthcorp, L.P.; National Health Realty, Inc.; NHC, Inc. a/k/a NHC, Inc.-Tennessee; and NHC/OP, L.P., for which execution may issue if necessary.

ORDER GRANTING IN PART AND DENYING IN PART APPELLEES' PETITION TO REHEAR

PER CURIAM

The appellees, NHC/OP, L.P., National Health Realty, Inc., NHC, Inc., a/k/a NHC, Inc., Tennessee, and National Health Corporation, have filed a petition to rehear the opinions of this Court filed on November 8, 2007. By order of January 4, 2008, appellant, Dorothy Owens, was ordered to file a response to the petition to rehear. Appellant's response was filed on January 16, 2008.

In their petition, the appellees allege that the Court improperly allowed discovery as to the principal's competence to sign the power of attorney.

Upon due consideration, the Court concludes that appellees' petition to rehear is well-taken as to this issue and should therefore be granted. The petition to rehear is denied as to the remainder of the issues.

It appearing to the Court from appellees' Petition to Rehear and appellant's response that footnote 4 of its Opinion filed November 8, 2007, should be modified,

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that the attached Opinion be and the same is hereby substituted for that Opinion filed in this cause on November 8, 2007, without change to this Court's judgment entered contemporaneously with the filing of the original Opinion on November 8, 2007, and without the further taxing of costs.

FN1. It should be noted that a living will and a durable power of attorney for health care are two different legal instruments. A living will, prepared and executed pursuant to the Tennessee Right to Natural Death Act, sections 32-11-101 to -112 (2001 and Supp.2006), is "a written declaration ... stating declarant's desires for medical care or noncare, including palliative care, and other related matters such as organ donation and body disposal."Tenn.Code Ann. § 32-11-103(4) (2001). A living will, therefore, is a written statement of the patient's *own* health care decisions regarding his or her medical care in the event he or she has a terminal condition and becomes incompetent; in such circumstances, health care providers may rely upon the living will and implement the patient's decisions set out in that instrument. By contrast, a durable power of attorney for health care, governed by Tennessee Code Annotated sections 34-6-201 to -218 (2001 and Supp.2006), is a document authorizing *another* person (an attorney-in-fact) to make health care decisions on behalf of the patient in the event he or she becomes incapacitated. Given their different purposes, a person may execute a living will, a durable power of attorney for health care, or both.

FN2.Section 29-5-319(a)(1) states that an appeal may be taken from "[a]n order denying an application to compel arbitration made under § 29-5-303."Tenn.Code Ann. § 29-5-319(a)(1) (2000).Section 29-5-319(b) further provides that "[t]he appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action."*Id.* § 29-5-319(b) (2000). The federal act contains a comparable provision. *See*9 U.S.C. § 16 (1999) ("Appeals").

FN3. Based upon our review of the record, it appears that the plaintiff served upon the defendants two sets of interrogatories and four sets of requests for production of documents while the case was pending in the trial court.

FN4. The plaintiff also questions whether King was incompetent to sign the nursing-home agreement when Daniel executed the contract pursuant to the power

> of attorney. The plaintiff asserts that the trial court should have permitted discovery regarding the circumstances surrounding the execution of both the nursing-home contract and the power of attorney, which was executed only twenty-one days later. We agree that discovery concerning whether King was incompetent to sign the nursing-home agreement should be permitted on remand. Discovery should not be permitted, however, concerning the validity of the power of attorney or the circumstances surrounding its execution. *See*Tenn. Code Ann. § 34-6-208 (providing immunity to health care providers who rely on decisions "made by an attorney in fact who the health care provider believes in good faith is authorized" to make health care decisions).

Tenn.,2007.
Owens v. National Health Corp.
--- S.W.3d ----, 2007 WL 3284669 (Tenn.)

END OF DOCUMENT

HBeverly Enterprises-Mississippi Inc. v. Powell
C.A.5 (Miss.),2007.
This case was not selected for publication in the Federal Reporter.Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,Fifth Circuit.

