Rel: October 5, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170524

Rhonda Stephan, as personal representative of the Estate of Bobby Gene Hicks, deceased

v.

Millennium Nursing and Rehab Center, Inc.

Appeal from Madison Circuit Court
(CV-17-902130)

BOLIN, Justice.

Rhonda Stephan as the personal representative of the Estate of Bobby Gene Hicks, deceased, appeals from an order

granting a motion to compel arbitration filed by Millennium Nursing and Rehab Center, Inc. ("Millennium").

I. Facts and Procedural History

A. Background

Stephan contends that Hicks, her father, died in 2015 while he was a resident at Millennium Nursing and Rehabilitation Center, a skilled-nursing facility owned and operated by Millennium ("the Rehab Center"). During Hicks's hospitalization at Crestwood Medical Center ("Crestwood"), Stephan signed all the paperwork arranging for her father to be discharged from the hospital and transferred to the Rehab Center; however, she did not hold a power of attorney or other actual legal authority to act on Hicks's behalf or to contract in his name. Hicks did not sign any of the paperwork, but he is named as a party to the contracts included within that paperwork. On October 26, 2015, Hicks was transferred from Crestwood to the Rehab Center.

B. Mental-Health History

Medical records indicate that Hicks first presented to the Clinic for Neurology, PA, in August 2014 complaining of memory impairment. Hicks reported that his "memory problems

have been going on for awhile" and that "it is more short term memory than long term." In summarizing the history of Hicks's illness, Dr. Scott C. Hitchcock, a doctor of osteopathic medicine, noted:

> "This is a pleasant gentleman but [is] having some short-term memory problems. He has not noticed it but family members have. His memory has slowly been worsening over more than a year. He constantly will repeat questions or conversations. He will ask about family members to have hard [sic] he passed away. He has difficulty fixing things. He has difficulty utilizing the microwave at times. He will get frustrated or angry more easily. He also loses items constantly. The patient has some word finding problems at times. 80s [sic] not noticed any exacerbating or alleviating factors. No definite other associated factors except for some depression. He feels like he is sleeping well. He is not having hallucinations. No history of any head injury, stroke, seizures or anoxia. Head CT showed some white matter changes and atrophy. B12 level was normal in the 400s."

In the physical-examination findings, Dr. Hitchcock also noted that Hicks was "not oriented to year or date." Dr. Hitchcock assessed memory loss or impairment, specifically noting his impression as follows:

> "[T]his is a very pleasant 78-year-old gentleman with slowly progressive cognitive impairment. [H]e has significant short-term memory problems and tends to repeat conversations or questions. He has difficulty using items in the house such as the microwave. [He] will ask how family members are doing, although they've been dead for many years.

> [H]is mini-mental status exam was 22/30. I suspect []he likely has senile dementia of alzheimer's type. [H]ead CT was unrevealing[;] B12 was normal. We will go ahead and check TSH as well as homocysteine and a sedimentation rate. He is on Aricept 10 mg which we will continue. He does have depression which may be worsening his memory. We will continue trazodone at 25 mg of Zoloft. I also will check an EEG. In the future we likely will start Namenda."

Hicks returned to the clinic in November 2014 reporting cognitive difficulties. Dr. Hitchcock noted:

> "Patient states his memory is good -- Wife says he took his medicine twice the other date -- Wife says patient will forget when he eats and he will eat again -- Patient needs 90 day supply on all scripts. His short-term memory is still very severely impaired. He repeats questions and conversations. Sometimes []he forgets to eat. He will eat again. His wife will give him his medicine and he forgets. Then he will take his medicine again. They have had to hide his medicine from him. He feels like his mood is good. [H]owever, his family members say he still has problems with depression."

Dr. Hitchcock found that, although Hicks was awake and alert, he was "not oriented." The physician assessed memory loss or impairment and noted his impression as follows:

> "1. dementia -- Last mini-mental Status exam was 22/30. Head CT was unrevealing. Labs normal except elevated homocysteine. Continue aricept 10 mg. add namenda XR
>
> "2. depression -- increased zoloft up to a dose of 50 mg

> "3. Hyper homocysteinemia -- give samples of cerfolin NAC and rx"

On March 18, 2015, Hicks returned to the clinic complaining of memory impairment and depression. His wife reported that he was "about the same" and that he "tend[ed] to repeat conversations he was asked [sic] the same question again and again [and] he'[d] been sleeping more." She also reported that the police were contacted after he slapped his granddaughter but that he had not had any other violent behavior. The physical examination indicated Hicks was "[n]ot oriented and tends to repeat questions" but that he was "able to follow commands" and had "normal speech and normal language." Dr. Hitchcock's diagnostic impression was dementia, depression with increased agitation at times, and hyperhomocysteinemia. Hicks was prescribed Namenda, donepezil, sertraline, and Cerefolin to treat his symptoms.

