IN THE SUPREME COURT OF MISSISSIPPI

ADAMS COMMUNITY CARE CENTER, LLC, et al. DEFENDANTS/APPELLANT

VERSUS NO. 2009-CA-00730

SHEILA REED PLAINTIFF/APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

A. 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;

B. Roland F. Samson, III, Esq. - of the law firm of Samson & Powers, PLLC, attorneys of record for Defendants/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;

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

D. John G. (Trae) Sims, III, Esq. and Robert L. Cooper, III, Esq. - of the law firm of Sims Law Group, PLLC, attorneys of record for Plaintiff/Appellee, Sheila Reed, as Personal Representative and Conservator of Annie Reed;

E. Dr. Barry Tillman - Co-Defendant;

F. R. Eugene Parker, Jr., Esq. and Lee D. Thames, Jr., Esq. - of the law firm of Varner, Parker & Sessums, P.A., attorneys of record for Co-Defendant, Dr. Barry Tillman;

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

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

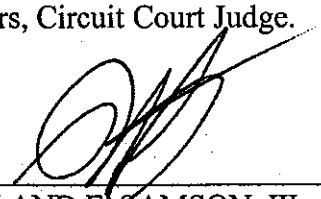
I. Legacy Care, Inc. d/b/a Legacy Healthcare Services, Inc., Legacy Healthcare Services, Inc. and Herman K. Beebe, Jr. - Co-Defendants;

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

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

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

J. Honorable Lillie Blackmon Sanders, Circuit Court Judge.



ROLAND F. SAMSON, III, Attorney for Defendants/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,

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STATEMENT OF THE ISSUES

Whether the trial court properly denied Defendants' Motion to Dismiss, to Compel Arbitration and to Stay and all factual and legal issues related thereto.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On December 27, 2005, Plaintiff, Sheila Reed, as Personal Representative and Conservator of Annie Reed[1] ("Plaintiff"), filed a Complaint against numerous Defendants in the Circuit Court of Adams County, Mississippi alleging, inter alia, that Annie Reed was a resident of Adams County Nursing Center ("ACNC"), and that while a resident of ACNC, she received inadequate care and treatment. (R. 3A-3L; Appellants' R.E. 8-19).[2] On June 8, 2005, Defendants, 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"), filed a Motion to Dismiss, To Compel Arbitration and To Stay ("Motion to Compel Arbitration") and submitted a supporting Memorandum Brief. (R. 1-22). On June 29, 2006, Defendants filed a Notice of Hearing on the Motion to Compel Arbitration, and thereafter on July 6, 2006, filed a Re-Notice of Hearing scheduling the hearing on the Motion to Compel Arbitration before Honorable Lillie Blackmon Sanders, Circuit Court Judge, on September 8, 2006. On September 5, 2006, Plaintiff filed a Response to the Motion to Compel Arbitration. (R. 23-42). On December 11, 2006, Defendants filed a Re-Notice of Hearing, scheduling the Motion to Compel Arbitration for hearing before Judge Sanders on March 5, 2007. On March 5, 2007, Judge Sanders heard oral argument on Defendants' Motion to Compel

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[1]Upon information and belief, Annie Reed passed away following her discharge from ACNC due to causes unrelated to any treatment or care, or alleged inadequate care or treatment, at the facility.

[2]References to the record are designated "R." followed by the applicable page number(s). References to the Appellants' Record Excerpts are designated "Appellants' R.E." followed by the page number(s). References to the transcript are designated "TR." followed by the page number(s).

Arbitration. On September 12, 2008, Plaintiff filed a Supplement to Prior Response to Defendants' Motion to Compel Arbitration (R. 43-48), and on September 25, 2008, Defendants filed a Supplemental Memorandum of Law in Support of the Motion to Compel Arbitration. (R. 49-57).

By Order entered December 22, 2008, the trial court denied Defendants' Motion to Compel Arbitration.[3] (R. 58-60; Appellants' R.E. 5-7). Because undersigned counsel did not receive a copy of the December 22, 2008, Order until February 17, 2009, Defendants filed a Motion to Reopen Time for Appeal Pursuant to Miss. R. App. P. 4(h) ("Motion to Reopen Time for Appeal"). (R. 61-64G). Plaintiff filed a Response to Defendants' Motion to Reopen Time for Appeal on March 6, 2009 (R. 65-70), and Defendants filed a Rebuttal in support of their Motion to Reopen Time for Appeal on March 20, 2009. (R. 71-76). Following a hearing before Judge Sanders on March 17, 2009, the Court entered an Order on March 20, 2009, granting the Defendants' Motion to Reopen Time for Appeal. (R. 77-78). On April 1, 2009, the Defendants timely filed a Notice of Appeal of the Court's December 22, 2009, Order denying Defendants' Motion to Compel Arbitration. (R. 79-81).

II. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

In the Complaint, Plaintiff alleges that Annie Reed was a resident of ACNC, a nursing home owned and operated by one or more of the Defendants. (R. 3D; Appellants' R.E. 11). Plaintiff alleges that during the course of Annie Reed's stay at ACNC, she suffered from decubitus ulcers, disfigurement, malnutrition, weight loss, dehydration, infections and amputation to her left heel. (R. 3E-3F; Appellants' R.E. 12-13). The Complaint alleges claims of

[3]While the December 22, 2008, Order is styled "Order to Compel Arbitration", it actually denies the Defendants' Motion to Compel Arbitration.

negligence and gross negligence, and Plaintiff seeks compensatory and punitive damages against the Defendants in unspecified amounts. (R. 3J-3K; Appellants' R.E. 17-18).

On the day prior to her admission to ACNC, one of Annie Reed's physician, Dr. Tillman, in his Certification for Nursing Facility and MI/MR Screening ("Certification") signed on February 16, 2004, notes her primary and secondary diagnoses as CVA left H.P. (Cerebrovascular accident and left hemiparesis) and HTN (hypertension) and DM (diabetes mellitus), respectively. Dr. Tillman also noted that Ms. Reed was "confused", and that she required assistance or total dependence with all Activities of Daily Living ("ADLs") (R. 57R; Appellants' R.E. 51). The records from ACNC contain the following admitting diagnoses for Ms. Reed: CVA with left hemiparesis, hypertension, diabetes mellitus, constipation, syncope, OBS, UTI, PT, OT and hemiplegia. (R. 57S; Appellants' R.E. 52).

Additionally, just prior to Annie Reed's admission to the facility, DeLisa Smith, an employee of ACNC, met with Ms. Reed at Promise Specialty Hospital to discuss pre-admission matters, including the admission agreement. During this meeting, DeLisa Smith observed that Annie Reed was confused and not able to understand their conversation adequately. This is not surprising, as Annie Reed was hospitalized at Promise Specialty Hospital due to a stroke and other medical conditions. (R. 57A-57C; Appellants' R.E. 34-36).

At the time of Annie Reed's admission to ACNC on February 17, 2004, James Wesley, son and Responsible Party for Annie Reed, signed an Admission Agreement, which includes an arbitration provision. (R. 3M-3S; Appellants' R.E. 20-26). On May 21, 2004, Larry Wesley, son and Responsible Party for Annie Reed, signed another Admission Agreement, which includes an arbitration provision. (R. 3T-3Z; Appellants' R.E. 27-33). Since the Admission Agreements are identical, they will be referred to collectively as "Admission Agreement."

The Admission Agreement covers the services and care that Annie Reed received as a resident of ACNC, as well as outlining financial terms, facility obligations, resident's responsibilities, duration and the arbitration provision. Section "E" of the Admission Agreement is entitled "Arbitration" and is initialed by James Wesley and Larry Wesley, Responsible Parties for Annie Reed. Section "E" of the Admission Agreement provides as follows:

> It is understood and agreed by the Facility and Resident and/or Responsible Party that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or related to the Admission Agreement or any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration pursuant to the Federal Arbitration Act, to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration which are hereby incorporated into this agreement, and not by a lawsuit or resort to court process[4] except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.
>
> This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment or refund for services rendered to the Resident by the Facility, violations of any rights granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract. However, this agreement to arbitrate shall not limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.
>
> The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credit against or limitations on, such damages.
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> 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 claim is derived through or on

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[4]In Doleac v. Real Estate Professionals, LLC, 911 So. 2d 496, 503 (Miss. 2005), the Mississippi Supreme Court held that a similar arbitration provision was "valid, and that no judicial action can be maintained until arbitration has been pursued."

behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident, shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or received by the Resident, and is not presented in the arbitration proceeding.

The parties understand and agree that by entering this Arbitration Agreement they are giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and a jury.

The Resident and/or Responsible Party understand that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this Arbitration is not a precondition to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within 30 days of signature. If not rescinded within 30 days, this Arbitration Agreement shall remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

Id.

In the trial court's December 22, 2008, Order, Judge Sanders recognized the applicability of the Federal Arbitration Act to contracts "'evidencing a transaction involving commerce' which include nursing home admission agreements." (R. 59; Appellants' R.E. 6). The trial court, citing Mississippi Care Center of Greenville, LLC v. Hinyub, 975 So. 2d 211 (Miss. 2008), held that the "execution of the arbitration agreement was not a requirement to the providing of services", and therefore, the arbitration provision is unenforceable. (R. 60; Appellants' R.E. 7). Importantly, it appears that the trial court's ruling is grounded, in part, on its initial determination that "the actual right to arbitrate is neither expressly authorized nor implied within section 41-41-203(h)", i.e., that a decision to arbitrate is not a health-care decision within the meaning of the statute. (R. 59; Appellants' R.E. 6). Notwithstanding this finding, the trial court curiously found

that "Larry Wesley or James Wesley only had the authority to make health-care related decisions for Annie Reed under Mississippi Code Annotated section 41-41-211(2) (Rev. 2008)." Id.

