IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-IA-00483-SCT

CAREGIVERS, LLC D/B/A
CLARKSDALE NURSING CENTER,
MAGNOLIA MANAGEMENT CORPORATION
D/B/A MAGNOLIA ANCILLARY SERVICES, INC.,
LEGACY MANAGEMENT SERVICES, LLC,
MAGNOLIA ANCILLARY SERVICES, INC. APPELLANTS

V.

ILEAN COMFORT AS EXECUTRIX
OF THE ESTATE OF MARIE ELLISON, DECEASED APPELLEE

REPLY BRIEF OF APPELLANTS'

(Oral Argument Requested)

John L. Maxey (MS Bar No. [redacted]
S. Mark Wann (MS Bar No. [redacted]
Marjorie S. Busching (MS Bar No. [redacted]
MAXEY WANN PLLC
210 East Capitol Street, Suite 2100
Post Office Box 3977
Jackson MS 39207
Telephone: (601) 355-8855
Facsimile: (601) 355-8881

ATTORNEYS FOR APPELLANTS

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-IA-00483-SCT

CAREGIVERS, LLC D/B/A
CLARKSDALE NURSING CENTER,
MAGNOLIA MANAGEMENT CORPORATION
D/B/A MAGNOLIA ANCILLARY SERVICES, INC.,
LEGACY MANAGEMENT SERVICES, LLC,
MAGNOLIA ANCILLARY SERVICES, INC. APPELLANTS

V.

ILEAN COMFORT AS EXECUTRIX
OF THE ESTATE OF MARIE ELLISON, DECEASED APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following have an interest in the outcome of this case:

1. Caregivers, LLC d/b/a Clarksdale Nursing Center, Magnolia Management Corporation d/b/a Magnolia Ancillary Services, Inc., Legacy Management Services, LLC, Magnolia Ancillary Services, Inc., Appellants

2. Ilean Comfort, Appellee

3. John L. Maxey II, S. Mark Wann, Marjorie S. Busching, Counsel for Appellants

4. George F. Hollowell, Jr., Counsel for Appellee

5. Honorable Albert B. Smith III, Circuit Court Judge

6. The Estate of Marie Ellison, Deceased

Marjorie S. Busching

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATUTES:

STATEMENT OF THE ISSUES

1. Did Ilean Comfort establish next friend standing on behalf of Marie Ellison on the face of the Complaint in order to file suit on December 19, 2002?

2. Can a Complaint that is void from its inception be amended in order to establish standing months after suit was filed?

ARGUMENT

Appellants will confine their Reply Brief to the issues raised in Appellee's [Comfort's] Response.

A. Ilean Comfort had no authority to bring suit on behalf of Marie Ellison and submitted no evidence Ellison designated Comfort to act as her agent and file this lawsuit.

1. The Affidavit of Comfort confirms Marie Ellison was under no disability.

Comfort submitted sworn testimony in the form of an Affidavit purportedly to confirm her authority to act on behalf of Ellison. (R.971-73) The Affidavit, if taken as fact, confirms: when Ellison "did not get the care she needed at the nursing home, she complained to me and asked me to help her get better care and to help her pursue her complaints against the nursing home"; ". . . asked me to consult a lawyer on her behalf to pursue her claims against the nursing home."; "Knew and approved of my hiring of Mr. Hollowell to pursue Ms. Ellison's claims"; Assisted Comfort in "providing information for Mr. Hollowell's use in pursuing Ms. Ellison's claims." ; ". . . [W]as aware that I would be filing a petition for conservatorship of Ms. Ellison and approved of this action." (R.971-73) The description by Comfort of Ellison, reflects a person capable of meeting with an attorney at the nursing home, verbalizing to an attorney what her complaints were, entering into a contract for services, signing a POA if necessary, and filing a joinder in the petition for Conservatorship, none of which was done. Instead, Comfort for her own benefit, hired an attorney and pursued the claims under no permissible authority. Comfort filed suit prematurely in December 2002, with no authority, presumably to place the claim outside the caps on non-economic damages that went into effect January 1, 2003. Comfort

remained at Clarksdale Nursing Center five (5) more years after suit was filed. Comfort jumped the gun. Comfort subsequently tried to ratify her actions by petitioning for a Conservatorship. Comfort argues Ellison's incapacity to justify her authority to serve as her next friend while at the same time Comfort's Affidavit establishes Ellison's capacity to bring suit in her own name under no disability. Comfort cannot have it both ways.