BEVERLY ENTERPRISES-MISSISSIPPI INC., doing business as Beverly Healthcare-Eason, Plaintiff-Appellant,

v.

Bertha POWELL, Wrongful Death Beneficiary of Charles McAlister, Deceased; Jennifer Pruitt, Wrongful Death Beneficiary of Charles McAlister, Deceased; Kathy Brunson; Bridget Jones; Darryl Kirk; Charles Lamont McAlister; Judy McAlister; Larry McAlister; Ruby McAlister; Steve McAlister; Anthony Gordon; Stevan (or Stephen) McAlister, Defendants-Appellees.

No. 06-60468.

Aug. 3, 2007.

Background: Deceased nursing home resident's sister and a wrongful death beneficiary sued the nursing home in state court, asserting claims of negligence, medical malpractice, fraud, breach of fiduciary duty, and wrongful death, and the nursing home brought suit in federal court to compel arbitration and enjoin the state court action. The United States District Court for the Northern District of Mississippi, 2006 WL 396947, entered summary judgment against the nursing home, and it appealed.

Holding: The Court of Appeals held that genuine issues of material fact existed as to whether an arbitration agreement was read to the resident and whether he placed an "X" on it.
Vacated and remanded.

West Headnotes

Federal Civil Procedure 170A ⇐2515

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2515 k. Tort Cases in General.
Most Cited Cases
Genuine issues of material fact as to whether an arbitration agreement was read to an illiterate nursing home resident and whether he placed an "X" on it precluded summary judgment as to whether the nursing home could compel arbitration of tort claims asserted against it in connection with the resident's death.

*577 William Grant Armistead, Lamar Bradley Dillard, Mitchell, McNutt & Sams, Tupelo, MS, for Plaintiff-Appellant.
Susan Nichols Estes, Deborah Truby Riordan, Wilkes & McHugh, Little Rock, AR, Christine Connely Althoff, Anthony Lance Reins, Wilkes & McHugh, Hattiesburg,*578 MS, Brian Gene Brooks, Greenbrier, AR, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi (1:04-CV-276).

Before KING, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM: FN*

FN* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 Beverly Enterprises-Mississippi, Inc. challenges an adverse summary judgment against its action to compel arbitration. Material fact issues, however, preclude that judgment. **VACATED AND REMANDED.

I.

In January 2003, Charles McAlister (decedent) was admitted to Beverly Healthcare-Eason, a nursing-home facility, owned and operated by Beverly

Enterprises-Mississippi, Inc. On the date of admission, decedent, who was illiterate, purportedly executed an arbitration agreement, which contained, *inter alia,* a provision requiring all claims or disputes raised in connection with his nursing-home care to be submitted to binding arbitration.

Decedent died at the Beverly facility in May 2003. In August 2004, Bertha Powell, decedent's sister and a wrongful death beneficiary, filed a state-court action, charging Beverly with, *inter alia,* negligence, medical malpractice, fraud, breach of fiduciary duty, and wrongful death.

In September 2004, Beverly filed this action against Powell and others (defendants) to compel arbitration and enjoin the state-court action. In response, defendants denied that the arbitration agreement was valid and enforceable. Following discovery, Beverly moved in August 2005 to compel arbitration. In February 2006, the district court denied Beverly's motion and closed its action, holding: testimony from Beverly's own witnesses suggest decedent was not read the arbitration document and did not sign it; and, due to decedent's illiteracy, Beverly engaged in fraud-in-the-inducement by having him sign the agreement without properly explaining it to him. Beverly's motion to alter or amend the judgment and for reconsideration was denied that April.

II.

In essence, summary judgment was awarded defendants. Beverly challenges that judgment, contending: the arbitration agreement was valid and enforceable; and, accordingly, decedent's claims should be submitted to arbitration. In the alternative, Beverly contends: if questions of material fact exist as to the arbitration agreement's enforceability, this action should be remanded for trial.

