IN THE COURT OF THE APPEALS OF THE STATE OF NEW MEXICO

VIRGIL CLAUDE,

Plaintiff/ Appellee,

vs.

No. 31,345
McKinley County
D-1113-CV-200900757

FUNDAMENTAL LONG TERM CARE
d/b/a SPECIALTY HOSPITAL OF
ALBUQUERQUE,

Defendant/ Appellant.

BRIEF-IN-CHIEF OF APPELLANT-DEFENDANT SPECIALTY HOSPITAL OF ALBUQUERQUE

Civil Appeal from the Eleventh Judicial District Court
County of McKinley
The Honorable Robert A. Aragon

Oral Argument Is Requested

JOHNSON, TRENT, WEST & TAYLOR, LLP
Lori D. Proctor, Esq.
919 Milam St., Suite 1700
Houston, TX 77002
Telephone: (713) 222.2323
Facsimile: (713) 222.2226
Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

NEW MEXICO CASES

OTHER CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF COMPLIANCE

This brief complies with the limitations set forth in NMRA 12-213(F)(3). The brief has been prepared using a proportionally spaced type style or typeface, Times New Roman 14, and the body of the brief contains 7,449 words. This information was obtained from a word-processing program, Microsoft Office Word 2003, 11.8326.8202.

STATEMENT OF PROCEEDINGS

A. Nature of the Case

This is an appeal from a final order entered on May 16, 2011 by the Honorable Robert A. Aragon ("Order"), denying a Motion to Dismiss for Lack of Subject Matter Jurisdiction, Motion to Stay Subject to Defendant's Motion to Dismiss for Insufficient Service of Process and Motion to Compel Arbitration ("Motion to Compel Arbitration" or "Motion") filed by Appellant Specialty Hospital of Albuquerque ("Specialty Hospital" or "Facility").

B. The Course of Relevant Proceedings and Disposition Below

On December 24, 2009, Appellee Virgil Claude filed a negligence lawsuit in the Eleventh Judicial District Court against Appellant and others, alleging that deficient care provided in Appellant's nursing home had injured him. [RP 1-5][1] On January 18, 2011, Appellant filed its Motion to Compel Arbitration, which asked the District Court to enforce an arbitration agreement ("Arbitration Agreement" or "Agreement") that Appellee's mother, Yvonne Claude, had signed to admit him to Specialty Hospital. [RP 73-92] Appellee opposed the Motion on February 3, 2011 [RP 115-35], to which Appellant replied on February 11, 2011.[2]

---

[1] Citations to "RP" are to the Record Proper.

[2] Appellant's reply brief inadvertently was omitted from the Record Proper. It thus is attached as Exhibit A to Appellant's *Unopposed* Motion to Supplement the Record on Appeal with Appellant's Reply Brief In Support of its Motion to Compel Arbitration ("**Reply Br.**"), filed contemporaneously herewith.

On March 14, 2011, Appellee filed a Motion for Leave to File a Surreply. [RP 155-58] Appellant responded to Appellee's Motion for Leave on March 18, 2011 [RP 172-77], to which Appellee replied on April 7, 2011, [RP 178-81].

On April 20, 2011, the District Court convened a telephonic hearing on Appellant's Motion to Compel Arbitration [RP 203-07], and later issued the Order denying it on May 16, 2011. [RP 215-16] The Order simply stated that the Motion "is not well-taken and should therefore be denied." [RP 216] Appellant timely noticed this appeal on May 27, 2011. [RP 219-26]

C. Summary of Facts

1. Arbitration Agreement

On March 11, 2008, Ms. Claude, acting as Appellee's authorized representative, signed the Arbitration Agreement and other paperwork to admit him to Specialty Hospital.[3] [RP 89-90, 130.] At the time, Appellee was thirty-years old and had been rendered a quadriplegic in a vehicular accident. [RP 2] Prior to his admission to the Facility, Appellee had been treated at San Juan Regional Medical Center and the University of New Mexico Medical Center. [RP 126]

[3] Ms. Claude signed all of the admission paperwork for her son, including forms entitled "Condition of Admission," "Patient Receipt of Required Admission Documents," and "Patient's Bill of Rights and Responsibilities." These documents are attached to Appellant's Motion to Supplement the Record on Appeal with Admission Documents, which is filed contemporaneously herewith.

The Arbitration Agreement is a two-page, stand-alone document that is printed in the same font type/size as other admission documents that Ms. Claude signed. At the top of the first page, the Agreement alerted Ms. Claude to "***PLEASE READ CAREFULLY.***" [RP 89]

The Arbitration Agreement is comprised of two sections, both of which are identified conspicuously by bold, all-cap headings. The first section, entitled "**EXPLANATION**," details the arbitration process in plain, non-legalistic terms. [RP 89] This section explains that "[t]he decision of the arbitrator binds both parties and is final. By agreeing to binding arbitration, both parties waive the right to trial before a judge or jury." [RP 89] In addition, this section provides:

> It is understood that any dispute as to professional negligence, medical malpractice, and/or general negligence, that is, as to whether any professional or medical services rendered under the admissions agreement were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by the Federal Arbitration Act, and not by a lawsuit or resort to court process except as the Federal Arbitration Act provides for judicial review of arbitration proceedings. [RP 89]

Section I of the Arbitration Agreement concludes by stating that "[b]oth parties to this [Arbitration] [A]greement, by entering into it, are giving up their constitutional right to have any dispute decided in a court of law before a jury, and instead are accepting the use of arbitration." [RP 89]