On April 7, 2015, Hicks returned to the clinic with a complaint of memory impairment, and mental-health personnel renewed his prescriptions. During his final visit to the

clinic on September 15, 2015, Hicks again complained of memory impairment.[1] The physician noted:

> "Hx of depression, agitation, and hyperhomocysteinemia -- Wife says memory has worsened since last ov -- Daughter says insurance would not cover Namenda so he hasn't been taking it -- too expensive the agitation does get worse. Sometimes he pulls his hand back like he is going to slap her. However he never has gotten a lot [sic]. He does get agitated easily. He sleeps a great deal. He is good about taking his medicines. He loses things constantly. A [sic] very quickly forgets conversations. He repeats questions. Typically he does not feel sad or depressed. There is no lack of sleep. There have been no new exacerbating or alleviating factors. There have been no new associated factors. No change in the characteristics of symptoms."

The physical examination indicated that Hicks was "not oriented" and that he had "a paucity of speech [which was] not dysarthric." Dr. Hitchcock assessed memory loss and set forth the following diagnostic impression:

> "1. dementia -- Head CT was unrevealing. Labs normal except elevated homocysteine. Continue Aricept 10 mg. Namenda XR was too expensive to afford. We will see generic memantine 10 mg twice a day is a portable.

[1]His medication history since his September 2015 visit to the clinic included prescriptions for Cerefolin, sertraline, donepezil, allupurinol, warfarin sodium, carvedilol, and Crestor.

> "2. depression and at times agitation -- zoloft 100 mg. add Ativan to use on an as-needed basis. In the future we also could consider Neudexta, Depakote, or Lamictal.
>
> "3. Hyperhomocysteinemia -- cerefolin NAC
>
> "Depression (311/F32.9)
>
> "Dementia, neurological (349.9/G98.8)
>
> "Hyperhomocysteinemia (270.4/E72.11)"

On October 15, 2015, Hicks suffered a fall and sustained fractures to his left hip and clavicle. He was subsequently admitted to Crestwood. After undergoing surgery to treat his injuries, Hicks was referred to the Rehab Center for rehabilitation.

On October 26, 2015, Hicks was discharged from Crestwood and transferred to the Rehab Center. The discharge summary from Crestwood sets forth Hicks's "functional status" as "need[ing] assistance" with "activities of daily living." Medical personnel also indicated that Hicks's cognitive status was "impaired cognition (dementia)." The discharge summary also summarized the "Hospital Course" as follows:

> "Hicks, Bobby is a 79-year-old Caucasian male, with past medical history significant for aortic valve replacement, AICD placement, hyperlipidemia, and dementia, who presented to our emergency department after a fall. As the patient [and] his

> adult daughter were leaving our emergency department, ... the patient fell in our parking lot sustaining a fall injury to his left shoulder, and a left hip. Additionally patient sustained abrasion to his left elbow. X-ray examinations in our emergency department were revealing for left clavicle fracture and left hip fracture. We consulted with ortho, Dr. Deorio, who recommended contacting the orthopedic trauma service to continue treatment and management of the patient's Left hip. It was Dr. Deorio's recommendation the L Clavicle fx would not require surgical intervention and the patient was placed into a sling. Patient proceeded with Left Hip arthroplasty with Dr. Thomasson. The patient's renal function showed an elevated creatinine and we consulted with Nephrology, Dr. Walker. We obtained urine cultures and the patient was found to have a urine creatinine of 199. Dr. Walker recommended to defer dialysis for now, continue to follow renal function, and increase his IVF due to poor p.o. intake with the patient. <u>The patient is pleasantly demented which made discharge planning difficult</u>. The patient's PT/INR was 3.8.
>
> "During hospitalization the patient developed left lower lobe infiltrate and he was started on meropenem and Zyvox and his infiltrate is improving also he had left-sided conjunctivitis in which Cipro eyedrops was started. The patient was switched to oral doxycycline with aspiration precautions and anti-reflux measures and the case was discussed with Dr. Walker [who] agreed to transfer the patient to skilled nursing facility and follow up as an outpatient.
>
> "The patient is currently eating, drinking, and mobilizing with assistance. I strongly do believe the patient will benefit from SNF/Rehab facility. The patient has reached maximum benefit of hospitalization."

(Emphasis added.)

Medical personnel's summary of the physical examination at the time of discharge from Crestwood also indicated that Hicks's general appearance was "very pleasant[ly] demented, poorly groomed." In addition, medical personnel noted that neurologically Hicks was alert and oriented to person, place, time, and date and that he followed commands. Upon discharge, Hicks was diagnosed with several conditions, including chronic dementia, depressive disorder, and pain. The physician noted that Hicks was "very sick with multiple comorbidities and [that] he does have guarded prognosis overall." Upon Hicks's admission to the Rehab Center that same day, a staff member noted in the "Activity Admission Assessment" that Hicks's cognitive status on the day of his admission was "confused."[2]

According to the complaint, on or around December 9, 2015, the staff at the Rehab Center found Hicks unresponsive

[2]A section of Millennium's admission assessment also directs the staff member completing the form to check applicable "challenges/needs." Although parts of this section indicate "Staff assessment mental status: short-term memory OK" or "1. Memory problem"; "Staff assessment mental status: long-term memory OK" or "1. Memory problem"; and "Staff assessment mental status: recall 0. No staff names/faces," none of these is checked on Hicks's admission assessment.

and transported him to Crestwood. On December 20, 2015, he passed away; the cause of death was septic shock and an associated urinary-tract infection.

