NO. 2009-CA-00730

IN THE SUPREME COURT OF MISSISSIPPI

ADAMS COMMUNITY CARE CENTER, LLC., et al.
Defendants/Appellants

VERSUS

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

REPLY BRIEF OF APPELLANTS, 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

Appeal from the Circuit Court of Adams County, Mississippi
Honorable Lillie Blackmon Sanders

Roland F. Samson, III
Mississippi Bar No. [redacted]
Samson & Powers, PLLC
Post Office Box 1417
Gulfport, MS 39502-1417
Telephone: (228) 822-1109
Facsimile: (228) 822-2317
Attorneys for Appellants, 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

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT

I. THE ADMISSION AGREEMENTS EXECUTED BY JAMES WESLEY AND LARRY WESLEY ARE VALID AND ENFORCEABLE, INCLUDING THE ARBITRATION PROVISION

Plaintiff initially argues that the Admission Agreements executed by James Wesley and Larry Wesley on behalf of Annie Reed are not valid contracts.[1] Specifically, Plaintiff contends: (1) that neither James Wesley nor Larry Wesley, Annie Reed's sons, had the express, implied or apparent authority to bind Annie Reed to the Admission Agreements; (2) that James Wesley and Larry Wesley did not have authority to bind Annie Reed to the Admission Agreements as surrogates under the Uniform Health-Care Decisions Act, Miss. Code Ann. § 41-41-211; and (3) even if James Wesley and Larry Wesley executed the Admission Agreements as Annie Reed's surrogates, the claims are still not subject to the mandatory arbitration because arbitration is not a health-care decision under the facts of the case. (Pl.'s Br., p. 9). Defendants will demonstrate that Plaintiff's arguments are without merit, and will address same in seriatim.

A. James Wesley and Larry Wesley, Annie Reed's sons, were implied agents of Annie Reed or had the apparent authority to bind her to the Admission Agreements, including the arbitration provision.

Plaintiff ignores the law on agency/apparent authority, the uncontradicted Affidavit of DeLisa Smith and Section F.5. of the Admission Agreements.

> 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. Capital Associates, Inc. v. Sally Southland, Inc., 529 So. 2d 640, 644 (Miss. 1988). The existence of an implied agency is proved by "facts and circumstances of the particular case, including words and conduct of the parties." 3 Am. Jur. 2d Agency, § 16 (2004). The focus is on whether the agent

[1]Plaintiff does not argue on appeal that the subject Admission Agreements are procedurally or substantively unconscionable.

> reasonably believes, because of the principal's conduct, that the principal desired the agent to act." Id. at § 72.

Forest Hill Nursing Center, Inc. v. McFarlan, 995 So. 2d 775, 781 (Miss. Ct. App. 2008).

"Apparent authority of an agent only binds the principal when the plaintiff can show 'acts of conduct of principal indicating agent's authority, reasonable reliance upon those acts by a third person, and detrimental change in position by third person as result of that reliance.'" McFarland v. Entergy Miss., Inc., 919 So. 2d 894, 902 (Miss. 2005) (quoting Eaton v. Porter, 645 So. 2d 1323, 1325 (Miss. 1994)).

Turning now to the undisputed facts of this case, DeLisa Smith averred that Annie Reed advised her that Larry Wesley, Annie Reed's son, was handling her affairs. However, Larry Wesley was not able to meet with Ms. Smith at that time to discuss his mother's admission to ACNC. Ms. Smith did speak to Larry Wesley, and he advised that it was acceptable for James Wesley to sign any documents or do anything else necessary to admit Annie Reed to ACNC. Accordingly, prior to Annie Reed's admission to ACNC, Ms. Smith reviewed and explained the Admission Agreement to James Wesley, and he executed same effective February 17, 2004, the day of her admission to ACNC. Following Annie Reed's admission on February 17, 2004, Larry Wesley became available, and Ms. Smith asked him to sign another Admission Agreement. Ms. Smith reviewed and explained the Admission Agreement to Larry Wesley, and he signed the Admission Agreement on May 21, 2004. (R. 57A-57C; Appellants' R.E. 34-36).

Additionally, Section F.5. of the Admission Agreements, which were signed by James Wesley and Larry Wesley state: **ANY RESPONSIBLE PARTY OR PARTIES EXECUTING THIS AGREEMENT REPRESENT AND WARRANT THAT THEY HAVE AUTHORITY, EITHER EXPRESS, IMPLIED OR APPARENT, TO ACT AS AGENT**

FOR THE RESIDENT AND TO EXECUTE THIS AGREEMENT ON RESIDENT'S BEHALF. (R. 3R and 3X; Appellants' R.E. 25 and 32) (emphasis in original).

