IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SHERRI CORUM, AS PERSONAL REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF MARY JO HEBERT, DECEASED,

Plaintiff/Appellee,

vs.

Ct. App. No. 28, 314
Dist. Ct. No. D-101-CV-2007-01307

ROSWELL SENIOR LIVING, LLC, D/B/A ROSWELL SENIOR LIVING COMMUNITY A/K/A LA VILLA, SUNWEST MANAGEMENT, INC., et. al.,

Defendants/Appellants.

On Appeal from the First Judicial District Court
Santa Fe County, New Mexico
The Honorable James Hall, Presiding

APPELLEE'S ANSWER BRIEF

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TABLE OF CONTENTS

Statement of Compliance With Rule 12-213(F) NMRA

This brief complies with Rule 12-213 (F) NMRA, with 9484 words in the entirety of the brief. This word count was performed by Microsoft Office Word 2003.

TABLE OF AUTHORITIES

New Mexico Cases

Cases from Other Jurisdictions

Statutes

I. INTRODUCTION

Plaintiff-Appellee Sherry Corum hereby respectfully submits her answer brief seeking affirmance of the district court's denial of Defendants' motion to compel arbitration. The district court properly found that Mr. Hebert lacked the authority to agree to arbitration on his wife's behalf when he admitted her to Defendants' long-term care facility, and its ruling should be upheld.

II. STATEMENT OF ISSUES

Summary of Additional Facts Relevant To Issues on Appeal

The record in this case is bare because of the procedural posture in which the case was decided. Mary Jo Hebert was admitted to Defendants' assisted living facility on March 15, 2006, by Ed Hebert. **[RP 181]** The parties agree that Ms. Hebert suffered from impaired cognitive skills for daily decision-making and memory problems, and lacked the capacity to make medical decisions for herself. **[RP 7, BIC 2]**

As part of the process to admit Mary Jo Hebert to La Villa assisted living facility, Ed Hebert completed an "Assisted Living Admission Agreement" ostensibly on behalf of Mary Jo Hebert. **[RP 183]** This document sets forth all manner of things including the services provided, the rates charged, payment arrangements, and transfer and discharge rules. **[RP 183-195]** Then, on pages 11 and 12 of this 13-page (22 pages with addenda) document, Defendants set forth

their "Dispute Resolution" procedure which includes a waiver of a jury trial and mandatory arbitration of claims. **[RP 193-194]**

The arbitration clause does not contain a dedicated signature block. **[RP 193-194]** The heading is underlined, but so are headings in the remainder of the document. The type, although in bold, is identical to the type contained in the remainder of the document. **[RP 193-194]** It is one of sixty-seven numbered sections, and it is separated from the signature page by at least one other page of text. **[RP 193-195]** Section 8.6 of the Admission Agreement contains a severability clause, which provides that "[i]f any term or provision of this Agreement proves to be invalid, illegal or unenforceable, the remainder of this Agreement shall remain in full force and effect." **[RP 192]**

In December 2003, Mrs. Hebert executed a two-part power of attorney. **[RP 216-219]** Titled "Durable Financial and Medical Power of Attorney," Article I of the document set forth "Financial Powers Granted," and Article II set forth "Medical Powers Granted." **[RP 216, 218]** Both sections became effective immediately upon signing, and the person appointed as attorney-in-fact under this document was Sherri Lynn Corum, Plaintiff in this matter. **[RP 216-219]**

Article I includes a broad delegation of authority, as well as a total of seven enumerated clauses, which authorize the attorney-in-fact to engage in a variety of financial transactions. **[RP 216-217]** Additionally, section 6 specifically gave Mrs.

Hebert's attorney-in-fact the authority to "institute or defend in my name any suit or proceeding in law or equity in any Court, and to abandon or settle the same, and to settle any claim, debt or demand without suit." **[RP 217]**

Article II similarly conferred broad authority upon Ms. Corum to act as Ms. Hebert's attorney-in-fact in health-care matters. **[RP 218]** It specifically enumerated certain health-care decision-making powers granted to Ms. Corum on Ms. Hebert's behalf. **[RP 218-219]** It was never revoked, and Defendants concede that it was in effect in March, 2006, when Mrs. Hebert was admitted to Defendants' facility. **[BIC 3]**

Defendants also concede that Mrs. Hebert had not executed any such document giving any such authority to her husband, Ed Hebert. Further, this was clearly known to the facility representative who executed the agreement on March 15, 2006, as evidenced by the "error" notation where the facility representative had placed a check for Mr. Hebert being Mrs. Hebert's "General POA." **[RP 200]**

Nevertheless, Mr. Hebert admitted Mrs. Hebert to Defendants' facility, signing the admission papers—which included an arbitration clause—as the "Responsible Party." **[RP 195]** The Admission Agreement describes "responsible party" as: "Responsible party...means an agent under a valid power of attorney or designated in writing by the Resident; a legally appointed guardian; or an executor,

executrix, administrator or administratrix of the estate of the deceased Resident." **[RP 187]** Mr. Hebert was none of these.

Defendants also recognize that Ms. Corum is the only person who had been authorized to make the admission decisions on Mrs. Hebert's behalf. *See* Affidavit of Diedra Duvall **[RP 182]** ("I attempted to contact Sherri Corum"; ¶ 6 and ¶ 7 "I inquired as to any other phone numbers for Sherri Corum..."). The record sets forth no facts under which Mr. Hebert purported or was found to have any authority to act as Mrs. Hebert's agent. Defendants had no evidentiary basis for believing that Mr. Hebert was authorized to enter into a contract on his wife's behalf.

III. ARGUMENT

A. The District Court's Interpretation of the New Mexico Uniform Health-Care Decisions Act is Correct.

Statement of Preservation

Plaintiff preserved this argument in her Response to Defendants' Motion to Compel Arbitration. **[RP 208-209]**

Standard of Review

The Court reviews questions of statutory interpretation de novo. *Cobb v. State Canvassing Board,* 2006-NMSC-034, ¶ 33, 140 N.M. 77, 140 P.3d 498 (quoting *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995)). In so doing, the Court's central concern is to determine and give effect to the intent of

the legislature. *Id.* (quoting *State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P. 2d 1111, 1114 (1988)).

