IN THE COURT OF APPEALS



FOR THE STATE OF NEW MEXICO

VIRGIL CLAUDE,

Plaintiff/Appellee,

vs.

Court of Appeals No. 31,345
McKinley County
Cause No. D-1113-CV-2009-757
Judge Aragon

THI OF NEW MEXICO AT ALBUQUERQUE, LLC,
D/B/A SPECIALTY HOSPITAL OF ALBUQUERQUE,

Defendant/Appellant.

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Appeal from the District Court of the

Eleventh Judicial District
McKinley County, New Mexico

The Honorable Robert A. Aragon, District Judge, Division VII

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# PLAINTIFF/APPELLEE'S ANSWER BRIEF

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## TABLE OF CONTENTS



**Transcript of Proceedings**

Counsel has not referred to the Court Monitor logs or the audio/CD recordings of the proceedings. However, it is assumed that the logs/audio recordings are recorded on the For The Record CD recording system authorized for use in the District Courts of the State of New Mexico or any such authorized system.

## TABLE OF AUTHORITIES

### NEW MEXICO STATUTES



### NEW MEXICO CASES



### OTHER CASES

## ARGUMENT AND AUTHORITIES IN SUPPORT

### I. APPELLEE IS NOT A THIRD-PARTY BENEFICIARY AND HIS MOTHER WAS NOT HIS APPARENT AGENT

#### *A. Third-Party Beneficiary*

Appellant (THI d/b/a Specialty Hospital) asserts that Plaintiff/Appellee Virgil Claude was a third-party beneficiary to the arbitration agreement his mother signed, and therefore it is binding on him. In support of this assertion, Appellant relies heavily on Fleet Mortg. Corp. vs. Schuster, 112 N.M. 48 (N.M. 1991). However, the Supreme Court in Fleet actually found that the wife was not a third-party beneficiary to the contract signed by the husband.

Appellant's argument that Appellee was a third-party beneficiary is simply an attempt to circumvent the New Mexico Uniform Healthcare Decisions Act (NMSA §24-7A-1 et. seq.) (the "Act"), which was recently relied upon by this Court in Corum vs. Roswell Senior Living, LLC, 2010 NMCA 105, NM, 248 P.3d 329 (January 12, 2011), in invalidating an arbitration agreement signed by a husband on behalf of a nursing home resident (his wife). The Corum Court held that a nursing home could not assume a resident was incompetent to sign his or her own agreements and make his or her own decisions, even where the parties stipulated the wife was incompetent to do so.

Both the Act and Corum provide that one may sign agreements and make healthcare decisions for another only when (1) they are a court-appointed guardian, (2) they are a "surrogate" and two healthcare providers have attested that the patient lacks capacity to make his or her own decisions, or (3) the person is an "agent" with a valid Power of Attorney. None of these requirements are satisfied in the case at bar; Appellee's mother was not a court-appointed guardian, was not a "surrogate upon a finding of two healthcare professionals, and she did not hold a Power of Attorney for Appellee.[1]

Put differently, nothing in the Act or Corum authorizes the signing of an arbitration agreement or any other agreement on behalf of another in the healthcare context, when that person is not an "agent", a "guardian" or a "surrogate" under the Act. Additionally, the caselaw in New Mexico does not support the theory that the clear, unambiguous language of the Healthcare Decisions Act may be circumvented simply by arguing that the resident was a third-party beneficiary.

[1]A more thorough discussion of why the signing of the arbitration agreement by Mrs. Claude is invalid under the New Mexico Healthcare Decisions Act and Corum is contained below in this Answer Brief.

### *B. Apparent Agency*

Much of Appellee's Response in District Court to Appellant's Motion to Compel Arbitration focuses on the fact that Appellant had not referred to the New Mexico Uniform Healthcare Decisions Act in its Motion or attendant briefing, or to Corum, which had been issued just days before Appellant filed its Motion in District Court (in which this Court held that a wife whose husband had signed an arbitration agreement on her behalf in a nursing home context was not bound by same under the Act).

In its Reply, in order to try to circumvent the effect of the Act and specifically of Corum, Appellant argued for the first time that Appellee was bound by his mother's signature on the arbitration agreement under the doctrine of Apparent Agency. Appellee thus filed a Motion for Leave to File Surreply in order to respond to this issue. The Motion was orally granted by Judge Aragon, who agreed that the Motion for Leave to File Surreply would, as a practical matter, act as the Surreply itself.

As the recent Corum case points out, the Act provides a statutory framework that, *inter alia,* sets forth various rights of patients in the nursing home/assisted living context. The Act states when a person may make a healthcare decision for a patient,

stating that a person is authorized to act for a patient in making a "healthcare decision" if:

> "(1) they are a "surrogate";
>
> (2) they are an "agent" by virtue of having been appointed by the patient in a "power of attorney for healthcare"; or
>
> (3) they have been appointed by a court as the patient's guardian."