2. **Comfort had no authority to serve as Ellison's agent to file suit.**

Comfort puts forth that Ellison manifested her intent for Comfort to act on behalf of her [Ellison] but submits no evidence to support this other than her own self-serving Affidavit. Comfort executed several documents related to Ellison's healthcare and directing payment for such healthcare. In her response, Comfort submits paying one's bills and purchasing groceries, clothes and personal items constituted entering into contracts on behalf of Ellison.[1] Most residents have a designated person doing the same on their behalf. Because a person assists another with tasks such as those described does not establish authority under Mississippi law to file a lawsuit, enter into a contract, transfer property, execute checks, sell stocks, etc. and Comfort references no such authority. Clarksdale would argue such actions do not constitute apparent authority to file suit on behalf of a person simply because you pay his or her bills and purchase groceries and clothes with his or her money. Nothing in the record directs Comfort to act in any legal capacity to enter into a binding contract for legal services and to file suit on behalf of Ellison.

Clarksdale does not dispute Comfort served as Ellison's responsible party during certain

[1] "Ms. Comfort entered into many contracts on Ms. Ellison's behalf, paying Ms. Ellison's bills with the money from Ms. Ellison's VA check, buying Ms. Ellison groceries, clothes, and all her personal items." (Appellee's Response at page 11).

times of Ellison's residency at Clarksdale. Leroy Davis, as her Conservator, also served as Ellison's responsible party at certain times. Davis, as Conservator, clearly could have filed suit under that authority. Comfort had no such authority. Comfort has submitted no tangible evidence of any apparent or expressed authority by Ellison to consult with an attorney and to enter into a contract to file suit on her behalf. The Mississippi Supreme Court reviewed the apparent authority of two sons of a nursing home resident to bind their mother to an arbitration agreement contract contained within a nursing home admission agreement. *Adams Cmty. Care Ctr., LLC v. Reed*, 37 So. 3d 1155 (Miss. 2010), reh'g denied (July 22, 2010).

> ACNC argues that James and Larry Wesley had apparent authority because they represented to the nursing home via DeLisa Smith that each was the responsible party for Annie Reed. In order to recover under a theory of apparent authority, the claimant must put forth "sufficient evidence" of "(1) acts or conduct of the *principal* indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third person as a result of that reliance." *Eaton v. Porter,* 645 So.2d 1323, 1325 (Miss.1994) (emphasis added).

Reed at 1160. Just as in *Reed,* there is no evidence in the instant record of any act or conduct of the ***principal herself*** [Ellison] indicating Comfort was her agent for purposes of entering into a contract with an attorney to file suit in a court of law on her behalf. As stated *supra*, Comfort's arguments and her Affidavit lend support to Clarksdale's argument that the principal [Ellison] was fully capable of retaining an attorney and entering into a contract, bringing a lawsuit, executing a POA or joining in the petition to have a Conservator appointed. Ellison took none of those steps indicating any authority of Comfort to do anything outside of acting as the Responsible Party to serve as a contact for the nursing home or running personal errands for the resident. Clarksdale admitted Ellison with both Ellison and Comfort executing certain admission documents. Clarksdale agrees both Ellison and Comfort assisted in certain healthcare decisions

and choices; however, there is no indication Ellison ever represented Comfort was anything other than her friend and responsible party and no evidence has been submitted establishing any other authority.

3. **Comfort has submitted no tangible evidence Ellison ratified any of her actions to bring suit on her behalf.**

Comfort has presented evidence she assisted with healthcare decisions of Ellison when admitting her to Clarksdale Nursing Home. She submitted medical records in an effort to support her position that Ellison ratified her actions to file suit on her behalf. Comfort has failed to submit any documentation whereby Ellison is asserting or setting forth Comfort is her legal agent authorized to file suit on her behalf. Comfort cites to *Ingram* as permitting a father to bring suit as next friend; however, in *Ingram,* the son ratified his father's actions by submitting a sworn Affidavit. *Ingram By and Through Ingram v. Ainsworth*, 184 F.R.D 90 (S.D. Miss. 1999). Comfort's Affidavit contains only her self serving statements regarding Ellison. There is no statement by or from Ellison ratifying anything Comfort did in filing this lawsuit. There are no documents submitted reflecting Ellison knew of this lawsuit, intended to file suit, or knew Comfort was petitioning for Conservatorship, or that Ellison agreed with any of Comfort's actions.

