IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00730

ADAMS COMMUNITY CARE CENTER, LLC,
ET AL. Appellants/Defendants

VS.

SHEILA REED, AS PERSONAL REPRESENTATIVE
AND CONSERVATOR OF ANNIE REED Appellee/Plaintiff

Appeal from the Circuit Court of Adams County, Mississippi
Civil Action No. 05KV0246S

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

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

1. Sheila Reed, as Personal Representative and Conservator of Annie Reed - Plaintiff/Appellee;

2. John G. (Trae) Sims, III, Robert L. Cooper, III, and Sims Law Group, PLLC - attorneys of record for Plaintiff/Appellee;

3. Adams Community Care Center, LLC d/b/a Adams County Nursing Center, Adams County Nursing Center, Magnolia Management Corporation d/b/a Magnolia Ancillary Services, Inc., Comm-Care Mississippi d/b/a Adams Comm-Care, LLC and Edward E. Crow, Administrator - Defendants/Appellants;

4. Roland F. Sampson, III, and Samson & Powers, PLLC - attorneys of record for Defendants/Appellants;

5. Barry Tillman, M.D. - Defendant;

6. R. Eugene Parker, Jr., and Varner, Parker & Sessums, P.A. - attorneys of record for Barry Tillman, M.D.;

7. Magnolia Management Corporation, Community Extended Care Centers, Inc. and Louisiana Extended Care Centers, Inc. - Defendants;

8. Patrick F. McAllister and Williford, McAllister & Jacobus, LLP - attorneys of record for Magnolia Management Corporation, Community Extended Care Centers, Inc. and Louisiana Extended Care Centers, Inc.;

9. Legacy Care, Inc. d/b/a Legacy Healthcare Services, Inc., Legacy Healthcare Services, Inc., and Herman K. Beebe, Jr. - Defendants;

10. John A. Stassi, II - attorney of record for Legacy Care, Inc. d/b/a Legacy Healthcare Services, Inc., Legacy Healthcare Services, Inc., and Herman K. Beebe, Jr.;

11. Professional Rehabilitation Hospital, LLC d/b/a Promise Specialty Hospital of Miss-Lou - Defendant;

12. John T. Rouse, Monica A. Frois, Brandy N. Sheely, and McGlinchey Stafford, PLLC - attorneys of record for Professional Rehabilitation Hospital, LLC d/b/a Promise Specialty Hospital of Miss-Lou; and,

13. Honorable Lillie Blackmon Sanders, Adams County Circuit Court Judge.

Respectfully Submitted,

ROBERT L. COOPER, III (MB# 100485)
Attorney for Plaintiff/Appellee

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STATEMENT OF THE ISSUES

1. Did Adams County Nursing Center meet its evidentiary burden to prove that Annie Reed's sons possessed the requisite express, implied or apparent authority to bind her to the arbitration clause found within the Admission Agreement?

2. Did Adams County Nursing Center meet its evidentiary burden to prove that the Mississippi Uniform Health Care Surrogate Statute was applicable in this case?

3. Assuming *arguendo* that a valid agreement to arbitrate exists between the parties, does the unavailability of the forum expressly agreed to by the parties to arbitrate any disputes render performance of said agreement impossible?

4. Do the terms of the arbitration clause in question, or the circumstances in which it was allegedly agreed to, render said agreement substantively or procedurally unconscionable?

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSTION IN THE COURT BELOW

In her capacity as personal representative and court-appointed conservator of Annie Reed, Sheila Reed ("Plaintiff") filed a Complaint alleging that Annie Reed suffered damages as a result of negligent medical treatment while a resident at Adams County Nursing Center ("ACNC"). (1:3A-3L; Appellants' R.E. 8-19)[1]. The Plaintiff made similar allegations against various other defendants in her Complaint as well. Id.

On June 8, 2005, ACNC, Adams Community Care Center, LLC d/b/a ACNC, Magnolia Management Corporation d/b/a Magnolia Ancillary Services, Inc., Comm-Care Mississippi d/b/a Adams Comm-Care, LLC, and Edward E. Crow, Administrator ("Defendants") filed a Motion to Dismiss, to Compel Arbitration and to Stay. (1:1-3). In support of their motion, the Defendants attached the Plaintiff's Complaint and the two Admission Agreements which contained arbitration clauses as exhibits. (1:3A-3Z; Appellants' R.E. 8-33). In the supporting memorandum to the motion, the Defendants asserted that the claims asserted on behalf of Annie Reed were subject to a valid arbitration entered by the sons of Annie Reed on her behalf. (1:4-22). The Defendants asserted that the arbitration clauses in question are not unconscionable, and that Annie Reed could be bound to the terms of the arbitration agreement even though she was not a signatory to the Admission Agreements. Id.