C. The Arbitration Agreement

On October 23, 2015 -- three days before Hicks was discharged from Crestwood -- Stephan signed a number of documents to prepare for Hicks's transfer to the Rehab Center, including an "Agreement to Alternative Dispute Resolution" ("the agreement"). Stephan signed the agreement in the space provided for the "signature of family member responsible for PATIENT." The spaces for the signature of "PATIENT (unless PATIENT lacks sufficient mental capacity)"; "Conservator/Guardian, Durable Power of Attorney for Health Care or other Legal Representative(s) (if any)"; and "Health Care Decision Maker (if one has been named or appointed)" were left blank. (Emphasis in original.)

The agreement included, in pertinent part, the following provisions:

> "1. Parties to the Agreement: The parties to this Agreement are Millennium inclusive of its employees and/or affiliates, which will be collectively referred to as the 'FACILITY,' and BOBBY HICKS, their health care decision maker or surrogate, or any representative of the

individual identified below, who will be collectively referred to as the 'PATIENT.' The parties agree that the undersigned individuals have the authority to bind their respective parties.

"2. Voluntary Nature of this Agreement: PATIENT and FACILITY agree that this Agreement is entered into on a voluntary basis. The PATIENT understands they have a choice of long-term care providers and that other nursing facilities may or may not use arbitration and/or mediation to resolve disputes. By signing below, the PATIENT agrees that the FACILITY is not requiring them to sign this Agreement and understands that they may be admitted to the FACILITY without entering into this Agreement. PATIENT and FACILITY also agree that PATIENT'S decision to enter into this Agreement is within the scope of a 'health care decision' under Alabama law.

"....

"6. Opportunity to Seek Counsel: The signature below of PATIENT indicates that the FACILITY has advised PATIENT, their health care decision maker and/or family members they may seek legal counsel prior to signing, entering into and/or being bound by this Agreement. PATIENT is encouraged to ask questions or seek legal counsel if they do not understand any of the provisions of this Agreement.

"....

"16. Binding Effect: It is the intention of the PATIENT and the FACILITY, its affiliated entities, management companies, administrators, owners, officers, shareholders, members, representatives, governors, directors, medical directors, employees, trustees, successors,

> assigns, agents, attorneys and insurers; and shall inure to the benefit of and bind the PATIENT, his/her agents, attorneys, direct and third party beneficiaries, insurers, heirs, trustees and representatives, including the personal representative, administrator, or executors of his/her estate, and his/her spouse and children."

(Capitalization in original.)

The agreement also provided that the parties should attempt to resolve any claims by mediation. The agreement further required that, "[a]fter conclusion of mediation, or upon the written agreement of both parties to waive the mediation process, or if the mediation does not occur or any issue remains unsolved after mediation, the PATIENT or the FACILITY shall initiate arbitration by serving on the other a written demand specifying the matter to be submitted to arbitration." (Capitalization in original.) In addition, the agreement provided an acknowledgment that the "patient and facility" were each "waiving their right to a trial by judge or jury" and that "the decisions of an Arbitrator bind both of them, and are not appealable," and that "[a]ny legal controversy, dispute, disagreement or claim of any kind between the parties arising out of or in any way relating to this Agreement or the PATIENT'S stay at the FACILITY shall be

submitted to ADR as described in this agreement." (Capitalization in original.)

D. Procedural History

On December 15, 2017, Stephan filed a complaint in the Madison Circuit Court, asserting a wrongful-death claim against Millennium.[3] On January 17, 2018, Millennium filed a motion to compel arbitration and to dismiss or to stay the proceedings pending arbitration, asserting that Stephan, by filing her complaint, had failed to comply with the terms of the agreement. On January 20, 2018, Stephan filed a response to the motion to compel with attached exhibits, including her own affidavit as well as medical records from Millennium, Crestwood, and the Clinic for Neurology, PA. On February 6, 2018, Millennium filed a motion to strike the exhibits, specifically asserting that Stephan failed to submit testimony from any witnesses authenticating the medical records and that Stephan's affidavit was based on inadmissible hearsay. On February 7, 2018, Stephan filed the affidavit of Jennifer Perry, a representative of the Clinic for Neurology with

[3]The pleadings indicate that Stephan was appointed personal representative of Hicks's estate by the probate court of Madison County on December 12, 2017.

personal knowledge of the matters set forth in the affidavit, including a true and correct copy of medical records related to Hicks's treatment at the clinic. She also filed an additional affidavit in which she set forth more detailed personal observations of her father. On February 8, 2018, the circuit court denied Millennium's motion to strike,[4] and on February 9, 2018, the circuit court granted the motion to compel arbitration.