NMSA 1978 §24-7A-1 et. seq.

Appellant was unable to show that Mrs. Claude was a "surrogate" under the Act, was an "agent" under the Act, or that she held a Power of Attorney for her son. Thus, in its Reply brief, it argued she was the "apparent agent" for the first time.[2] However, suffice it to say, the Act does not provide for "apparent agency" and Mrs. Claude was clearly not her son's "agent" under the Act, because she did not hold a Power of Attorney for him. (RP at 134-135; RP at 155-158)

Putting aside the fact that neither the Act nor the caselaw provide for "apparent agency" in terms of making decisions for a patient/resident under the Act, in terms of the ostensible "indicia of apparent authority" that Appellant relies on, it is significant that nowhere in the record proper did Appellant submit any evidence that

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[2]A thorough discussion of Corum and the New Mexico Heatlhcare Decisions Act is found below in Sub-section I. D of this Answer Brief, as that it the order in which Appellant raised the issue in its Brief in Chief.

would support a finding that it reasonably relied on an apparent agency relationship between Appellee and his mother.

In other words, Appellant submitted no evidence as to why it would have assumed that Appellee had appointed his mother to act as his agent, particularly in light of the fact that the admissions paperwork noted time and again that he had *not* appointed his mother as a Power of Attorney. (RP at 126-129). Further, Appellant developed no evidence to explain why it completely bypassed Appellee on such a serious issue such as waiving a constitutional right of access to the courts, when Appellant's own chart for Appellee showed that he was "alert and oriented" and capable of making decisions. (RP at 127-129).

Appellee executed an Affidavit in support of his Answer Brief to Appellant's Motion to Compel Arbitration. That Affidavit confirmed that at the time of his admission to Specialty, Appellee was able to read and understand documents and that he did not advise Specialty that his mother was his "surrogate" for making healthcare decisions for him under the New Mexico Healthcare Decisions Act or his agent in any other way. (RP at 134-135).

Appellee also stated in his Affidavit that he would have objected to waiving his right to access the courts if asked about this issue and that none of the admission paperwork was ever presented to him. Lastly, and perhaps most significantly in terms

of the public policy underpinning the Act, Appellee stated that although his body was severely damaged in an accident, he was "as capable of understanding matters as I was before my accident." (RP at 134-135).

Apparent agency in New Mexico requires that the person or entity relying on apparent agency acted reasonably in doing so. Here, the district court was clearly within its rights to conclude that there was no apparent agency in light of Appellant failing to introduce any evidence whatsoever as to why it reasonably assumed Mrs. Claude was her son's agent, in having her (as opposed to Appellee Mr. Claude) sign the arbitration agreement.

The Act does not provide for apparent agency as being a permissible method for a person to be empowered to make healthcare decisions for another. Nor does "apparent agency" overcome the statutory presumption addressed in Corum, that patients are presumed to be able to make their own decisions. In short, the Act simply does not permit "apparent" agents to make decisions for patients.

Even assuming, *arguendo*, that notwithstanding the Healthcare Decisions Act and Corum, supra, the doctrine of apparent agency applied to this case, the elements of apparent agency are not met here. Appellant cites this Court at length to Barron vs. Evangelical Lutheran Good Samaritan Soc'y, 2011 NMCA 094 (May 31, 2011).

However, the Barron Court stated "Apparent authority arises from manifestations by the principal to the third party and can be created by appointing a person to a position that carries with it generally recognized duties." Barron v. Evangelical Lutheran Good Samaritan Soc'y, 2011 NMCA 094 (N.M.App.,2011) [internal citations omitted].

The Barron Court then went on to note the limits of the scope of apparent agency, stating:

> "In considering the scope of an agent's apparent authority, New Mexico courts look to the reasonableness of the third party's reliance on the agent's representation of authority. See Comstock, 110 N.M. at 132, 793 P.2d at 262 (stating that "a person dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent is acting within the scope of his powers"). Where a principal claims not to be bound by an agreement with a third party because it was made by an agent who exceeded his or her authority, the proper inquiry is whether the third party "knew or through the exercise of due diligence should have known that [the agent's] authority was limited" to the extent that the principal claims."

Id., at par. 16 [internal citations omitted].

Even assuming the Act somehow implicitly condones apparent agency, there is no evidence in the case at bar of any "exercise of due diligence" on the part of Appellant to (1) determine whether Appellee had authorized his mother to sign any documents on his behalf, and (2) if he did, that the scope of his authorization included not just signing admission documents, but actually signing a document that waived

his constitutional right of access to the courts. In fact, the record is devoid of any evidence that anybody at Specialty bothered to consult him about any of these documents, despite knowing that Appellee was "alert and oriented" and had *not* signed a Power of Attorney for his mother.

