Rel: August 19, 2022

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

1200843

Ball Healthcare Services, Inc., d/b/a Lighthouse Rehabilitation and Healthcare Center

v.

Ledell Flennory, as personal representative of the Estate of Rosa Lee McCreary

Appeal from Dallas Circuit Court
(CV-20-900214)

PARKER, Chief Justice.

Ball Healthcare Services, Inc. ("Ball Healthcare"), appeals an order of the Dallas Circuit Court denying its motion to compel arbitration in

Ledell Flennory's wrongful-death suit against it. Because Flennory did not meet his burden of rebutting Ball Healthcare's evidence that an enforceable arbitration agreement existed, we reverse and remand.

I. Facts[1]

Rosa Lee McCreary sought admission to Lighthouse Rehabilitation and Healthcare Center ("Lighthouse"), a skilled-nursing facility operated by Ball Healthcare. At that time, McCreary had numerous health issues, including gangrene, vascular issues, and complications from diabetes and a stroke. She also had had a leg amputated and was legally blind. McCreary's daughter, Jacqueline Williams, signed the admission paperwork. The paperwork included a dispute-resolution agreement that provided that all disputes between Ball Healthcare and McCreary or her estate would be resolved by arbitration ("the arbitration agreement"). The arbitration agreement stipulated that Ball Healthcare regularly engaged in transactions involving interstate commerce and that its services involved interstate commerce. The arbitration agreement

[1]The historical facts stated in this section are undisputed for purposes of this appeal. They are based on the evidence that was submitted to the circuit court in support of and in opposition to Ball Healthcare's motion to compel arbitration.

provided that it could be signed by an "Authorized Representative" of the resident:

> "If the Resident is unable to consent to or sign this Agreement because of a physical disability or mental incompetence or is a minor, this Agreement may be executed by an 'Authorized Representative,' who is duly authorized to execute this Agreement on behalf of the Resident, and who shall execute this Agreement on behalf of the Resident on the signature line for the Authorized Representative below …. If this Agreement is signed by an Authorized Representative of the Resident, the Authorized Representative hereby certifies that he/she is duly authorized by the Resident or otherwise to execute this Agreement and accept its terms."

The arbitration agreement contained three signature blocks, for "Resident," "Responsible Party," and "Facility." The "Resident" block was unsigned. Williams signed in the "Responsible Party" block. (The signature block's use of the words "Responsible Party" rather than "Authorized Representative" appears to have been a scrivener's error. The words "Responsible Party" do not appear in the body of the arbitration agreement. Flennory does not contend that the signature block was intended to be signed by anyone other than an "Authorized Representative" or that the apparent scrivener's error makes any difference.) Williams's signature was notarized.

McCreary resided at Lighthouse for about two months, until she

allegedly developed an infected pressure ulcer on her foot and died from septic shock. Flennory, who was McCreary's son and the personal representative of her estate, commenced this wrongful-death action against Ball Healthcare.

Ball Healthcare moved to compel arbitration and submitted the arbitration agreement in support. Ball Healthcare asserted that Williams's signature created an enforceable agreement to arbitrate.

Flennory responded that Williams was not McCreary's "Authorized Representative," as that term was defined in the arbitration agreement. Specifically, Flennory contended that the arbitration agreement allowed Williams to sign only if McCreary was unable to consent to or sign the arbitration agreement because of a physical disability or mental incompetence. It is undisputed that McCreary was mentally competent to sign the arbitration agreement. Moreover, Flennory asserted, McCreary was physically able to sign the arbitration agreement. In support, he submitted two medical records purportedly signed by McCreary five weeks before and seven weeks after her admission to Lighthouse, which he argued showed that she had the ability to sign documents. Therefore, Flennory argued, Williams did not validly sign the

arbitration agreement on behalf of McCreary. Accordingly, Flennory contended, there was no valid agreement to arbitrate.

The circuit court denied Ball Healthcare's motion. Ball Healthcare filed a motion to alter, amend, or vacate the court's order and, while that motion was pending, filed its notice of this appeal to this Court. The circuit court did not rule on the motion to alter, amend, or vacate.[2]

II. Standard of Review

> "'This Court reviews de novo the denial of a motion to compel arbitration. A motion to compel arbitration is analogous to a motion for a summary judgment. The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. "[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question."'"

Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)) (internal citations omitted).

III. Analysis

[2]Flennory died during the circuit-court litigation, and, after Ball Healthcare commenced this appeal, the estate's new personal representative was substituted in the circuit court. That personal representative has not been substituted in this appeal.