When construing a statute, the Court must construe the entire statute as a whole, considering provisions in relation to one another. *Maestas v. Zager,* 2007-NMSC-003, ¶ 12, 141 N.M. 54, 152 P. 3d 141. Statutes must be construed so that all parts are included, and no part is surplusage or superfluous. *Cobb,* 2006-NMSC-034 at ¶ 34.

However, the Court cannot "read into a statute or ordinance language which is not there, particularly if it makes sense as written." *Id.* Nor can the Court depart from the plain wording of a statute, unless necessary to correct an unintentional mistake or absurdity, address an irreconcilable conflict among statutory provisions, or to resolve an ambiguity. *Id.*

A statute is ambiguous when "it can be understood by reasonably well-informed persons in two or more different senses." *State v. Elmquist,* 114 N.M. 551, 552, 844 P.2d 131, 132 (Ct. App. 1992).

If the statute is ambiguous, then the Court may consider the legislative intent of the statute. *In Re Gabriel M.*, 2002-NMCA-047, ¶¶ 12-13, 132 N.M. 124, 45 P. 3d 64. In determining legislative intent, the courts may consider the statute's history and background, its language, the object the legislature sought to

accomplish and the wrong the statute is designed to remedy. *State v. Hernandez*, 2001-NMCA-057, ¶ 18, 130 N.M. 698, 30 P. 3d 387.

"It is the general rule of law that one who is not a party to a contract cannot maintain a suit upon it." *Staley v. New*, 56 N.M. 756, 758, 250 P.2d 893 (1952). For a person's actions to bind another, he or she must have some clearly granted authority from the principal: "An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons..." UJI 13-401 NMRA, *cited in Tercero v. Roman Catholic Diocese,* 2002-NMSC-018, ¶ 12, 132 N.M. 312, 48 P.3d 50. The existence of an agency relationship depends upon the principal's agreement, and whether an agency relationship exists is a question of fact, determined by the circumstances of each case. *Tercero,* 2002-NMSC-018 at ¶12. It is undisputed that Ms. Corum, not Mr. Hebert, held the power of attorney for Mrs. Hebert. Defendants' only claim is that the NMUHCDA granted Mr. Hebert the authority to agree to the arbitration clause contained in his wife's admission contract.

1. The Plain Language of the Act is Clear and Unambiguous, and Does Not Confer Authority to a Surrogate to Waive the Right to a Jury Trial and Consent to Arbitration.

The district court ruled that the New Mexico Uniform Health-Care Decisions Act ("NMUHCDA" or "the Act")'s "decision by surrogate" clause did not confer the authority to consent to arbitrate. **[RP 248]**

Read as a whole, the Act clearly support the district court's interpretation that it only provides a surrogate decision-maker with the ability to make decisions concerning the patient's health care and not make the legal decision to waive her constitutional right to a jury trial in pursuit of relief for negligence. *See* NMSA 1978, §§24-7A-1 to -18 (1995).

While the Act specifies that the surrogate may make a decision about the selection and discharge of the patient's health-care providers and institutions, that provision is modified by the preceding language: "'health-care decision' means a decision made by an individual or the individual's agent, guardian or surrogate, **regarding the individual's health care,** including..." NMSA 1978, § 24-7A-1(G) (1995) (emphasis added).

"The rule of ejusdem generis states that where general words in a statute follow a designation or enumeration of particular subjects, objects, things, or classes of the same general character, sort, or kind, to the exclusion of all others, such general words are not to be construed in their widest extent, but are to be held as applying only to those things of the same general kind or class as those specifically mentioned." *In Re Gabriel M.,* 2002-NMCA-047 at ¶ 16. Contrary to this principle, Defendants argue that the enumeration of specific acts in section 24-7A-1(G) means that the legislature did not intend to limit the surrogate's authority. **[BIC 7]** Here, all of the other items specifically expressed in the listing are

explicitly decisions related to particular aspects of health care: approval of diagnostic tests and surgical procedures; approval or disapproval of orders not to resuscitate; directions related to life-sustaining treatment; directions to provide, withhold or withdraw artificial nutrition and hydration. Section 24-7A-1(G). The selection and discharge of health-care providers and institutions should similarly be narrowly construed to include only the selection of a health-care provider *as it relates to the individual's health care.* This is what the express language of the Act provides, and read as a whole with the rest of the Act and the rest of this clause, this is the correct interpretation of this portion of the Act.

Defendants argue that the power to select a health care institution must necessarily include the power to enter into contracts to admit the individual to the institution. **[BIC 8-9]** However, this is not true. Further, Defendants' contention that Mr. Hebert signed the Admission Agreement "pursuant to" the NMUHCDA or any other authority is without legal or evidentiary basis. **[BIC 5]**

Authority for one type of decision does not and cannot necessarily translate into authority for another type of decision. In a real estate transaction, for example, a broker may have the client's authority and permission to act as her agent to convey and receive offers; however, such authority would not extend to signing the purchase agreement or agreeing to material changes in the purchase agreement. While in such an example the limits of authority are set forth

contractually, and here the only potential authority is conferred statutorily, the Court should similarly be loath to read into the grant of statutory authority any powers not explicitly granted. Similarly, the authority to choose a facility and admit an incapacitated patient to that facility must be construed only within the scope of the Act's purpose: to obtain and provide health care, which the Act defines as "any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition." NMSA 1978, § 24-7A-1(F) (1995)

Defendants' contention that the statutory authority to make "life and death decisions" for an individual must encompass the authority to sign a contract containing an arbitration clause is absurd. **[BIC 9]** The decision to prolong or terminate life-sustaining measures has absolutely nothing to do with entering into legal contracts, and does not subsume all other authority the incapacitated person may have had. Taking Defendants' argument to its logical extreme suggests that because one has the authority to take a loved one off of life support, he or she necessarily has the authority to sell the loved one's house or car, or sign over retirement or social security benefits. While the greater powers set forth in the Act—termination or prolongation of life-support measures—do indeed include the lesser—authority to agree to palliative medication or authority to place the individual on hospice care—the types of powers Defendants seek to subsume in

the Act's enunciated powers are wholly unrelated. To argue otherwise misses the point of the Act entirely.

