**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



# REPLY BRIEF 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***

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## 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 3,802 words. This information was obtained from a word-processing program, Microsoft Office Word 2003, 11.8326.8202.

## ARGUMENT[1]

### I. THE NEW MEXICO UNIFORM HEALTH-CARE DECISIONS ACT DOES NOT ABROGRATE COMMON LAW THIRD-PARTY BENEFICIARY OR APPARENT AUTHORITY DOCTRINES

As explained in the Brief-In-Chief at 13-20, Appellee is bound to the Arbitration Agreement by the third-party beneficiary and apparent authority doctrines. Appellee proffers no serious argument to the contrary. Appellee's argument, instead, is that New Mexico's Uniform Health-Care Decisions Act ("UHDA" or "Act"), NMSA 1978, §§ 24-7A-1 *et seq.* abrogates common law third-party beneficiary and apparent authority principles and stands alone as the *only* basis upon which a third party may bind a patient to an agreement to arbitrate. [AB at 2, 4, 6] According to Appellee, the third-party beneficiary and apparent authority doctrines do not apply because they effectively would circumvent the Act. [AB at 2, 3, 9] Appellee is wrong for several reasons.

Preliminarily, Appellee is estopped from claiming that the UHDA is controlling because in the District Court below he argued (and does not disavow here) that an arbitration agreement is ***not*** a "healthcare decision" under the Act. [RP 120-21] *See Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶ 12, 147 N.M. 244, 219 P.3d 12 (noting that judicial estoppel "prevents a party who

[1] The terms defined in Appellant's Brief-In-Chief ("BIC") shall be applied herein. Appellee's Answer Brief shall be cited as "AB."

successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position . . ."). By its terms, the UHDA governs a surrogate's power to make only "*healthcare decisions*." *See* NMSA 1978, § 24-7A-2. Taking Appellee's contention at face value that an agreement to arbitrate is not a healthcare decision, the UHDA does not apply and therefore does not preclude the third-party beneficiary and apparent authority doctrines from binding Appellee to the Arbitration Agreement.

Moreover, Appellee's position fails because apart from his citations to *Corum v. Roswell Senior Living, LLC*, 2010-NMCA-105, 149 N.M. 287, 248 P.3d 329—which (as explained below) has nothing to do with abrogation of the common law—Appellee points to no authority indicating that the UHDA displaces the third-party beneficiary and apparent authority doctrines. *See The Bank of N.Y. v. Romero*, 2011-NMCA-110, ¶ 16, __ N.M. __, __ P.3d __ ("Where a party cites no authority to support an argument, we may assume no such authority exists."), *cert. granted*, (N.M. Oct. 25, 2011). Appellee's failure to cite any supporting authority, by itself, is disqualifying. *See In re Adoption of Doe*, 100 N.M. 764, 765, 767 P.2d 1329, 1330 (1984) ("Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal."). Accordingly, Appellee's argument fails on these preliminary grounds alone.

Appellee's argument that the Act displaces third-party beneficiary and apparent authority principles fares no better on the merits. *First*, Appellee's contention is unsupported by the Act's text. In New Mexico, "[w]e presume that the Legislature enacts statutes that are consistent with the common law and that the common law applies unless it is clearly abrogated." *San Juan Agric. Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, ¶ 20, 150 N.M. 64, 257 P.3d 884. Thus, "[a] statute will be interpreted as supplanting the common law only if there is an *explicit indication* that the legislature so intended." *Sims v. Sims*, 1996-NMSC-078, ¶ 22, 122 N.M. 618, 930 P.2d 153 (emphasis added).

Here, Appellee points to no provision of the UHDA which so much as hints—let alone "explicitly indicates"—that the Act supplants common law.[2] *See KNME-TV*, 2011-NMSC-011, ¶¶ 28-29 (noting that such an inquiry begins with examination of statutory language). If anything, the Act preserves traditional common law and equitable principles. *See* NMSA 1978, § 24-7A-10 (noting that statutory damages for violations of the Act "are in addition to other types of relief available under other law . . ."); *see id.* § 24-7A-14 ("[T]he district court may enjoin or direct a health-care decision or order other *equitable relief*." (emphasis

[2] Appellee argues incorrectly that the third-party beneficiary and apparent authority doctrines are abrogated because the Act does not specifically authorize them. [AB 2, 4, 6] Statutory silence, however, is not determinative. *See Sims*, 1996-NMSC-078, ¶ 22 ("adopt[ing] a strict rule that the common law must be expressly abrogated by a statute . . .").

added)); *cf. Barker v. Evangelical Lutheran Good Samaritan Soc'y*, 720 F. Supp. 2d 1263, 1267-68 (D.N.M. 2010) ("find[ing] nothing in [a state nursing home regulation] to indicate that [] the common law of contracts or the [UHDA] is somehow displaced or inapplicable to the arbitration agreement at issue").