For the reasons set forth below, the trial court's December 22, 2008, Order erroneously determined that James Wesley and Larry Wesley were not Annie Reed's statutory surrogates at the time of her admission to the facility. Further, the trial court's finding that an agreement to arbitrate is not a health-care decision within the purview of Miss. Code Ann. §§ 41-41-203(h) and 41-41-211 is in contravention of Mississippi precedent. The trial court also erroneously rejected Defendants' argument that James Wesley and Larry Wesley had actual or apparent authority to bind Annie Reed to the arbitration provision in the face of the uncontradicted Affidavit of DeLisa Smith. Additionally, the subject Admission Agreement and arbitration provision are not substantively or procedurally unconscionable, and the subsequently issued en banc opinion issued by the Mississippi Supreme Court in Covenant Health & Rehabilitation of Picayune, LP v. Moulds, 14 So. 3d 695 (Miss. 2009) is inapposite.

SUMMARY OF THE ARGUMENT

Annie Reed was admitted to ACNC on February 17, 2004, from Promise Specialty Hospital where she had been hospitalized due to a stroke and other co-morbid medical conditions. At the time of her admission to ACNC, one of Annie Reed's physicians, Dr. Tillman, had determined that she lacked the ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision. This finding is also corroborated by the ACNC records and ACNC employee, DeLisa Smith, who had met with Annie Reed just prior to her admission to ACNC to discuss pre-admission matters (including the Admission Agreement), and observed Annie Reed to be confused and not capable of understanding their conversation.

At the time of Annie Reed's admission to ACNC on February 17, 2004, James Wesley, son and Responsible Party for Annie Reed, signed an Admission Agreement, which included an arbitration provision. On May 21, 2004, Larry Wesley, son and Responsible Party for Annie Reed, signed another Admission Agreement, which included an arbitration provision. Since Annie Reed lacked capacity to make decisions for herself at the time of her admission to ACNC, James and Larry Wesley were Annie Reed's lawful surrogates pursuant to Miss. Code Ann. § 41-41-211. Accordingly, Annie Reed, and those claiming through her, are bound by the provisions of the Admission Agreement, including the arbitration provision which states that any legal dispute, controversy, demand or claim **shall** be resolved exclusively by binding arbitration.

Moreover, pursuant to the uncontradicted Affidavit of DeLisa Smith and Section F.5. of the Admission Agreement, James and Larry Wesley were agents (actual or implied) of Annie Reed and had the lawful authority to sign the Admission Agreement on her behalf. It is undisputed that the Plaintiff's claims fall within the purview of the arbitration provision.

The arbitration provision, which was expressly acknowledged by James and Larry Wesley via their initials appearing at the top of Section E, ARBITRATION – PLEASE READ CAREFULLY _____ (initial), unequivocally provides for (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; and (3) to utilize the AHLA Rules to govern the arbitration. Although the AHLA no longer administers cases filed after January 1, 2004, unless there is a post-dispute arbitration agreement, this is of no moment to Defendants' Motion to Compel Arbitration. First, the subject arbitration agreement provides for the application of the AHLA Rules to the parties' arbitration, not that the AHLA will administer the arbitration. Second, the AHLA has announced that it will administer an arbitration without a post-dispute agreement if

ordered to do so by a court. The Court has the authority to order AHLA to administer the parties' dispute, and AHLA has agreed to administer same pursuant to Court Order. Most importantly, however, is that the FAA (which governs Defendants' Motion to Compel Arbitration as a matter of law) specifically provides that if no method is provided in the arbitration provision for the appointment of an arbitrator, then upon the application of either party to the Circuit Court of Adams County, Mississippi, the court shall designate and appoint an arbitrator, who shall act under the agreement as if he/she had been specifically named therein. Therefore, there is an available forum for the parties' dispute.

Having established that there is a valid arbitration agreement, and that the Plaintiff's claims fall within the scope of the arbitration provision, the final question is whether there are any legal constraints external to the parties' agreement which would prevent the enforceability of the arbitration provision. The answer is a resounding "No", as any issue regarding substantive and procedural unconscionability is a nonstarter as relates to the instant Admission Agreement and arbitration provision.