On appeal, Ball Healthcare argues that it met its burden of showing the existence of a contract calling for arbitration and of a transaction affecting interstate commerce by introducing the signed arbitration agreement, but that Flennory did not meet his burden of rebutting that evidence with evidence that the arbitration agreement was invalid. In particular, Ball Healthcare argues that Flennory failed to submit evidence that McCreary had not authorized Williams to sign on her behalf. Flennory responds that he showed that Williams did not have authority to sign the arbitration agreement because its definition of "Authorized Representative" required that the resident be physically unable to sign and he submitted evidence that McCreary was physically able to sign. In contrast, Ball Healthcare contends that Williams's signature bound McCreary under the doctrine of apparent authority.

Our analysis of whether the arbitration agreement was enforceable must begin with whether each party met its evidentiary burden. As stated above, the party moving for arbitration must show the existence of a contractual arbitration provision and a transaction affecting interstate commerce. Elizabeth Homes, 882 So. 2d at 315. (Flennory does not dispute that the arbitration agreement evidenced a transaction

affecting interstate commerce, so we do not address that element.) The opposing party must then show that the arbitration provision is not valid or does not apply. Id. To make the required showing, each party must submit substantial evidence. Ex parte Cain, 838 So. 2d 1020, 1026 (Ala. 2002). "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).

Thus, Ball Healthcare's initial burden was to submit substantial evidence that a contractual arbitration provision existed. Ball Healthcare met that burden by submitting the arbitration agreement, which, at least on its face, appeared to be signed by a person with authority. See SSC Selma Operating Co. v. Gordon, 56 So. 3d 598, 603 (Ala. 2010). In SSC, in support of a motion to compel arbitration, nursing-home defendants submitted an arbitration agreement that appeared to have been signed by the resident's wife. The plaintiff asserted that the wife had not signed the agreement. We held that the defendants had met their initial burden because "[t]he arbitration agreement itself constituted substantial evidence that a contract calling for arbitration existed." Id. at 603.

When Ball Healthcare submitted the signed arbitration agreement, the burden shifted to Flennory to submit evidence that the arbitration agreement was invalid or inapplicable. Flennory contends that he showed that Williams's signature was invalid because the arbitration agreement's "physical disability" condition was not met. Ball Healthcare asserts that Williams had apparent authority to sign the arbitration agreement.

"The doctrine of apparent authority rests upon the principle of estoppel, which forbids one by his acts to give an agent an appearance of authority which he does not have and to benefit from such … conduct to the detriment of one who has acted in reliance upon such appearance." Patterson v. Page Aircraft Maint., Inc., 51 Ala. App. 122, 126, 283 So. 2d 433, 437 (Civ. App. 1973). The issue of apparent authority has arisen before in our cases involving nursing-home arbitration agreements. In Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983 (Ala. 2004), we held that a resident was bound by an arbitration agreement signed by her daughter as "'Guardian' and 'Sponsor.'" Id. at 987. We noted that "[t]here [was] no evidence indicating that [the resident] had any objection to [the signatory's] acting on her behalf in admitting [the resident] to the

nursing home." Id.

Similarly, in Carraway v. Beverly Enterprises Alabama, Inc., 978 So. 2d 27 (Ala. 2007), a nursing-home resident's brother signed an arbitration agreement as "'Authorized representative.'" Id. at 30. We held that the brother had apparent authority to sign, explaining: "Apparent authority 'is implied where the principal passively permits the agent to appear to a third person to have the authority to act on [her] behalf.' 'It is not essential that the right of control be exercised so long as that right actually exists.'" Id. (internal citations omitted). We emphasized that "[t]here [was] no evidence indicating that [the resident] had any objection to [the signatory's] acting on her behalf in admitting [the resident] to the nursing home." Id. at 31.

Likewise, in Tennessee Health Management, Inc. v. Johnson, 49 So. 3d 175 (Ala. 2010), a resident's daughter signed an arbitration agreement as "'Family Member Responsible for RESIDENT.'" Id. at 177-78. We held that the daughter had apparent authority, explaining:

> "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 [the signatory] to appear to [the

> defendant] to have the authority to act on her behalf, and [the signatory's] apparent authority is, therefore, implied.
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> > "… [T]here is no evidence indicating … that [the resident] ever objected to [the signatory's] having signed the admission documents …. '[T]here is no evidence indicating that [the resident] had any objection to [the signatory's] acting on her behalf in admitting [the resident] to the nursing home.'"

Id. at 180 (internal citations omitted).

Finally, in Kindred Nursing Centers East, LLC v. Jones, 201 So. 3d 1146 (Ala. 2016), a resident's daughter signed an arbitration agreement as "'Legal Representative.'" Id. at 1151. We again held that the daughter had apparent authority:

> "[The resident] passively ratified the [arbitration] agreement ….
>
> > "… [I]n view of the evidence indicating that [the resident] passively permitted [the signatory] to act on her behalf in signing the admission forms and the lack of evidence indicating that [the resident] ever objected to [the signatory's] signing those forms, we hold that [the signatory] had the apparent authority to bind [the resident] at the time [the signatory] signed the admission documents."