II. Standard of Review

> "'This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 770 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. "[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

[4]In its "Statement of Facts," Millennium states that the documents from Crestwood and Millennium attached to Stephan's response are unauthenticated. Nonetheless, Millennium refers to those medical records throughout its brief, without any qualifying language indicating its opposition to the circuit court's denial of the motion to strike. Thus, this Court will consider the documents submitted by Stephan and referenced by Millennium that are included in the record.

> dispute in question." Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n.1 (Ala. 1995) (opinion on application for rehearing).'"

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) (emphasis added)). See also Kindred Nursing Ctrs. East, LLC v. Jones, 201 So. 3d 1146, 1152 (Ala. 2016).

III. Discussion

There is no dispute that a clause calling for arbitration exists and that the agreement, which contains the clause, evidences a transaction affecting interstate commerce. It is also undisputed that Hicks did not sign the agreement and that Stephan signed on Hicks's behalf as a family member. Stephan, however, asserts that the arbitration provision is not enforceable because, she says, she did not have the legal or apparent authority to execute the agreement on behalf of her father. Specifically, she argues that Hicks was mentally incompetent at the time she signed the agreement.

In general, "a nonsignatory to an arbitration agreement cannot be forced to arbitrate [his] claims." Cook's Pest

Control, Inc. v. Boykin, 807 So. 2d 524, 526 (Ala. 2001). There are, however, exceptions.

> "[T]his 'Court has created a distinct body of caselaw considering specifically the issue[s] [as to] how and when arbitration agreements executed by the owners and operators of nursing homes and their residents and/or their residents' family members should be enforced.' SSC Montgomery Cedar Crest Operating Co. v. Bolding, 130 So. 3d 1194, 1196 (Ala. 2013). See also Owens v. Coosa Valley Health Care, Inc., 890 So. 2d 983 (Ala. 2004); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661 (Ala. 2004); Noland Health Servs., Inc. v. Wright, 971 So. 2d 681 (Ala. 2007); Carraway v. Beverly Enters. Alabama, Inc., 978 So. 2d 27 (Ala. 2007); and Tennessee Health Mgmt., Inc. v. Johnson, 49 So. 3d 175 (Ala. 2010)."

Diversicare Leasing Corp. v. Hubbard, 189 So. 3d 24, 28 (2015).

Before determining whether Stephan had the apparent authority to execute the agreement, the Court must decide whether Hicks, on whose behalf the agreement was signed, was mentally competent at the time Stephan signed the agreement. Millennium argues that Stephan has not met her burden of proving Hicks's incapacity. Specifically, Millennium argues that Stephan has failed to demonstrate that Hicks's advanced age and dementia resulted in anything more than short-term memory loss.

In Troy Health & Rehabilitation Center v. McFarland, 187 So. 3d 1112 (Ala. 2015), this Court discussed the enforceability of an arbitration agreement and whether a nursing-home resident was mentally competent when he executed a durable power of attorney naming his nephew as his attorney-in-fact. We find the following reasoning from that case to be analogous:

> "'[T]he standard for determining whether a person is competent to execute a power of attorney is whether that person is able to understand and comprehend his or her actions. Queen v. Belcher, 888 So. 2d 472, 477 (Ala. 2003). The burden initially falls on the party claiming that the person who executed the power of attorney was incompetent when he or she executed the power of attorney. Id. If, however, it is proven that the person who executed the power of attorney was habitually or permanently incompetent before executing the power of attorney, the burden shifts to the other party to show that the power of attorney was executed during a lucid interval. Id.'
>
> "Yates v. Rathbun, 984 So. 2d 1189, 1195 (Ala. Civ. App. 2007)."

187 So. 3d at 1119.

We held that the presumption is that every person has the capacity to understand until the contrary is proven. McFarland, 187 So. 3d at 1120 (citing Yates v. Rathbun, 984

So. 2d 1189, 1120 (Ala. Civ. App. 2007), Thomas v. Neal, 600 So. 2d 1000, 1001 (Ala. 1992), and Hardee v. Hardee, 265 Ala. 669, 93 So. 2d 127 (1956)). The Court differentiated between the burden of proving permanent incapacity and temporary incapacity.[5] Specifically, we held that proof of incapacity

> "'"'at intervals or of a temporary character would create no presumption that it continued up to the execution of the instrument, and the burden would be upon the attacking party to show [incapacity] at the very time of the transaction.'"' Wilson v. Wehunt, 631 So. 2d 991, 996 (Ala. 1994) (quoting Hall v. Britton, 216 Ala. 265, 267, 113 So. 238, 239 (1927)(emphasis added))."

McFarland, 187 So. 3d at 1119.

