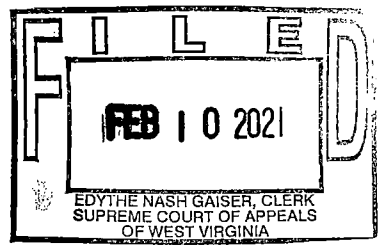
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0680



BECKLEY HEALTH PARTNERS, LTD., d/b/a THE VILLAGES AT GREYSTONE; CHANCELLOR SENIOR MANAGEMENT, LTD., AND MEGAN WARD WILSON, RESIDENCE, LTD.,

Defendants Below, Petitioners,

V.)

CYNTHIA F. HOOVER, DURABLE POWER OF ATTORNEY OF ELVERIA M. FAW,

Plaintiff Below, Respondent.

Appeal from an order of the Circuit Court
of Raleigh County (CC-41-2019-C-159)

Respondent's Brief

Counsel for Respondent:

S. Andrew Stonestreet (WV Bar #11966)
Counsel of Record
Jeff D. Stewart (WV Bar #9137)
Andrew L. Paternostro (WV Bar #5541)
Michelle L. Barker (WV Bar #8509)
STEWART BELL, PLLC
30 Capitol Street
Charleston, West Virginia 25326
304.345.1700
sastonestreet@belllaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

The pertinent facts are undisputed. On or around September 3, 2017, Elveria May Faw was admitted as a resident to an assisted living facility owned and operated by Petitioners known as The Villages at Greystone ("Greystone"), located in Raleigh County, West Virginia. (A.R. 15). Prior thereto, Ms. Faw's daughter, Cynthia Hoover, executed an Assisted Living Residency Agreement ("Residency Agreement") on behalf of her mother, which set forth the care and services Greystone would provide. (A.R. 31). Ms. Hoover also executed a "Community Arbitration Agreement" ("Arbitration Agreement") on behalf of her mother, which required that the parties arbitrate "any legal dispute, controversy, demand or claim . . . that arises out of or relates to the [Residency Agreement]" and "any claims for . . . violations of any right granted to Resident by law . . . for breach of contract, fraud, misrepresentation, negligence, . . . or any claim based upon any departure from accepted standards of medical or health care or safety . . . ." (A.R. 60). The Arbitration Agreement further stated that "the execution of this Arbitration Agreement is not a precondition to the furnishing of services to the Resident" and that the "Arbitration Agreement may be rescinded by written notice to [Greystone] from the Resident within 30 days of signature." (A.R. 60).

Ms. Hoover executed the Residency Agreement and Arbitration Agreement on August 30, 2017, and at the time, she had merely been appointed Ms. Faw's health care surrogate. (A.R. 1). Thereafter, Ms. Faw appointed Ms. Hoover as her General Durable Power of Attorney – nine (9) days after Ms. Hoover executed the Residency Agreement and the Arbitration Agreement. (A.R. 122). For the next several months, Ms. Faw

resided at the Greystone facility, and during the course of her residency, she allegedly sustained injuries as a result of Petitioners' negligence.

On April 12, 2019, Respondent (Plaintiff-below) filed suit against Petitioners (Defendant-below). (A.R. 15). In her complaint, Respondent asserted statutory and common law claims based on alleged breaches in the standard of care that occurred during Ms. Faw's residency at the Greystone facility. (A.R. 15). For their responsive pleading, Petitioners filed *Defendants' Motion to Compel Arbitration.* (A.R. 26). Respondents responded to the motion, and the circuit court heard oral argument. (A.R. 116). On August 27, 2020, the circuit court entered its *Order Denying Defendants' Motion to Compel Arbitration*, concluding that the Arbitration Agreement was unenforceable. (A.R. 1). The current appeal followed.

SUMMARY OF ARGUMENT

The circuit court correctly applied *State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 740 S.E.2d 66 (2013), which is factually indistinguishable from the present case. In *AMFM* and at present, the daughters of health care facility residents served as their mothers' health care surrogates at the time of the residents' admission to the facility. During the admissions process, the daughters executed arbitration agreements on behalf of the incapacitated residents. Subsequently, the daughters were appointed as the durable powers of attorney for their respective mothers.

The *AMFM* Court held that an adult daughter ***did not*** possess the authority to bind her mother to the arbitration agreement in her capacity as her mother's "health

care surrogate" at the time the arbitration agreement was signed (*Id.* at 75–76); a person who has been appointed medical power of attorney for an incapacitated person does not have the authority to enter into an arbitration agreement on behalf of an incapacitated person with regard to future disputes concerning care provided by the nursing home to the incapacitated person (*Id.*); the appointment of the daughter as power of attorney subsequent to her signing the arbitration agreement did not act to retroactively bind her mother to the arbitration agreement – "[i]t is the authority that [the daughter] possessed ***at the time the Arbitration Agreement was signed*** on September 10, 2009, and not the authority with which she was imbued some three months later, that is determinative of her authority to bind [her mother] to the Arbitration Agreement." *Id.* at 75 n. 9) (emphasis added).