Reading Section 24-7A-1(F) together with Section 24-7A-1(G) shows that a surrogate may only make decisions for an incapacitated patient regarding the individual's care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition. In some situations, but certainly not all, admission to or discharge from a facility may relate to the individual's care or treatment which affects the individual's physical or mental condition; however, acquiescing to an arbitration agreement purportedly on behalf of that resident clearly does not fit within this definition.

This interpretation is also supported by other language in the Act: "Before implementing a health-care decision made for a patient, a supervising health-care provider shall promptly communicate to the patient the decision made and the identity of the person making the decision." NMSA 1978, § 24-7A-7(A) (1995) (emphasis added). This language clearly shows that it is highly unlikely that the legislature meant that a "health-care decision" would include consent to arbitration. This section clearly contemplates a physician or other health-care provider informing the patient about a surgical procedure, change in feeding tube or hydration, or disconnection of an assistive apparatus.

The very basis of the Act is health care. The Act concerns itself only with decisions related to an individual's physical or mental condition. Thus, it is clear that the Act implicates only decisions related to health care and not to a waiver of legal rights. The Act could, and did, confer authority on Mr. Hebert, in Ms. Corum's absence, to make decisions related to Mrs. Hebert's care and treatment which affected her physical and mental condition. However, his authority extended only to those decisions which were related to her care and treatment, and not to any legal decisions.

Defendants also posit that as Mrs. Hebert's surrogate under the Act, Mr. Hebert had the authority to agree that Mrs. Hebert would pay for her care, not smoke tobacco, or keep a pet in the facility. **[BIC 10]** While these particular addenda are not currently in dispute, they include such disparate living-arrangement related matters as having pets, smoking tobacco, alcohol consumption, and possession of firearms. **[RP 196-204]** Mr. Hebert may have signed these addenda, but Plaintiff vehemently disputes that he had any authority to bind Mrs. Hebert to them.

2. Even if the Court Concludes That the Language of the NMUHCDA is Ambiguous, the History of the NMUHCDA and Persuasive Analysis from Other Courts Demonstrates that Surrogacy Authority Does Not Encompass the Ability to Execute Arbitration Agreements.

In construing the NMUHCDA, the Court may properly consider the

circumstances that prompted its enactment or adoption. NMSA 1978, § 12-2A-20(C)(1) (1997); *State v. Hernandez*, 2001-NMCA-057, ¶ 18, 130 N.M. 698, 30 P.3d 387. Here, as the statute could be construed to be ambiguous, and it is an issue of first impression in New Mexico, it is helpful to review the circumstances that prompted the enactment and adoption of the Act. Further, the Court may also consider "a judicial construction of the same or similar statute or rule of this or another state." NMSA 1978, § 12-2A-20 (B)(2) (1997). The Uniform Health-Care Decisions Act ("UH-CDA") has been adopted in some form by Alabama, Alaska, California, Delaware, Hawaii, Maine, Mississippi, and Wyoming, as well as New Mexico.[1] Additionally, although the Uniform Laws Annotated does not list Tennessee as a state which has adopted the UH-CDA, the Tennessee Health Care Decisions Act mirrors much of the language of the Uniform Act.[2]

a. The History of the NMUHCDA Demonstrates that the Law Was Intended to Apply to Health-Care Decisions Only.

In 1990, the United States Supreme Court decided *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261 (1990). *Cruzan* involved protracted litigation over the termination of artificial nutrition and hydration for a patient in a persistent vegetative state. There, the parents and co-guardians of Nancy Cruzan

[1] *See* Uniform Health-Care Decisions Act (U.L.A.); Ala. Code 1975 §§22-8A-1 to 22-8A-13 ("Natural Death Act"); AS 13.52.010 to 13.52.395; Cal. Probate Code §§4670-4743; 16 Del.C. §§2501-2517; H.R.S. §§327E-1 to 327 E-16; 18-A M.R.S.A. §§5-801 to 5-817; Miss. Code 1972 §§41-41-201 to 41-41-229; Wyo. Stat. Ann. §§35-22-401 to 35-22-416.

[2] T.C.A. §§68-11-1801 to 68-11-1815.

sought to terminate that type of medical treatment, and hospital officials refused to do so absent a court order. *Id.* at 265-67.

The Uniform Health-Care Decisions Act sought, in the wake of the *Cruzan* decision, to accomplish several ends with the uniform legislation: to acknowledge the right of competent individuals to decide all aspects of his or her own healthcare; to be comprehensive; to simplify and facilitate the making of advance health-care directives; to ensure that decisions will be guided by the individual's own desires; to ensure compliance by health-care providers and institutions; and to provide a procedure for the resolution of disputes. *See* Uniform Health-Care Decisions Act (U.L.A) Prefatory Note.

The Uniform Act's purpose was to set forth clear parameters for those making important decisions regarding an individual's health care when she was unable to do so for herself. It plainly sought protection for those individuals making health-care decisions—in the absence of an advance health-care directive—from litigation or non-compliance by others who disagreed with their decisions. Its definition of "health care" encompassed more than end of life decisions, because even individuals permanently or periodically lacking capacity will often need other health-related decisions made on their behalf—for example, consent for diagnostic and surgical procedures or approval of medication regimens.

New Mexico adopted the UH-CDA in 1995. NMSA 1978, §§ 24-7A-1 to -

18 (1995). In New Mexico, it was a successor to the Right to Die Act, which concerned itself solely with end-of-life decisions. *Protection & Advocacy Sys. v. Presbyterian,* 1999-NMCA-122, 128 NM 73, 989 P.2d 890.