Soon thereafter, the Plaintiff responded to the motion to compel arbitration and argued, *inter alia*, that the Defendants had failed to meet their burden of establishing that a valid agreement to arbitrate existed, that the Plaintiff's claim were no longer arbitrable under the

[1] Volumes 1, 2 and 3 of the Record are cited herein as "[volume]:[page number]." The Appellee's Record Excerpts are cited as "Appellee's R.E. [tab]." The Appellants' Record Excerpts are cited as "Appellants' R.E. [page number]."

purported arbitration clause because the mutually agreed upon forum was no linger available, and that the arbitration clause in question was both substantively and procedurally unconscionable. (1:23-42; Appellee's R.E. 1). Alternatively, the Plaintiff requested that the Court allow the parties to conduct arbitration-related discovery and to participate in an evidentiary hearing. (1:39-40; Appellee's R.E. 1).

On March 5, 2007, the Defendants brought their motion to compel arbitration on for hearing and made their argument in support of arbitration to the trial court. (3:1-35; Appellee's R.E. 2). At the evidentiary hearing, the Defendants called no witnesses and offered no new evidence but instead relied solely on arguments of counsel and the exhibits to their motion to compel arbitration. Id. Before the trial Court ruled on the Defendants' motion, this Court handed down two decisions which squarely addressed the issues below, and the Plaintiff filed a supplement to her response to motion to compel arbitration on September 12, 2008. (1:43-48). In response, the Defendants filed a supplemental memorandum in support of their motion to compel arbitration, submitted several more exhibits to support their motion and requested leave of court to take the arbitration-related deposition of Defendant Dr. Barry Tillman . (1:49-57 HHH, 2:57 III; Appellants' R.E. 34-58).

On December 22, 2008, the trial court denied the Defendants' motion to compel arbitration finding that Annie Reed's sons lacked the authority to bind her to the arbitration clause and specifically finding that "no evidence was exhibited that she was incompetent, incapacitated, or otherwise unable to sign the contract herself." (2:59; Appellants' R.E. 6). The Court never rendered a decision on either the Plaintiff's or the Defendants' request to conduct arbitration-related discovery.

B. STATEMENT OF FACTS

The facts set forth in the Appellants' brief are an accurate representation of the information that can be gleaned from the record currently before the Court. However, more important than what can be found in the record is what is missing from the record. There is no proof, and it is undisputed, that Annie Reed did not personally execute or agree to the terms of the arbitration agreement. There is no competent evidence in the record to prove that Annie Reed expressly authorized either James or Larry Wesley to accept the terms of the arbitration agreement on her behalf. There is no competent evidence in the record that Annie Reed, through her words or actions, did anything to lead any agent and/or employee of Defendants to believe that either James or Larry Wesley enjoyed implied or apparent authority to bind her to the arbitration agreement.

There is no competent evidence in the record to prove that Annie Reed was incompetent upon admission to ACNC. At the hearing on the Defendants' motion to compel arbitration, the trial court specifically requested for the Defendants to provide evidence to support their contention that Annie Reed was incompetent upon admission to ACNC. (3:32; Appellee's R.E. 2). At the conclusion of the hearing, the following exchange occurred between Judge Sander and counsel for Plaintiff, Trae Sims:

> MR. SIMS: I did have one question on clarifying the understanding of what the Court is Ordering with regard to the evidence that has been requested by the defendants to produce evidence of being incompetent.
>
> THE COURT: The Court is going to make them produce medical records to show that Ms. Annie Reed was incompetent.
>
> MR. SIMS: I just wanted to make sure I understood. Would that or would that not include an affidavit from Dr. Tillman, as he is a co-defendant who has mentioned in the arbitration clause as controlling --

THE COURT: Well, he says he was there. Get one from Dr. Tillman.

MR. SIMS: Would the Court be relying on an affidavit from Dr. Tillman to make that determination?