Appellee relies only upon *Corum* in arguing that the UHDA abrogates common law third-party beneficiary and apparent authority principles [AB at 1, 3], but *Corum* says no such thing. There, the Court concluded that a husband lacked authority under the UHDA to sign, on behalf of his wife, a nursing home admission contract that contained an arbitration provision because the wife previously had executed a power of attorney that named the husband's daughter as her attorney-in-fact. 2010-NMCA-105, ¶¶ 1-2. In *Corum*, the parties did not argue, nor did the Court consider, whether the resident was bound to the arbitration agreement as a third-party beneficiary or under the apparent authority doctrine—much less whether the UHDA renders these common law precepts inert.

*Second*, further proof that the UHDA provides no defense to arbitration agreements is that Appellee's proposed interpretation of the Act is preempted by Section 2 of the FAA, which governs here. [RP 90] Section 2 provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exists at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added). It is well-settled "that only 'generally applicable

contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravention of § 2.'" *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (quoting *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996)); *see also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable [under Section 2 of the FAA] if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."). Thus, a court may void an arbitration agreement "if and only if the party resisting arbitration can point to a generally applicable principle of contract law under which the agreement could be revoked." *Fitz v. Islands Mech. Contractor, Inc.*, Civ. No. 08-cv-00060, 2010 WL 2384584, at *6 (D.V.I. June 9, 2010) (citations omitted); *see also Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001) ("[A] state law that invalidates arbitration agreements is not preempted by the FAA only if the law is 'generally applicable,' or applies to 'any contract'" (internal citations omitted)). Appellee does not meet this test.

Appellee's contention that the UHDA trumps third-party beneficiary and apparent authority principles fails under Section 2 of the FAA because the UHDA is not applicable to "any contract." Instead, the Act governs only patient "health-care decisions" made by third parties. *See* NMSA 1978, § 24-7A-2(A)-(G). Accordingly, the Act furnishes no defense that is applicable to contracts generally.

As one court aptly noted (in a passage that could have been written with the UHDA in mind), "[c]ases addressing the conflict between the FAA and state laws prohibiting or restricting arbitration agreements universally support the proposition that a state statute prohibiting arbitration is not a 'generally applicable principle of contract law' when it is limited to a specific type of contract." *Fitz,* 2010 WL 2384585, at *7 (collecting cases); *see also Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1219 (Ill. 2010) ("State laws that are applicable to arbitration contracts and some other types of contracts, but not all contracts, are not grounds for the revocation of *any* contract [under Section 2 of the FAA]").

Moreover, for FAA preemption purposes it matters not that the UHDA does not specifically mention arbitration. *See Carter*, 927 N.E.2d at 1218 (explaining that Supreme Court precedents "make clear that state statutes are preempted by the FAA if the statutes as applied preclude the enforcement of federally protected arbitration rights, regardless of whether the state statutes specifically target arbitration agreements."). Appellee's proposed construction of the UHDA would subject contracts regarding healthcare decisions, and only such contracts, to special rules not applicable to contracts generally. To the extent the UHDA's special contract rules would preclude enforcement of arbitration agreements, such rules are preempted by Section 2 of the FAA. *See id.* at 1219 ("[T]he antiwaiver provisions of the Nursing Home Care Act purport to invalidate arbitration agreements in a

specific type of contract—those involving nursing care—and for that reason alone they are not a defense generally applicable to 'any contract.'").