Thus, a party seeking to avoid a contract based on the defense of incapacity must prove either permanent incapacity or contractual incapacity at the very time of contracting. See Ex parte Chris Langley Timber & Mgmt., Inc., 923 So. 2d 1100, 1106 (Ala. 2005). The party seeking to avoid the contract bears the burden of proving incapacity to contract by

[5]We note that the Court in McFarland quoted from cases that use the antiquated terms of "permanent insanity" and "temporary insanity" when discussing the capacity to contract. Although the reasoning in those cases is applicable, the term "insanity" has now been replaced by the term "incapacity" or "incompetency" when discussing civil contractual issues.

a preponderance of the evidence. See Hester v. Hester, 474 So. 2d 734, 736 (Ala. Civ. App. 1985).

This Court recognizes that Hicks's diagnosis of dementia, by itself, does not establish permanent incapacity. McFarland, 187 So. 3d at 1120 (citing Ex parte Chris Langley Timber, 923 So. 2d at 1106). Although it may be apparent that Hicks's dementia was chronic in nature as distinguished from temporary, it is not so apparent that the state of Hicks's dementia constituted "permanent incapacity" as that term is used to describe the mental incapacity necessary to justify the avoidance of the arbitration provision. See Ex parte Chris Langley Timber, 923 So. 2d at 1106. The Court is unable to discern from the medical records whether Hicks's mental-health condition had progressed to the level of "permanent incapacity" by the time he was admitted to Crestwood. Dr. Hitchcock's notes indicate that Hicks's dementia caused no more than short-term memory loss. The notations during visits to the clinic between August 2014 and September 2015 indicate that Hicks was "not oriented"; however, the record also indicates that Hicks's condition was "slowly progressive" and that he was able to follow commands and sometimes converse

with the physician. Thus, this Court cannot conclude that Stephan has overcome her burden of proving that Hicks's condition rose to the level of permanent incapacity as that term is used under the law to void a contract.

The more important question is whether Stephan has overcome her burden of demonstrating contractual incapacity "'"'at the very time of the transaction.'"'" McFarland, 187 So. 3d at 1119 (quoting Wilson v. Wehunt, 631 So. 2d 991, 996 (Ala. 1994), quoting in turn Hall v. Britton, 216 Ala. 265, 267, 113 So. 238, 239 (1927)). It is clear that Stephan has presented evidence establishing that, at the time of execution of the agreement, Hicks "'had no reasonable perception or understanding of the nature and terms of the contract.'" Ex parte Williams, 686 So. 2d 1110, 1111 (Ala. 1996)(quoting Williamson v. Matthews, 379 So. 2d 1245, 1247 (Ala. 1980)). In her affidavit, Stephan stated that, beginning around the time her father was first diagnosed with dementia by Dr. Hitchock, she personally witnessed episodes of her father's confusion and loss of cognition, including his inability to comprehend writings or to attend to financial matters. She also stated that Hicks was confused throughout his hospitalization at

Crestwood and that, "[u]pon advising [Hicks] that he would be transferred to a nursing home for further rehabilitative care, he was unable to talk with us about this transfer." In the discharge record from Crestwood, which summarizes the entirety of Hicks's course of hospitalization, hospital personnel specifically noted that Hicks was "pleasantly demented which made discharge planning difficult."[6] In addition to suffering from dementia, Hicks was recovering from reconstructive hip surgery after suffering a fall when Stephan signed the transfer paperwork, which included the agreement. Thus, this case is similar to "the cases in which this Court has held arbitration agreements nonbinding on mentally incompetent residents of nursing homes [where] those residents were substantially mentally impaired" at the time of contracting. See Kindred Nursing Ctrs. East, LLC v. Jones, 201 So. 3d at 1156 (differentiating the facts of its case, in which a patient passively agreed to arbitration, from other cases and

[6]See Cantor, Making Advance Directives Meaningful (1998), 4 Psychol. Pub. Policy & Law 629, 643 (September 1998)(noting that "mental incapacity speaks to varying degrees of dementia -- from the extreme of the permanently unconscious patient to the opposite extreme of the 'pleasantly senile' patient who is confused and disoriented but still capable of pleasant experiences").

specifically noting that, "[i]n [SSC Montgomery Cedar Crest Operating Co. v.] Bolding, [130 So. 3d 1194 (Ala. 2013),] the resident had been hospitalized after suffering stroke and heart-attack symptoms .... In Noland [Health Services, Inc. v. Wright, 971 So. 2d 681 (Ala. 2007)], the resident suffered from dementia related to Alzheimer's disease"). See also Estate of McCall v. SSC Montgomery South Haven, No. 2:14-cv-588-MHT-PWG (M.D. Ala. Aug. 6, 2015)(not selected for publication in F. Supp.)(denying motion to compel arbitration in a diversity case applying Alabama law in which patient's confusion was related to "'possible delirium and was temporary, a fluctuating level of cognition due to low oxygen levels and Dilantin,'" and patient was "'drowsy and unable to answer questions'" when family member signed admissions paperwork). Therefore, under the particular circumstances in Hicks's case, it is clear that, at the time Stephan signed the paperwork for Millennium in preparation for his transfer from Crestwood to the Rehab Center, Hicks did not have "'"'sufficient capacity to understand in a reasonable manner the nature and effect of the act which he [or his daughter] was doing.'"'" Ex parte Chris Langley Timber, 923 So. 2d at