THE COURT: That would certainly be some evidence that she was incompetent.

Id.

In response to this request by the Court, the Defendants supplemented their evidence with a few pages of unauthenticated medical records and the affidavit of an employee of ACNC who is not a medical doctor to prove that Annie Reed was incompetent at the time of her admission to ACNC. (1:57A-57C, 57R-57S; Appellants' R.E. 34-36, 51-52). The Defendants were unable to produce a sworn affidavit of Annie Reed's primary physician, Dr. Barry Tillman, stating that she was incompetent when she was admitted to ACNC. Dr. Barry Tillman lives in Natchez, Adams County, Mississippi and his medical clinic is located in Natchez, Adams County, Mississippi. (1:3D; Appellants' R.E. 11). The Defendants could have easily obtained an affidavit from co-defendant Dr. Barry Tillman to authenticate medical records or to offer an opinion as to Annie Reed's competency. Similarly, the Defendants could have simply subpoenaed Dr. Barry Tillman and elicited live testimony at the hearing on their motion in regard to the competency issue. The Defendants failed to do either, and, as a result, the trial court found that there was no competent evidence to support a finding that Annie Reed was incompetent upon admission to ACNC. (1:59; Appellants' R.E. 6).

II. SUMMARY OF THE ARGUMENT

The record before the Court supports the trial court's denial of the Defendants' motion to compel arbitration; therefore, this Court should affirm the decision of the court below and allow this case to proceed to a trial on the merits.

A party seeking to compel arbitration bears the burden of proving the existence of a valid agreement to arbitrate. The Defendants failed to present evidence of a valid agreement to arbitrate to the court below, and this lack of evidence ultimately doomed their motion to compel arbitration. First and foremost, Annie Reed, the individual who was suffered negligent medical care at the hands of the Defendants, did not execute the Admissions Agreements containing the arbitration clause. Annie Reed's sons, James and Larry Wesley, each executed an Admissions Agreement which contained an arbitration clause as Annie Reed's "Responsible Party." However, Annie Reed can only be bound to the terms of the Admissions Agreement if her sons had express, implied or apparent authority to act on behalf and bind her to the terms of the arbitration clause.

There is no evidence the record that either of Annie Reed's sons had the express authority, via a power of attorney or otherwise, to execute the Admissions Agreement on her behalf. Similarly, there is no evidence that Annie Reed, either through her words or actions, behaved in such a manner that her sons could reasonably conclude that they enjoyed implied authority to execute the Admissions Agreements on her behalf. And lastly, there is no evidence in the record of any conduct, actions or words of Annie Reed which would have reasonably led the employees of ACNC to conclude that either of her sons had the apparent authority to execute the Admissions Agreements on her behalf.

The Defendants argue that Annie Reed's sons had the authority to bind to the terms of the Admissions Agreements pursuant to Uniform Health Care Surrogate Statute. For prove that the surrogate statute was applicable in the instant action, the Defendants had the burden of introducing credible evidence that Annie Reed had been found to be incapacitated, or incompetent, by her primary physician. Annie Reed's primary physician was a co-defendant in this case and resides and practices medicine in the same county in which this action was filed. Though the Defendants assert that Dr. Barry Tillman found that Annie Reed was incompetent upon her admission to ACNC, they failed to call him as a witness at the hearing on their motion to compel arbitration to elicit such testimony. Further, the Defendants ignored the trial court's request that they obtain the sworn affidavit of Dr. Barry Tillman to support their contention that Annie Reed was incompetent upon admission to ACNC. Apparently, Dr. Barry Tillman was either unwilling or unable to swear that Annie Reed was incompetent upon admission to ACNC, and as a result, the Defendants were unable to meet their evidentiary burden on this issue before the court below.

Assuming *arguendo* that the Court finds that Annie Reed's sons had the authority to bind her to the terms of the Admissions Agreements, the arbitration clause contained therein is still unenforceable as the forum contemplated and agreed to by the parties is now unavailable. The Admissions Agreements require any arbitration to be administered in accordance with the rules of the AHLA, and the AHLA will longer arbitrate claims arising under pre-dispute agreements to arbitrate. The Defendants knew this when they drafted the Admissions Agreements, and they are now inviting the Court to reform an agreement that they drafted. The Court should decline this invitation.