*Third*, Appellee's contention that the UHDA bars the third-party beneficiary and apparent authority doctrines flies in the face of recent case law. For example, in *Barron v. The Evangelical Lutheran Good Samaritan Soc'y*, 2011-NMCA-094, ¶ 17, 150 N.M. 669, 265 P.3d 720, *cert dismissed* No. 33,104 (N.M. Sept. 14, 2011), this Court ruled that a resident's granddaughter had apparent authority to bind the resident to an optional arbitration clause in a nursing home admission contract. Implicitly recognizing that apparent authority is an independent basis to compel arbitration, the Court did not address whether the UHDA empowered the granddaughter to act for the resident, noting that the nursing home "did not argue in the district court, nor d[id] [it] argue on appeal, that [the granddaughter's] authority stemmed from the Act." *Id.* ¶ 12. Appellant cited *Barron* for this principle in its Brief-In-Chief at 21, but Appellee did not address or refute this aspect of *Barron*—nor could he do so. [AB 6-8]

Similarly, in *THI of N.M. at Hobbs Center, LLC v. Patton*, Civ. No. 11-537 LH/CG, 2012 WL 112216, at *7-9 (D.N.M. Jan. 3, 2012), the court ordered arbitration of claims brought by a nursing-home resident's estate because the resident was a third-party beneficiary of an arbitration agreement that was identical to the one in this case. If Appellee were correct that the UHDA sweeps so broadly

to displace the common law—such that a third-party may sign an arbitration agreement on behalf of a patient *only* if s/he qualifies as a "surrogate" under the Act, it stands to reason that either the parties or the court in *Patton* would have taken note of it. But the *Patton* Court's exhaustive opinion does not even mention the UHDA; instead, without hesitation, the Court compelled arbitration based on third-party beneficiary and equitable estoppel grounds. *See id.* at *7-11.

Appellee's position also is belied by decisions from other jurisdictions, including cases that Appellant cited in its Brief-In-Chief at 21 but which Appellee failed to address in his Answer Brief. In *Corum*, 2010-NMCA-105, ¶ 11, this Court observed, for example, that Mississippi has a statute similar to our Act. Decisions from Mississippi courts have enforced arbitration agreements on common law grounds even though a third-party lacked authority to bind a patient under Mississippi's UHDA.[3] [BIC 21] *Cf. THI of S.C. at Columbia Manor, LLC*

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[3] *Corum* noted that Tennessee also has a healthcare surrogacy statute analogous to our Act, 2010-NMCA-105, ¶ 12, but we found no Tennessee decision on point. The closest case we could find is *Ricketts v. Christian Care Ctr. of Cheatham County, Inc.*, No. M2007-02036-COA-R9-CV, 2008 WL 3833660, at *4 (Tenn. Ct. App. Aug. 15, 2008), in which the court declined to compel arbitration pursuant to the third-party beneficiary doctrine where the Tennessee surrogacy statute was inapplicable, but only because there was no independent contract between the resident's representative and the facility. By contrast, Ms. Claude executed the Arbitration Agreement in her personal capacity so that Appellee would receive the benefits of admission to Specialty Hospital—a fact that Appellee does not dispute. [AB 1-2; BIC 6 (citing RP 90)] *See Patton*, 2012 WL 112216, at *9 (reaching the same conclusion with respect to the same arbitration agreement).

*v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 n.13 (D.S.C. Sept. 13, 2011) (concluding that it was unnecessary to decide whether a daughter had statutory authority to bind her father to an arbitration agreement because it was enforceable on third-party beneficiary and equitable estoppel grounds). These cases provide guidance which this Court should follow given that our courts' "interpretation of the Act should effectuate the purpose of uniformity with other states that have likewise adopted the [UHDA]." *Corum*, 2010-NMCA-105, ¶ 5 (citing NMSA 1978, § 12-2A-18(B)).

*Finally*, application of common law contract principles in this case is consistent with the purpose of the UHDA and, more importantly, is required given the U.S. Supreme Court's admonition that "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). The UHDA safeguards "a patient's right to make their own medical decisions." *Corum*, 2010-NMCA-105, ¶ 15. That is exactly what happened here.

It is undisputed that Appellee was the intended third-party beneficiary of the Arbitration Agreement and other papers that Ms. Claude executed so that Appellee would have the benefit of admission to Specialty Hospital. [BIC 15-16] Appellee does not challenge—and thus effectively concedes—that he knowingly accepted the benefits of admission to the Facility that Ms. Claude had conferred upon him.