II. Comfort misrepresented her authority and had no standing to sue as the Conservator of Marie Ellison.

It is undisputed that Comfort was *not* the Conservator of Marie Ellison when suit was filed. It is undisputed Comfort *had not petitioned* to become the Conservator when she filed suit. It is undisputed that, notwithstanding Comfort's representation that Ellison approved of Comfort being appointed her Conservator, the Chancellor *did not appoint* Comfort when she petitioned

for the position.

III. Ellison was under no disability to qualify Comfort to assert next friend standing.

Comfort submits medical records of the nursing home to support her position there is "...considerable other relevant evidence of Ms. Ellison's lack of mental competence to bring suit herself at the time suit was filed without a later determination of incompetency in the Conservatorship proceeding." (Appellee's Brief pp. 16-17). Comfort again cites to the Federal Court's determination in *Ingram by & Through Ingram v. Ainsworth,* 184 F.R.D.90 (1999). In *Ingram,* as opposed to the instant matter, the person in issue, Terry Ingram, submitted evidence as to his approval of his father filing suit as next friend. *Id at *93.* "The court may also consider evidence as to whether the incompetent party approves of the suit in question. *Id* at *92, *citing, Bodnar v. Bodnar,* 441 F.2d 1103 (5th Cir. 1971). Not only has Comfort failed to submit any evidence Ellison approved of the lawsuit in question, Comfort failed to submit any evidence under Mississippi law that Ellison had been deemed incompetent by her physician or was under any disability at the time suit was filed.[2] Despite medical records being submitted years after suit was filed, the record is still absent of any determination by Ellison's primary care physician, ***at the time suit was filed***, that Ellison lacked capacity. Nursing records do not constitute a determination by Ellison's physician that she lacked capacity.

> Our Legislature has very specifically provided the manner in which the presumption that an individual has capacity to make a health-care decision may be rebutted: by a *primary physician* determining lack of capacity. Miss.Code Ann. § 41-41-211(1) (Rev.2009). As noted by Reed, Smith is not a physician, and her

[2]*Ingram* was a federal case. The Court referenced the 5th Circuit's determination that it, as a federal body, did not have to follow the state's procedures for determining competency or capacity. *Id* at *90. Comfort is asking this Court to ignore Mississippi law for determining incompetency or lack of capacity.

> opinion is irrelevant to this inquiry under Section 41-41-211. Furthermore, there is no evidence in the record that Dr. Tillman was Annie Reed's primary physician or that he ever determined she lacked "capacity" as that term is defined under Section 41-41-203(h). *See also Compere's Nursing Home, Inc. v. Estate of Farish ex rel. Lewis,* 982 So.2d 382, 384 (Miss.2008) (ruling "there is no evidence that Ms. Farish had 'been determined by [her] primary physician to lack capacity' "); *see also Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby,* 994 So.2d 159, 162 (Miss. 2008).

Adams Cmty. Care Ctr., LLC v. Reed, 37 So. 3d 1155, 1159 (Miss. 2010), reh'g denied (July 22, 2010). The Mississippi Supreme Court has addressed the issue of whether a person is or is not competent to make a healthcare decision in setting forth the standard to enter into a contract for healthcare services when being admitted to a nursing home. As referenced *supra,* the same arguments have been made as to contracts to arbitrate and the failure to show a resident is or is not incompetent when the contract for admission is signed. This Court has consistently determined absent a power of attorney, legal authority, or conservatorship and a determination of incompetency, an agreement to arbitrate is invalid without the Resident's signature. *Id.* (Also see *Mississippi Care Center of Greenville v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008) ("Neither party presents a declaration by Wyse's primary physician stating that Wyse was incapable of managing his affairs prior to Hinyub signing the Admission Agreement with the arbitration Agreement));(Also see *Forest Hill Nursing Center, Inc. v. McFarlan*, 995 So. 2d 775, 781 (Miss. 2008) ("There is no evidence in the record that any type of agreement existed between McFarlan and Mathews that would give Mathews the authorization to act on McFarlan's behalf.")) Ellison had not been deemed incompetent when suit was filed December 19, 2002. Any contract employing an attorney is invalid without Ellison's signature or mark. In fact, Ellison signed her Will the day before Comfort filed suit, indicating the capacity to act on her own behalf. (R.344-46) Comfort assumed she could file a lawsuit and name herself as Ellison's next friend. Under