Pursuant to the teachings of McFarlan and McFarland and the "facts and circumstances of the particular case, including words and conduct of the parties", James Wesley and Larry Wesley were implied agents of Annie Reed or had the apparent authority to bind her to the Admission Agreements, including the arbitration provision.

B. James Wesley and Larry Wesley had authority to bind Annie Reed to the Admission Agreements as her health-care surrogate pursuant to Miss. Code Ann. § 41-41-211.

Plaintiff complains that the Defendants did not provide an Affidavit from Dr. Barry Tillman regarding Annie Reed's lack of capacity. First, upon information and belief, Dr. Randy Tillman, Dr. Barry Tillman's brother, was the physician who signed the February 16, 2004, Certification for Annie Reed's admission to ACNC.[2] To claim that there is no proof from a physician regarding Annie Reed's lack of capacity, in the face of Dr. Tillman's February 16, 2004, Certification, is dubious at best. Second, Dr. Randy Tillman is not a Defendant in this action, and the Mississippi Supreme Court's holding in Scott v. Flynt, 704 So. 2d 998 (Miss. 1996) prevents ex parte contact between undersigned counsel and Dr. Randy Tillman, including contact for the purpose of obtaining an Affidavit. See also Riley v. F. A. Richard & Assoc., Inc., 16 So. 3d 708 (Miss. 2009) (lawsuit by workers' compensation claimant against employer, employer's self-insured claims administrator and case manager alleging various tort claims as a result of ex

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[2]Plaintiff actually states that Defendants did not provide an Affidavit from "Dr. Barry Tillman to bolster their assertion that Annie Reed was incompetent upon admission to ACNC on February 17, 2004." (Pl.'s Br., p. 13). Miss. Code Ann. § 41-41-211 refers to "lack of capacity" rather than "incompetence." Additionally, a review of the transcript reveals that it was Plaintiff's counsel who asked about an Affidavit from Dr. Tillman in response to Judge Sanders' request that the Defendants produce medical records to show that Annie Reed was "incompetent." (Tr. 32).

parte meeting between case manager and claimant's treating physician). Lastly, as noted in Defendants' opening Brief, leave of the trial court to depose Dr. Tillman was requested, since Defendants' counsel was not going to attempt to depose Dr. Tillman and run any risk of having Plaintiff's counsel argue that the Defendants had waived their right to compel arbitration by voluntarily engaging in discovery in the Circuit Court action. (Defs.' Br., p. 13 n. 7). See e.g., Manhattan Nursing & Rehabilitation Center, LLC v. Williams, 14 So. 3d 89 (Miss. Ct. App. 2009) (finding that nursing home had not waived right to compel arbitration where it had sought depositions, but the depositions were never scheduled or taken).

Since Dr. Randy Tillman was not deposed in this case, his Certification and Annie Reed's admitting diagnoses were made part of the record. Pursuant to the Certification that Annie Reed was confused and required assistance of total dependence with all ADLs and her admitting diagnoses of CVA with hemiparesis, hypertension, diabetes mellitus, constipation, syncope, OBS, UTI, PT, OT and hemiplegia, Dr. Tillman made an uncontroverted determination and declaration that Ms. Reed lacked capacity to make her own health-care decisions. Annie Reed's lack of capacity is also documented by DeLisa Smith's Affidavit. (R. 57A-57C and 57R-57S; Appellants' R.E. 34-36 and 51-52). Accordingly, James Wesley and Larry Wesley were Annie Reed's lawful surrogates as provided in Miss. Code Ann. § 41-41-211.

C. The decision to arbitrate is a health-care decision pursuant to Miss. Code Ann. §§ 41-41-203(h) and 41-41-211.

If the Court finds that (1) James Wesley and/or Larry Wesley were implied agents of Annie Reed; (2) that James Wesley and/or Larry Wesley had the apparent authority to bind Annie Reed to the Admission Agreements; or (3) that Annie Reed was a third-party beneficiary to the Admission Agreements, the Court need not address Plaintiff's argument that a decision to

arbitrate is not a health-care decision under Miss. Code Ann. §§ 41-41-203(h) and 41-41-211.[3] Under any of the three scenarios above, the Admission Agreements and arbitration provision are enforceable. Stated another way, if, and only if the Court finds that James Wesley and Larry Wesley were not implied agents of Annie Reed or did not have the apparent authority to bind her to the Admission Agreements or that Annie Reed was not a third-party beneficiary to the Admission Agreements, would the Court be required to determine whether the decision to arbitrate in this case is a health-care decision pursuant to Miss. Code Ann. §§ 41-41-203(b) and 41-41-211. Having satisfied the threshold question in Section I.B., supra, that James Wesley and Larry Wesley were Annie Reed's surrogates pursuant to Miss. Code Ann. § 41-41-211, the question is whether the decision to arbitrate in this case is a health-care decision as contemplated by Miss. Code Ann. §§ 41-41-203(h) and 41-41-211.