ARGUMENT

In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-part inquiry. "Under the first prong, the court should determine whether the parties have agreed to arbitrate the dispute." Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney, 950 So. 2d 170, 173 (Miss. 2007) (citing East Ford, Inc. v. Taylor, 826 So. 2d 709, 713 (Miss. 2002)). "The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of

the arbitration agreement."[5] Taylor, 826 So. 2d at 713. Under the second prong, the court is to consider "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." Id. "Under the second prong, applicable contract defenses available under state contract law such as fraud, duress and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act." Id.

I. JAMES WESLEY AND LARRY WESLEY, ANNIE REED'S SONS, HAD AUTHORITY TO BIND ANNIE REED TO THE ARBITRATION PROVISION PURSUANT TO MISS. CODE ANN. § 41-41-211.

Miss. Code Ann. § 41-41-211 provides, in pertinent, part as follows:

> (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 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.
>
> (3) If none of the individuals eligible to act as surrogate under subsection (2) is reasonably available, an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as a surrogate.
>
> (7) A health-care decision made by a surrogate for a patient is effective without judicial approval.

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[5]Defendants submit that there is no dispute as to whether Plaintiff's claims fall within the scope of the subject arbitration provision.

The totality of the evidence clearly demonstrates that Annie Reed lacked capacity at the time of her admission to ACNC on February 17, 2004. In the Affidavit of DeLisa Smith, she avers as follows regarding Ms. Reed's lack of capacity and the authority of James and/or Larry Wesley to sign the subject Admission Agreements:

> 1. My name is DeLisa Smith, and at all relevant times I was an employee of Adams County Nursing Center. I am over the age of 21 and have personal knowledge of the matter set forth herein or knowledge from the records.
>
> 2. On February 17, 2004, Annie Reed was admitted to Adams County Nursing Center. Prior to her admission to Adams County Nursing Center, I met with Annie Reed at Promise Specialty Hospital to discuss pre-admission matters, including the Admission Agreement. It was my understanding that Annie Reed had been hospitalized at Promise Specialty Hospital due to a stroke and other medical conditions. During my meeting with Ms. Reed, she was confused and not able to understand our conversation adequately. I was advised that Larry Wesley, Annie Reed's son, was handling her affairs; however, he was not available to meet with me at that time to discuss his mother's admission to Adams County Nursing Center. I 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 Adams County Nursing Center.
>
> 3. Prior to Ms. Reed's admission to Adams County Nursing Center, I reviewed and explained the Admission Agreement to James Wesley. Thereafter, he executed the Admission Agreement, a true and correct copy of which is attached to this Affidavit as Exhibit "A".
>
> 4. Following Ms. Reed's admission on February 17, 2004, Larry Wesley became available, and I asked him to sign another Admission Agreement. I reviewed and explained the Admission Agreement to Larry Wesley, and he signed the Admission Agreement on May 21, 2004. A true and correct copy of the Admission Agreement signed by Larry Wesley is attached to this Affidavit as Exhibit "B".
>
> 5. After Larry Wesley signed the Admission Agreement on May 21, 2004, Sheila Reed became involved in Annie Reed's treatment and care, and disagreement and confrontation began developing between Sheila Reed, James Wesley and Larry Wesley and Adams County

> Nursing Center. On August 30, 2004, Sheila Reed checked Annie Reed out of Adams County Nursing Center against medical advice.

(R. 57A-57C; Appellants' R.E. 34-36).

Further, the February 16, 2004, Physician's Certification for Nursing Facility and MI/MR Screening ("Certification") signed by Annie Reed's physician, Dr. Tillman, notes her primary and secondary diagnoses as CVA left H.P. (Cerebrovascular accident and left hemiparesis) and HTN (hypertension) and DM (diabetes mellitus), respectively. Additionally, Dr. Tillman noted that Ms. Reed was "confused", and that she required assistance or total dependence with all Activities of Daily Living ("ADLs") (R. 57R; Appellants' R.E. 51). The records from ACNC reflect the following admitting diagnoses for Ms. Reed: CVA with left hemiparesis, hypertension, diabetes mellitus, constipation, syncope, OBS, UTI, PT, OT and hemiplegia. (R. 57S; Appellants' R.E. 52).

Based upon the written Certification of Dr. Tillman, Ms. Reed's primary/attending physician, that Annie Reed was "confused" and required assistance or total dependence with all ADLs, he clearly made a determination and declared that Ms. Reed lacked capacity to make her own health care decisions[6]. Annie Reed's lack of capacity is also documented by DeLisa Smith. Consequently, James and Larry Wesley were Annie Reed's authorized surrogates pursuant to

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[6]The decision to admit Ms. Reed to a nursing home, i.e., ACNC, constitutes a "health-care decision." See Miss. Code Ann. § 41-41-203(h); Covenant Health Rehab of Picayune v. Brown, 949 So. 2d 732 (Miss. 2007); Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005); and Moffett v. Life Care Centers of America, 187 P. 3d 1140 (Colo. Ct. App. 2008).

