IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00945-COA

BEDFORD HEALTH PROPERTIES, LLC, BEDFORD CARE CENTER OF HATTIESBURG, LLC, HATTIESBURG MEDICAL PARK, INC., HATTIESBURG PARK MANAGEMENT CORP., MICHAEL MCELROY, JR. AND ROBERT PERRY — **APPELLANTS**

v.

THE ESTATE OF THEODORE DAVIS, BY AND THROUGH PATRICIA DAVIS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THEODORE DAVIS, AND ON BEHALF OF AND FOR THE USE AND BENEFIT OF THE WRONGFUL DEATH BENEFICIARIES OF THEODORE DAVIS — **APPELLEE**

DATE OF JUDGMENT:	04/26/2007
TRIAL JUDGE:	HON. ROBERT B. HELFRICH
COURT FROM WHICH APPEALED:	FORREST COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	STEVEN MARK WANN HEATHER MARIE ABY MARJORIE SELBY BUSCHING
ATTORNEYS FOR APPELLEE:	ANNETTE ELISE BULGER MATHIS DOUGLAS BRYANT CHAFFIN
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	DENIED DEFENDANT'S MOTION TO COMPEL ARBITRATION
DISPOSITION:	REVERSED AND REMANDED: 12/16/2008
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE MYERS, P.J., GRIFFIS AND ISHEE, JJ.

GRIFFIS, J., FOR THE COURT:

¶1. Patricia Davis, on behalf of the Estate of Theodore Davis, filed suit against Bedford

Health Properties, LLC ("Bedford") based on alleged personal injuries that Theodore sustained while a resident at Bedford. In response, the defendants filed a motion to compel arbitration that was denied by the circuit court. Bedford now appeals and argues that the circuit court should have ordered arbitration. We find the denial of the motion to compel arbitration to be in error. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

FACTS

¶2. On September 20, 2000, Theodore executed a properly authenticated durable power of attorney making his wife, Patricia, his agent for all healthcare decisions.

¶3. On November 12, 2002, Patricia signed an admissions agreement with Bedford Care Center on behalf of Theodore as his responsible party. The admissions agreement contained an arbitration clause that stated, "[i]t is understood and agreed by the Facility and Resident and/or Responsible Party that any legal dispute, controversy, demand or claim . . . that arises out of or relates to . . . any service or health care provided by the Facility to the Resident, shall be resolved exclusively by binding arbitration . . . ." This clause also stated, "[t]he parties understand and agree that by entering this Arbitration Agreement they are giving up and waiving their constitutional rights to have any claim decided in a court of law before a judge and a jury." This section was initialed by Patricia.

STANDARD OF REVIEW

¶4. We apply a de novo standard of review to the denial of a motion to compel arbitration because the motion presents a question of law as to whether the circuit court has jurisdiction to hear the underlying matter. *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 513

(¶9) (Miss. 2005). The Federal Arbitration Act ("FAA") governs contracts "evidencing a transaction involving commerce" which include nursing home admissions agreements. *Id.* at 514-15 (¶¶13, 16-18) (quoting 9 U.S.C. § 2 (2000)). Therefore, we must apply the policy of the FAA to "rigorously enforce agreements to arbitrate." *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (¶11) (Miss. 2002) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

ANALYSIS

I. Agency

¶5. "In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. 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." *Id.* at 713 (¶9). The second prong of the inquiry is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." *Id.* at 713 (¶10) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). Further, "only generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate arbitration provisions or agreements" governed by the FAA. *Stephens*, 911 So. 2d at 514 (¶11).

¶6. Bedford argues that Patricia was authorized to bind Theodore to arbitration because she was Theodore's express agent under a durable power of attorney for healthcare. Patricia counters by arguing that the power of attorney was limited to decisions involving healthcare and did not include the ability to waive Theodore's right to a jury trial.