Seeking to avoid court intervention in family decision-making for those who were unable to make health-care decisions on their own, the State adopted the Act to name a hierarchy of people who would be able to make those decisions. The Act focused primarily on the procedures rather than the content of these decisions. *Id., ¶ 16.*

In *Protection and Advocacy*, the Court heard testimony from Professor Robert Schwartz from the University of New Mexico School of Law that the Act reflects a belief that "'the best way for the law to go was to decide *who* would make the decision, not what decision they ought to make.'" *Id.* (emphasis in original). In considering this, the Court stated that "[e]ven if the medical facts are clear, different patients can make markedly different, but still reasonable, choices, depending on their religious beliefs, their assessments of the joys of life, their tolerance for pain, their regard for others, and a multitude of other factors.'" *Id.*

Clearly, the Court construed the Act to authorize durable health care powers of attorney or surrogate decision-makers to make decisions related to medical facts and the provision or withholding of specific health-care services. This is consistent with both the nature of the Act and its plain language.

Further, while the *Protection and Advocacy* court noted that the Act was broader than the predecessor Right to Die Act, it confined its applicability to "all **health-care decisions**, broadly defined." *Id.* at ¶ 15, emphasis added. The history of the Act in New Mexico shows that the Legislature intended it only to fill in the lacunae in the common law and statutory scheme for making important health-care decisions on behalf of an incapacitated patient. In that sense, the definition of health-care decisions was broadened to include decisions related to medical issues other than those occurring at the end of life, but does not and cannot extend to granting authority to contract away important legal rights of the incapacitated person.

As analyzed in *Protection and Advocacy*, the types of heath-care decisions contemplated by the Act include the placement and removal of feeding or hydration tubes; placement and removal of breathing apparatuses; and approval or disapproval of surgical or other medical procedures. The Act sought to remedy the ill of protracted litigation by family members and interested parties over health-care decisions being made for individuals who lacked the ability to make or implement the decisions themselves. While the Act clearly expanded upon the Right to Die Act to include more than end-of-life decisions, its scope plainly only includes other health-related decisions. It is ludicrous, given the clear history of the Act, to shoe-horn into this scope the ability to acquiesce to arbitration to limit

the health-care provider's negligence.

b. The Analysis of Pagarigan is Sound, and Subsequent California Case Law Demonstrates the Continued Validity of the Ruling.

The rules of statutory interpretation support looking to the case law of other states if that of our own state is silent on the issue. While it is certainly not binding precedent, it can inform the court's analysis of our statute. As noted above, the Court may consider "a judicial construction of the same or similar statute or rule of this or another state." NMSA 1978, § 12-2A-20 (B)(2) (1997).

In ruling, the district court noted that it believed New Mexico courts would follow the California courts' decision, as announced in *Pagarigan v. Libby Care Center,* 99 Cal. App. 4th 298 (2002). **[RP 248]** Although the statutory language relied upon in *Pagarigan* differs slightly from the language at issue here, the rationale of *Pagarigan* is compelling and correct.

Pagarigan involved an elderly, comatose woman admitted to a nursing home by her adult daughters. Mrs. Pagarigan had no durable power of attorney, and the Court determined that her daughters had no authority to enter into an arbitration contract on behalf of their mother. *Id.* at 300-01.

The Court first found that daughters' mere representation that they were their mother's agent was insufficient to bind their mother. *Id.* at 301. The Court then found that the daughters had no authority to bind their mother to an arbitration

agreement by merely being her next of kin. Looking at section 1418.8 of the California Health and Safety Code, the Court found that this provision regarding informed consent for treatment in the absence of a person with legal authority did not apply to the arbitration agreement at issue: "Defendants do not explain how the next of kin's authority to make medical treatment decisions for the patient at the request of the treating physician translates into authority to sign an arbitration agreement on the patients' behalf at the request of the nursing home." *Id.* at 302.

Next analyzing other statutory provisions related to nursing home admissions, the Court rejected Defendants' argument. "The statutes and regulations cited by defendants demonstrate that when the Legislature and the Department of Health Services wanted to confer authority on next of kin to take some action on behalf of a nursing home resident they knew how to say so." *Id.* at 303.

Although *Pagarigan* dealt with a combination of state statutes different than the Uniform Health-Care Decisions Act, it nonetheless stands for the proposition that a person who is not expressly granted authority to sign an arbitration agreement cannot bind another to the terms of that agreement. The existence of a simple relationship such as "next of kin" as described in the California laws, or "surrogate" as defined in the NMUHCDA, is insufficient to confer such authority.

Contrary to Defendants' claim **[BIC 17],** *Hogan v. Country Villa*, 148 Cal. App. 4th 259 (2007) does not mandate a different result than the one reached by the trial court. In *Hogan,* the Court was relying upon a written power of attorney granting the authority to the person signing the admission agreement. *Hogan*, 148 Cal. App. 4th at 262 (2007); *see also Garrison v. Superior Court,* 132 Cal. App. 4th 253 (2005). It is undisputed that Mrs. Hebert delegated exactly such powers, in writing, to her daughter, but not to her husband—the powers both to obtain medical care and treatment for her, and to litigate claims on her behalf. **[RP 216-219]** In the absence of any such designations to Mr. Hebert, and indeed, in the presence of the explicit designations to Ms. Corum, *Hogan* could only support the Defendants' proposition had Ms. Corum signed the arbitration agreement.

Nor was *Pagarigan* an aberration in California law. A subsequent California case, *Flores v. Evergreen,* 148 Cal. App. 4th 581 (2007), supports exactly the result reached here, in a nearly-identical fact pattern, where the husband signed a nursing home admission agreement and arbitration clause on behalf of his incapacitated wife. The *Flores* Court explicitly examined the facts in light of *Pagarigan, Hogan* and *Garrison.*

Mr. Flores signed the admission agreement, which contained two arbitration agreements, as "Legal Rep/Responsible Party/Agent," while admitting his wife to a nursing home. Mrs. Flores was suffering from dementia, and at that time had

executed no power of attorney or other document authorizing her husband to act as her agent. The court found that, as here, there was no written document conferring agency authority to Mr. Flores. *Flores*, 148 Cal. App. 4th at 587. Absent any written agency authority, the Court rejected the Defendants' arguments that Mr. Flores had apparent authority to bind his wife, or that a mere spousal relationship was sufficient to confer such authority. *Id.* at 587-589.