1105 (quoting Wilson v. Wehunt, 631 So. 2d at 996, quoting in turn Hall v. Britton, 216 Ala. at 267, 113 So. at 239, quoting in turn other cases)). This Court therefore concludes that, at the time Stephan signed paperwork for Millennium in preparation for Hicks's discharge from Crestwood and transfer to the Rehab Center, Hicks did not have the capacity to understand the nature and effect of allowing his daughter to agree to an arbitration provision.

Consequently, this court rejects Millennium's argument that Stephan's reliance on Noland Health Services, Inc. v. Wright, 971 So. 2d 681, 685 (Ala. 2007); SSC Montgomery Cedar Crest Operating Co. v. Bolding, 130 So. 3d 1194, 1196 (Ala. 2013); and Hubbard, 189 So. 3d at 28, is misplaced because Stephan did not prove her contractual-incapacity defense. In Diversicare Leasing Corp. v. Hubbard, supra, this Court determined that an arbitration agreement signed by the mother of an adult developmentally delayed nursing-home resident could not be enforced against the mother in her capacity as a "next friend" of her son because he was incapable of authorizing his mother to act on his behalf. In Hubbard, we discussed the law regarding apparent authority as follows:

"In Bolding, supra, also a plurality opinion, Norton Means was admitted to a nursing home for rehabilitation and nursing services while he recovered from stroke and/or heart-attack-like symptoms. Means was accompanied by his daughter, Michelle Pleasant, who completed the admitting paperwork on his behalf. Among the paperwork completed and signed by Pleasant was an arbitration agreement. Pleasant signed her name on the arbitration agreement on a line indicated for the 'Signature of Legal Representative or Family Member.' Subsequently, Means was readmitted to the hospital. Linda Bolding, another of Means's daughters to whom he had previously granted a durable power of attorney, sued the nursing home alleging that the nursing home had negligently cared for Means, resulting in his suffering dehydration, malnourishment, and an untreated infection that resulted in his readmission to the hospital. The nursing home moved to compel arbitration pursuant to the terms of the arbitration agreement. Bolding responded by arguing that the arbitration agreement was unenforceable as to Means because Pleasant had no legal authority to act on his behalf at the time she executed the arbitration agreement. The trial court entered an order denying the motion to compel arbitration. The nursing home appealed.

"In affirming the denial of the motion to compel arbitration and holding that the arbitration agreement signed by Pleasant on behalf of Means was ineffective to bind Means, Justice Stuart aptly explained the distinguishing principle between arbitration agreements signed on behalf of competent nursing-home residents and arbitration agreements signed on behalf of mentally incompetent nursing-home residents, making clear this Court's treatment of the two:

> "'The only evidence before the Court in this case indicates that Means was mentally incompetent when he was admitted

> to [the nursing home] and the DRA [dispute resolution agreement] was executed; indeed, [the nursing home] does not even argue that he was competent at any relevant time. ...
>
> "'Children and the mentally incompetent have traditionally been treated differently under the law than the standard competent adult. See, e.g., Ex parte E.R.G., 73 So. 3d 634, 678 (Ala. 2011) (Main, J., dissenting) ("The state necessarily injects itself into the affairs of children and the mentally incompetent when they are in need of protection because their developmental differences and their environmental restraints render them more vulnerable than competent adults."). And, while we have held that competent residents of nursing homes may be bound by arbitration agreements executed by their representatives, see, e.g., Carraway [v. Beverly Enterprises Alabama, Inc.], 978 So. 2d [27] at 30-31 [(Ala. 2007)], and [Tennessee Health Mgmt., Inc. v.] Johnson, 49 So. 3d [175] at 176 [(Ala. 2010)], our cases also indicate that incompetent residents are not so bound. In Noland Health Services[, Inc. v. Wright, 971 So. 2d 681 (Ala. 2007)], we considered whether the administrator of Dorothy Willis's estate was bound to arbitrate personal-injury and wrongful-death claims stemming from Dorothy's treatment at a nursing home pursuant to an arbitration provision in a contract executed by Dorothy's daughter-in-law, Vicky Willis, when Dorothy was admitted to the nursing home. 971 So. 2d at 683. A plurality of the Court agreed with the trial court's finding that Dorothy was incompetent when the contract was signed and that Vicky's signature as the "responsible party" or

next friend on that contract "was ineffective to bind Dorothy or her personal representative to the agreement." 971 So. 2d at 686. In support of that conclusion, the plurality opinion quoted Page v. Louisville & Nashville R.R., 129 Ala. 232, 238, 29 So. 676, 678 (1901), for the proposition that "one who purports to act merely as a 'next friend' of a 'non compos mentis' is 'wholly without authority to make any contract that would bind her or her estate.'" Noland Health Servs., 971 So. 2d at 686.

