

IN THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI

**FILED**

JOHN MORRISON AS NEXT FRIEND  
OF ALBERTA MORRISON

OCT 01 2003

PLAINTIFF

V.

VICKIE P. HARIEL, CIRCUIT CLERK

BY

*A. Harrel*

CAUSE NO.: 2002-0571

PICAYUNE CONVALESCENT CENTER,  
BOND, JOHNSON AND BOND, INC., KERI  
H. LADNER, DR. DEWITT BOLTON, AND  
JOHN DOES 1-20

DEFENDANTS

**ORDER**

BEFORE THE COURT is the Defendants' Motion to Compel Arbitration. The Court, after reviewing the file, arguments of counsel and all relevant law, finds the motion is not well taken, and is therefore **DENIED** for the following reasons to wit:

**Background**

Alberta Morrison ("Morrison") became a resident of Picayune Convalescent Center in 2001. Upon entering the nursing home with her daughter, Ann Hennington ("Hennington"), they were handed a multi-page document entitled "Admission Agreement". The document was comprised of six sections, the last of which, section "F", was an arbitration provision that stated in part that should any claim or dispute arise in the future, the parties agreed to submit such claim to arbitration as opposed to pursuing a traditional remedy in a judicial forum. Now, a tort claim has arisen, and the Defendants in this case are seeking to compel the Plaintiff to arbitrate that

claim.

## Law and Analysis

### Arbitration Agreements Generally.

Arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 2, are favored in federal law and both federal and state courts are required to rigorously enforce them. *East Ford, Inc. v. Taylor*, 826 So.2d 709 (Miss. 2002) ¶ 11 (citing *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987)). The Court is required to give a “healthy regard,” to both federal policy and recent Mississippi precedent favoring arbitration. *East Ford*, 826 So.2d at 713, ¶ 11. “In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., 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 agreement.” *East Ford, Inc. v. Taylor*, 826 So.2d 709 (Miss. 2002). 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* at 713. “The courts have recognized two types of unconscionability, procedural and substantive.” *Id.* at 714 (citing *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F.Supp.2d 655 (S.D. Miss. 2000) (quoting *York v. Georgia-Pac. Corp.*, 585 F.Supp. 1265, 1278 (N.D. Miss. 1984)). “Procedural unconscionability may be proved by showing ‘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.* “Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive.” *Id.* Also, “Substantively unconscionable clauses have been held to include waiver of choice of forum, and waiver of certain remedies.” *Id.* In sum, “this Court defined an unconscionable contract as one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other. . .” *Terre Haute Cooperage v. Branscome*, 35 So.2d 537 (Miss. 1948).

#### **First Prong.**

This court finds that the arbitration agreement itself is valid. While there is some argument as to the binding effect that Hennington’s signature has on Morrison, the court finds that there is a valid power of attorney, and even if, *arguendo*, it is not valid, Hennington as Morrison’s adult child certainly has the authority as an agent, or a surrogate under Miss Code Ann. § 41-41-211 to make decisions related to her mother’s healthcare, which as a practical matter may include signing contracts that have legal effect on a non-signing party such as Morrison in this case. As will be discussed later, the agreement appears to be one-sided, but it is nonetheless valid, and this type of action, one of medical negligence, is certainly one within the scope of the agreement. In fact, more than likely, this type of action was exactly what the drafter of the provision contemplated when he or she inserted it into the contract. Therefore, the first prong of analysis is satisfied.

#### **Second Prong.**

As mentioned above, the defense of unconscionability may be used to invalidate an otherwise valid arbitration agreement. This Court finds the arbitration in this agreement to be

procedurally, as well as substantively unconscionable.

Procedural unconscionability.

First, the arbitration provision of the contract is a subsection of a multi-page contract, and is found on the second to last page at the bottom one third of that page. It is merely part of a preprinted form contract, and does not appear to stand out from any other provision of the contract. There is a reference to the arbitration agreement specifically in a statement at the very bottom of the page that states that the undersigned has read the agreement including the arbitration provision and agrees to the provisions of the contract. Apparently, this self serving language is meant to be another notice drawing attention to the arbitration clause. This court fails to appreciate any significant value to the Plaintiff of such a "notice". Furthermore, it is doubtful that even if the Plaintiff were aware of the arbitration provision, she would have had the knowledge to make an informed decision related to the waiving of her rights. Additionally, the arbitration agreement is part of a larger contract of adhesion which is of course not automatically void, but is most certainly a factor to be considered in the context of procedural unconscionability. In other words, the plaintiffs were presented with the contract on a "take it or leave it" basis, and thus had no real power to negotiate the terms of the contract indicating a lack of voluntariness on the part of the Plaintiff.