Section II of the Agreement, entitled "**AGREEMENT**," begins by reciting that it was made between "'Specialty Hospital ('Health Care Center')," "Virgil Claude ('Resident')," and "Yvonne Claude," who was denominated as "('Resident's Durable Power of Attorney for Health Care'/'Resident's Legal Guardian'/'Resident's Responsible Party' hereinafter collectively 'Representative')." [RP 89] In the second paragraph of Section II, Ms. Claude acknowledged that "she [was] not required to use the aforesaid [Specialty Hospital] for [Appellee's] healthcare needs and that there are numerous other health care providers in the State where [Specialty Hospital] is located that are qualified to provide such care." [RP 89] This section also states that "signing this Agreement to arbitrate *is a precondition* for medical treatment or admission to [Specialty Hospital]." [RP 89 (emphasis added)]

The third paragraph of Section II provides, in relevant part:

> In the event of ***any controversy or dispute*** between the parties arising out of or relating to Resident's stay at [Specialty Hospital], [Specialty Hospital's] Admission Agreement, or breach thereof, or relating to the provision of care or services to Resident, ***including but not limited to any alleged tort, personal injury, negligence,*** contract, consumer protection, claims under the New Mexico Unfair Trade Practices Act, or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the National Arbitration Forum Code of Procedure or other such association. [RP 89 (emphasis added)]

Section II specifies that the Arbitration Agreement "shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16." [RP 90] In this section, Ms. Claude acknowledged that she had "the right to consult with an attorney of his/her choice before signing this agreement and to receive from that attorney explanations or clarification of any of the terms of this Agreement." [RP 90]

Finally, Ms. Claude executed the Agreement not only on behalf of Appellee, but also in her personal capacity: "By signing this Agreement, Representative certifies that he/she is duly authorized by law to execute this Agreement and agree to its terms ***on behalf of him/herself as Representative*** and on behalf of [Appellee.]" [RP 90 (emphasis added)] In a disclaimer that appears directly above the signature line where Ms. Claude signed her name, she acknowledged that:

> **RESIDENT/REPRESENTATIVE UNDERSTANDS THAT BY SIGNING THIS ARBITRATION AGREEMENT, HE/SHE IS WAIVING HIS/HER RIGHT TO HAVE CLAIMS, INCLUDING MALPRACTICE CLAIMS, HE/SHE MAY HAVE AGAINST [SPECIALTY HOSPITAL] (INCLUDING ITS PARENTS, AFFILIATES, AND SUBSIDIARY COMPANIES, OWNERS, OFFICERS, DIRECTORS, MEDICAL DIRECTORS, EMPLOYEES, SUCCESSORS, ASSIGNS, AGENTS, ATTORNEY AND INSURERS) BROUGHT AS A LAWSUIT IN COURT BEFORE A JUDGE OR JURY.** [RP 90]

2. Appellant's Motion to Compel Arbitration

After Appellee filed suit, on January 18, 2011, Appellant moved to enforce the Arbitration Agreement. [RP 73-92] Appellee opposed the Motion to Compel Arbitration, arguing that the Specialty Hospital admission documents that Ms. Claude had signed, including the Arbitration Agreement, were unenforceable because she lacked authority as his "surrogate" to sign them under New Mexico's Uniform Healthcare Decisions Act ("UHDA" or "Act"), NMSA 1978, §§ 24-7A-1 *et seq.* [RP 116-18] Appellee also argued that even if Ms. Claude were his surrogate under the Act, her consent to the Arbitration Agreement was not a "healthcare decision" which the Act permitted her to make for him. [RP 120-21]

Moreover, Appellee vehemently asserted that despite his injuries, he had been perfectly capable of deciding for himself whether to enter into the admission agreements, including the Arbitration Agreement. [RP 118-20] Appellee claimed that "there [were] numerous references in the medical record to demonstrate that [he] *did*, in fact, have the capacity to make his own healthcare decisions." [RP 119 (emphasis in original)] Appellee pointed to medical records which, according to Appellee, showed that while he was in the care of other providers prior to arriving at Specialty Hospital, he "was noted to be 'alert and oriented.'" [RP 119 (citing RP 126, 127)] Appellee also pointed to a January 21, 2008 report from an attending physician at University of New Mexico Hospital, which stated that

Appellee "is still able to follow up commands with his eyes only. There have been several discussions with the patient and his family regarding his course and prognosis and both [Appellee] and his family are in agreement that they would like everything done. [Appellee] was evaluated by Psychiatry on January 3, 2008 and was deemed competent to make his own decisions." [RP 126] In sum, Appellee argued that the Facility knew or should have known that he "was competent to approve documents and agreements himself." [RP 120; *see also* RP 123]

In addition, Appellee claimed that the Arbitration Agreement was unconscionable. [RP 123-24] With respect to procedural unconscionability, Appellee alleged that when his mother (and his girlfriend, Ernestine John) met with a Facility representative to review and sign the admission forms, the representative merely placed the documents in front of her, having marked with stickers for her convenience the pages where Ms. Claude was to sign. [RP 122-23] Appellee contended that Ms. Claude did not have an opportunity to review the admission documents, the representative did not explain them to her, and no negotiating took place. [RP 123] Appellee argued that the Arbitration Agreement was substantively unconscionable because Ms. Claude had no authority to waive his right to a jury trial. [RP 123-24]