¶7. "The burden of proving an agency relationship rests squarely upon the party asserting it." *Highlands Ins. Co. v. McLaughlin*, 387 So. 2d 118, 120 (Miss. 1980). "An express agent is one who is 'in fact authorized by the principal to act on their behalf.'" *McFarland v. Entergy Miss., Inc.*, 919 So. 2d 894, 902 (¶25) (Miss. 2005) (quoting *Cooley v. Brawner*, 881 So. 2d 300, 302 (¶10) (Miss. Ct. App. 2004)). After reviewing the durable power of attorney, we find that Patricia was Theodore's express agent. Now, we must determine if the decision regarding arbitration is within the scope of the express agency that Theodore granted Patricia.

¶8. The durable power of attorney authorizes Patricia "to make all Health-Care Decisions for [Theodore] . . . ." Paragraph eighteen of the power of attorney states:

> ACTS CONNECTED WITH AUTHORIZATION: In connection with the exercise of the powers herein described, my *Agent is fully authorized and empowered to* perform any acts and things and *to execute and deliver any documents, instruments, and papers necessary, appropriate, incident, or convenient to such exercise or exercises, including without limitation the following* . . . .

(Emphasis added). Paragraph eighteen then lists various actions in subsections (a) through (g) that Patricia may undertake in order to fulfill Theodore's healthcare wishes. Subsection (g) of paragraph eighteen states that the agent's power includes the ability, "to grant . . . . waivers of or releases from liability required by any hospital or physician to implement my wishes regarding medical treatment or non-treatment."

¶9. We find that, under the durable power of attorney, Theodore granted Patricia the power to consent to the arbitration clause because he authorized her to execute documents in order to fulfill his healthcare needs. The power of attorney clearly stated that the items

listed in subsections (a) through (g) of paragraph eighteen were not exclusive. Instead, we find that these items are merely illustrative of the types of acts Patricia may undertake in order to fulfill Theodore's healthcare needs. Theodore authorized Patricia to grant waivers or releases in order to implement his wishes regarding medical treatment; consequently, Theodore granted Patricia, in connection with his medical treatment, the ability to waive his right to a jury trial. Therefore, we find that Patricia was authorized to sign the arbitration provision, and we reverse and remand for further proceedings consistent with this opinion.

II. Unconscionability

¶10. Having found that Theodore's estate is bound by the arbitration agreement, we now turn to the second prong of *East Ford* to see if any general contract defenses exist to invalidate the contract. *East Ford*, 826 So. 2d at 713 (¶10). The estate argues that it should be allowed to conduct discovery related to the enforceability of the arbitration provision in order to determine whether the clause is unconscionable. However, neither the supreme court nor this Court has determined that such discovery is necessary before we may analyze whether a provision is unconscionable. *See Stephens*, 911 So. 2d at 516-25 (¶¶20-48); *Cmty. Care Ctr. of Vicksburg, LLC. v. Mason*, 966 So. 2d 220, 229-31 (¶¶23-33) (Miss. Ct. App. 2007). Likewise, we find that no further discovery on this issue is needed, and we will now determine whether the arbitration clause is unconscionable.

¶11. The Mississippi Supreme Court has defined unconscionability as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *East Ford*, 826 So. 2d at 715 (¶17) (citation omitted). There are two types of unconscionability: procedural and substantive.

a. Procedural Unconscionability

¶12. Procedural unconscionability exists when there is "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms." *Id*. at 714 (¶13) (quoting *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 657 (S.D. Miss. 2000)). Under procedural unconscionability, we examine the circumstances surrounding the overall formation of the contract in which the subject clause is contained. *Stephens*, 911 So. 2d at 517 (¶¶23-24).