Finally, the Court then looked at "the issue of whether, independent of agency principles, there is a *statutory* basis for the authority to agree to arbitration based solely on kinship." *Id.* at 590 (emphasis in original). Examining the comprehensive California statutory scheme, the Court determined that although "next of kin" were those individuals who may make medical decisions on behalf of an incapacitated patient, those medical decisions did not include the ability to arbitrate future disputes. Although the statutory language—next of kin vs. surrogate—may differ, the rationale behind *Flores* applies equally here.

The Defendants argue that the NMUHCDA language which authorizes a surrogate to select and discharge health-care providers and institutions necessarily encompasses the ability to enter into the arbitration agreements present in the admission contract. **[BIC 8, 9]** However, *Flores* specifically declaimed this argument, and recognized that while there may be instances when no formal legal representative is available for a nursing home admittee suffering from dementia,

the resident's next of kin is authorized "to sign a nursing home contract for the limited purpose of *admitting* a mentally incompetent relative to the facility, even if the family member did not technically qualify as an agent, legal representative or responsible party." *Id.* at 593. The court could not conclude that the Legislature intended "to include the *arbitration* decision as among the matters that may be decided by next of kin when signing a nursing home admission contract." *Id.*, emphasis in original.

In applying *Pagarigan's* logic to the matter before them, the Court specifically stated that, "[u]nlike admission decisions and medical care decisions, the decision whether to agree to an arbitration provision in a nursing home contract **is not a necessary decision that must be made to preserve a person's well-being.** Rather, an arbitration agreement pertains to the patient's legal rights, and results in a waiver of the right to a jury trial." *Id.* at 594. (emphasis added). This analysis is sound, well-reasoned, and comports with the expressed intention of the UH-CDA as adopted in New Mexico, as well as the lower court's explicit ruling in this matter.

c. Tennessee Law Supports the District Court's Ruling.

As noted above, the law of other states may be instructive in addressing the scope of the Act in New Mexico. In 2003, the Tennessee Court of Appeals decided *Ratieri v. NHC*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413 at

*9 (Tenn. Ct. App.), ruling that a spouse who signed a nursing home admission agreement which contained an arbitration clause did not have "the right to waive his wife's very valuable constitutional right to a jury trial to adjudicate her rights in this matter." In 2004, the State adopted its version of the Health Care Decisions Act. TCA §§ 68-11-1801 to 68-11-1815 (2004). Since then, the Tennessee courts have declined to summarily enforce arbitration clauses against individuals who signed the admissions agreements with no written delegation of authority.

In *McKey v. National Healthcare Corp., et. al,* M2007-02341-COA-R3-CV, 2008 WL 3833714 (Tenn. Ct. App) (filed August 15, 2008), the Tennessee Court of Appeals determined that allowing a health care "surrogate" to sign an admission contract/arbitration agreement did not bind the principal, as the nursing home failed to show that it complied with the Act's statutory scheme.

In *McKey*, an elderly woman was admitted to the nursing home with undisputed cognitive impairment. However, no "designated physician" had yet determined that she lacked capacity, a prerequisite to the appointment of a surrogate under the Act. Because the nursing home had not strictly complied with the statutory scheme, the Court was unwilling to ratify the act purportedly taken pursuant to the Act. Noting that the Act "affects a person's fundamental right to personal autonomy," the Court affirmed the trial court's denial of the Defendants' motion to compel arbitration. *McKey* at p. 7.

The logic that the Tennessee court used in *McKey* applies in the instant case. In New Mexico, the Act requires that "a surrogate shall communicate his assumption of authority as promptly as practicable to the patient, to members of the patients' family specified in Subsection B of this section who can be readily contacted and to the supervising health-care provider." 1978 NMSA, § 24-7A-5(D) (1995). Defendants bear the burden of presenting evidence that this provision was followed, but have failed to present any evidence that Mr. Hebert complied with that provision of the Act.

Further, the Act requires that "[b]efore implementing a health-care decision made for a patient, a supervising health-care provider shall promptly communicate to the patient the decision made and the identity of the person making the decision." NMSA 1978, § 24-7A-7(A) (1995). Again, this shows that acquiescence to arbitration is clearly not a health-care decision, as it is difficult to determine how exactly one "implements" an arbitration provision in the context contemplated by the Act for implementing a health-care decision.

Further, the Defendants made no showing that the supervising health-care provider made such a prompt communication to Mrs. Hebert, and following the rationale expressed in *McKey,* the district court's decision should be upheld.

d. Mississippi's Case Law on its UH-CDA is in Flux.

Defendants cite to *Covenant Healthcare v. Brown,* 949 So.2d 732 (Miss.

2007), *Magnolia Healthcare, Inc. v. Barnes ex rel Grigsby,* 2008 WL 95814 (Miss. 2008), and *Covenant Health & Rehab of Picayune v. Lumpkin,* 2008 WL 306008 (Miss. Ct. App. 2008) in support of their proposition that the UH-CDA authorizes a decision-making surrogate to agree to binding arbitration for the facility resident. **[BIC 13-14]** However, these references fail to show the entire picture of the case law in Mississippi on this issue; indeed, one of these cases has already been reversed.

In 2006, the Mississippi Court of Appeals decided in *Covenant v. Lambert,* 984 So. 2d. 283, ¶14 (Miss. Ct. App. 2006), *cert. denied* 984 So.2d 277 (2008), that the nursing home resident's son, her health care surrogate, had the authority to make health care decisions on her behalf, pursuant to the Act. However, the Court found that the trial judge "erred in finding that health care decisions include signing arbitration agreements." *Id.*

The *Lambert* Court explained that the decision to arbitrate was neither authorized nor implied within the Act, whose definition of "health care decision" is the same as under our Act. *Id. Lambert* has never been overruled; indeed, the Mississippi Supreme Court denied certiorari on it only three months ago.