In its reply brief, Appellant further demonstrated that the Arbitration Agreement was enforceable because (1) Ms. Claude had apparent authority to sign

it on Appellee's behalf; and (2) Appellee was bound by the Arbitration Agreement as a third-party beneficiary because Ms. Claude executed the Agreement and other documents for his benefit to secure his admission and treatment at Specialty Hospital, and Appellee, by his own accord, knowingly accepted those benefits. [Reply Br. at 2-4] Moreover, Appellant noted that Appellee's claims were within the scope of the Arbitration Agreement (and Appellee never has contended otherwise). [*See id.* at 5]

With respect to apparent authority, Appellant proffered as exhibits two admission documents that Ms. Claude had signed. The first was an "**AUTHORIZED AGENT'S STATEMENT OF UNDERSTANDING**," which Ms. Claude signed as Appellee's "authorized agent." This form reads, in relevant part: "As the authorized agent for Virgil Caudle, I affirm and state" that in the event extraordinary, life-sustaining measures are necessary, "***[Appellee] has informed me that it is his[] informed decision that***: CPR shall be performed and [Appellee] shall be considered **FULL CODE**." [Reply Br. Ex. A (emphasis added)]

The second document was a Social Worker's handwritten notes from a March 12, 2008 telephone interview with Ms. Claude and her husband. Consistent with the notation in the first document indicating that Ms. Claude was acting as Appellee's agent, the fifth sentence of the Social Worker's notes reads: "Parents

state that it is [Appellee's] and their preference that he be full code." [Reply Br. Ex. B]

Finally, Appellant showed that the Arbitration Agreement was not unconscionable. Appellant pointed out that there was no evidence nor had Appellee ever argued that his admission was an emergency, that Ms. Claude ever asked to review the admission documents (let alone that her request was refused), that the Specialty Hospital representative discouraged her from asking questions, or that any portion of the Arbitration Agreement was unintelligible to her. [Reply Br. at 6-7] Appellant further noted the absence of any allegation or proof that the Facility representative ever said or did anything to prevent Ms. Claude from reading the materials, or that Ms. Claude asked to take the Arbitration Agreement home with her to obtain legal advice regarding its terms (as was her right under the Agreement). [*See id.* at 6] Appellant also noted that there was no evidence that Ms. Claude could not have obtained a suitable nursing-home placement for Appellee except by acquiescing to the Arbitration Agreement. Indeed, in the Agreement, Ms. Claude acknowledged that "she [was] not required to use [Specialty Hospital] for [Appellee's] healthcare needs and that there are numerous other health care providers in [New Mexico] . . . that are qualified to provide such care." [RP 89]

On March 14, 2011, Appellee submitted a motion for leave to file a surreply to address the exhibits that Appellant had attached to its reply brief in support of its contention that Ms. Claude had apparent authority to sign the Arbitration Agreement. [RP 155-58] Appellee's surreply was predicated on the mistaken belief that whether Ms. Claude had apparent authority to act for Appellee did not matter because she only could have done so if she were a "surrogate" for him under the Act, which Appellee claimed she was not. [RP 156]

In addition, nowhere in Appellee's motion for leave to file a surreply did he dispute the evidence in Appellant's reply brief exhibits that Appellee *knew* that his mother was making arrangements and directing care on his behalf—specifically, that his mother, on his behalf, communicated Appellee's wish that he wanted to be treated as a "FULL CODE," and that Ms. Claude was to implement that decision for him as his agent. [RP 174-75]

Significantly, although Appellee believed that Appellant's apparent authority argument warranted further briefing, *nowhere* in Appellee's briefs in support of his motion for leave *did he address, let alone dispute,* that he was bound by the Arbitration Agreement as a third-party beneficiary. [RP 155-58; 178-81]

SUMMARY OF ARGUMENT

The District Court erred in denying Appellant's Motion to Compel Arbitration because the Arbitration Agreement is valid and enforceable under the Federal Arbitration Act ("FAA"), and Appellee's claims against Appellant are within the scope of the Agreement. *First*, Appellee is bound to the Agreement pursuant to a classic application of the third-party beneficiary doctrine—and Appellee never has contended otherwise. Consent to the Arbitration Agreement was precondition to Appellee's admission and treatment at the Facility. Believing that her son could not do so himself, Ms. Claude executed the Arbitration Agreement and other admission documents so that Appellee would receive the benefits of care and treatment at Specialty Hospital, and Appellee acknowledges that he knowingly accepted those benefits. Appellee therefore is required to arbitrate his claims against Appellant in accordance with the Arbitration Agreement.

Second, Ms. Claude was imbued with apparent authority to bind Appellee to the Arbitration Agreement. There was ample evidence before the District Court that Appellee directed or (at the very least) knowingly permitted Ms. Claude to control every aspect of his admission and treatment, which she did. And Appellee has not alleged (let alone proffered evidence) that he ever objected to his mother's actions, or that he limited in any way her authority to make decisions for him.

Under the circumstances, Ms. Claude had apparent authority to sign admission documents, including the Arbitration Agreement.

Finally, the evidence from the record makes plain that the Arbitration Agreement was neither procedurally nor substantively unconscionable. To the extent the District Court set aside the Agreement on this ground, it erred. Accordingly, Appellant respectfully asks this Court to reverse the District Court's Order denying the Motion to Compel Arbitration.

ARGUMENT

I. APPELLEE IS BOUND BY THE ARBITRATION AGREEMENT PURSUANT TO THE THIRD-PARTY BENEFICIARY AND APPARENT AUTHORITY DOCTRINES

A. Preservation and Standard of Review

These issues were preserved below [Reply Br. at 2-4; RP 173-74], and are subject to a *de novo* standard of review. *See Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 4, 137 N.M. 57, 107 P.3d 11 (N.M. Ct. App. 2005).