Id. at 1156-57.

A common thread running through each of those cases was our emphasis on the fact that the plaintiff did not submit any evidence that the resident objected to the signatory's signing the arbitration

agreement. Thus, it is apparent from our precedent that, once a nursing-home defendant submits an arbitration agreement that appears on its face to have been signed by a person with authority, the burden is then on the plaintiff to submit evidence that the signatory lacked apparent authority. Such evidence could include circumstances that put the defendant on notice that the signatory lacked authority, such as a prior or contemporaneous objection by the resident, cf. Owens, 890 So. 2d at 987; Carraway, 978 So. 2d at 31; Tennessee Health, 49 So. 3d at 180; Kindred, 201 So. 3d at 1157.[3]

[3]The structure of analysis in some of our prior opinions could plausibly be read as suggesting that the issue of apparent authority comes within the defendant's burden of showing the existence of a contractual arbitration provision. See Owens, 890 So. 2d at 987 (discussing resident's lack of objection before concluding that defendant met its burden of showing existence of arbitration provision); Carraway, 978 So. 2d at 30-31, 33 (discussing issue of apparent authority and resident's lack of objection before concluding that defendant met its burden of showing existence of arbitration provision); Tennessee Health, 49 So. 3d at 179-81 (same); Kindred, 201 So. 3d at 1153, 1156-57 (discussing issue of apparent authority and resident's lack of objection, after stating that dispositive issue on appeal was whether defendant met its burden of showing existence of arbitration provision, and before concluding that defendant met that burden). However, those opinions' analyses consistently pointed to the absence of evidence to negate apparent authority (such as evidence of an objection by the resident), and the burden of submitting such evidence would necessarily have been on the plaintiff. Consequently, those opinions should not be read as placing

Consequently, the burden was on Flennory to show that Williams lacked apparent authority to sign the arbitration agreement. Like the plaintiffs in the prior cases, Flennory submitted no evidence to negate Williams's apparent authority, such as evidence that Ball Healthcare was on notice of an objection by McCreary.[4]

Flennory tries to distinguish Carraway on its facts. In Carraway, when discussing apparent authority, this Court pointed out that there was no evidence that the resident objected to the signatory's signing on her behalf. We then noted: "On the contrary, the evidence suggests that [the resident] approved of [the signatory's] acting on her behalf. A few weeks into [the resident's] residency at the nursing home, she executed a power of attorney, giving [the signatory] further authority to act on her behalf." 978 So. 2d at 31. Flennory points out that, unlike in Carraway, here McCreary did not sign a power of attorney authorizing Williams to

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the evidentiary burden regarding the issue of apparent authority on the defendant.

[4]We have separately held that the doctrine of apparent authority does not apply when the resident lacked mental capacity to give the signatory authority. See Stephan v. Millennium Nursing & Rehab Center, Inc., 279 So. 3d 532, 539-46 (Ala. 2018); Kindred, 201 So. 3d at 1153-56 (surveying cases). That caveat does not apply here because it is undisputed that McCreary had mental capacity.

act on her behalf. However, Flennory attributes to our mention of the power of attorney in Carraway an analytical significance it simply does not have. The key fact there was that the plaintiff submitted no evidence that the signatory lacked apparent authority, such as an objection by the resident. The resident's subsequent execution of a power of attorney merely further highlighted that absence of evidence. Similarly to what we later said in Tennessee Health in response to a plaintiff's similar apparent reliance on the presence of a power of attorney in Carraway, "[t]he absence of a power of attorney in this case is not fatal to our conclusion that [the plaintiff failed to submit evidence that the signatory lacked] the apparent authority to bind [the resident] at the time [the signatory] signed the admission documents." 49 So. 3d at 181.

Flennory contends that the issue of apparent authority is not ripe for our review because Ball Healthcare did not raise it in the circuit court until after the court entered the order that Ball Healthcare is appealing (the order denying the motion to compel arbitration). As noted above, after the court denied the motion to compel, Ball Healthcare filed its motion to alter, amend, or vacate, in which, Flennory asserts, Ball Healthcare raised the issue of apparent authority for the first time. While

that motion was pending, Ball Healthcare filed its notice of appeal, and the circuit court did not thereafter rule on the motion. Thus, Flennory asserts, the motion to alter, amend, or vacate -- including its argument about apparent authority -- is still pending before the circuit court.