In Covenant Health Rehab of Picayune v. Brown, 949 So. 2d 732 (Miss. 2007) and Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005), the Mississippi Supreme Court held that a surrogate had the right to bind a patient to an arbitration agreement, and the Mississippi Legislature delineated in the Uniform Health-Care Decisions Act what is not a health-care decision. Of note is the fact that the right to enter into an arbitration agreement is not listed. The fact of the matter is that the Legislature expressly provided that the only decision precluded by the statute is a decision made pursuant to the Anatomical Gift Law. See Miss. Code Ann. § 41-41-203(h).

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[3]As stated in Section I.A., above, the undisputed facts and the Court's holdings in McFarlan and McFarland clearly demonstrate that James Wesley and Larry Wesley were implied agents of Annie Reed or had the apparent authority to bind her to the subject arbitration provision.

In Mississippi Care Center of Greenville, LLC v. Hinyub, 975 So. 2d 211 (Miss. 2008), the Mississippi Supreme Court found that the record was "devoid of any information to properly determine if Hinyub could act as Wyse's health care surrogate." Id. at 217. Accordingly, the Hinyub Court rejected defendants' reliance on Miss. Code Ann. § 41-41-211. In dicta, the Court further explained that the escape clause (i.e., "the execution of this Arbitration is not a precondition to the furnishing of services to the Resident by the Facility. . . .") in the Hinyub arbitration agreement invalidated an otherwise enforceable arbitration agreement on the grounds that a decision to arbitrate was not part of the consideration "necessary" for the patient's admission to the nursing facility, and therefore, not a health-care decision.[4] Id. at 218.

Given the litany of cases emanating from the Mississippi Supreme Court and Mississippi Court of Appeals in the last 5-6 years regarding arbitration, many nursing facilities have proactively reconstructed and refined their arbitration agreements in order to conform with the mandates for enforceability and public policies enumerated by the Court to avoid contracts of adhesion. After all, the Court has repeatedly noted that "the use of arbitration to resolve disputes finds favor under federal and state law." Covenant Health & Rehabilitation of Picayune, LP v. Moulds, 14 So. 3d 695 (Miss. 2009) (citing IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96 (Miss. 1998)). However, to believe that an "escape clause" in an arbitration agreement somehow makes the arbitration provision less necessary than an arbitration provision in which is contained in a contract of adhesion is hollow. The vast majority of all arbitration agreements

[4]The Court's use of the word "necessary" does not comport with the language of the statute, which allows the surrogate to make any health care decision for the patient/resident. The fact that an arbitration provision is in a nursing home admission agreement, which admission agreement unquestionably addresses all of the rights and duties of the parties from a contractual standpoint, necessarily makes the decision to arbitrate a health-care decision.

contain escape clauses, and any resident/responsible party seeking admission to a nursing facility which mandates arbitration as a prerequisite to admission can request that the arbitration provision be revised or stricken or go to another facility. In short, Hinyub is in conflict with the well-settled law favoring arbitration, and the Court should not follow the Hinyub dicta. Rather the Court should follow the reasoning and holdings of Brown and Stephens in finding that the decisions by James Wesley and Larry Wesley to bind their mother, Annie Reed, to arbitration as provided in the subject Admission Agreements was a health-care decision pursuant to Miss. Code Ann. §§ 41-41-203(b) and 41-41-211.

II. THERE IS AN AVAILABLE FORUM FOR ARBITRATION

Plaintiff invites the Court to adopt the plurality decision in Magnolia Healthcare, Inc. v. Barnes, 994 So. 2d 159 (Miss. 2008), which was cited in Covenant Health & Rehabilitation of Picayune, LP v. Moulds, 14 So. 3d 695 (Miss. 2009), for the proposition that there is no available forum in this case. In the instant action, the arbitration provision calls for the use of the AHLA Rules, but does not require that AHLA administer the arbitration. First, Moulds is not on point, in that the arbitration provision before the Court (i.e., requiring administration by the American Arbitration Association and use of its rules and procedures) is easily distinguished. More importantly, however, is the fact that neither Barnes nor Moulds addressed AHLA Rule 1.01/Affidavit of Peter Leibold and Section 5 of the Federal Arbitration Act. AHLA Rule 1.01 provides that in "limiting the circumstances under which the Service will administer the arbitration of a consumer health care liability claim, the Service does not intend to affect the enforceability of an agreement to apply the Rules–only that the Service will not administer the arbitration." See Affidavit of Peter Leibold (in consumer health care liability cases, the AHLA will administer the arbitration process by court order or by agreement of the parties, and AHLA's