B. Appellee Is Bound to the Arbitration Agreement as a Third Party Beneficiary

Appellee must arbitrate his claims against Specialty Hospital because he is a third-party beneficiary of the Arbitration Agreement. A person is a third-party beneficiary of a contract "if the parties to the contract intended to benefit the third party." *Fleet Mortg. Corp. v. Schuster*, 112 N.M. 48, 49-50, 811 P.2d 81, 82-83 (N.M. 1991). "Such intent must appear either from the contract itself or from some

evidence that the person claiming to be a third party beneficiary is an intended beneficiary." *Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 581, 734 P.2d 1258, 1264 (N.M. 1987). It is well-settled that an agreement to arbitrate, like any other contract, may be enforced against nonparties who are third-party-beneficiaries. *See, e.g., Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 129 (2009); *Gibson v. Wal-Mart Stores, Inc.*, 181 F.3d 1163, 1170 n.3 (10th Cir. 1999); *Rivera v. American Gen. Fin. Servs., Inc.*, 2010-NMCA-046, ¶¶ 20-22, 148 N.M. 784, 242 P.3d 351 (N.M. Ct. App. 2010), *rev'd on other grounds*, 2011-NMSC-033, 150 N.M. 398, 259 P.3d 80 (N.M. 2011).

This Court has applied the third-party beneficiary doctrine in the arbitration context. In *Rivera*, the plaintiff entered into a loan agreement for the purchase of a truck that provided for arbitration of certain claims arising from the purchase, including claims against "all persons or entities who may be liable" to either party to the transaction. 2010-NMCA-046, ¶¶ 2, 22. The insurer of the truck moved to compel arbitration of claims that the plaintiff had brought against it, arguing that even though it was not a party to the loan agreement, it could enforce the arbitration provision as a third-party beneficiary of the agreement. *See id.* ¶¶ 5, 20. This Court held that because of the loan agreement's requirement that the plaintiff purchase insurance for the truck, the insurer might be liable to the plaintiff in a

dispute concerning insurance arising from the loan agreement, and thus was a third party beneficiary that could compel arbitration. *See id.* ¶¶ 3, 22.

By the same token, this case is analogous—if not substantively identical—to fact patterns in numerous decisions where courts have ordered arbitration of claims brought by or on behalf of nursing home residents because a resident was a third-party beneficiary of a contract containing an arbitration clause. *See, e.g., JP Morgan Chase & Co. v. Conegie,* 492 F.3d 596, 600 (5th Cir. 2007); *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011); *Cook v. GGNSC Riply, LLC*, 786 F. Supp. 2d 1166, 1171-72 (N.D. Miss. 2011); *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson*, 19 So. 3d 735, 740 (Miss Ct. App. 2008); *Forest Hill Nursing Ctr., Inc. v. McFarlan*, 995 So. 2d 775, 782-83 (Miss. Ct. App. 2008); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 579 (Fla. Dist. Ct. App. 2007 (per curiam); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987 (Ala. 2004); *see also* 21 Williston on Contracts § 57:19 (4th ed. 2011) (noting that non-signatories may be bound by arbitration agreements under third-party beneficiary theories).

Here, Appellee never has disputed that he was a third-party beneficiary of the Arbitration Agreement—nor could he do so. The record establishes that Ms. Claude signed the Arbitration Agreement and other admission documents so that

Appellee would have the benefit of admission and treatment at Specialty Hospital. Consent to arbitrate any disputes arising from services the Facility provided to Appellee was an essential term to Specialty Hospital's agreement to admit him. [RP 89] That Appellee was the intended beneficiary is readily apparent from the face of the Arbitration Agreement, which specifically identifies him as the resident to be admitted to the Facility. [RP 89] *See Wiggins*, 2011 WL 4089435, at * 6 (noting that third-party beneficiary was "named as the resident to be admitted to the [nursing home] facility"). And Appellee's care and treatment was the essential purpose of the Arbitration Agreement.

Moreover, Appellee knowingly accepted the benefits of admission to the Facility that his mother had conferred upon him, thus further solidifying his third-party beneficiary status. From the very beginning, Appellee argued that when he was admitted to Specialty Hospital, he was "alert and oriented," and capable of making his own decisions. [RP 119-20; *see also* RP 122 (arguing in opposition to Appellant's Motion to Compel Arbitration: "It is uniformly agreed that [Appellee's] motor functions have been compromised, however, there has never been any evidence that the same can be said of his cerebral ones.")] Having accepted the benefits of admission to the Facility, Appellee must abide by the Arbitration Agreement as well. In sum, the third-party doctrine is an independent ground to enforce the Arbitration Agreement which mandates arbitration of

Appellee's claims. Thus, the District Court erred in denying the Motion to Compel Arbitration.

C. Ms. Claude Had Apparent Authority To Sign the Arbitration Agreement on Appellee's Behalf

Ms. Claude also had apparent authority to bind Appellee to the Arbitration Agreement. "Apparent authority is that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence." *Tabet v. Campbell*, 101 N.M. 334, 337, 681 P.2d 1111, 1114 (N.M. 1984) (emphasis omitted). "A principal is bound by the actions taken under the apparent authority of its agent if the agent is in a position which would lead a reasonably prudent person to believe that the agent possessed such apparent authority." *Vickers v. North Am. Land Dev., Inc.*, 94 N.M. 65, 67, 607 P.2d 603, 605 (N.M. 1980).