"'Of course, Noland Health Services was a plurality opinion, and its precedential value is accordingly limited. Ex parte Achenbach, 783 So. 2d 4, 7 (Ala. 2000). However, this Court subsequently recognized the principle for which Noland Health Services is now cited in Johnson. In Johnson, Tennessee Health Management ("THM") appealed the denial of its motion to enforce an arbitration agreement against Carol Rousseau Johnson, who was prosecuting personal-injury and wrongful-death claims against THM in her capacity as the personal representative of the estate of Dolores Rousseau, who allegedly was injured while a resident of a nursing home operated by THM. 49 So. 3d at 176. When Dolores was admitted to that nursing home, her daughter Barbara Rousseau had signed an arbitration agreement with THM, but "[t]here is no evidence indicating that Dolores ... was mentally incompetent when she was admitted...." 49 So. 3d at 176-77. Citing Noland Health Services, Carol subsequently argued to this Court that Dolores was not bound by the arbitration agreement because she had not signed it. 49 So. 3d at 180. This Court rejected her argument,

distinguishing Noland Health Services as follows:

> "'"Carol relies upon Noland Health Services, Inc. v. Wright, 971 So. 2d 681 (Ala. 2007). In Noland, a plurality of this Court held that a daughter-in-law's signature as the responsible party on a nursing-home arbitration agreement was ineffective to bind the resident to the agreement. Noland is distinguishable from this case, however, because the nursing-home resident in Noland was mentally incompetent and could not authorize anyone to act on her behalf and because the daughter-in-law did not sign any document in the capacity of her mother-in-law's legal representative."

"'Johnson, 49 So. 3d at 180–81. We thereafter held that the arbitration agreement executed by Barbara did bind Dolores and was therefore enforceable against Carol, thus recognizing the distinction between arbitration agreements signed on behalf of nursing-home residents who are incompetent and those signed on behalf of nursing-home residents who are competent. 49 So. 3d at 181.

"'[The nursing home] argues that Noland Health Services is distinguishable inasmuch as Vicky Willis did not sign the contract containing the arbitration provision in Noland Health Services as Dorothy's legal representative, while, [the nursing home] asserts, Pleasant did sign

> the DRA as Means's legal representative. We disagree, however, with [the nursing home's] assertion that Pleasant signed the DRA as Means's legal representative. The signature block on the DRA indicates that Pleasant signed the DRA as "Legal Representative or Family Member." (Emphasis added.) Moreover, although the paragraph above the signature line indicates that the signer of the document is asserting that he or she has "the authority to sign the agreement on [the resident's] behalf," merely claiming to have legal authority on someone else's behalf or claiming to be someone else's legal representative does not make it so. It is undisputed that Pleasant has never held a power of attorney for Means, and she also stated in an affidavit submitted to the trial court that she was granted "no legal authority by him or anyone else to enter into the [DRA] on his behalf."
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> "'[The nursing home] argues in the alternative that the doctrine of apparent authority should nevertheless bind Means, and by extension Bolding, to the DRA. In Carraway, we applied the doctrine of apparent authority to hold that Shirley Carraway, a nursing-home resident, was bound by an arbitration agreement signed by her brother Richard Carraway:
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> > "'"Just as Richard signed all the other documents relating to Shirley's admission into the nursing home on Shirley's behalf, Richard signed the arbitration agreement on Shirley's behalf expressly as an 'authorized representative.' 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.' Treadwell Ford, Inc. v. Courtesy Auto Brokers, Inc., 426 So. 2d 859, 861 (Ala. Civ. App. 1983). 'It is not essential that the right of control be exercised so long as that right actually exists.' Wood Chevrolet Co. v. Bank of the Southeast, 352 So. 2d 1350, 1352 (Ala. 1977). There is no evidence indicating that Shirley had any objection to Richard's acting on her behalf in admitting Shirley to the nursing home. On the contrary, the evidence suggests that Shirley approved of her brother's acting on her behalf. A few weeks into Shirley's residency at the nursing home, she executed a power of attorney, giving Richard further authority to act on her behalf."

"'978 So. 2d at 30-31. We likewise applied the doctrine of apparent authority in Johnson, stating that Dolores "passively permitted Barbara to appear to THM to have the authority to act on her behalf, and Barbara's apparent authority is, therefore, implied." 49 So. 3d at 180. However, in both Carraway and Johnson the nursing-home resident was competent and effectively acquiesced to and/or ratified the decisions made by their respective representative, thus making the application of the apparent-authority doctrine appropriate.