Miss. Code Ann. § 41-41-211.[7] See Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So. 2d 732, 736 (Miss. 2007).

Additionally, pursuant to the uncontradicted Affidavit of DeLisa Smith, James and Larry Wesley were agents (actual or implied) of Annie Reed and had the lawful authority to sign the Admission Agreement, including the arbitration provision. In Monticello Community Care Center, LLC v. Martin, ___ So. 3d ___, 2009 WL 2595727 at *4 (Miss. Ct. App. August 25, 2009), the Mississippi Court of Appeals held as follows regarding apparent authority/implied agency:

> To prove that an implied agency existed, the evidence must show that the principal expressly gave the alleged agent the authority to perform acts on his behalf, which would reasonably lead a third party to believe that an agency relationship existed. The implied agency relationship can be proven by "facts and circumstances of the particular case, including words and conduct of the parties." (citations omitted).

DeLisa Smith averred that "I was advised that Larry Wesley, Annie Reed's son, was handling her affairs; however, he was not available to meet with me at that time to discuss his mother's admission to Adams County Nursing Center. I 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 Adams County Nursing Center." (Affidavit of DeLisa Smith, ¶ 2, R. 57A-57C; Appellants' R.E. 34-36). Although not offered to detract from the uncontradicted Affidavit of DeLisa Smith, Defendants note that Section F.5. of the Admission Agreement

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[7]Appellants requested that they be allowed (by leave of Court) to depose Dr. Tillman and introduce his testimony into the record in the event the lower court found that the records did not clearly demonstrate Annie Reed's lack of capacity at the time of her admission to ACNC. (Supplemental Memorandum of Law in Support of Defendants' Motion to Dismiss, to Compel Arbitration and to Stay, R. 53). The Defendants were not simply going to attempt to depose Dr. Tillman and then have Plaintiff's counsel argue that the Defendants had waived their right to compel arbitration by voluntarily engaging in discovery in the Circuit Court action.

(signed by James Wesley and Larry Wesley) states: **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).

Lastly, since Annie Reed was clearly identified as the resident to be admitted to ACNC on both of the Admission Agreements, that her sons, James and Larry Wesley, were identified as Annie Reed's Responsible Party, and that the benefits of residing at ACNC flowed directly to her as a result of the Admission Agreements, she was an intended third-party beneficiary of the Admission Agreements and bound by same, including but not limited to, the arbitration provision. See Forest Hill Nursing Center, Inc. v. McFarlan, 995 So. 2d 775 (Miss. 2008).

II. NOTWITHSTANDING THAT THE AHLA ALTERNATIVE DISPUTE RESOLUTION SERVICE RULES OF PROCEDURE FOR ARBITRATION APPLY TO THE PARTIES' ARBITRATION PROCEEDING, THERE IS AN AVAILABLE FORUM FOR THIS PROCEEDING

In Covenant Health & Rehab. of Picayune, LP v. Moulds, 14 So. 3d 695, 703 (Miss. 2009)[8], the Mississippi Supreme Court held that "'Arbitration is about choice of forum – period.'" (quoting Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 525 (Miss. 2005)). In this case, the Admission Agreement provides as follows regarding the forum:

> It is understood and agreed by the Facility and Resident and/or Responsible Party that any legal dispute, controversy, demand or claim (hereinafter collectively referred to as "claim" or "claims") that arises out of or related to the Admission Agreement or any service or

[8]The Moulds case overruled Covenant Health Rehab. of Picayune, L.P. v. Brown, 949 So. 2d 732 (Miss. 2007) and Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005) only to the extent that they are inconsistent with Moulds. The instant Admission Agreement does not contain the numerous unconscionable provisions at issue in Moulds. Simply, Moulds is inapposite and not controlling as to any of the issues in this appeal.

> health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration pursuant to the Federal Arbitration Act, to be conducted at a place agreed upon by the parties, or in the absence of such agreement, at the Facility, in accordance with the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration which are hereby incorporated into this agreement, and not by a lawsuit or resort to court process except to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards.

(Admission Agreement, R. 3Q and 3X; Appellants' R.E. 24 and 31).

Based upon clear and unequivocal language, the parties agreed to resolve any and all of their disputes related to any service or health care provided by the facility to the resident, Annie Reed, exclusively by way of "binding arbitration" and "at a place agreed upon by the parties, or in the absence of such agreement, at the Facility. . . ." Id. In fact, the parties agreed to the forum, arbitration, and the location of same, i.e., at a place agreed upon by the parties, or in the absence of such agreement, at Adams County Nursing Center in Natchez, Mississippi. Id. The next inquiry issue is what rules, if any, did the parties specify to govern the arbitration proceeding. The Admission Agreement provides that the "American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration" ("AHLA Rules"), which are expressly "incorporated into [the] . . . agreement" will apply to the arbitration, in addition to the fact that damages shall be "determined in accordance with the provisions of the state or federal law applicable to a comparable civil action . . . ." Id.

