No. 14-0747

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA 13 100109

DANIEL P. LANG, as the Personal Representative of the Estate of Mary L. Stevens (Deceased),

Plaintiff-Appellee,

v.

BEACHWOOD POINTE CARE CENTER, *et al.*,

Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS BEACHWOOD POINTE CARE CENTER, BEACHWOOD NURSING & REHAB, BROOK POINTE HEALTH & REHAB, INC., BCFL HOLDINGS, INC., AND PROVIDER SERVICES

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I. Explanation of why this is a case of public or great general interest

In *Hayes v. Oakridge Nursing Home*, 122 Ohio St.3d 63, 2008-Ohio-2054, this Court rejected a broad policy disfavoring the use of arbitration agreements in nursing home contexts and said, instead, that they are enforceable to the same extent that other arbitration agreements executed in any other commercial context are enforceable. *Id.* at ¶ 15-19. The Eighth District Court of Appeals, however, side-stepped *Hayes* and created new requirements for establishing apparent agency to effectively reach a conclusion that *Hayes* rejected: that arbitration agreements executed in nursing home settings are disfavored.

And the Eighth District is not alone in doing so. A growing number of other appellate and trial courts around the state have likewise ignored Hayes and conflated apparent authority with actual authority to create a growing general consensus that the courts in this state disfavor arbitration agreements executed in a nursing home context. *See, e.g., McFarren v. Emeritus at Canton*, 2013-Ohio-3900, 997 N.E.2d 1254 (5th Dist.); *Koch v. Keystone Pointe Health & Rehab.*, 9th Dist. Lorain No. 11CA010081, 2012-Ohio-5817; *see also Templeman v. Kindred Healthcare, Inc.*, 8th Dist. Cuyahoga No. 99618, 2013-Ohio-3738.

The broad implications of the Eighth District's decision, and other like decisions rejecting the use of arbitration agreements executed in a nursing home setting, underscores that this case is a case of public and great general interest. The elderly are the largest and fastest growing segment of society today. Because of age-related limitations, they often rely on the assistance of family members in making living arrangements, arranging for medical care and financial assistance, and otherwise ensuring that they get whatever assistance may be needed to be well cared for. And it is not only the mentally incapacitated elderly that do so, but the elderly with lesser physical and mental limitations brought on by advancing age. Family members regularly rely on nursing homes to make this transition as easy as possible for their elderly

family members. And nursing homes regularly rely on the actions of, and representations made, by residents' family members when they provide this valuable assistance to their elderly family members.

And that is what happened in this case. Here, all arrangements for nursing home selection, placement, payment, and receipt of protected health information were made by a family member of the nursing home resident. Dessie Stevens—Mary Stevens's stepdaughter—contacted Appellant Beachwood Pointe Care Center to inquire about moving her father Jacob Stevens and stepmother Mary Stevens there to reside together as a couple. Once the decision had been made to move, Stevens executed all documents necessary to effect Mary's residency there. She signed—as Mary's "authorized representative"—documents necessary for Mary's admission to Beachwood Pointe, including documents to release Mary's records containing her protected health information and to obtain government benefits for payment of her care while there. Based on the exercise of that authority, Mary's protected health information was released, she was able to obtain government benefits to pay for her care while there. And Mary, along with her husband Jacob, moved to Beachwood Pointe without objection and into a room they jointly shared—all because of the efforts of Stevens.

In any other commercial context, Stevens's exercise of authority would be sufficient to constitute apparent authority and find the arbitration agreement executed here enforceable. Indeed, even the Eighth District, in *Stocker v. Castle Inspections, Inc.*, 99 Ohio App.3d 735 (8th Dist.1995), had earlier found an arbitration agreement enforceable under similar "family member" facts—i.e., a father acting as agent effecting a home inspection for his son as principal. The only difference was that the arbitration agreement in *Stocker* was executed in a nonnursing home context. *Id.* Although cited in briefs and argued in court, the Eighth District made no

reference to *Stocker* in its opinion; its only attempt to distinguish this case during oral argument was that it was executed in a "commercial," not "nursing home" setting.

Principles of apparent authority, however, are still principles of apparent authority. And under those well-established principles, an arbitration agreement is enforceable when the principal "knowingly permits" the agent to act on the principal's behalf to effect the principal's purpose—here, moving to a nursing home—so that those dealing with the agent are justified in assuming the agent is acting with the requisite authority. Courts are not free to interject additional requirements to make the analysis for what constitutes "knowingly permits" more stringent for arbitration agreements executed in a nursing home setting than they would be for the same agreements executed in any other commercial setting.