In 2007, the Mississippi Supreme Court decided *Covenant v. Brown,* 949 So. 2d 732 (Miss. Ct. App. 2007). In that case, also involving a nursing home admission agreement containing an arbitration clause, both the decedent and her

daughter had signed the admission agreement. While the Court stated that the resident's "adult daughter, Goss, was an appropriate member of the classes from which a surrogate could be drawn, and thus, Goss could contractually bind Brown in matters of health care[,]" the Court did not have to address the scope of Ms. Goss's agency, if any, and it did not do so. *Id.* at 737. Instead, the opinion focused on procedural unconscionability and substantive unconscionability. "Cases are not authority for propositions not considered." *Piedra, Inc. v. N.M. Transportation Commission*, 2008-NMCA-089, ¶ 32, 144 N.M. 382, 188 P.3d 106 (*cert. denied* Supreme Ct. no. 31,071). *Brown's* holding is simply inapposite here.

Similarly, the Mississippi Court of Appeals in *Lumpkin f*ailed to perform an analysis of the statutory scope of the health-care decision act, and instead relied on Brown's "implicit holding." *Lumpkin*, 2008 WL 306008 at ¶ 10.

On August 7, 2008, the Mississippi Supreme Court issued an opinion upon rehearing in *Magnolia v. Barnes ex. rel. Grigsby,* ---So. 2d ---, 2008 WL 3101737 (Miss.) and ruled that the nursing home admission contract arbitration agreement was unenforceable due to substantive terms in the contract. Further, although the original *Magnolia* opinion analyzed the Mississippi health-care decision act in light of *Brown* and determined that the surrogate had the authority to bind the resident to binding arbitration, (*Magnolia I,* ¶ 6), that discussion was notably absent from the opinion issued upon rehearing. Instead, upon rehearing, the Court

affirmed the district court's denial of the motion to compel arbitration, on the basis that there was no agreement to arbitrate, because the arbitral forum set forth in the arbitration clause would no longer arbitrate such disputes. *Magnolia II,* at ¶ 11.

However, Justice Dickinson, joined by Justices Waller and Lamar, concurred, and noted, as the Tennessee *McKey* Court did, that the Plaintiff had no authority to bind the decedent to an agreement to arbitrate, because Defendants had not complied with the formalities of the Health-Care Decisions Act. *Id.* at ¶ 15. Further, Justice Graves, concurring in the result only and joined by Justice Diaz, explicitly analyzed the Health-Care Decisions Act, and determined it did not apply. Justice Graves found that the Act was clear and unambiguous, and noted that

> "[t]he Legislature clearly and specifically defined 'health-care decision, being careful to list specific instances which qualify as 'health-care decision[s]' that a health-care surrogate is authorized to make on behalf of the patient. Nothing within the statute would indicate the Legislature's intent to allow a health-care surrogate to enter into contracts which are not strictly related to health-care decisions. The decision to submit to arbitration is not a health-care decision." *Id.* at ¶ 19.

Justice Graves recognized *Brown's* implicit holding, but also recognized *Lambert's* explicit holding to the contrary, and stated that "[i]t is clear from a plain-meaning interpretation of the statute that a health-care surrogate is not authorized by Mississippi Code Annotated Section 41-41-203(h) to waive or compromise a patient's property rights, such as the right to trial by jury or civil

remedies in negligence, and therefore, cannot bind a patient to arbitration." *Id.* at ¶ 21.

Mississippi Care Center v. Hinyub, 975 So.2d 211 (Miss. 2008), further limited the value of *Brown;* while the Mississippi Supreme Court recognized Brown's "implicit holding," it declined to apply it in a case where the arbitration clause was optional. The Court reasoned that if the arbitration agreement was not mandatory, it could not be considered a health-care decision, and therefore, the arbitration agreement signed by a health-care surrogate could not be enforced.

Thus, it is clear that the Mississippi case law is still very much unsettled on the present question before this Court, and its persuasive value is slight indeed. From the positions set forth in the *Barnes* concurrences, a majority of the Mississippi Supreme Court would at the very least mandate strict compliance with the surrogate law when one sought to enforce an arbitration agreement signed purportedly under its authority, and some would explicitly overturn *Brown's* "implicit holding" entirely. As its own courts are seeking to limit or overturn the idea implicitly set forth in *Brown* as dicta, Mississippi law interpreting the Act is inapposite.

e. Other Jurisdictions Which Have Adopted the UH-CDA Have Not Ruled on This Issue.

As noted above, in addition to Tennessee and Mississippi and California, several other states have adopted the UH-CDA in one form or another: Alabama,

Alaska, Delaware, Hawaii, Maine, and Wyoming. There is no relevant or instructive case law from any of these other states.

Alabama courts have not addressed surrogate decision-making authority under the Act, instead issuing several decisions addressing the capability of a purported agent to bind the principal to an arbitration agreement in a nursing home admission. *See, e.g., Noland Health Services v. Wright*, 971 So. 2d 681, (Ala. 2007) (Court declining to enforce an arbitration agreement signed by a friend with no power of attorney); *Briarcliff v. Turcotte,* 894 So.2d 661 (Ala. 2004), (Concluding that because individuals who signed the admission agreement as fiduciary parties were also the individuals bringing suit, they were contractually bound by what they had signed); *Owens v. Coosa Valley*, 890 So. 2nd 983 (Ala. 2004) (Plaintiff, the resident's daughter, brought suit after having signed the arbitration agreement as her mother's "guardian.").