III. ARGUMENT

The policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties. Morrison v. Amway Corp., 517 F.3d 248, 254 (5th Cir. 2008). That determination "is generally made on the basis of 'ordinary state-law principles that govern the formation of contracts.' " Id. (*quoting* First Options of Chicago Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995)). In Mississippi, the elements of a valid contract are: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation. Rotenberry v. Hooker, 864 So.2d 266, 270 (Miss. 2003). Both the United States Supreme Court and Mississippi Supreme Court have held that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648, 655 (1986); Pre-Paid Legal Servs., Inc. v. Battle, 873 So.2d 79, 83 (Miss.2004). The Court must then determine "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." Grenada Living Ctr, LLC v. Coleman., 961 So.2d 33, 36 (Miss. 2007) (*quoting* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)). The Supreme Court has further clarified that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 of the Federal Arbitration Act." Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996); Mitsubishi Motors Corp., 473 U.S. at 614.

The burden of proving whether the arbitration agreement actually exists rests on the party seeking to invoke the agreement. Trinity Mission Health & Rehab of Holly Springs, LLC v. Lawrence, 2009 WL 331629 (Miss. 2009) (*citing* Mariner Healthcare, Inc. v. Green, 2006 WL 1626581 , 2006 U.S. Dist. LEXIS 37479, at *4 (N.D. Miss. Jun. 7, 2006)).[2]

A. STANDARD OF REVIEW

The grant or denial of a motion to compel arbitration is reviewed de novo. Coleman, 961 So.2d at 36. A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence. Par Indus., Inc. v. Target Container Co., 708 So.2d 44, 47 (Miss.1998); *see also* Chantey Music Publ'g, Inc. v. Malaco, Inc., 915 So.2d 1052, 1055 (Miss.2005) (stating in a contract case that "where the judge has sat as the fact-finder, we afford deference to the findings of the trial judge"). "[W]e will not disturb the trial judge's findings of fact 'unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied.' " Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, 964 So.2d 1100, 1107 (Miss.2007).

B. THE ADMISSIONS AGREEMENTS PURPORTEDLY EXECUTED BY JAMES AND LARRY WESLEY ON BEHALF OF ANNIE REED ARE NOT VALID CONTRACTS.

There is no proof in the record that James or Larry Wesley had the express authority to bind Annie Reed to the terms of the Admissions Agreements. Similarly, there is no proof in the record that James or Larry Wesley had the authority to bind Annie Reed to the terms of the Admissions Agreements by virtue of the Mississippi Uniform Health Care Surrogate Statute. There is no proof in the record that Annie Reed acted in such a manner that the Defendants could

[2] For whatever reason, WESTLAW still notes the Lawrence case as not yet released for publication. Therefore, no official Southern Reporter citation is currently available. Counsel for Plaintiff herein was attorney of record for the Appellee in Lawrence and received Notice that this Court issued its Mandate in Trinity Mission Health & Rehab of Holly Springs, LLC v. Lawrence, Supreme Court Case # 2008-CA-00027-SCT on April 23, 2009.

reasonably be led to believe that either James or Larry Wesley possessed the implied or apparent authority to bind her to the terms of the Admission Agreements.. Annie Reed, and Annie Reed only, could validly execute the Admissions Agreements and bind any potential claim that she may have against ACNC to mandatory arbitration.

1. Neither James Nor Larry Wesley Possessed the Requisite Express, Implied or Apparent Authority to Bind Annie Reed to the Terms of the Admissions Agreements.

The burden of proving an agency relationship rests squarely on the party asserting it. Forest Hill Nursing Center, Inc. v. McFarlan, 995 So.2d 775, 781 (Miss. 2008). An express agent is one who is in fact authorized by the principal to act on their behalf. Id. There is no evidence in the record that any type of agreement existed between James or Larry Wesley and Annie Reed that would have provided either with the express authority to act on behalf of Annie Reed. Express authority can be evidenced by a durable power of attorney, or can be judicially conferred by court order (e.g., conservatorship or guardianship). Neither James nor Larry Wesley had power of attorney over Annie Reed, and neither of them were Annie Reed's judicially-appointed conservator.