this reasoning, Comfort would have been able to file suit on behalf of any nursing home resident as long as the resident had a diagnosis believed to limit that person's ability to prosecute a lawsuit ". . . on her own under the conditions imposed by and required for litigation."[3] (Appellee's Brief at pp. 17-18). No evidence has been submitted of Ellison's desire, request or approval for Comfort to file any litigation other than the hearsay Affidavit of Comfort, drafted after Ellison's death.

IV. Rule 17(a) substitution is not proper.

Comfort did not name herself soley as next friend of Marie Ellison. She represented in the styling that she *was* the Conservator, and in the body that she had petitioned for Conservatorship. Neither was true. Comfort subsequently moved to have Leroy Davis, as the first Conservator of Ellison substituted in this instant matter. (R.31-32) [4] Comfort's position as Conservator was not established when suit was filed. There was no Conservator up and until Leroy Davis was appointed. Comfort had no authority to file suit as next friend, therefore it was void *ab initio*.

"Standing is a jurisdictional issue which may be raised by any party or the Court at anytime...." *Kirk v. Pope*, 973 So. 2d 981 (Miss. 2007) (Internal citations omitted). Comfort confuses real party in interest with standing for purposes of substitution under Rule 17(a) of the Mississippi Rules of Civil Procedure. Under Rule 17(a), Comfort had no representative capacity

---

[3] Comfort fails to state what "the conditions imposed by and required for litigation" are, that qualify Comfort to file suit.

[4] Comfort's Motion to Amend specifically requested the Court "...to enter an Order granting Plaintiff leave to amend their Complaint to... the **proper** Conservator for the Estate of Marie Ellison...." (*Emphasis supplied*)

to sue as delineated. *Miss. R. Civ. P. 17(a).* Where a survival suit is brought by the *proper* party, substitution by the real party in interest under Rule 17(a) is applicable. (See *Necaise v. Sacks*, 541 So. 2d 1098 (Miss. 2003)). In *Necaise*, Charles Freeman [Marie Ellison] filed suit on his own behalf. His Estate was substituted after his death. In the instant matter, Ellison never filed suit and Comfort was not a proper party to file suit. Comfort did eventually move to substitute the Conservator, Leroy Davis, but the suit was void *ab initio* since the original plaintiff [Comfort] was not proper and did not have authority to file suit on Ellison's behalf.

Comfort's Affidavit, submitted in an effort to establish her status as next friend, set forth the *capabilities* of Ellison, not her incapabilities, to direct the filing of a lawsuit because of alleged complaints regarding her care. Next friend standing does not attach simply because a person is living at home or in a nursing home as Comfort would argue. Nursing home residents are individuals in need of care for certain conditions, including physical, mental and emotional; however, nursing home residents have the same legal rights and protections as other citizens. Comfort describes a resident [Ellison] fully capable of taking the necessary legal steps to either file suit or establish the legal authority for Comfort to act on her behalf. She did neither, rather Comfort proceeded to file suit with no legal authority to do so. Comfort has not submitted any evidence whereby Ellison ratified her actions.[5] In fact nothing in the record to date indicates Ellison even knew Comfort had filed suit on her behalf or that suit was ongoing for over 5 years before she died. The suit was void at its inception. Substituting parties was of no consequence, regardless of who was substituted.

---

[5] Documents submitted by Comfort, signed by Comfort and Ellison in 1996 upon admission to Clarksdale, did not reflect Ellison establishing Comfort with any authority to file a lawsuit but only to participate in addressing healthcare needs and services along with Ellison.

VII. The issue of the Savings Statute of Miss. Code Ann. §15-1-69 is not ripe for determination.

Comfort raises the issue of the savings statue of Miss. Code Ann §15-1-69. Respectfully the issue, as part of this interlocutory appeal, is not for this Court to determine. For arguments sake, the Mississippi Supreme Court has analyzed four elements in deciding whether the savings statute is applicable.