Rules may be utilized by another arbitrator/arbitration service if AHLA does not administer a pre-injury arbitration agreement) (R. 57GGG-57III; Appellants' R.E. 56-58); Bedford Health Properties, LLC v. Davis, ___ So. 2d ___, 2008 WL 5220594 (Miss. Ct. App. 2008) (arbitration pursuant to the AHLA's rules and procedures is still possible even though the AHLA would not preside over the arbitration in the case).

Plaintiff requests that the Court not become a party to redrafting or reforming the arbitration provision to select a forum not anticipated by the parties to this action. (Pl.'s Br., p. 17). To be clear, the Court need not reform the arbitration provision. There is nothing to prohibit the Court from ordering that AHLA administer the arbitration and, in fact, Rule 1.01 of the AHLA Rules and the Affidavit of Peter Leibold confirm that the AHLA will administer a pre-injury arbitration agreement if ordered by a court. Further, there is nothing in the AHLA Rules that suggests the instant arbitration agreement is unenforceable or that the forum is unavailable. Moreover, should this Court choose not to order AHLA to administer the arbitration, Section 5 of the FAA and interpretive case law provide that if there is no method for the appointment of an arbitrator, then either party may petition the court which shall designate and appoint an arbitrator, who shall act under the agreement as if he had been specifically named. See Brown v. ITT Consumer Financial Corp., 211 F.3d 1217 (11th Cir. 2000) (affirming the district court's decision to appoint an arbitrator and held that when "the chosen [arbitration] forum is unavailable . . . or has failed for some reason, [section] 5 [of the FAA] applies").

The parties have agreed to: (1) binding arbitration; (2) with the location of the arbitration to be at a place agreed upon by the parties, or in the absence of such an agreement, at the facility; (3) to utilize the AHLA Rules to govern their arbitration; and (4) Section 5 of the FAA provides that if the parties and their counsel cannot agree on an arbitrator, either party may petition the

Circuit Court of Adams County, Mississippi to designate and appoint an arbitrator, who shall act as if he/she had been specifically named by the parties in their arbitration provision.

Bottom line – there is an available forum.

III. ANNIE REED WAS A THIRD-PARTY BENEFICIARY TO THE ADMISSION AGREEMENTS, AND DEFENDANTS HAVE NOT WAIVED THIS ARGUMENT

Plaintiff's counsel is incorrect when he states that the Defendants "did not raise or brief the issue [regarding third party beneficiary] before this Court, and it is thereby waived." (Pl.'s Br., p. 17). The truth of the matter is that the Defendants raised the issue on page 14 of its opening Brief.

It is well-established that "arbitration agreements can be enforced against non-signatories if such non-signatory is a third-party beneficiary." Adams v. Greenpoint Credit, LLC, 943 So. 2d 703, 708 (Miss. 2006) (citing Smith Barney, Inc. v. Henry, 775 So. 2d 722, 727 (Miss. 2001). In Greenpoint Credit, LLC, the Mississippi Supreme Court set forth factors to consider when determining whether someone is a third-party beneficiary:

> [T]he contracts between the original parties must have been entered for his benefit, or least such benefit must be the direct result of the performance within the contemplation of the parties as shown by its terms. There must have been a legal obligation or duty on the part of the promisee to such third person beneficiary. The obligation must have been a legal duty which connects the beneficiary with the contract. In other words, the right of the third party beneficiary to maintain an action on the contract must spring from the terms of the contract itself.

Greenpoint Credit, LLC, 943 So. 2d at 708-09 (quoting Burns v. Wash. Sav., 251 Miss. 789, 796, 171 So. 2d 322, 325 (1965)).