3. The Court's Analysis Comports with the Federal Arbitration Act.

The district court found that although Mr. Hebert may have had authority to make health-care decisions for his wife, the decision to submit future claims of negligence, thereby waiving the right to a jury trial, was not a health-care decision. Defendants concede that the District Court's ruling is limited to an evaluation of the scope of the NMUHCDA. **[BIC 4]**

However, Defendants then argue that the court's ruling implies that an arbitration agreement is subject to special scrutiny under the NMUHCDA. **[BIC 18]** This clearly misinterprets the court's ruling. Rather than apply a special scrutiny to the agreement under the Act, the Court simply concluded that an agreement to arbitrate fell outside the scope of the authority granted by the NMUHCDA. The NMUHCDA clearly enumerates its scope of surrogate authority, and the Court correctly found that its narrow scope did not include agreements to arbitrate. This finding does not single out arbitration agreements for special or suspect status; rather, this ruling would also be consistent with finding, for example, that the scope of surrogate authority from the NMUHCDA did not include the authority to buy or sell property.

The Federal Arbitration Act provides that arbitration agreements are subject to the same defenses to any contracts. Arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. Section 2. Arbitration agreements are not held to any higher standard than any other contract. The New Mexico Supreme Court recently re-affirmed this proposition in *Fiser v. Dell,* 2008-NMSC-046, ¶ 23, --NM--, --P.3d --:

> "While the FAA prevents states from singling out arbitration provisions for suspect status, it does not give arbitration provisions special protection either. It only requires that they be placed upon the same footing as other contracts. Thus, generally applicable contract

> defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."
>
> *Fiser* 2008-NMSC-046 at ¶ 23 (internal citations and quotation marks omitted).

Similarly, the United States Supreme Court has noted:

> "[c]hallenges to the validity of arbitration agreements upon such grounds as exist at law or in equity for the revocation of any contract can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate...The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.,* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid."

Buckeye v. Cardegna, 546 U.S. 440, 444 (2006). (internal citations and quotation marks omitted).

Here, Plaintiff challenged only the validity of the agreement to arbitrate, and not the contract as a whole. As such, the Court properly considered *only* the validity of the agreement to arbitrate, and Mr. Hebert's lack of authority to agree to that particular clause given the narrow scope of the NMUHCDA.

The trial court below did not single out the arbitration provision for suspect status here. Rather, it determined, as was proper, that while Mr. Hebert may have had authority under the NMUHCDA to bind Mrs. Hebert to matters involving health care, the arbitration clause was specifically not a health care decision, and therefore Mr. Hebert lacked authority under the law to act as Mrs. Hebert's agent in that matter.

Defendants rely on *Rainbow Health Care Center v. Crutcher,* 2008 U.S. Dist. Lexis 6705 **[BIC 18].** That case, however, is inapposite, as it addresses not an individual's suit against a nursing home, but rather a nursing home's injunctive suit against the Oklahoma State Department of Health regarding a provision in Oklahoma's Nursing Home Care Act, Okla. Stat. tit. 63, § 1-1900.1 *et. seq.* There, the state law sought to protect nursing home residents from waiving their right to a jury trial prior to any incidents of neglect or abuse. Analyzing the Act in conjunction with federal legislation and the Federal Arbitration Act, the Court concluded that the federal statute pre-empted the state statute, and the state statute was therefore unenforceable.

Clearly, the situation here is vastly different. Here, no state legislation pre-empts arbitration contracts in nursing home admissions. Instead, the Court, analyzing the arbitration provision of the contract as an independent clause, found that the contract defense of lack of authority was present. The Defendants themselves insinuated the NMUHCDA into this dispute by proposing that the NMUHCDA conferred authority to Mr. Hebert to enter the contract. **(RP 176)** The parties dispute the scope of the Act's surrogate authority; Defendants have not previously argued that the Act discriminates against arbitration agreements. Further, as the Admission Agreement itself posits that unenforceable clauses may

be stricken and the contract may continue as otherwise set forth **[RP 192],** the failure of this clause does not affect the remaining issues set forth in the contract.

The Court did not put the arbitration clause on separate footing from the other clauses. The material of the clauses, however, were vastly different, and authority to agree to one type of clause—a health care clause—did not extend to authority to agree to another—a legal clause. This analysis was proper and permissible under the FAA.

B. Appellant's Requested Remedy is Improper.

Statement of Preservation

Plaintiff preserved these arguments in her Response to Defendants' Motion to Compel Arbitration. **[RP 209-215]**

Standard of Review

The Court reviews denials of motions to compel arbitration de novo. *Piano v. Premier Distributing*, 2005-NMCA-018, ¶ 4, 137 N.M. 57, 107 P.3d 11. Whether or not the parties have agreed to arbitrate is a question of law. *Id.* The Court reviews the applicability and construction of a contractual provision requiring arbitration de novo. *Id.*

The Court may affirm the district court's ruling on any basis. Even if the Court determines that the lower court's ruling on the NMUHCDA was incorrect, the Court may affirm on any of the other bases Plaintiff initially argued to the trial

court. *Meiboom v. Watson*, 2000-NMSC-004, 128 N.M. 536, 994 P.2d 1154 Defendants concede that the Plaintiff previously argued, but the Court did not consider, that the agreement did not bind the wrongful death beneficiaries, and that the agreement was unconscionable. **[RP 248, BIC 2]**

However, Defendants here request that the Court reverse the district court and remand with directions to order arbitration. **[BIC 19]** This is an improper remedy. Instead, should the Court determine that the district court's ruling on the NMUHCDA was incorrect, and that it cannot rule summarily on the issues discussed below, the proper remedy would be remand for consideration of the other issues Plaintiff raised.