Moreover, like the *AMFM* Court, the circuit court rejected arguments sounding in apparent or ostensible agency: "we reject [the nursing home's] argument that [the daughter] had the authority to bind [her mother] to the Arbitration Agreement as her apparent or ostensible agent." And further, the *AMFM* Court rejected the facility's ratification argument as "disingenuous."

Relying on this binding precedent, the circuit court, in the present case, correctly denied *Defendants' Motion to Compel Arbitration*, concluding that Ms. Hoover lacked the requisite authority to bind Ms. Faw and her legal representatives to a contract, rendering the Arbitration Agreement unenforceable.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The dispositive issues in this case were previously discussed and authoritatively settled in this Court's decision in *State ex rel. AMFM, Inc. v. King*, 230 W.Va. 471, 740 S.E.2d 66 (2013), discussed *infra*. Further, the circuit court's underlying order correctly applied the applicable law in making its findings and reaching its conclusions. For these reasons, oral argument under *Revised Rules of Appellate Procedure* 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for argument pursuant to Rule 19 and disposition by memorandum decision. *Rev. R.A.P.* 19.

STANDARD OF REVIEW

In the case, *sub judice*, the circuit court entered an *Order Denying Defendants' Motion to Compel Arbitration* on August 27, 2020. (A.R. 1). While the general rule is that interlocutory orders are not subject to appellate review, this Court has held that, "[a]n order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556, 557 (2013). Further, such an order is reviewed *de novo*. *See, e.g.*, Syl. pt. 4, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998) ("When a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*."). *See also*, *Certegy Check Servs., Inc. v. Fuller*, 241 W. Va. 701, 704, 828 S.E.2d 89, 92 (2019) *citing* Syl. pt. 1, *W. Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W.

Va. 465, 796 S.E.2d 574 (2017) ("When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo*."); and *citing Salem Int'l Univ., LLC v. Bates*, 238 W. Va. 229, 233, 793 S.E.2d 879, 883 (2016) ("applying a *de novo* standard of review to a 'motion to stay proceedings pending mandatory alternative dispute resolution [*i.e.*, binding arbitration]'").

ARGUMENT

The circuit court correctly applied *State ex rel. AMFM v. King* – which is factually indistinguishable from the present case – in concluding that Ms. Hoover, as health care surrogate, lacked the requisite authority to bind Ms. Faw to the Arbitration Agreement.

At the time Cynthia Hoover executed the Arbitration Agreement on behalf of Elveria Faw, she lacked the requisite authority to bind Ms. Faw to the contract, and therefore, she was not a "competent party." Accordingly, the circuit court correctly concluded that the Arbitration Agreement is unenforceable.

In West Virginia, "to be valid, an arbitration agreement must conform to the rules governing contracts, generally." *State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 478, 740 S.E.2d 66, 73 (2013). "The fundamentals of a legal contact are ***competent parties***, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." Syl. Pt. 3, *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012) (internal citations omitted) (emphasis added); *see also*, *State ex rel. AMFM, LLC*, 740 S.E.2d at 73 ("[T]o be valid, the subject Arbitration Agreement must have ***(1) competent parties***; (2) legal subject matter; (3) valuable consideration; and (4) mutual assent. Absent any one of these elements, the Arbitration

Agreement is invalid.") (emphasis added). "To be a competent party, the person or entity signing the Arbitration Agreement must have had the authority to do so." *Id.*

In *AMFM*, this Court held:

> an agreement to submit future disputes to arbitration, which is optional and not required for the receipt of nursing home services, is not a health care decision under the West Virginia Health Care Decisions Act, W. Va. Code § 16-30-1 et seq. Because the subject Arbitration Agreement was not a health care decision, [the health care surrogate], whose role as . . . health care surrogate permitted her to make only health care decisions, was not a 'competent part[y]' to the Agreement because she did not have the authority to sign this document on [the resident's] behalf. Therefore, the circuit court correctly refused to compel arbitration based upon [the health care surrogate's] lack of authority to bind [the resident] to the Arbitration Agreement.

State ex rel. AMFM, LLC, 740 S.E.2d at 75–76 (internal citations omitted). In *State ex rel. AMFM, LLC*, Ms. Wyatt, deemed incapacitated by her physician, was admitted to a nursing home. *Id.* at 70. At the time of admission, Ms. Wyatt's daughter, Ms. Belcher, had been selected to serve as her mother's health care surrogate. *Id.* During the admissions process, Ms. Wyatt's daughter executed an Arbitration Agreement, which stated that all legal disputes arising out of the Admission Agreement or the residency shall be resolved exclusively by binding arbitration. *Id.* Three months after the admission, Ms. Belcher was appointed as her mother's power of attorney. *Id.* at 76 n. 9.