This Court and other tribunals have applied the apparent authority doctrine to enforce arbitration agreements against non-signatory nursing home residents in similar circumstances. *See, e.g., Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 2011-NMCA-094, ¶ 17, __ N.M. __, __ P.3d __ (N.M. Ct. App. May 31, 2011), *cert. dismissed*, No. 33,104 (N.M. Sept. 14, 2011); *Tennessee Health Mgt., Inc. v. Johnson*, 49 So. 3d 175, 180 (Ala. 2010); *Carraway v. Beverly Enters. Ala.*,

Inc., 978 So. 2d 27, 28-29 (Ala. 2007); *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777, at *2 (Ohio Ct. App. Dec. 21, 2005).

The record demonstrates apparent authority for several reasons. According to Appellee, when he was admitted to Specialty Hospital, he was "alert and oriented," and his mental faculties were unimpaired. [RP 122] Indeed, Appellee argued to the District Court below that he "was perfectly competent to make his own decisions" about his care and treatment at the Facility. [RP 122] Thus, there is no reason to doubt that Appellee *knowingly* allowed his mother to exercise control regarding his admission and treatment. *See Johnson*, 49 So. 3d at 180 ("Because [the resident] enjoyed the ease of checking into [the nursing home] without the requirement that she sign anything, *under circumstances in which no reasonable person could consider the admission possible without the intervention of an agent to act on [the resident's] behalf*, she thereby passively permitted [her daughter] to appear to [the nursing home] to have authority to act on her behalf, and [the daughter's] apparent authority is, therefore, implied." (emphasis added)).

Ms. Claude signed not only the Arbitration Agreement, but all of the other admission paperwork as well. [RP 130] Given that Appellee lived at the Facility for more than a month [RP 3 ¶¶ 11-12], it defies credulity that Appellee, whose mind was "alert and oriented" [RP 119], assumed that his admission and residency would be possible absent his mother's actions. And there is no evidence that

Appellee ever objected to his mother's exercise of authority for him. *See Johnson*, 49 So. 3d at 180 (finding apparent authority under similar circumstances); *see also Barron*, 2011-NMCA-094, ¶ 28 (granddaughter had apparent authority to sign arbitration agreement where "there was no evidence indicating that [the resident] objected to [her granddaughter] acting on her behalf.").

There are other indicia of apparent authority that the District Court overlooked, including an "Authorized Agent's Statement of Understanding" form that Ms. Claude signed as Appellee's "authorized agent." [Reply Br. at Ex. A] In this document, Ms. Claude "affirm[ed] and state[d] that I have read and understand the [the Facility's] *Policies and State Requirements* regarding the action to be taken if [Appellee] suffers cardiac or respiratory arrest AND [Appellee's] treating physician has certified in writing that [Appellee] has a terminal condition or is in a persistent vegetative state." [*Id.*] Ms. Claude represented to Specialty Hospital that "[u]nder those circumstances, *[Appellee] has informed me that it is his[] informed decision* that: CPR shall be performed and [Appellee] shall be considered a FULL CODE." [*Id.* (emphasis added, capitalization in original)] Accordingly, Appellee instructed his mother to act as his agent in carrying out his instructions regarding the use of CPR—thus cloaking her with the power of life or death (literally) over his fate. Appellee does not dispute that he directed his mother to

act for him in this regard, nor is there evidence that Appellee objected or limited Ms. Claude's authority in any respect.

In a March 12, 2008 interview with a Facility social worker, Ms. Claude, again acting in her capacity as Appellee's agent, reiterated to the Facility her son's preference "that he be full code." [Reply Br. Ex. B]

This conduct by *Appellee* evinces that *he* directed or allowed his mother to exercise, and to hold herself out as possessing, authority to make decisions about his admission and treatment. Ms. Claude therefore had apparent (if not actual) authority to sign the Arbitration Agreement. *See Barron*, 2011-NMCA-094, ¶ 38; *see also Carraway*, 978 So. 2d at 28-29 (nursing home resident's brother signed admission documents as resident's representative and there was no evidence that resident had any objection to brother acting on her behalf); *Broughsville*, 2005 WL 3483777, at *2-3 (resident bound to arbitration agreement that resident's daughter signed as her representative with resident's knowledge and without objection).

In short, Ms. Claude had authority to sign the Arbitration Agreement, and the District Court thus erred in denying the Motion to Compel Arbitration.

D. The New Mexico Uniform Health-Care Decisions Act Does Not Invalidate the Arbitration Agreement

In the District Court below, Appellee argued that his mother did not qualify as a person authorized under the UHDA to enter into contracts on his behalf, and therefore he was not bound by the Arbitration Agreement. [RP 156] To the extent

the District Court based its denial of the Motion to Compel Arbitration on this rationale, it erred.

Appellee's defense to Appellant's apparent authority argument was predicated on the mistaken belief that whether Ms. Claude had apparent authority to act for Appellee did not matter because, according to Appellee, she could have signed the Arbitration Agreement *only* if she were a "surrogate" for him under the UHDA. Appellee's position is legally incorrect. As this Court recognized in *Barron*, 2011-NMCA-094, ¶ 12, apparent authority is an *independent* source of authority to sign an agreement to arbitrate on behalf of a nursing home resident, separate and apart from any powers *vel non* conferred under the Act.