"'In contrast, the only evidence in the record in this case indicates that

> Means is incompetent and thus unable to empower an agent, whether passively or through affirmative acts. See Johnson, 49 So. 3d at 180-81 ("[T]he nursing-home resident in Noland was mentally incompetent and could not authorize anyone to act on her behalf...."). Thus, at best Pleasant may have purported to be Means's legal representative, but that is an insufficient basis upon which to apply the doctrine of apparent authority. Northington v. Dairyland Ins. Co., 445 So. 2d 283, 286 (Ala. 1984) ("[I]n order for a principal to be held liable under the doctrine of apparent authority and estoppel, the principal must have engaged in some conduct which led a third party to believe that the agent had authority to act for the principal." (emphasis added)). See also Gray v. Great American Reserve Ins. Co., 495 So. 2d 602, 607 (Ala. 1986) (noting that one cannot "blindly trust" another's statements regarding the extent of his or her agent power), and City Stores Co. v. Williams, 287 Ala. 385, 391, 252 So. 2d 45, 51 (1971) ("The burden of proving agency rests upon the party asserting it.").
>
> "'In conclusion, we hold that Means was not bound by the DRA executed by Pleasant; therefore, Bolding was not bound. However, we emphasize that this conclusion is not reached because Means did not personally execute the DRA. Rather, it is because all the evidence in the record indicates that Means is incompetent. Thus, while Bolding, as the holder of a durable power of attorney granted by Means, may have been able to bind him to an arbitration agreement, Pleasant, as merely a family member or next friend, could not."

> "Bolding, 130 So. 3d at 1196-99 (final emphasis added)."

Hubbard, 189 So. 3d at 34-37.

In this case, Stephan signed the agreement solely as a family member. Because this Court concludes that Hicks lacked the capacity to contract at the time the agreement was signed, Stephan did not have apparent authority to execute the agreement on his behalf.

We note that this case is distinguishable from Kindred Nursing Centers East, LLC v. Jones, 201 So. 3d 1146 (Ala. 2016), in which this Court determined that Jones, a nursing-home resident, passively agreed to her daughter's signing an arbitration agreement. Jones was under the influence of pain medication following knee-replacement surgery at the time her daughter signed paperwork, including an arbitration agreement, representing that she was her mother's legal representative. According to the medical records, Jones's daily activities were not limited by pain and she did not suffer from any cognitive defects or dementia. Medical personnel administered a total of two doses of Lorcet to Jones after one or two days of physical therapy. Unlike in Jones, the record in this case is replete with references to Hicks's suffering from confusion

and frequently lacking orientation to date, time, and place before and during his hospitalization. In addition, Hicks suffered from dementia, was heavily medicated, and was recovering from surgery at the time his daughter signed the paperwork and at the time he was admitted to the Rehab Center. Furthermore, Stephan never represented to Millennium that she was her father's legal representative. Thus, this case is distinguishable from Jones.

This case is also substantially different from Health Management, Inc. v. Johnson, 49 So. 3d 175 (Ala. 2010), a case cited in Jones, supra, in which a nursing-home resident's daughter signed paperwork outside her mother's presence during her hospitalization for hip-replacement surgery. In Johnson, this Court reasoned that, because the mother accepted the benefits of the services rendered without objection or question, she passively agreed to the terms of the contract. Unlike this case, however, there was no dispute in Johnson as to the competency of the mother at any time during her hospitalization or residency.

Accordingly, we conclude that Stephan cannot be bound to the arbitration provision in her capacity as the personal

representative of Hicks's estate when she signed the agreement in what amounts to her capacity as Hicks's relative or next friend. See Hubbard, 189 So. 3d at 41-42.

Conclusion

Based on the foregoing, we reverse the circuit court's order granting the motion to compel arbitration and remand the case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, C.J., and Parker, Shaw, Main, Wise, Bryan, and Mendheim, JJ., concur.

Sellers, J., dissents.

SELLERS, Justice (dissenting).

I respectfully dissent.

When Rhonda Stephan signed the arbitration agreement as the "family member responsible for PATIENT," she expressly agreed that she had "the legal authority to bind" Bobby Gene Hicks and did not object to his absence when she completed the paperwork for admission to the facility operated by Millennium Nursing and Rehab Center, Inc. ("Millennium"). Stephan cannot now argue that the agreement she signed was void because Hicks lacked capacity. Stephan should not be allowed to induce Millennium to admit Hicks for treatment by agreeing to submit any dispute to arbitration and then, in her capacity as personal representative, repudiate her own actions on the grounds that Hicks was incompetent and that she did not have the apparent authority to bind Hicks's estate to arbitrate the wrongful-death issue. See Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1134 (Ala. 2000)("A [party] cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions."). Stephan received a benefit by having a nursing home admit Hicks, and she signed the necessary paperwork mandated for admission; she should be

estopped as the personal representative from repudiating the contract in her capacity as personal representative of Hicks's estate. I would hold that the trial correct correctly enforced the arbitration agreement.