However, Flennory misunderstands the procedural effect of the filings below. An order denying arbitration is treated as a "judgment" for purposes of postjudgment motions filed under Rule 59, Ala. R. Civ. P. See Bowater Inc. v. Zager, 901 So. 2d 658, 664-66 (Ala. 2004). When a Rule 59 motion to alter, amend, or vacate a judgment is pending and a notice of appeal is filed, the notice of appeal is held in abeyance until the Rule 59 motion is disposed of. Rule 4(a)(5), Ala. R. App. P. The Rule 59 motion is then deemed denied by operation of law if not ruled on within 90 days after its filing. Rule 59.1, Ala. R. Civ. P. Thus, Ball Healthcare's notice of appeal was held in abeyance until its Rule 59 motion to alter, amend, or vacate was deemed denied when it was not ruled on within 90 days after it was filed, and the notice of appeal then became effective. Therefore, the Rule 59 motion was deemed denied by the circuit court before the notice of appeal was effective, and the issues raised in the motion are properly before this Court.

In addition, Flennory argues that he showed that Williams lacked authority to sign the arbitration agreement because the arbitration agreement's language conditioned the representative's authority on the resident's physical inability to sign and he submitted evidence that McCreary was physically able to sign. Flennory relies on the following language in the arbitration agreement: "If the Resident is unable to consent to or sign this Agreement because of a physical disability or mental incompetence or is a minor, this Agreement may be executed by an 'Authorized Representative[]' …." And Flennory points to the two medical records that McCreary signed several weeks before and after she was admitted to Lighthouse.

We rejected the same argument, however, in Carraway. There, the arbitration agreement provided: "'If the resident is unable to consent or sign this provision because of physical disability or mental incompetence or is a minor and this provision is being signed by an authorized representative, complete the following [signature block].'" 978 So. 2d at 30. Based on that language, the plaintiff asserted that the agreement would have been valid only if the resident had been physically unable to sign it. We disagreed because there was no evidence that the signatory

lacked apparent authority.

Our rejection of the plaintiff's argument in Carraway was premised on the implications of the doctrine of apparent authority. By signing the agreement as authorized representative, the signatory implicitly certified that any contractual conditions of his authority (such as physical inability of the resident) had been met. And because of the signatory's apparent authority, the nursing home was entitled to rely on that certification. Thus, it was not necessary for the nursing home to independently determine that the contractual conditions were met (including that the resident was physically unable to sign), in the absence of circumstances putting the nursing home on notice that the signatory's certification was false. See 2 Restatement (Third) of Agency § 6.11(1) (Am. L. Inst. 2006) ("When an agent … makes a false representation about the agent's authority to a third party, the principal is not subject to liability unless the agent acted with actual or apparent authority in making the representation and the third party does not have notice that the agent's representation is false."); cf. 1 Restatement (Second) of Agency § 162 cmt. c (Am. L. Inst. 1958) ("If the authority of an agent is dependent upon a fact, the existence of which the principal relies upon

the agent to determine and to make known to a third person, the principal is subject to liability upon a contract made by the agent with a person to whom the agent has affirmed the existence of such fact."); § 8-2-4(2), Ala. Code 1975 ("An agent has authority to ... [m]ake a representation respecting any matter of fact ... upon which his right to use his authority depends and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made."). Accordingly, Carraway essentially held that if, under the circumstances, it is reasonable for a nursing home to rely on the implied certification of an apparently authorized signatory that the resident is physically unable to sign, the nursing home is entitled to rely on that certification without investigating whether the resident actually is physically unable to sign.

Here, Flennory points to the medical records as evidence that McCreary was actually able to sign. However, he did not submit evidence showing that it was unreasonable for Ball Healthcare to rely on Williams's certification to the contrary, such as evidence that Ball Healthcare knew about the signed medical records when the arbitration agreement was signed. Therefore, as in Carraway, the contractual

condition that resident McCreary be physically unable to sign did not negate signatory Williams's apparent authority.

In summary, Ball Healthcare met its burden of showing the existence of a contractual arbitration provision. In response, Flennory did not submit evidence to negate Williams's apparent authority. Flennory submitted evidence that McCreary did not meet the contractual condition of being physically unable to sign the arbitration agreement. But that evidence was not sufficient to negate Williams's apparent authority because Flennory did not submit evidence that Ball Healthcare knew about that evidence. Thus, Flennory did not meet his burden of showing that the arbitration agreement was invalid. For these reasons, the circuit court erred by denying Ball Healthcare's motion to compel arbitration.

IV. Conclusion

We reverse the circuit court's order denying Ball Healthcare's motion to compel arbitration and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Shaw, Bryan, Mendheim, and Mitchell, JJ., concur.