In upholding the circuit court's ruling, this Court, in *AMFM*, determined the following: an adult daughter ***did not*** possess the authority to bind her mother to the arbitration agreement in her capacity as her mother's "health care surrogate" at the time the arbitration agreement was signed (*Id.* at 75–76); a person who has been appointed medical power of attorney for an incapacitated person does not have the authority to

enter into an arbitration agreement on behalf of an incapacitated person with regard to future disputes concerning care provided by the nursing home to the incapacitated person (*Id.*); the appointment of the daughter as power of attorney subsequent to her signing the arbitration agreement did not act to retroactively bind her mother to the arbitration agreement – "[i]t is the authority that [the daughter] possessed ***at the time the Arbitration Agreement was signed*** on September 10, 2009, and not the authority with which she was imbued some three months later, that is determinative of her authority to bind [her mother] to the Arbitration Agreement." *Id.* at 75 n. 9) (emphasis added). Courts across the country consistently agree with West Virginia's analysis.[1]

In the present case, the pertinent facts are identical to the facts in *AMFM* and are likewise dispositive. Here, Elveria Faw was admitted to Petitioners' health care facility on September 3, 2017. (A.R. 15). At the time of admission, Ms. Faw's daughter, Cynthia Hoover, served as her mother's heath care surrogate. (A.R. 1). On August 30, 2017, in anticipation of Ms. Faw's impending transfer to Petitioner's facility, Ms. Faw's daughter

[1] *See e.g., Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C.*, 66 So. 3d 396, 400 (Fla. Dist. Ct. App. 2011) ("The [Health Care Power of Attorney] cabins Mrs. Springer's authority. We would strain her mother's intent to conclude that the POA authorized Mrs. Springer to bind Mrs. Irons to arbitration."); *Mt. Holly Nursing Ctr. v. Crowdus*, 281 S.W.3d 809, 811 (Ky. Ct. App. 2008) (holding that the arbitration agreement signed by a patient's health care surrogate was invalid and unenforceable because the health care surrogate lacked the requisite authority to bind the patient to arbitration); *Lujan v. Life Care Centers of America*, 222 P.3d 970 (Co. Ct. Appl. 2009) (holding that the decision to arbitrate was not a "health care decision," and thus, the pertinent statute did not authorize the health care surrogate to sign an arbitration provision on behalf of his incapacitated mother); *Flores v. Evergreen at San Diego, LLC*, 148 Cal.App.4th 581, 55 Cal.Rptr.3d 823 (2007) ("Unlike admission decisions and medical care decisions, the decision whether to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a person's well-being."); *Pagarigan v. Libby Care Center, Inc.*, 99 Cal.App.4th 298, 120 Cal.Rptr.2d 892 (2002) (perceiving no authority to enter into arbitration agreement in the health care surrogate statute, the court concluded that the patient's children lacked authority to sign such agreement).

executed an Arbitration Agreement, which stated that all legal disputes arising out of the Admission Agreement or the residency shall be resolved exclusively by binding arbitration. (A.R. 60). On September 8, 2017 – nine days after Ms. Hoover purportedly executed the arbitration agreement on Ms. Faw's behalf – Ms. Faw appointed Ms. Hoover as her General Durable Power of Attorney. (A.R. 122).

Applying *AMFM* to the present facts, the lower court correctly ruled that the Arbitration Agreement was unenforceable because Ms. Hoover was not a competent party:

> In the instant case, Ms. Hoover possessed only the requisite authority to make strictly heath care decisions on behalf of Ms. Faw and was not a "competent party" to sign the Arbitration Agreement on her behalf. It is the authority that Ms. Hoover possessed at the time the Arbitration Agreement was signed, and not the authority with which she was imbued some nine days later, that is determinative of her authority to bind Ms. Faw to the Arbitration Agreement. Insofar as the only authority that Ms. Hoover had to act on her mother's behalf as of the date of signing of the Arbitration Agreement was her status as Ms. Faw's health care surrogate, the decisions she could make for her mother were limited to those concerning Ms. Faw's medical condition and corresponding health care. The fact that Ms. Hoover was later appointed her mother's power of attorney is therefore of no moment in these circumstances.

(AR 12-13).