¶13. In *Stephens*, the supreme court reviewed the circumstances surrounding the signing of a nursing home admissions agreement that contained an arbitration clause. The court held that a contract of adhesion is not unconscionable per se. It is essential that the evidence shows a "lack of knowledge or voluntariness by the weaker party." *Id*. at 520 (¶32). In concluding that the contract was not procedurally unconscionable, the supreme court in *Stephens* noted the following facts: (1) there were no circumstances of exigency; (2) the arbitration agreement appeared on the last page of a six-page agreement and was easily identifiable as it followed a clearly marked heading printed in all caps and bold-faced type clearly indicating that section "F" was about "Arbitration"; (3) the provision itself was printed in bold-faced type of equal size or greater than the print contained in the rest of the document; and (4) appearing between the arbitration clause and the signature lines was an all caps, bold-faced consent paragraph drawing special attention to the parties' voluntary consent to the arbitration provision contained in the admissions agreement. *Id*. at (¶33). After analyzing the above facts, the supreme court held that there was no evidence of a lack

of knowledge or voluntariness on the part of the weaker party. Instead, the parties were "competent individuals signing a well-marked, highly visible agreement which indicated very clearly that dispute resolution would be accomplished by way of arbitration." *Id*.

¶14. In the present case, page five of Bedford's admissions agreement is titled: "ARBITRATION - PLEASE READ CAREFULLY." The arbitration clause is located on pages five and six of a seven[-]page document. At the bottom of page five, the arbitration provision stated, "[t]he 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." Furthermore, the last paragraph of the arbitration provision stated:

> The Resident and/or Responsible Party understands that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this Arbitration Agreement 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.

There is also no evidence in the record to show that Patricia signed this document under exigent circumstances. Therefore, we find that the agreement in this case, like the agreement in *Stephens*, is not procedurally unconscionable.

b. Substantive Unconscionability

¶15. Substantive unconscionability exists when the terms of the arbitration agreement are shown to be oppressive. *East Ford*, 826 So. 2d at 714 (¶14). "When reviewing a contract for 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, contracting parties." *Stephens*, 911 So. 2d at 521 (¶35).

"While unconscionably oppressive terms can be facially invalid, a per se finding of substantive unconscionability is strictly applicable only" where the language of the contract greatly alters the legal rights of the parties or severely limits the damages available. *Id*. at (¶38).

¶16. We find that the arbitration clause in the admissions agreement neither significantly alters Theodore's legal rights nor severely limits the damages available to his estate. Instead, it "merely provides for a mutually agreed-upon forum for the parties to litigate their claims and is benign in its effect on the parties' ability to pursue potential actions." *Id.* at 522 (¶39). It did not contain any of the language previously held unconscionable by Mississippi courts. There is no required grievance resolution process, no limit on the amount of damages, no waiver of punitive damages, and no requirement to compensate Bedford's staff for their involvement in a dispute. *See id*. at 522-24 (¶¶39-43); *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 737-41 (¶¶14-25) (Miss. 2007). Accordingly, we find that the arbitration agreement is not substantively unconscionable.

III. Validity

¶17. The estate's final argument is that the arbitration provision is unenforceable because American Health Lawyers Association ("AHLA"), which is mentioned in the provision, has adopted the policy that they will no longer hear cases unless all parties involved agree to arbitration after the dispute arises. In a case similar to this one, this Court held: "While it would appear that the AAA would not administer the arbitration of this claim since there is only a pre-dispute agreement to arbitrate, it does not mean that arbitration is precluded. Arbitration pursuant to the AAA's rules and procedures would still be possible." *Trinity*

Mission Health & Rehab. of Clinton v. Estate of Scott, 2006-CA-01053-COA (¶32) (Miss. Ct. App. Jan. 8, 2008).[1] Likewise, arbitration pursuant to the AHLA's rules and procedures is still possible even though the AHLA would not preside over the arbitration in this case. Accordingly, this issue is without merit.

¶18. **THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

KING, C.J., LEE AND MYERS, P.JJ., CHANDLER, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR. IRVING, J., CONCURS IN PART AND IN RESULT.

[1] The Mississippi Supreme Court dismissed the appeal in this matter on July 31, 2008. *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott*, 2006-CA-01053-SCT (Miss. July 31, 2008).