1. An Arbitration Agreement Executed Prior to Accrual of the Claim Cannot Apply to Wrongful Death Claims.

Plaintiff brings suit in her capacity as the statutory personal representative under the Wrongful Death Act on behalf of Ms. Hebert's statutory Wrongful Death beneficiaries. **[RP 2]** It is well-established that "[t]he cause of action under our Wrongful Death Act is in the 'personal representative.'" *Stang v. Hertz Corp.*, 81 N.M. 348, 352, 467 P. 2d 14, 18 (1970). "A 'personal representative' has no cause of action until the injured person dies." *Id.*

New Mexico courts have consistently held that our Wrongful Death Act cause of action belongs to the beneficiaries, and is initiated by the personal representative, who acts as trustee for the beneficiaries. The Act's purpose is to

"compensate the statutory beneficiaries and to deter negligent conduct." *Romero v. Byers*, 117 N.M. 422, 427, 872 P. 2d 840, 845 (1994). The Act does not provide merely a continuation of a cause of action that the decedent could have brought during her life. Instead, it "provides a cause of action *for the benefit of the statutory beneficiaries* to sue a tortfeasor for the damages, measured by the value of the decedent's life, which the decedent himself would have been entitled to recover had death not ensued...." *Id.* at 428 (emphasis added and internal citations omitted).

Under the Wrongful Death Act, damages are recoverable by proof of the worth of the life of the decedent, even though there is no kin to receive the award. *Stang,* 81 N.M. at 350. "The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb by making negligence that causes death costly to the wrongdoer." *Id.* at 350-351.

Because the Personal Representative, as such, did not exist until after Ms. Hebert's death and after the accrual of the wrongful death claim, the Personal Representative cannot possibly be said to have previously promised to arbitrate any dispute that arises, including the wrongful death claim. Plaintiff's capacity as the personal representative of Ms. Hebert's wrongful death beneficiaries did not arise until June 4, 2007, when the district court entered the Order of Appointment of

Personal Representative to Pursue Wrongful Death Claim, naming her as the personal representative under the Wrongful Death Act. **[RP 23-24]**

Further, Plaintiff cannot be bound by any argument that the agreement would "bind" her "heirs," **[RP 194]** as such language would only apply to a probate estate, and not to those bringing a suit on behalf of the wrongful death beneficiaries. New Mexico law is clear that the beneficiaries under the Wrongful Death Act are not the same as the beneficiaries of an estate. "Any recovery for wrongful death has no relation to the deceased's estate; the recovery does not become part of the estate's assets." *Chavez v. Regents of UNM*, 103 N.M. 606, 608, 711 P.2d 883, 885 (1985). The personal representative is only a nominal party who was selected by the legislature to act as the statutory trustee for the individual statutory beneficiaries. *Id.* The authority to act as personal representative to bring a wrongful death act is derived from the wrongful death statutes, not from the probate or estate laws. *Id.* at 609.

The arbitration agreement cannot and does not bind Ms. Hebert's wrongful death beneficiaries, as they were neither known nor in existence at the time the agreement was signed. Thus, the contract cannot be enforced against Plaintiff as personal representative of Ms. Hebert's wrongful death beneficiaries.

2. The Arbitration Clause is Unconscionable, and Cannot Be Enforced.

Additionally, elements of unconscionability mandate denial of Defendants' appeal. To be valid, an agreement to arbitrate must contain all the essential elements of any contract: offer, acceptance, consideration and mutual assent. *Piano*, 2005-NMCA-18 at ¶ 6. However, even if the contract meets all of the essential elements, it may still be unenforceable as procedurally or substantively unconscionable. *See, e.g., State ex Rel. State Highway & Transportation Dept. v. Garley*, 111 N.M. 383, 389-90, 806 P. 2d 32, 38-39 (1991).

Unconscionability has two prongs: substantive, and procedural. *Fiser v. Dell*, 2008-NMSC-046, ¶ 20, --N.M.--, --P.2d.--. A substantively unconscionable contract has terms which are illegal, contrary to public policy, or grossly unfair. *Id.* "Procedural unconscionability is determined by analyzing the circumstances surrounding the contract's formation, such as whether it was an adhesive contract and the relative bargaining power of the parties." *Id.*

This agreement and its execution are both procedurally and substantively unconscionable, which mandates affirmance of the trial court's ruling.

The contract is substantively unconscionable because there is significant concern about the fairness of any proceeding conducted by Defendants' chosen forum, the NAF. *See Mercuro v. Superior Court,* 96 Cal. App. 4th 167, 178 (2002) (noting that in a substantive unconscionability analysis of an arbitration clause, the

court may consider that the "repeat player effect," where one party is frequently before the same arbitrator or group of arbitrators, could tilt the tables substantially in that party's favor.) It is very likely that a party like Defendants, who selected this arbitrator and include it in every admission agreement arbitration clause, frequently arbitrates claims with this group, and will have a decided advantage with this forum. Such advantage is heightened by the fact that to maintain a steady stream of business from the Defendants, the arbitrator may be inclined to rule in Defendants' favor. *See, e.g., Walker v. Ryan Steak Houses, Inc.,* 400 F.3d 370, 387-88 (6th Cir. 2005) ("[P]arties to a valid arbitration agreement also expect that neutral arbitrators will preside over their disputes regarding both the resolution on the merits and the critical steps, including discovery, that precede the arbitration award. A structural bias in the make-up of the arbitration panel, which would stymie a party's attempt to marshal the evidence to prove or defend a claim, can be just as prejudicial as arbitral bias in the final decision on the merits.")

Further, there are significant elements of procedural unconscionability, as this was a situation where an elderly, distraught man was admitting his ailing wife to a long-term care facility. Instead of having the task fall on Mrs. Corum's shoulders—as Mrs. Hebert anticipated it should—it fell to Mr. Hebert to attempt to make sense of a twenty-two page contract containing 67 clauses, written in dense, legalistic text. The size of the text, lack of separate demarcation of the arbitration

clause, and tremendous pressure generally accompanying such admission situations mandate a finding of procedural unconscionability.

IV. CONCLUSION

It is clear that the law supports the trial court's ruling, and it should be upheld for the reasons stated in the court's order. In the alternative, the trial court's ruling should be upheld for any other reason set forth above. Plaintiff respectfully requests that this Court DENY Defendants' Appeal, uphold the trial court's ruling, and provide whatever further relief this Court deems just and proper.

Respectfully submitted,

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