A summary judgment is reviewed *de novo, e.g.,* Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and is appropriate "if ... there is no genuine issue as to any material fact and ... the mov [ant] ... is entitled to a judgment as a matter of law", FED.R.CIV.P. 56(c). "An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir.2000) (citation omitted). "A fact issue is material if its resolution could affect the outcome of the action." *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir.2005) (quoting *579*Thompson v. Goetzmann*, 337 F.3d 489, 502 (5th Cir.2003)). Finally, all reasonable inferences are made in the light most favorable to the non-movant. *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721, 725 (5th Cir.2002).

**2 In determining whether parties should be compelled to arbitrate, courts perform a bifurcated inquiry. "First, the court must determine whether the parties agreed to arbitrate the dispute. Once the court finds that the parties agreed to arbitrate, it must consider whether any federal statute or policy renders the claims nonarbitrable." *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir.2004). In this regard, a party seeking to avoid arbitration must prove the arbitration provision was a product of fraud or coercion or other "such grounds [that] ... exist at law or in equity for the revocation of any contract". *Sam Reisfeld & Son Imp. Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir.1976) (quoting the Federal Arbitration Act, 9 U.S.C. § 2); *see also Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 332 (5th Cir.1987). In contending that no valid arbitration agreement exists, and, therefore, in support of the summary judgment, defendants make two contentions.

First, they assert decedent did not agree to arbitrate any disputes because he did not sign the arbitration agreement. Decedent's family, although not present at his admission to the Beverly facility, testified the signature on the agreement (characterized by an "X" mark) is not his; the family produced other documentation which they claimed was signed by decedent and which purported to show a wholly different signature. In response, Beverly offers deposition testimony from two employees: one, who witnessed decedent sign the agreement; and a second, who signed the agreement as a witness. (Although the latter did not remember decedent's signing the agreement, she testified she would not have signed as witness had decedent not signed the agreement.)

In the alternative, defendants contend: even if the agreement was signed, it is unconscionable, both procedurally and substantively. Under Mississippi law, unconscionability can either be substantive or procedural. *West v. West*, 891 So.2d 203, 213

(Miss.2004). For procedural unconscionability, parties invoking it point to the "formation of the contract", *id.*; unconscionability generally requires showing lack of either knowledge or voluntariness. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 517 (Miss.2005) (citation omitted).

Defendants assert the circumstances surrounding the agreement's formation rendered it procedurally unconscionable: decedent was illiterate and totally dependent on Beverly employees; and the employees did not read or explain the agreement to him, but simply paraphrased it. As a related claim, defendants contend, and the district court found, that these actions amounted to fraud-in-the-inducement, by which Beverly took advantage of both its relationship with decedent and his illiteracy by failing to inform him that he was signing an arbitration agreement. Beverly employees, however, present at decedent's admission, testified by deposition that the agreement was explained to him; and that he understood the contents of the agreement when he executed it. Further, Beverly notes: under Mississippi law, "illiteracy alone is not a sufficient basis for the invalidation of an arbitration agreement". *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537 (5th Cir.2003).

3 Needless to say, the contentions by both sides demonstrate this matter is not easily resolved. Indeed, the district court noted as much, stating: "there is conflicting testimony, from [each party's witnesses], as to whether [decedent] was read the Agreement*580** and whether he placed an X on it". The resolution of these fact issues will undoubtedly affect the disposition of this action. (Because material fact issues exist, we need not address defendant's claims for substantive unconscionability and breach of fiduciary duty.) Therefore, summary judgment was improper.

III.

For the foregoing reasons, the denial of arbitration is **VACATED** and the matter is **REMANDED** for trial.

VACATED AND REMANDED.

C.A.5 (Miss.),2007.
Beverly Enterprises-Mississippi Inc. v. Powell
244 Fed.Appx. 577, 2007 WL 2228537 (C.A.5 (Miss.))

END OF DOCUMENT