Moreover, in *AMFM*, this Court rejected arguments sounding in apparent or ostensible agency: "we reject [the nursing home's] argument that [the daughter] had the authority to bind [her mother] to the Arbitration Agreement as her apparent or ostensible agent." *State ex rel. AMFM, LLC*, 740 S.E.2d at 76 n. 10 (citing Syl. Pt. 2, in part, *John W. Lohr Funeral Home, Inc. v. Hess & Eisenhardt Co.*, 152 W.Va. 723, 166

S.E.2d 141 (1969)) ("Where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power; and, if the agent exceeds his authority, the contract will not bind the principal[.]" Pt. 1[, in part], syllabus, *Rosendorf v. Poling*, 48 W.Va. 621, 37 S.E. 555 [(1900)].") The Court explained that, "[i]n seeking to show apparent agency, a person also must evidence that he or she believed that the alleged agent was acting on the authority of another and this belief was reasonable under the circumstances." *State ex rel. AMFM, LLC*, 740 S.E.2d at 76, n. 10 (internal citations omitted). The *AMFM* Court determined that, "in dealing with Ms. Belcher as the purported agent of Ms. Wyatt, [the nursing home] was charged with determining the scope of Ms. Belcher's authority to act on Ms. Wyatt's behalf." *Id.* The Court concluded that, given Ms. Belcher's status as a health care surrogate and reference set forth in the West Virginia Health Care Decisions Act, the nursing home "should have known that Ms. Belcher possessed authority to make health care decisions for Ms. Wyatt and nothing more." *Id.* Further, the *AMFM* Court deemed unreasonable the nursing home's belief that the health care surrogate's authority extended beyond health care decisions:

> to the extent that [the nursing home] believed that Ms. Belcher's authority extended to the making of other, non-healthcare decisions, ***its belief was not reasonable in light of the explicit limitation of Ms. Belcher's power as a health care surrogate*** to the making of health care decisions on Ms. Wyatt's behalf and its own concession that the subject Arbitration Agreement was not a precondition for Ms. Wyatt's receipt of services.

Id. (emphasis added).

Once again, consistent with the identical facts in *AMFM*, the circuit court rejected all arguments that Ms. Hoover had authority to bind Ms. Faw as her apparent or ostensible agent:

> In summary, Greystone was squarely charged with the task of determining the scope of Ms. Hoover's authority to act on Ms. Faw's behalf and with ensuring that its belief in Ms. Hoover's authority was reasonable. Greystone should have known that Ms. Hoover possessed authority only to make health care decisions for Ms. Faw and nothing more. To the extent that Greystone believed that Ms. Hoover's authority extended to the making of other, non-health decisions, its belief was not reasonable, particularly in light of the fact that the subject Arbitration Agreement was not a precondition for Ms. Faw's receipt of services.

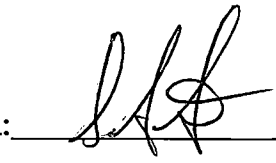
(A.R. 13). Consistent with its prior holdings, this Court should affirm the circuit court's order.

Lastly, this Court dismissed the facility's ratification argument in *AMFM* as "disingenuous." *State ex rel. AMFM, LLC*, 740 S.E.2d at 76, fn. 10. The Court stated that it would be "miraculous" for Ms. Wyatt, who was incapacitated at the time of admission, to have "regained her faculties within thirty days of her nursing home admission such that she then could have rescinded the arbitration agreement." *Id.* The same rationale applies at present. And to the extent that Ms. Faw subsequently appointed a power of attorney after she had been determined to be incapacitated, the validity of that appointment is "questionable." *Id.* As this Court stated, "[a]bsent a contemporaneous recognition that [the patient's] incapacity had been cured, we do not believe that [the health care facility's] proposition that [the patient] failed to timely rescind the Arbitration Agreement is plausible." *Id.*

At bottom, "[t]he doctrine of *stare decisis* requires this Court to follow its prior opinions" to "promote certainty, stability, and the uniformity of law." *State Farm Mut. Auto. Ins. Co. v. Rutherford,* 229 W.Va. 73, 83, 726 S.E.2d 41, 51 (2011) (Davis, J., concurring, in part, and dissenting, in part); Syl. Pt. 2, *Dailey v. Bechtel Corp.*, 157 W.Va. 1023, 207 S.E.2d 169 (1974). Analyzing facts identical to this Court's 2013 decision in *AMFM*, the circuit court correctly applied the applicable law in making its findings and reaching its conclusions. Accordingly, the circuit court's *Order Denying Defendants' Motion to Compel Arbitration* should be affirmed.

CONCLUSION

Based upon the facts and the legal authority set forth herein, the circuit court's *Order Denying Defendants' Motion to Compel Arbitration* should be affirmed.

Signed: 

S. Andrew Stonestreet (WV Bar #11966)
Counsel of Record for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February 2021, a true and accurate copy of the foregoing **Respondent's Brief** was deposited in the U.S. Mail contained in a postage-paid envelope addressed to counsel for Petitioner to this appeal as follows:

Counsel for Petitioner

Avrum Levicoff, Esquire
THE LEVICOFF LAW FIRM, P.C.
4 PPG Place, Suite 200
Pittsburgh, Pennsylvania 15222

Signed: 

S. Andrew Stonestreet (WV Bar #11966)
Counsel of Record for Respondent