[BIC 16] To be sure, Appellee claims (as he did before the District Court) that when he was admitted to Specialty Hospital, he was "'alert and oriented' and capable of making decisions" [AB 5] and was "as capable of understanding matters as [he] was before [his] accident," [AB 6]. Nor does Appellee deny that he knowingly allowed his mother to make and implement all decisions regarding his admission, thus cloaking her with apparent authority. [BIC 18; *see infra* note 4]

The Arbitration Agreement that Ms. Claude signed for Appellee's benefit is a direct result of these decisions by Appellee. Requiring Appellee to abide by the consequences of his decisions by application of common law contract principles is not unfair; in fact, it is consistent with the UHDA's purpose. To do otherwise would countenance Appellee's attempt to misuse the Act as both a shield and sword to defeat Appellant's arbitration rights that Appellee is obligated to respect.

In sum, there is no merit to Appellee's assertion that the UHDA displaces third-party beneficiary and apparent authority principles which bind Appellee to the Arbitration Agreement.

## II. THE ELEMENTS OF THE THIRD-PARTY BENEFICIARY AND APPARENT AUTHORITY DOCTRINES ARE SATISFIED

As he did in the District Court, Appellee does not—and cannot—dispute in his Answer Brief at 1-2 that the elements of the third-party beneficiary doctrine are satisfied in this case such that he is bound by the Arbitration Agreement. *See Patton*, 2012 WL 112216, at *7-10 (enforcing the same arbitration agreement

under New Mexico law against the estate of a former patient who was a third-party beneficiary of the agreement); *see also McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 63185675, at *3 (D.S.C. Dec. 15, 2011) (same result under South Carolina law); [BIC 15 (citing cases)].

Appellee contends that the elements of apparent authority are not met, but to no avail. *First*, Appellee accuses Specialty Hospital of failing to exercise due diligence to determine (1) whether Ms. Claude had authority to sign his admission paperwork, and (2) if she did, whether that authority extended to the Arbitration Agreement. [AB 7-8] Both points miss the mark.

As explained in the Brief-In-Chief at 12, 18-20, given Appellee's insistence that he was "alert and oriented" when he arrived at Specialty Hospital [RP 119], there is ample record evidence that Appellee directed or knowingly permitted Ms. Claude to control every aspect of his admission and treatment at the Facility—and *Appellee does not contend otherwise*.[4] Moreover, knowing that Ms. Claude was making and implementing all of his decisions at the Facility, Appellee cannot now

[4] At most, Appellee attested in an affidavit that he submitted to the District Court that "[a]t no time at Specialty Hospital did I advise anyone that my mother, Yvonne Claude, was my 'surrogate' for making healthcare decisions for me under the [UHDA]" [RP 134], but that is beside the point. Even if he did not expressly designated Ms. Claude as his statutory surrogate, Appellee—who claims that he was "alert and oriented" [RP 119]—never has denied that he knowingly directed or permitted Ms. Claude to exercise decision-making authority for him regarding his admission to Specialty Hospital, or that he knowingly accepted the benefits of admission and treatment at the Facility.

claim that his mother's authority did not include the power to sign the Arbitration Agreement. *See Barron*, 2011-NMCA-094, ¶¶ 21-22 (rejecting a similar argument on similar grounds). In light of Appellee's broad grant of apparent authority to Ms. Claude, there is no merit to Appellee's contention that Specialty Hospital was remiss by failing to confirm with Appellee that Ms. Claude had authority to sign the Arbitration Agreement in addition to the other admission paperwork she completed for him. [AB 8; RP 130] *See id.* ¶ 24. Knowing that Ms. Claude was acting on his behalf, Appellee had a duty to make any limitation on her authority known if he objected to his mother's exercise of authority for him—which he never did.

*Second*, Appellee claims there is no evidence that he engaged in conduct indicating that his mother had authority to make decisions for him. [AB 8] Not so. Appellee ignores exhibits discussed in the Brief-In-Chief at 19-20 revealing instances where he directed or allowed his mother to exercise, or hold herself out to Specialty Hospital as possessing, authority to make decisions about his admissions and treatment. In his Answer Brief, Appellee does not dispute that he actually gave his mother the authority as reflected in these exhibits. Such unrefuted evidence is more than enough to establish apparent authority.

*Finally*, Appellee argues that the Facility's reliance on his manifestations of apparent authority that he conferred upon Ms. Claude was unjustified because the

"admissions paperwork noted time and again that he had *not* appointed his mother as a Power of Attorney." [AB 5 (citing RP 126-29)] This Court rejected a similar contention in *Barron*, "disagree[ing] with the district court that [a granddaughter] could only act on [the resident's] behalf pursuant to . . . a power of attorney." 2011-NMCA-094, ¶ 12. Indeed, *Barron* recognized that apparent authority is an independent source of authority to execute an arbitration agreement on behalf of a nursing home resident even in the absence of a power of attorney. [BIC 31] In short, despite Appellee's futile assertions to the contrary, the elements of the third-party beneficiary and apparent authority doctrines are satisfied.