Implied agency requires that the principal give the agent actual authorization to perform acts which reasonably lead third parties to believe that an agency relationship exists. Id. The existence of an implied agency is proved by facts and circumstances of the particular case, including words and conduct of the parties. Id. (*citing* 3 Am.Jur.2d *Agency* § 16 (2004)). The focus is on whether the agent reasonably believes, because of the principal's conduct, that the principal desired the agent so to act. Id. (*citing* 3 Am.Jur.2d *Agency* § 72 (2004)). The Defendants have offered no evidence of any words or conduct on the part of Annie Reed which would have led James or Larry Wesley to believe either was her agent or had any authority to act on her behalf in executing the admissions agreements.

In order to prove that James or Larry Wesley had apparent authority to act on behalf of Annie Reed, the Defendants must provide evidence of acts or conduct of the principal indicating the agent's authority, reasonable reliance on those acts by a third person, and a detrimental change in position as a result of that reliance. Id. Once again, the record before the Court contains no proof of any acts or conduct of Annie Reed which would have reasonably led ACNC to conclude that either James or Larry Wesley had the authority to execute the Admissions Agreements on behalf of Annie Reed.

Not only does the record in this case fail to show that either James or Larry Wesley had any authority to bind Annie Reed to the arbitration and admissions agreement, but the record is also void of any evidence to suggest that Annie Reed authorized anyone other than herself to contract on her behalf. Absent proof to the contrary, the Court must find that Annie Reed retained the exclusive authority to execute the arbitration and admissions agreements on her own behalf.

2. **Because There Is No Proof in the Record that Annie Reed Was Incompetent When Either of the Admissions Agreements Were Executed by James and Larry Wesley, The Uniform Health Care Surrogate Statute Is Inapplicable in this Case.**

The Uniform Health Care Surrogate Statute states in pertinent part:

> (1) A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.
>
> (2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:
>
> (a) The spouse, unless legally separated;
> (b) An adult child;
> (c) A parent; or

(d) An adult brother or sister.

. . .

(6) A surrogate shall make a health-care decision in accordance with the patient's individual instructions, if any, and other wishes to the extent known by the surrogate. Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate.

Miss. Code Ann. § 41-41-211. Quite obviously, the Uniform Health Care Decisions Act does not apply to those persons who are competent. Coleman, 961 So.2d at 38. It is clear that a surrogate may make health-care decisions for a patient only after the patient is found to be incapacitated by a physician. McFarlan, 995 So.2d at 780. The Defendants have come forward with no proof sufficient to trigger the application of the health-care surrogate statute.

The Defendants have argued to this Court that the "totality of the evidence clearly demonstrates that Annie Reed lacked capacity at the time of her admission to ACNC on February 17, 2004." (Appellants' Brief, Page 11). This "totality of the evidence" consists of two pages of Annie Reed's medical records: one in which Dr. Barry Tillman diagnosed a cerebrovascular accident ("CVA," or a stroke) on February 17, 2004, and one in which Dr, Barry Tillman noted Annie Reed's behavior as "confused" on February 16, 2004. (1:57R-57S; Appellants' R.E. 51-52).

The Defendants also contend that the affidavit of DeLisa Smith, an employee of ACNC who is not a medical doctor, is sufficient proof of Annie Reed's incompetence. Smith states, "During my meeting with Ms. Reed, she was confused and not able to understand our conversation adequately." (1:57A-57C; Appellants' R.E. 34-36). The Uniform Health Care Surrogate Statute, by its plain terms, requires that a medical doctor determine whether an individual is incapacitated or incompetent for the purposes of the statute. Therefore, DeLisa

Smith's observations are simply not relevant in deciding whether Annie Reed was competent upon her admission to ACNC on February 17, 2004.

The trial judge requested that the Defendants provide an affidavit from Dr. Barry Tillman to bolster their assertion that Annie Reed was incompetent upon admission to ACNC on February 17, 2004. (3:32; Appellee's R.E. 2). Although no reasons have been offered as to their inability to comply with the trial court's request, the Defendants were not able to procure such an affidavit from Dr. Barry Tillman. Obviously, Dr. Barry Tillman was either unwilling, or more likely unable, to offer sworn testimony that Annie Reed was incapacitated or incompetent upon her admission to ACNC on February 17, 2004. As Dr. Barry Tillman was a co-defendant in this matter and both resides and works in close proximity to the courthouse in Adams County, one would think that the Defendants would have simply asked him or subpoenaed him to elicit live testimony at the hearing on their motion. The Defendants did neither, and as a result, they failed to meet their burden of proving that the Uniform Health Care Surrogate Statute is applicable due to Annie Reed's incompetence at the time of her admission to ACNC on February 17, 2004.