In Moulds, the arbitration provision at issue provided, in part, as follows:

> The Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them and the Facility or its Owners, officers, directors or employees shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures.

Moulds, 14 So. 2d at 706.

The Moulds Court noted that:

> The AAA announced nearly seven years ago that it "no longer accept[s] the administration of cases involving individual patients without a post-dispute agreement to arbitrate." The AAA continues to administer health-care arbitrations in which businesses, providers, health care companies, or other entities are involved on both sides of the dispute. Id. The AAA stated that the policy was a part of its "ongoing efforts . . . to establish and enforce standards of fairness for alternative dispute resolution. . . . " The Senior Vice President of the AAA was quoted as follows:
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> > Although we support and administer pre-dispute arbitration in other case areas, we thought it appropriate to change our policy in these cases since medical problems can be life or death situations and require special consideration.
>
> Id.
>
> Another alternate-dispute-resolution organization, the American Healthcare Lawyers Association (AHLA), has made a similar announcement about healthcare arbitrations. Owens v. Nexion Health at Gilmer, Inc., 2007 WL 841114, at *3 (E.D.Tex. Mar.19, 2007). The AHLA also has announced that it would administer an arbitration without a post-dispute agreement only if ordered to do so by a court. Id. Covenant Health argues that AHLA's policy is relevant to this case and speculates that the AAA is likely to follow the AHLA's lead and administer disputes if ordered to do so. The AAA has made no such announcement.

Id. at 706-707 (emphasis added).

Importantly, in the case sub judice, the arbitration provision does not mandate that AHLA will "administer" the arbitration (the Moulds arbitration clause provides that AAA will administer the arbitration). The distinction between the administration of an arbitration proceeding vis-a-vis the parties' agreement to utilize a certain set of rules in their arbitration proceeding cannot be overstated.

The AHLA Rules provide as follows:

> **1.01 Applicability of Rules**
>
> The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a 'consumer health care liability claim' on or after January 1, 2004 only if (1) 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 (2) a judge orders that the Service administer an arbitration under the terms of a pre-injury arbitration agreement. 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.

(AHLA Rules, Rule 1.01) (emphasis added).

In his Affidavit, Peter Leibold, Chief Executive Officer and Executive Vice-President of the AHLA, avers, in part, as follows:

> 3. I am the Chief Executive Officer and Executive Vice-President of the American Health Lawyers Association.
>
> 4. The AHLA is a non-profit organization located in Washington, D.C., and registered with the Department of Consumer and Regulatory Affairs of the District of Columbia.
>
> 5. The AHLA was previously named the National Health Lawyers Association, Inc. (NHLA).
>
> 6. On or about August 22, 1997, the NHLA filed Articles of Amendment with the Department of Consumer and Regulatory Affairs of the District of Columbia in order to change its name to NHLA/AAHA, Inc. (Exhibit A).
>
> 7. On August 22, 1997, the Department of Consumer and Regulatory Affairs of the District of Columbia issued a Certificate of Amendment changing the name of the NHLA to NHLA/AAHA, Inc. (Exhibit B).

8. On or about August 18, 1998, the NHLA/AAHA, Inc. filed Articles of Amendment with the Department of Consumer and Regulatory Affairs of the District of Columbia. (Exhibit C).

9. On August 18, 1998, the Department of Consumer and Regulatory Affairs of the District of Columbia issued a Certificate of Amendment changing the name of the NHLA/AAHA, Inc., to the American Health Lawyers Association. (Exhibit D).

10. The AHLA ADR Service Rules of Procedure for Arbitration have been amended from time to time since their original enactment in 1991. Our roster of arbitrators change each year with new arbitrators added, and some are dropped when they decide not to remain a dispute resolver.

11. In "consumer health care liability claims," the AHLA's Alternative Dispute Resolution Service ("Service") will administer the arbitration process, by court order and/or agreement of the parties, provided the parties mutually submit the Service's Request for a List of Arbitrators ("Request"). This mutual Request, by its express terms, submits the process to the Service pursuant to its Rules of Procedure and with agreement by the parties that the dispute is subject to resolution under the Rules.

12. A mutual Request satisfies the requirement in a "consumer health care liability claim" that the post-injury agreement be in writing to arbitrate the claim. Accordingly, if the parties submit the mutual Request (either by agreement or pursuant to a court order), the Service will administer the arbitration of a consumer health care liability claim under its Rules just as it administers requests for arbitration in non "consumer health care liability claims."