Further, Appellant cites no representations or conduct by Appellee that communicated to Appellant that he had authorized his mother to sign documents, including the arbitration argument, on his behalf. The law provides that "apparent authority must emanate from the conduct of the person to be charged as principal". Id., at par. 17.

Additionally, Appellant has failed to note a stark factual distinction between the case at bar and the Barron case. In the latter, the Court found that "Ms. Chapman also had apparent authority given that Ms. Barron communicated Ms. Chapman's authority to Ms. Santillan." Id., at par. 17 [emphasis added].

In the case at bar, there is no allegation, much less evidence, that Appellee ever "communicated" to any Specialty staff that he had given his mother authority to act on his behalf.

The conduct by Appellant in having the mother sign the admission documents and a document that waived Appellee's constitutional right to access the courts, runs

absolutely contrary to the public policy underpinning the Act and this Court's decision in Corum.

If Appellant were able to use the doctrine of apparent agency to circumvent the Act's clear requirement that in order to make decisions for a resident, one must be a court-appointed guardian, a "surrogate" or an "agent" with a Power of Attorney, then the Act itself, and this Court's decision in Corum, would be effectively nullified. As a result, residents/patients whose bodies may be for lack of a better word broken, but whose minds are intact, would effectively be denied the assurance that they will be able to make their own decisions, the very right that the statute manifestly seeks to protect.

### *C. The Arbitration Agreement is Invalid under the New Mexico Healthcare Decisions Act*

As stated briefly above, the Act provides three ways for a person to be empowered to make a healthcare decision for another, *to wit:* (1) by being a surrogate, (2) by being an "agent" through the execution of a Power of Attorney, or (3) by being appointed by a court as the person's guardian. None of the three apply in the case at bar.

First, the record is replete with evidence that Appellant was aware that Appellee had *not* appointed anyone as a Power of Attorney. (RP at 126-135).

Second, the record is equally clear that Mrs. Claude was not a "surrogate" for her son under the Act. Mrs. Claude was not a "surrogate" under the Act or Corum[3] because the Act presumes as a matter of law that a patient has the capacity to make his or her own decisions (in fact, even where the parties stipulate to a lack of capacity, that is insufficient to overcome the statutory presumption of capacity. Corum, par.10.) That is because under the Act, to be a "surrogate", there must be a conclusion by two (2) qualified healthcare providers that the patient cannot make his or her own decisions. Corum, par. 10. There is no evidence of a conclusion by two qualified healthcare providers in this case.

Lastly, there is no evidence in the case at bar that Mrs. Claude was appointed by a court as her son's guardian. Thus, it is clear that Mrs. Claude was not Appellee's "guardian", "agent", or "surrogate" under the Act. She therefore had no authority to make such a decision as to waive Appellee's constitutional right of access to the courts in the context of signing the admission paperwork, which Appellant concedes required a waiver of this constitutional right in order to receive treatment. (Appellant's Brief in Chief, page 5, par. 1).

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[3]Significantly, in Appellant's Motion to Compel Arbitration (RP at 73-92), Appellant did not contend that Mrs. Claude was a "surrogate", an "agent", or that she held a Power of Attorney for her son. Instead, Appellant simply argued that Mrs. Claude was Appellee's "fiduciary". (RP 73-76).

In the case at bar it is undisputed that Mrs. Claude did not hold a Power of Attorney for her son, as the admissions paperwork specifically noted several times that no Power of Attorney had been signed in favor of the mother . (RP 126-129).

It is equally clear that Appellant was unable to rebut the statutory presumption of capacity of Appellee to sign agreements on his own, nor has it argued that Mrs. Claude had (1) a power of attorney, or (2) was a court-appointed guardian under the Act.

## II. PROCEDURAL UNCONSCIONABILITY

### *A. Strausberg and Shifting of the Burden of Proof*

Strausberg (cited by Appellant), which held that the burden of proof rests on the party seeking to enforce an arbitration agreement, is essentially inapplicable to the case at bar. Appellant never submitted any evidence to contradict the Affidavits of Yvonne Claude and Ernestine John. Thus, the trial court was never put in the position of having to weigh one side's evidence against the other.

### *B. Procedural Unconscionability*

As alluded to earlier, both Appellee's mother, Mrs. Yvonne Claude, and his long-time girlfriend, Ms. Ernestine John, executed Affidavits which were submitted

in support of Appellee's Answer Brief to Appellant's Motion to Compel Arbitration. (RP at 130-133).