The Defendants submitted absolutely no evidence to the trial court relating to Annie Reed's competence at the time the May 21, 2004, Admissions Agreement was executed by Larry Wesley. Therefore, even if this Court somehow construed that Annie Reed was incapacitated within the meaning to the Uniform Health Care Surrogate Statute on February 17, 2004, there is no evidence that she was incapacitated at the time the May 21, 2004, Admissions Agreement was executed.

The trial court specifically found that the Defendants offered no evidence proving that Annie Reed "was incompetent, incapacitated, or otherwise unable to sign the contact herself." (1:59; Appellants' R.E. 6). The Defendants failed to meet the evidentiary burden, and the trial

court could reach no other conclusion based upon the evidence. Under Upchurch, the trial court's finding of fact in regard to Annie Reed's competence, and thereby the application of the Uniform Health Care Surrogate Statute, can be reversed only if this Court concludes the findings of fact were manifestly wrong or clearly erroneous. The Plaintiff contends that the record before the Court would not support such a finding.

C. EVEN IF JAMES OR LARRY WESLEY EXECUTED THE ADMISSIONS AGREEMENTS AS ANNIE REED'S HEALTH CARE SURROGATE, THE CLAIMS ARE STILL NOT SUBJECT TO MANDATORY ARBITRATION BECAUSE ARBITRATION IS NOT A HEALTH CARE DECISION UNDER THE SPECIFIC FACTS OF THIS CASE.

The Court has held that a nursing home resident's daughter lacked the necessary authority to enter into an arbitration provision contained within an admission agreement, on the resident's behalf, therefore the arbitration provision was invalid and the nursing home could not compel arbitration. Mississippi Care Center of Greenville, LLC v. Hinyub, 975 So.2d 211 (Miss. 2008). The Court found that the daughter did not have authority to bind her father to an arbitration agreement in the absence of a durable power of attorney or authority conferred as health care surrogate pursuant to the Uniform Health Care Surrogate Statute, Miss. Code Ann. § 41-41-211 (Rev. 2005). Id. According to the statute, the authority of a health care surrogate is limited to making "health care decisions," and although the execution of an arbitration clause as part of an admissions agreement has been held to be a "health care decision," the Court distinguished the arbitration clause in Hinyub because it did not have to be specifically agreed to in order for the patient to be admitted or receive care at the nursing home. Id.

Like Hinyub, the arbitration clause in the present case did not have to be agreed to in order for Annie Reed to be admitted to ACNC. (1:3R, 3Y; Appellants' R.E. 25, 32). Therefore, under Hinyub, the arbitration clause in this case was not part of a "health care decision." In Hinyub, this Court held that an arbitration clause that is not mandatory to be admitted to the

nursing home will not qualify as part of the "health care decision" under the Uniform Health Care Surrogate Statute. Id. at 218. The language of the arbitration clause makes it clear that the resident is not required to sign to be admitted. In pertinent part, the arbitration clause states that "the execution of this Arbitration is not a precondition to the furnishing of services to the resident by the facility." (1:3R, 3Y; Appellants' R.E. 25, 32). Therefore, even assuming *arguendo* that Larry Wesley or James Wesley could be construed to be Annie Reed's surrogate, under the clear rule set out in Hinyub, the Uniform Health Care Surrogate Statute is not applicable based upon the facts in the record.

Because the Admissions Agreements did not require an agreement to arbitrate as a condition of admission, the decision of whether to agree to the arbitration clause would not be considered a health care decision. Applying Hinyub, the trial court reached the same conclusion. (1:59-60, Appellants' R.E. 6-7).

D. THE ARBITRATION CLAUSE IS UNEFORCEABLE BECAUSE THE DESIGNATED ARBITRATION FORUM IS UNAVAILABLE.

The Court has stated, "Arbitration is about choice of forum-period." Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 525 (Miss. 2005). In the admissions agreement signed by Northrip on January 14, 2005, the Defendants proposed to have any disputes administered in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitrations. (1:3Q, 3X; Appellants' R.E. 24, 31) Further, the AHLA Alternative Dispute Resolution Service Rules of Procedure for Arbitrations were also incorporated into and made part of the arbitration agreement. *Id.*

According to the AHLA's website, the AHLA's Alternative Dispute Resolution Service [the Service] has amended its rules for consumer health care liability claims filed with the

Service after January 1, 2004.[3] Effective June 2006, the Service will administer a "consumer health care liability claim" on or after January 1, 2004 only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators or a judge orders that the Service administer an arbitration under the terms of a pre-injury agreement.