Likewise, courts in other jurisdictions with healthcare-surrogacy laws similar to our Act have reached the same conclusion with respect to the third-party beneficiary doctrine. *See, e.g., Wiggins*, 2011 WL 4089435, *6 n.13 (deeming it unnecessary to decide whether wife had statutory authority to sign arbitration agreement because her resident-husband was bound by the agreement as a third-party beneficiary); *Cook*, 786 F. Supp. 2d at 1171-72 (even though Mississippi's Uniform Health Care Decisions Act did not apply, resident was bound by a nursing home arbitration agreement as a third-party beneficiary); *McFarlan*, 995 So. 2d at 779-81 (same); *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 917-19 (Miss. Ct. App. 2007) (same).

In sum, Appellee is bound by the Arbitration Agreement regardless of whether Ms. Claude had authority to act has his surrogate under the UHDA because Appellee is required to arbitrate pursuant to third-party beneficiary and apparent authority principles. The District Court thus erred in denying the Motion to Compel Arbitration.

II. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

A. Preservation and Standard of Review

Appellant's arguments that the Arbitration Agreement was not unconscionable were preserved below [Reply Br. at 6-7], and are subject to a *de novo* standard of review. *See Piano*, 2005-NMCA-018, ¶ 4.

B. *Strausberg* Is Preempted by the FAA

On November 4, 2011, this Court decided *Strausberg v. Laurel Healthcare Providers, LLC*, No. 29,238, slip op. ¶ 20 (N.M. Ct. App. Nov. 4, 2011), in which a divided panel held that "when a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing home, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable." Even though the Court acknowledged that jurisprudence in New Mexico and elsewhere uniformly puts the burden to prove unconscionability on the party asserting it, the Court determined that such "cases all deal with commercial

transactions" that "are distinguishable and unpersuasive in the context [of mandatory nursing home arbitration agreements]." *Id.* ¶ 17 & n.1 (citing cases). The Court pointed to potential hardships and difficulties that residents may confront in seeking admission to nursing homes as its basis "for treating nursing home contracts with mandatory arbitration agreements differently from mere commercial contracts."[4] *Id.* ¶ 19 (quoting *Brown v. Genesis Healthcare Corp.*, No. 35494, slip op. at 16, 17-18, 20, 2011 WL 2611327 (W. Va. June 29, 2011)).

---

[4] The FAA is not limited to disputes involving "commercial transactions" or "commercial contracts," *Strausberg*, slip op. ¶¶ 17-19, and to the extent *Strausberg* concluded otherwise, it is simply wrong. *See id.* ¶ 7 (quoting 9 U.S.C. § 2). By its terms, Section 2 of the FAA broadly mandates enforcement of agreements to arbitrate any "*controversy*" in a contract that affects interstate commerce—which even the *Brown* court recognized covers nursing home arbitration agreements. *See Brown*, slip op. at 46-47.

Moreover, to the extent the Court relied on *Brown* for the proposition that, notwithstanding Section 2, Congress meant to limit the FAA's coverage to traditional "commercial contracts," *Strausberg* is foot-steadied on shaky ground, indeed. Although the *Brown* court claimed that "Congress [] intended the [FAA] to govern only contracts between merchants with relatively equal bargaining power who voluntarily entered into arbitration agreements," *Brown*, slip op. at 40, its primary authority was a citation to Justice Black's ***dissenting*** opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409 n.2 (1967) (Black, J., dissenting). *See Brown*, slip op. at 40 n.87. By contrast, the U.S. Supreme Court time and again has refused to limit Section 2's application to "commercial contracts." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) (limiting Section 2 to "commercial" contracts would be inconsistent with the Court's prior ruling that "§ 2 [of the FAA] required the arbitration of an age discrimination claim based on an agreement in a securities regulation application, a dispute that did not arise from a 'commercial deal or merchant's sale.'" (citation omitted)); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 n.5 (2011) ("[T]he dissent suggests [based on legislative history] that Congress

The *Strausberg* rule does not apply to this case because it is preempted by Section 2 of the FAA. Here, the Arbitration Agreement states that it "shall be governed by and interpreted under the [FAA]." [RP 90] Under the FAA, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (citation omitted), "'save upon such grounds as exists at law or equity for the revocation of *any* contract,'" *id.* (quoting 9 U.S.C. § 2 (emphasis added)). "Thus, state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* (emphasis added). This means a state law defense applies if—and only if—it complies with Section 2. State-law contract defenses are displaced, however, if they target or "single out" arbitration, or if they "derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion,* 131 S. Ct. at 1746; *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." (citation and quotations omitted)).

---

thought that arbitration would be used primarily where merchants sought to resolve disputes of fact . . . [and] possessed roughly equivalent bargaining power. Such a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our cases." (internal quotation marks and citations omitted)).

In this case, *Strausberg* violates Section 2 of the FAA because it imposes a unique requirement on mandatory nursing-home arbitration agreements—*i.e.*, the nursing home must prove that the agreement is not unconscionable if a resident asserts that defense—which the Court readily acknowledges is inapplicable to other arbitration agreements and other contracts generally. *Strausberg*, slip op. ¶ 19; *see also id.* (Wechsler, J., dissenting) ("I [] do not agree with shifting the burden to the party seeking to enforce an arbitration agreement to prove that an arbitration agreement is not unconscionable, because this position does not have a basis on well-established contract law."). The inevitable result of *Strausberg*'s burden-shifting rule is that nursing homes like Specialty Hospital that require residents to agree to arbitrate disputes as a condition of their admission will face greater difficulty in enforcing their federally-protected arbitration rights. This is precisely what Section 2 forbids. *See DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 9, 134 N.M. 630, 81 P.2d 573 (N.M. Ct. App. 2003) ("States may not subject an arbitration agreement to requirements that are more stringent than those governing the formation of other contracts."); *see also Perry*, 482 U.S. at 492 n.9 ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable a court to effect what . . . the state legislature cannot."); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281

(1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."). Accordingly, *Strausberg* does not apply to this Arbitration Agreement.