13. In circumstances where a Court simply orders to arbitrate a consumer health care liability claim according to the AHLA ADR Service Rules, the AHLA will not administer the arbitration, but recommends that its Rules of Procedure be applied by another arbitration service.

14. Nothing in our Rules precludes the administration of a "consumer health care liability claim" under our Rules by another ADR Service.

Affidavit of Peter Leibold dated July 27, 2007, R. 57ZZ-58BBB; Appellants' R.E. 53-55; see also Affidavit of Peter Leibold dated August 21, 2008, R. 57GGG-57III; Appellants' R.E. 56-58).

Bottom line – the arbitration provision in this case does not mandate that AHLA administer the parties' arbitration proceeding – only that the AHLA Rules apply to the arbitration. Consequently, there is no reason or basis to void the arbitration provision. Further, the AHLA Rules expressly provide 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 AHLA Rule 1.01; see also 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).

It is undisputed that the parties have agreed to the following: (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; and (3) to utilize the AHLA Rules to govern the arbitration. The only missing piece – who is going to be the arbitrator(s)?[9] Section 5 of the Federal Arbitration Act ("FAA") supplies the only potential missing piece to the arbitration puzzle.

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[9]First, there is no reason that the parties cannot agree to an arbitrator. Undersigned counsel has arbitrated approximately 20+ cases where arbitration was agreed to by the parties/counsel or ordered by a court (including cases where the purported forum was not available or the parties/counsel agreed not to use the ADR service identified in an arbitration provision for a number of reasons, including but not limited to, cost), and there has not been a single case where the parties and their counsel were not able to agree on an arbitrator, whether a retired judge or attorney learned in the subject matter of the dispute. In fact, it is undersigned's experience that an agreement to utilize the services of a retired judge or attorney is much more cost effective for the litigants than utilizing the services of a recognized ADR organization, which is forced to charge administrative expenses and other fees to administer the arbitration. Additionally, there is nothing to prohibit this Court from ordering that AHLA administer the arbitration and, in fact, Rule 1.01 of the AHLA Rules confirms that the AHLA will administer a pre-injury arbitration agreement if ordered by a court.

9 U.S.C. § 5 provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or umpire, such method shall be followed; but if no method is provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

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 holding that when "the chosen [arbitration] forum is unavailable . . . or has failed for some reason, [section] 5 [of the FAA] applies").

Purely and simply, this is not a case where the forum is unavailable. Although the Defendants sincerely believe that the parties and their counsel could and would agree on an arbitrator and, alternatively, that the Court has the authority to order that AHLA administer the arbitration, should this Court find otherwise, the FAA expressly addresses and resolves the situation at hand (i.e., ". . . [I]f no method is provided therein [for the appointment of an arbitrator], . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein. . . .").

In sum, 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) governing law.

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.

III. THE INSTANT ADMISSION AGREEMENT AND ARBITRATION PROVISION ARE NOT PROCEDURALLY OR SUBSTANTIVELY UNCONSCIONABLE AND SHOULD BE ENFORCED

As the Mississippi Supreme Court noted, the Moulds decision "does not prevent nursing homes . . . from entering contracts that include arbitration agreements. Our courts will enforce arbitration agreements when they do not seek to impose terms deemed unconscionable by this Court." Moulds, 14 So. 3d at 706. Against this backdrop, the Defendants are well aware that contract terms (or the contract as a whole) may be declared unconscionable and severed from a contract.[10] To this end, Mississippi law is well-settled regarding the difference between substantive and procedural unconscionability.

Substantive unconscionability may be found when the terms of the contract are of such an oppressive character as to be unconscionable. Russell v. Performance Toyota, Inc., 826 So. 2d 719, 725 (Miss. 2002) (citing Bank of Indiana, Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 109-110 (S.D. Miss. 1979)). Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicious print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of the opportunity to study the contract and inquire about the contract terms. Id. (citing East Ford, Inc. v. Taylor, 826 So. 2d 709, 714 (Miss. 2002)). In Russell, the Court explained that "Russell's claims of lack of

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[10]F.1 of the Admissions Agreement provides that "[i]n the event any provision of this Agreement is held to be unenforceable for any reason, the unenforceability thereof shall not affect the remainder of the Agreement, which shall remain in full force and effect and enforceable in accordance with its terms." (R. 3R and 3Y; Appellants' R.E. 25 and 32).

knowledge and lack of voluntariness are claims of procedural unconscionability, while his claims of the arbitration clause not bearing a reasonable relationship to the business risks of the parties and being in violation of public policy are claims of substantive unconscionability." Russell, 826 So. 2d at 725. In further clarifying procedural unconscionability, the Russell Court recognized that "where a contract which contains an arbitration agreement is attacked as being procedurally unconscionable, the attack is on the formation of the contract generally, not an attack on the arbitration itself." Id. at 726.