## III. THERE WAS NO PROCEDURAL UNCONSCIONABILITY

In his Answer Brief, Appellee provides no support for his defective procedural unconscionability claim,[5] but instead, merely rehashes his original, bald assertions of procedural unfairness which the Brief-In-Chief showed are insufficient and/or inaccurate. [BIC 26-31] Indeed, Appellee's Answer Brief fails to address most, if not all, of the points and authorities in the Brief-In-Chief regarding Appellee's claim of procedural unconscionability.

[5] Appellee does not dispute Appellant's assertion that Appellee's procedural unconscionability defense is preempted by the FAA because it seeks to impose heightened requirements that apply solely to the Arbitration Agreement. [BIC 26 n.5] *See Corum*, 2010-NMCA-105, ¶ 18 ("[T]he FAA does not allow for special scrutiny to be applied to arbitration agreements").

In sum, Appellee's unconscionability claim boils down to a hollow argument that the Arbitration Agreement should be voided because Ms. Claude signed the document without reading it. [AB 12] But that is not the law of New Mexico. In rejecting similar arguments directed towards an identical arbitration agreement, the U.S. District Court for the District of New Mexico reiterated that "[e]ach party to a contract [] has a duty to read and familiarize herself with its contents before signing it, and thus, a party who executes and enters a written contract is presumed to know the terms of the agreement and to have agreed to each of its provisions in the absence of fraud, misrepresentation, or some other wrongful act." *Patton*, 2012 WL 112216, at *22 (citing *Smith v. Price's Creameries*, 98 N.M. 541, 545 (1982)).

Appellee also asserts that the procedural impropriety of the circumstances in which Ms. Claude signed the Arbitration Agreement are "obvious" [AB 14], but this is unproven hyperbole—and nothing more. Here, the record shows that: (1) "the terms of the Arbitration Agreement are straight-forward and clear enough that an unsophisticated lay person could understand," *Patton*, 2012 WL 112216, at *22; (2) Ms. Claude did not attest in her affidavit [RP 130] that she did not understand the Arbitration Agreement or that even if she had reviewed the Agreement during the admission process, she would not have signed it anyway; (3) Ms. Claude never told the Facility representative that she wanted to review the Arbitration Agreement, or that she ever asked the representative to explain the Agreement to

her, or that she ever told the representative that she wished to seek advice from an attorney before signing the document, as was her right under the Agreement [RP 90]; and (4) Appellant's admission was not an emergency that prevented Ms. Claude from reviewing the Arbitration Agreement—nor could Appellant make such an accusation given that Ms. Claude attested in her affidavit that "[Appellant] had already been admitted and was physically at Specialty Hospital when I signed the admission papers." [RP 130, ¶ 3]

Further evidencing the futility of his argument, Appellee repeats the false allegation that the Facility representative "discouraged" Ms. Claude from reading the Arbitration Agreement "by directing [her] attention only to the 'sign here' stickers and telling her to do so." [AB 14] As explained in the Brief-In-Chief at 28-29, Ms. Claude made no such allegation herself in her affidavit [RP 130], yet Appellee attributed that contention to Ms. Claude in his Answer Brief anyway. In any event, even if Ms. Claude harbored subjective concerns that she was not free to reject the Arbitration Agreement, the *Patton* court made plain that that does not amount to procedural unconscionability. 2012 WL 112216, at *22 ("Nor is Ms. Barry's mere subjective feeling of not being free to decline arbitration terms enough to demonstrate procedural unconscionability.").

Finally, as in *Patton*, there is no evidence that Specialty Hospital pressured Ms. Claude to sign the Arbitration Agreement without comprehending its terms or

that there were no other reasonable nursing home facilities available to Appellant such that she was forced to accept the terms of the Arbitration Agreement. *See id.* In sum, Appellee's procedural unconscionability defense is legally invalid.

## CONCLUSION

For the reasons set forth above and in the Brief-In-Chief, the District Court's Order denying Appellant's Motion to Compel Arbitration should be reversed.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2012, a copy of the forgoing Reply Brief of Appellant-Defendant was sent via First Class U.S. mail, postage prepaid, to the following:

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