As explained below, regardless who has the burden of proof, the evidence shows that the Arbitration Agreement is not even close to being unconscionable.

C. There Was No Procedural Unconscionability

Appellee's procedural unconscionability defense consisted of the following three sentences in his opposition to Appellant's Motion to Compel Arbitration:

> The [admission] documents were simply placed in front of [Ms.] Claude by a Specialty Hospital employee during an encounter that was so brief, the employee never even sat down. The documents were not explained, nor did any negotiating take place. In fact, the employee discouraged reading of the entire [Arbitration Agreement] by directing [Ms.] Claude's attention only to the "sign here" stickers and telling her to do so. [RP 123]

These allegations do not make out even a colorable claim of procedural unconscionability.[5] *First*, despite Ms. Claude's post-hoc complaints about the

[5] Appellee's procedural unconscionability defense is preempted by the FAA. The alleged deficiencies in the admission process (*i.e.*, lack of explanation, no negotiation, hurried procedure) naturally apply to all of the other admission documents that Ms. Claude executed at the same time she signed the Arbitration Agreement. [RP 130] But Appellee did not ask the District Court to apply these heightened standards to anything other than the Arbitration Agreement. [RP 122-23] Instead, Appellee, in asserting procedural unconscionability, asked the District Court to impose special rules regarding presentation, explanation, disclosure and facilitation that apply specifically and uniquely to the Arbitration Agreement alone.

admission process, she did not allege in her supporting affidavit [RP 130], nor is there any other evidence, that she did not understand the Arbitration Agreement. Even if Ms. Claude did not understand the Agreement, that would not amount to procedural unconscionability—not by a long shot. *See Day v. Persels & Assoc., LLC*, No. 8:10-CV-2463-T-33TGW, 2011 WL 1770300, at *6 (M.D. Fla. May 9, 2011) ("[Plaintiff's] assertion that she 'did not understand the language regarding arbitration' and that '[t]he arbitration language is not clear to me' is simply too vague and conclusory;" given that the arbitration clause was clearly delineated, "it is not good enough to simply say in general that the language was not clear and [the plaintiff] did not understand it.").

As explained above, the Arbitration Agreement was a two-page, stand-alone document—that Ms. Claude was directed to "***PLEASE READ CAREFULLY***"—which explained the arbitral process in clear and unmistakable terms. [RP 89]

This is prohibited by Section 2 of the FAA. In *Concepcion*, the Supreme Court reiterated that although Section 2 permits courts to set aside arbitration provisions by general contract defenses, such defenses are invalid if they target or "single out" arbitration, or if they "derive their meaning from the fact that an agreement to arbitrate is at issue." 131 S. Ct. at 1746. Appellee's procedural unconscionability arguments do precisely that. Just as a state statute may not impose unique requirements on arbitration agreements, *see Casarotto*, 517 U.S. at 687-88, nor may a court do so via application of unconscionability principles, *Concepcion*, 131 S. Ct. at 1747 ("[A] court may not reply on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." (quotations and citation omitted).

Notably, there is no indication that Ms. Claude ever *told* the Facility representative that she did not understand the Arbitration Agreement or that she ever *asked* the representative (or anyone else) to clarify or explain it to her.[6] [RP 130] Nor did Appellee make even the bare allegation that Specialty Hospital would not have helped Ms. Claude if she had done so.[7] *See Bland v. Health Care & Ret. Corp.*, 927 So. 2d 252, 256 (Fla. Dist. Ct. App. 2006) (enforcing arbitration agreement where signatory had the opportunity to ask questions or seek advice but chose not to do so).

Second, Appellee asserted in his opposition to Appellant's Motion to Compel Arbitration that the Facility representative "discouraged" Ms. Claude from reading the Arbitration Agreement by showing her where to sign her name, *but Ms.*

---

[6] *See Owens*, 890 So. 2d at 988 (noting that nursing home had no duty to explain arbitration agreement to resident or her representative); *see also D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1164 (Nev. 2004) (per curiam) (noting that defendant "did not have a duty to explain in detail each and every right that the [plaintiffs] would be waiving by agreeing to arbitration" where the agreement was clear).

[7] The Facility had no duty to read Ms. Claude's mind; if she did not understand the Arbitration Agreement, it was *her* duty to seek advice. *See Ratliff v. Costar Realty Info. Servs., Inc.*, Civil Action No. 11-0813, 2011 WL 2680585, at *6 (D. Md. July 7, 2011) ("Plaintiff does not cite any case law suggesting that [Defendant] had an obligation to ensure that she understood each and every term of the [arbitration] agreement prior to signing, nor is the court aware of any."). "Each party to a contract has a duty to read and familiarize [herself] with its contents before [she] signs and delivers it, and if the contract is plain an unequivocal in its terms, each is ordinarily bound thereby." *Smith v. Price's Creameries*, 98 N.M. 541, 545, 650 P.2d 825, 829 (N.M. 1982).