Most recently, the Mississippi Supreme Court explained substantive unconscionability as follows:

> Our precedent follows the Williams ("absence of meaningful choice") language as quoted above from Corbin. See Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1207 (Miss. 1998) (quoting Bank of Indiana, Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 109 (S.D. Miss. 1979)). Unconscionability can be procedural or substantive. East Ford, 826 So. 2d at 714. Under "substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, the contracting parties." Stephens, 911 So. 2d at 521. Substantive unconscionability is proven by oppressive contract terms such that "there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach. . . ." Holyfield, 476 F. Supp. at 110. One example of a one-sided agreement is one that allows one party to go to court, but restricts the other to arbitration. See Pridgen v. Green Tree Fin. Servicing Corp., 88 F. Supp. 2d 655, 658 (S.D. Miss. 2000).

Our courts may remedy unconscionable agreements as follows:

> "The law of Mississippi imposes an obligation of good faith and fundamental fairness in the performance of every contract . . . this requirement is so pronounced that courts have the power to refuse to enforce any contract ... in order to avoid an unconscionable result." Section 75-2-302 of the Mississippi Code provides: "If the court as a matter of law finds the contract to have been unconscionable . . . [it] may refuse to enforce the contract, or it may enforce the remainder of

> the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."
>
> Jeffrey Jackson and Mary Miller, Encyclopedia of Mississippi Law, Vol. 3, § 21.54 (Mississippi Practice Series, 2001) (quoting Holyfield, 476 F. Supp. at 109).

Moulds, 14 So. 3d at 699-700.

In the instant case, neither the Admission Agreement nor the arbitration provision are even remotely similar to the admission agreement (or arbitration clause) considered by the Court in Moulds, Brown and Stephens. In fact, the subject Admission Agreement (and arbitration provision) is easily distinguished from the admission agreement before the Court in Moulds, Brown and Stephens.

In Moulds, the Court noted that the following provisions had either been acknowledged by the facility to be unenforceable or judicially declared to be unenforceable: E7 (limitation of liability); E8 (bilateral waiver of punitive damages); C5 (hold harmless for private duty nursing, etc.); C8 (hold harmless for criminal acts); E5 (requires patient to submit to grievance procedure, while facility may resort to civil action); E6 (requires mediation, with cost to be split); E12 (awards all cost to the other party if a party fails to comply with arbitration provision); E16 (institutes a one-year statute of limitations); "the last sentence of the arbitration provision" (refers to other unconscionable provisions, E7 and E8); D4 (survival clause, allowing 11 listed clauses to survive the termination of the agreement and the death of any party); E13 (bilateral waiver of a right to a jury trial); and E14 (sets a $3.00/page charge for copies requested by parties). Moulds, 14 So. 3d at 701-702. The Court noted "several other questionable provisions" as follows: Clause A5, which is similar to C5 (awards facility all costs, including attorney's fees and other litigation costs, if an account becomes delinquent); Clause E9 (requires the patient to submit any

damage recovery to any third-party payor, including Medicare and Medicaid, to reimburse the payor's expenses); Clause E15 (requires that any dispute resolution or legal proceeding be brought in the county where the facility is located). Id. Consequently, the Mississippi Supreme Court adopted "the circuit court's rationale that the arbitration clause sub judice, coupled with a multitude of unconscionable provisions, makes this an unconscionable contract as a whole." Id.

The admission agreement before the Court in Moulds is night and day different than the instant Admission Agreement. Accordingly, the Court need not be detained by an exhaustive examination of the subject Admission Agreement. The subject Admission Agreement appears to share only the following relevant provisions with the Moulds admission agreement: C5[11] (hold harmless for private duty nursing); A5 (awards facility all costs, including attorney's fees and other litigation costs, if an account becomes delinquent); and E - first sentence (requires arbitration at the facility, but only if the parties cannot agree on a location for the arbitration).

Pursuant to the teachings of Moulds or any decision from the Mississippi Supreme Court or Mississippi Court of Appeals, the subject Admission Agreement is not substantively or procedurally unconscionable. For these reasons, the instant Admission Agreement (excepting only Section C5, but including the arbitration provision, Section E), should be enforced as agreed to by the parties.

CONCLUSION

For the reasons stated hereinabove, this Court should reverse the trial court's December 22, 2008, Order denying Defendants' Motion to Compel Arbitration. Further, in accordance with Mississippi law and the Federal Arbitration Act, the Court should remand this action with

[11]This reference and the following references are found in the subject Admission Agreement.

instructions for the trial court to order the Plaintiff and Defendants to submit their dispute to binding arbitration.

RESPECTFULLY SUBMITTED, this the 16th day of October, 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

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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:

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