Assuming *arguendo* that a valid agreement to arbitrate exists between the Plaintiff and Defendants, in light of the AHLA rules amendment, the arbitration agreement in the instant action has likely become unenforceable because the parties' forum choice is no longer available.[4] In Magnolia Healthcare, Inc. v. Barnes, 994 So.2d 159, 160 (Miss. 2008), the arbitration agreement called for the use of the AHLA rules, but did not require AHLA administration.[5] The plurality of the Court (who would have found the arbitration agreement unenforceable because the forum choice was no longer available) cited the AHLA rules, which require a post-dispute agreement to arbitrate. Id. The plurality concluded that, because the patient's injuries occurred after AHLA's policy was implemented, and there was no post-dispute agreement, "there was no valid agreement to arbitrate." Id. at 162. Although a plurality decision, the rational of Barnes should be applied in this action, and the arbitration agreement should be deemed unenforceable as the choice of forum agreed to by Defendants and Plaintiff is no longer available.

This Court should also note that the Supreme Court recently cited with approval and applied the rational of the Barnes plurality decision to render an arbitration clause unenforceable on the basis of forum unavailability. Covenant Health & Rehabilitation of Picayune, LP v. Moulds, 14 So.3d 695, 707-08 (Miss. 2009). If the arbitration clauses before the Court are valid

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[3] http://www.healthlawyers.org/Resources/ADR/Pages/RulesAmendment.aspx#1 (visited November 10, 2009).

[4] This is precisely what a plurality of the Mississippi Supreme Court would have held in Magnolia Healthcare, Inc. v. Barnes, 994 So.2d 159 (Miss. 2008).

[5] The Arbitration Agreement currently before the Court is the same as that described in Barnes and calls for the use of AHLA rules but does not require administration.

and the forum agreed to by the parties herein was the AHLA, and the AHLA refused to accept the dispute, then the primary purpose of arbitration, that being to avoid crowded dockets and involvement of courts. Id. at 707. Following Moulds, this Court should not become a party to redrafting or reforming the purported agreement and should not be used to reform a contract to select a forum not anticipates by the parties to this action. This Court's involvement is limited to determining whether to compel arbitration *vel non*. Id.

The Defendants drafted the Admissions Agreements containing the arbitration clauses at issue and presented them for execution that the AHLA amended its rules in January of 2004 to exclude administration of pre-dispute agreements to arbitrate. The Defendants have now realized this oversight on their part has rendered the arbitration clauses unenforceable, and they are essentially inviting this Court to reform the contract that they drafted. Just as in Barnes and Moulds, the Court should refuse this invitation.

E. THE DEFENDANTS HAVE FAILED TO ADDRESS WHETHER ANNIE REED WAS A THIRD PARTY BENEFICIARY TO THE ADMISSIONS AGREEMENTS EXECUTED BY JAMES AND LARRY WESLEY AND ANY SUCH ARGUMENT HAS BEEN WAIVED.

The Defendants sought this Court's review of all factual and legal issues related to the trial court's denial of their motion to compel arbitration. (Appellants' Brief, p. 1). However, the Defendants raised and addressed the four issues identified in the Statement of the Issues contained herein. The law is well settled in Mississippi that this Court is not required to address any issue that is not supported by reasons or authority. Varvaris v. Perreault, 813 So.2d 750, 753 (Miss. 2001). An issue is waived if an appellant fails address it and/or fails to cite authority. Id. The issue of third party beneficiary was raised in the court below, and the trial court found that the doctrine was inapplicable to the facts of this case. (1:59; Appellants' R.E. 6). The Defendants did not raise or brief the issue before this Court, and it is thereby waived.

CONCLUSION

For the reasons stated above, the Court should affirm the ruling of the trial court denying the Defendants' motion to compel arbitration and allow this matter to proceed to a trial on the merits in the court below.

RESPECTFULLY SUBMITTED, this the 16th day of November, 2009.

SHEILA REED, PERSONAL
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