Claude herself made no such allegation in her supporting affidavit. [RP 130] In any event, Appellee's contention hardly demonstrates procedural unfairness. In the Arbitration Agreement, Ms. Claude expressly acknowledged that she had the "right to consult with an attorney of []her choice before signing this [A]greement and to receive from that attorney explanations or clarifications of any of the terms of this Agreement." [RP 90] If Ms. Claude wanted legal advice regarding the Arbitration Agreement or any other admission document, she could have exercised her right to obtain it. Under the circumstances, Appellee's false assertion that the Facility "discouraged" Ms. Claude from reading the Arbitration Agreement, or improperly pressured or hastened her to sign it without comprehending its terms, falls woefully short of procedural unconscionability. *See Sanford v. Castleton Health Care Ctr. LLC*, 813 N.E.2d 411, 418 (Ind. Ct. App. 2004) (enforcing arbitration agreement where plaintiff subjectively felt "rushed" during admission process but no one at the facility "urged her to hurry or told her not to read the contract").

Third, Appellee's allegation that no "negotiating [took] place" during the admission process adds nothing to his procedural unconscionability claim because there is no allegation or proof that that Ms. Claude ever asked to negotiate the Agreement, let alone that her request was refused. *See Thompson v. THI of New Mexico at Casa Arena Blanca, LLC*, No. CIV 05-1331 JB/LCS, 2006 WL

4061187, at *14 (D.N.M. Sept. 12, 2006) (explaining that arbitration agreement was not a contract of adhesion because plaintiff did not show "that he attempted to negotiate and was rebuffed"). And even if there was no opportunity to bargain, Ms. Claude could have refused to sign the Arbitration Agreement and placed Appellee at another facility. Indeed, Ms. Claude acknowledged in the Agreement that "there are numerous other health care providers in [New Mexico] where [Specialty Hospital] is located that are qualified to provide such care." [RP 89] *See Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 281 (Fla. Dist. Ct. App. 2003) (upholding arbitration agreement absent a showing that plaintiff's daughter "could not have obtained a satisfactory placement for her mother except by acquiescing to the terms as written"); *Briarcliffe Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 666 (Ala. 2004) (per curiam) (rejecting procedural unconscionability defense where evidence did not show "that the nursing home care is unavailable without agreeing to arbitration").

Finally, Appellee does not contend that his admission to Specialty Hospital was an emergency that prevented Ms. Claude from reviewing the Arbitration Agreement and other admission forms. *See Rinderle v. Whispering Pines Health Care Ctr.*, No. CA2007-12-041, 2008 WL 3823701 *3 (Ohio Ct. App. Aug. 18, 2008) (rejecting procedural unconscionability claim because the record "d[id] not

indicate that the admission was an emergency"); *Broughsville*, 2005 WL 3483777, at *5 (same).

In sum, Appellee is wrong—there was nothing unfair, let alone procedurally unconscionable, about the Arbitration Agreement. To the extent the District Court concluded otherwise, it committed reversible error.

D. The Arbitration Agreement Is Not Substantively Unconscionable

Appellee argued before the District Court that the Arbitration Agreement was substantively unconscionable because Ms. Claude had no authority to waive his right to a jury trial merely by signing the Agreement as a "responsible party." [RP 123] Appellee was wrong. As explained above, the Arbitration Agreement is valid and enforceable against Appelllee under the third-party-beneficiary and apparent authority doctrines.

Moreover, there is nothing substantively unconscionable about the fact that Appellee must arbitrate his claims against Appellant because "it is axiomatic that a party may waive the right to a trial by jury in a civil case by entering into a contract to arbitrate." *Carter v. SSC Odin Operating Co., LLC*, 927 N.E.2d 1207, 1220 (Ill. 2010) (citing authorities). Indeed, a central goal of arbitration—and the strong federal and New Mexico public policies favoring it, *see Thompson*, 2006 WL 4061187, at *5 ("New Mexico courts have construed the legislative purpose of the [New Mexico Uniform Arbitration Act] as an attempt to reduce the caseload of

the courts")—is to forgo litigation in court in favor of the substantial benefits that the arbitral process affords, *see Barron*, 2011-NMCA-094, ¶ 41 ("[T]here are advantages to arbitration which, among other benefits, are that it generally costs less than litigation and leads to a quicker resolution."). In short, the Arbitration Agreement is not substantively unconscionable and the District Court erred in denying Appellant's Motion to enforce it.

CONCLUSION

For the foregoing reasons, the District Court's Order denying Appellant's Motion to Compel Arbitration should be reversed.

REQUEST FOR ORAL ARGUMENT

Pursuant to NMRA 12-214(B), Appellant respectfully requests oral argument to address the facts and recent developments in the case law cited herein and to address any other issues that may arise as a result of the parties' briefing of this appeal.

Respectfully Submitted,

JOHNSON, TRENT, WEST & TAYLOR, L.L.P.

By: Lori D. Proctor

Lori D. Proctor, Esq.
919 Milam, Suite 1700
Houston, TX 77002
Telephone: (713) 222-2323
Facsimile: (713) 222-2226

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2011, a copy of the forgoing Brief-In-Chief of Appellant-Defendant was sent via First Class U.S. mail, postage prepaid, to the following:

Adam D. Rafkin
ADAM D. RAFKIN, P.C.
Post Office Box 1912
Ruidoso, NM 88355

Lorri Krehbiel
Melanie Frassanito
KREHBIEL LAW OFFICE, PC
7770 Jefferson Street NE, Suite 315
Albuquerque, NM 87109-4386

Arthur D. Beach
KELEHER & MCLEOD, P.A.
Post Office Box AA
Albuquerque, NM 87103

Lori D. Proctor

Lori D. Proctor, Esq.