Substantive unconscionability.

Here, the language of the arbitration provision states in part that the Arbitration will be heard and decided by an arbitrator *selected by the facility*, and that the decision of the arbitrator will be final. Following that language, the provision states that all parties are agreeing to arbitration anticipating the benefits of reduced cost in pursuing a claim should one arise, and

finally that all parties are hereby waiving rights to a jury trial. It should be noted as well that while not part of the section entitled "arbitration agreement", directly above said section, #8 of section "E." states that the parties hereto waive punitive damages, and promise not to seek punitive damages under any circumstance. Interestingly enough, in #5 of section A. "Financial Agreement", the Defendant reserves the right to *litigate* in the event the account of the Plaintiff becomes delinquent. While the court is aware that arbitration is the subject of this motion, one of the many factors to consider when making a determination of unconscionability is waiver of a remedy. The defendant by not placing the waiver under the heading "Arbitration Agreement" has not precluded the court from looking at the contract as a whole and considering such a waiver when making a determination of unconscionability. If that were the case, a drafter could simply avoid the problem of substantive unconscionability altogether by never including the waivers under the heading "Arbitration Agreement", but instead placing them like the Defendants did here outside the agreement. In any event, understanding that most cases brought by plaintiffs are at little or no "out of pocket" expense to the plaintiff himself, this court sees no benefit to this Plaintiff in the way of a reduced cost of pursuing a claim. Furthermore, it seems unfair that the Plaintiff, per the contract, is precluded from seeking a "judicial" remedy to the very claim that is most likely to arise because of the acts or omissions of the Defendants, and yet the Defendants reserve their rights to "litigate" a claim that is most likely to arise because of the acts or omissions of the Plaintiff.

Keeping in mind the Supreme Court's definition of unconscionability mentioned above, this Court does not believe that if Morrison and Hennington were told that they were waiving their rights to punitive damages, that their actual damages would be limited to the lesser of

\$50,000.00 or the daily rate of the nursing home times the number of days that Morrison spent there, that they would not be allowed to have a jury trial, but that instead, the Defendants would pick the place and person where their claim would be resolved, that the decision of that person would be unappealable, and finally that the Defendants were reserving their rights to sue the Plaintiffs should they become delinquent in their accounts, that the Plaintiffs would have been willing to enter into a contract with the Defendants.

#### Conclusion

The Court finds that there existed an otherwise valid arbitration agreement between the Plaintiff and the Defendants. However, because of the parties involved, the oppressive terms, and the facts surrounding the signing of the larger contract, the Court finds that the provision related to arbitration is procedurally as well as substantively unconscionable, and as such is unenforceable.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Defendants' Motion to Compel Arbitration is hereby **DENIED**.

SO ORDERED AND ADJUDGED this, the 30 day of September 2003.

  
CIRCUIT JUDGE

Serial: 110751

IN THE SUPREME COURT OF MISSISSIPPI

No. 2003-M-02663

*PICAYUNE CONVALESCENT CENTER, BOND,  
JOHNSON AND BOND, INC. AND KERI H. LADNER*

*Petitioners*

v.

*JOHN MORRISON*

*Respondent*

**FILED**

JAN 29 2004

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

ORDER

This matter is before the panel of Smith, P.J., Cobb and Graves, JJ., on the Petition for Stay of Proceedings and Interlocutory Appeal filed by the petitioners. Also before the panel is the Response filed by John Morrison. After due consideration, the panel finds that the petition should be denied.

IT IS THEREFORE ORDERED that the Petition for Stay of Proceedings and Interlocutory Appeal is denied.

SO ORDERED, this the 22<sup>nd</sup> day of January, 2004.

*Kay B. Cobb*  
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KAY B. COBB, JUSTICE