Defendants submit that the Mississippi Court of Appeal's rationale in Forest Hill Nursing Center, Inc. v. McFarlan, 995 So. 2d 775 (Miss. Ct. App. 2008) should be followed in finding

that Annie Reed was a third-party beneficiary of the Admission Agreements, and therefore, is bound by same as a non-signatory: (1) Annie Reed is named as the resident at the top of the Admission Agreements; (2) the Admission Agreements refer numerous times to benefits and responsibilities of both the resident and responsible party (i.e., in this case, James Wesley and Larry Wesley); (3) the benefits of residing at ACNC flow directly to Annie Reed as a result of the Admission Agreements; and (4) by the terms of the Admission Agreements, ACNC agreed to certain duties in the provision of care for Annie Reed. Simply put, Annie Reed's care was not incidental to the Admission Agreements. To the contrary, it was the essential purpose of the Admission Agreements. Further, Section E of the Admission Agreements provides, in pertinent part, as follows:

> It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons who[se] claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

(R. 57H and 57O; Appellants' R.E. 41 and 48).

Utilizing the McFarlan rationale and pursuant to the express language of Section E of the Admission Agreements, Annie Reed was an intended third-party beneficiary of the Admission Agreements and should be bound to arbitrate any legal disputes related to the Admission Agreements or her care and treatment at ACNC with the Defendants.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's December 22, 2008, Order denying Defendants' Motion to Compel Arbitration and, in accordance with Mississippi

law and the Federal Arbitration Act, remand this action with instructions for the trial court to order the Plaintiff and Defendants to submit their dispute to binding arbitration.

RESPECTFULLY SUBMITTED, this the 3rd day of December, 2009.

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

BY: SAMSON & POWERS, PLLC

BY: _____
ROLAND F. SAMSON, III
Mississippi Bar No [redacted]

SAMSON & POWERS, PLLC
1300 25th Avenue, Suite 130
Post Office Box 1417
Gulfport, Mississippi 39502-1417
Telephone: 228/822-1109
Facsimile: 228/822-2317

CERTIFICATE OF SERVICE

I, ROLAND F. SAMSON, III, of the law firm of Samson & Powers, PLLC, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing pleading to the following:

Honorable Lillie Blackmon Sanders
Circuit Court Judge
Post Office Box 1384
Natchez, MS 39121-1384

John A. Stassi, II, Esq.
2755 Pan American Life Center
601 Poydras Street
New Orleans, LA 70130

John G. (Trae) Sims, III, Esq.
Sims Law Group, PLLC
Post Office Box 917
Canton, MS 39046

John T. Rouse, Esq.
McGlinchey Stafford, PLLC
Post Office Box 22949
Jackson, MS 39225

R. Eugene Parker, Jr., Esq.
Lee D. Thames, Jr., Esq.
Varner, Parker & Sessums, P.A.
Post Office Box 1237
Vicksburg, MS 39181-1237

Monica A. Frois, Esq.
McGlinchey Stafford, PLLC
601 Poydras Street, 12th Floor
New Orleans, LA 70130

Patrick F. McAllister, Esq.
Williford, McAllister & Jacobus, LLP
303 Highland Park Cove, Suite A
Ridgeland, MS 39157-6059

THIS, the 3rd day of December, 2009.

ROLAND F. SAMSON, III
MS BAR NO [redacted]

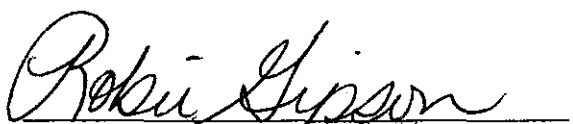
SAMSON & POWERS, PLLC
Attorneys at Law
1300 25th Avenue, Suite 130
Post Office Box 1417
Gulfport, Mississippi 39502-1417
Telephone: 228/822-1109
Facsimile: 228/822-2317

IN THE SUPREME COURT OF MISSISSIPPI

ADAMS COMMUNITY CARE CENTER, LLC, et al.	DEFENDANTS/APPELLANT
VERSUS	NO. 2009-CA-00730
SHEILA REED	PLAINTIFF/APPELLEE

MISS. R. APP. P. 25(a) CERTIFICATE OF FILING

The undersigned, Robin Gipson of the law firm of Samson & Powers, PLLC, certifies that on December 3, 2009, I delivered the following documents to Federal Express to be delivered to the Clerk of the Mississippi Supreme Court: (1) Letter to the Mississippi Supreme Court Clerk; (2) original and three (3) copies of Appellants' Reply Brief; and (3) CD containing the Appellants' Reply Brief in PDF format. Additionally, on December 3, 2009, I delivered a copy of the following documents to the United States Postal Service to be delivered to Honorable Lillie Blackmon Sanders and all counsel of record by regular mail: (1) copy of letter to the Mississippi Supreme Court Clerk; and (2) copy of Appellants' Reply Brief.



ROBIN GIPSON