Both Affidavits essentially recited the circumstances under which the arbitration agreement was signed by Mrs. Claude. The Affidavits established that Mrs. Claude and Ms. John were directed to an employee breakroom by a Specialty employee. An employee of Specialty came in with a stack of paperwork and instructed Mrs. Claude to sign where various "sign here" stickers had already been affixed. Mrs. Claude simply signed the documents where she was told to and the employee left. (RP at 130-133).

The Affidavits both confirm that Mrs. Claude was not provided an opportunity to review the documents nor were the contents of any of the documents explained to her. It was a brief encounter, so brief, in fact, that the employee never even sat down. Mrs. Claude simply signed where the stickers had been placed and that was it. (RP at 130-133). Again, Appellant submitted no evidence to contradict this.

Appellant seems to have simply assumed that because Appellee was physically disabled, he was mentally disabled as well. The fact is that Appellee was perfectly competent to make his own decisions and did not authorize his mother to enter into any agreements on his behalf, much less to waive any of his constitutional rights. (RP at 134-135). Appellee is an "incomplete quadriplegic"; he is thus physically (but not

mentally) disabled, and had the ability to understand such matters. It is significant that the record is devoid of any evidence adduced by Appellant that Appellee ever represented to anyone that his mother was his agent and that he did not want to make his own decisions.

It is well-settled that arbitration clauses in contracts are unenforceable if substantively or procedurally unconscionable. In Cordova vs. World Finance Corp. of NM, the Supreme Court stated:

> "Procedural unconscionability goes beyond the mere facial analysis of the contract and examines the particular factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other."

Cordova v. World Finance Corp. of NM, 146 N.M. 256, 262-263, 208 P.3d 901, 907 - 908 (N.M.,2009) [internal citations omitted].

In other words, procedural unconscionability focuses on the inequality in bargaining power and/or the manner in which the arbitration agreement is presented and signed. Gutthman v. La Vida Llena, 103 N.M. 506, 510 (S.Ct. 1985).

One way to demonstrate procedural unconscionability is to show the arbitration agreement was an "adhesion contract". An adhesion contract is one which (1) was prepared solely by one party, and (2) the contract, because of its nature, must be

accepted on an "as is" basis. Albuquerque Tire Co. vs. Mountain States Tel & Tel. Co., 102 N.M. 445, 448 (S.Ct. 1985).

However, a contract of adhesion is not the only method of invalidating an arbitration agreement on grounds of procedural unconscionability. Other ways include "sharp practices, high pressure tactics, the relative sophistication, education or wealth of the parties, and the financial resources of the parties." Adkins vs. Laurel Healthcare of Clovis, L.L.C., (Ct.App 2007).[4]

The procedural impropriety of the facts surrounding the signing of the arbitration agreement by Mrs. Claude are obvious. The documents were simply placed in front of Mrs. Claude by a Specialty employee during an encounter that was so brief, the employee never even sat down. The documents were not explained to Mrs. Claude nor did any negotiating take place. In fact, the employee discouraged reading of the entire document by directing Mrs. Claude's attention only to the "sign here" stickers and telling her to do so.

Further, it was manifestly improper for Appellant to present the arbitration agreement to Appellee's mother to sign, knowing full well that Appellee had *not*

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[4]One of the most thorough, scholarly opinions on the subject is contained in Adkins vs. Laurel Healthcare of Clovis, L.L.C., No. 26,759 (Ct.App. 2007). Although not cited for precedential value because it is an unreported decision, its reasoning sheds considerable light on the issues raised herein.

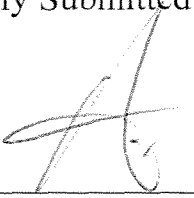
signed a Power of Attorney and that he was "clear" and "oriented" (and thus, competent to approve his own agreements).

Lastly, merely signing a document as a "responsible party" does not result in the waiver of the right to a jury trial. (See Goliger v. AMS Properties, Inc., 123 Cal.App.4th 374, 378, 19 Cal. Rptr. 3d 819, 821 (Cal.App. 2 Dist.,2004)). "Here, however, Binshtock was not acting in her personal capacity when she signed the arbitration agreements, but instead in her representative capacity as her mother's responsible party. Hence, no waiver of Binshtock's personal right to a jury trial can be inferred. (See Benasra v. Marciano, supra, 92 Cal.App.4th at p. 990, 112 Cal.Rptr.2d 358.)").

## CONCLUSION

Appellee prays this Court enter its order affirming the trial court's denial of Appellant's Motion to Compel Arbitration, and for such other further relief as this Court deems just and proper.

Respectfully Submitted:



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**Certificate of Service**

I hereby certify that on the 3rd day of January, 2012, I have caused a true and correct copy of the foregoing Plaintiff/Appellee's Answer Brief to be forwarded ***via First Class U.S. Mail*** to the following:

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