> The elements are whether: (1) the action has been duly commenced within the applicable statute of limitations, (2) the complaint was filed in good faith, (3) the prior suit was dismissed as a matter of form without adjudication on the merits, and (4) new action was commenced within one year of said dismissal. *Crawford v. Morris Transp., Inc.*, 990 So.2d 162 170 (Miss.2008).

Harris v. Darby, 17 So. 3d 1076, 1079 (Miss. 2009). The instant litigation was never duly commenced as directed, *supra*. Comfort had no standing to file the suit as next friend as Ellison was under no disability based upon Comfort's own sworn testimony contained within her Affidavit. Comfort misapplies the facts of this case to those as stated in *Harris*. In *Harris*, there was no issue raised that Lula Green was the proper party to the suit. In *Harris*, the savings statute did not apply. The issue was substitution under Rule 25 of the Mississippi Rules of Civil Procedure upon the death of Green. *Id.* at 1080. No issue is being raised herein regarding substitution of the Estate of Ellison. The substitution of Leroy Davis as Conservator was impermissible when Comfort failed to duly and properly commence suit in the first place. Suit was null and void when filed as Comfort had no standing. In the instant matter, Comfort first sought substitution by the proper Conservator, Leroy Davis. No other person prior to that time had the authority to legally file a suit on behalf of Ellison. Because the suit was not duly commenced, substituting the Conservator fails to cure the fact the suit was void *ab initio* to begin

with. Additionally, were Comfort to re-file suit today, such suit would be subject to all caps as to non-economic damages now in place. This is not an issue of substitution under Rule 25 as cited by Comfort in reference to *Harris*. Appellants position is the suit was void at its inception; therefore *any* substitution is improper.

Comfort is not identified as "next friend" on the face of the Complaint, but only referenced in the styling. There is no declaration or statement set forth in the Complaint establishing next friend status of Comfort to sue on behalf of Ellison, no Affidavit of Ellison, no attached physician statement establishing Ellison's disability or incompetency, no Power of Attorney, and no evidence Ellison had any knowledge a lawsuit was filed for her alleged injuries. The first numbered paragraph, setting forth the identity of the Plaintiff to the lawsuit only identifies Comfort and states *her* name and *her* place of residence. *There is no identification of Ellison as a party*, only Comfort. The Complaint is void of any explanation setting forth why Ellison was not capable of filing a lawsuit on her own behalf when she had executed her Will the day before suit was filed. Comfort clearly had no standing as a Conservator and no standing as next friend to sue on behalf of Ellison. The Complaint was null and void at its inception and should have been dismissed.

CONCLUSION

Ilean Comfort filed suit on behalf of Marie Ellison with no legal authority to do so. She sought that authority months after suit was filed. Comfort sought to substitute the proper person legally authorized to represent Ellison by substituting the Conservator first appointed six months after suit was filed. The substitution as part of the Amended Complaint was improper and does not relate back to a suit that is void at its inception. Comfort could not "hold the place" for Davis

as she had no standing to bring suit in the first place. All Davis needed to do was re-file suit under his authority. This was not done. The matter should have been dismissed in its entirety, with prejudice.

Dated, this the 20th day of April, 2012.

Respectfully submitted,

John L. Maxey, II (MSB No. [redacted]
S. Mark Wann (MSB No. [redacted]
Marjorie S. Busching (MSB No. [redacted]
MAXEY WANN PLLC
210 E. Capitol Street, Suite 2100
P. O. Box 3977
Jackson, Mississippi 39207-3977
Telephone: (601) 355-8855
Facsimile: (601) 355-8881

Attorneys for Caregivers, LLC d/b/a Clarksdale Nursing Center, Magnolia Management Corporation d/b/a Magnolia Ancillary Services, Inc., Legacy Management Services, LLC, Magnolia Ancillary Services, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of the above and foregoing was sent via United States Mail, postage pre-paid to the following:

Honorable Albert B. Smith III
Coahoma County Circuit Judge
Courthouse, 200 Court Street
Cleveland, Mississippi 38732

George F. Hollowell, Jr., Esquire
Hollowell Law Firm
P.O. Drawer 1407
Greenville, Mississippi 38702-1407

Dated, this the 20th day of April, 2012.

Marjorie S. Busching