But the Eighth District did that here. It added a requirement that there be evidence the arbitration agreement was "a necessary precondition" for admission to a nursing home, which is contrary to R.C. 2711.23(A) and could never be shown by Beachwood Pointe without violating that statutory provision. And it likewise added a requirement—never before required for apparent authority—that there be evidence showing that the resident as principal had "actual knowledge" or "reasonably expected" that the admission paperwork would include an arbitration provision. *See* 3/27/14 Op. at ¶ 6, Appx. 6; *see also id.* at ¶ 9, Appx. 7-8.

Nor can a court—as the Eighth District did here—conflate periods of forgetfulness with lack of mental capacity to support a conclusion that a nursing home was not justified in relying on the successful exercise of authority by the family member who made all arrangements—physical, medical, and financial—for the resident to move to the nursing home in the first instance. *See, e.g., id.* at ¶ 9, Appx. 7. Neither the Eighth District here nor other courts around the state should be permitted to misapply Ohio law to reach an "unenforceable" conclusion merely

because they disfavor arbitration agreements executed in the nursing home context. This Court already rejected such a broad policy in *Hayes*.

By accepting jurisdiction in this case, the Court can clarify for the courts below that agency principles apply with equal force—and without any additional requirements—to arbitration agreements executed in a nursing home setting as they would apply in any other commercial context. Without further intervention by this Court, courts across the state will increasingly continue to ostensibly search for any mechanism to find these agreements unenforceable, or impose new requirements when doing so, merely because of the context in which they were executed. This is contrary to this Court's broad pronouncement in *Hayes*. When an arbitration agreement executed under apparent authority would be otherwise enforceable if executed in any context other than a nursing home context, it must be enforceable in that context as well.

II. Statement of the case and facts

A. Dessie Stevens arranges for Mary Stevens to be admitted to Beachwood Pointe, including executing documents as her authorized representative to release Mary's records and arrange for Medicaid coverage.

Mary had been living in an assisted living facility with her husband Jacob before she began residing at Beachwood Pointe. When Jacob's health deteriorated, he was no longer able to assist Mary with her care and the decision was made to pursue long-term care for both him and Mary. Stevens began that process sometime in February 2012.

As part of this process, Stevens contacted Beachwood Pointe to inquire about admission for Mary and Jacob, and eventually executed three Western Reserve Area Agency on Aging forms as part of Mary's application for PASSPORT services, which were required because Mary received Medicaid benefits. Stevens signed these forms as Mary's "authorized representative,"

"the person giving consent," or as "the consumer." *See* 3/27/14 Op. at ¶ 5, Appx. 5. The execution of these forms allowed Western Reserve to release records containing Mary's confidential health information (which is otherwise protected by state and federal law), including its assessment and ultimate recommendation that Mary was an appropriate candidate for long-term care and that Medicaid cover eligible expenses.

Once Beachwood Pointe received the PASSPORT documents and Mary's protected health information, Beachwood Pointe Director of Admissions Kelly Shannon began speaking with Stevens about the admissions. Mary was eventually admitted to Beachwood Pointe on March 1, 2012. It was Stevens who arranged for Mary to reside at Beachwood Pointe, made all arrangements to ensure that Mary's protected health information was sent there, and that Mary continued to receive Medicaid benefits to cover eligible costs while there. And it was at Stevens's request that Mary and Jacob shared a room there.

B. Stevens signs the admission paperwork on Mary's behalf, including the Arbitration Agreement.

Shannon asked Stevens to sign the Admission Agreement and Arbitration Agreement sometime after Mary's admission because Mary appeared forgetful at times and Stevens appeared to have decision-making authority for her. *See* 3/27/14 Op. at ¶ 8, Appx. 7. Indeed, she initiated the admission process, executed all PASSPORT forms before Mary could begin to receive care and services at Beachwood Pointe, and otherwise effected Mary's successful move there.

Stevens agreed and executed both agreements as Mary's representative, but not until after Shannon spent an hour and a half thoroughly reviewing the documents with her. The Arbitration Agreement explains that all disputes, whether sounding in contract or tort, or are based upon statutory obligations, are subject to arbitration. The Agreement also explains the legal effect of

signing the document—i.e., that its execution is not a condition to admission, that there is no requirement that it be signed, and it advised of the right to seek legal counsel. And, even if signed, it could be canceled within 30 days.

According to Shannon, Stevens did not object to signing these documents as Mary's representative at the time, nor did she voice any discomfort in doing so. Although Stevens, claimed differently in the courts below, at no time during the admission process or afterward is there any evidence that Mary objected to Stevens's exercise of authority in the pre-admission and admission process. There is no evidence that Mary objected to receiving the care and services provided by Beachwood Pointe through PASSPORT that resulted from Stevens's exercise of authority in executing those documents. And there is no evidence that Mary ever voiced any objection to her living arrangements made possible by Stevens's exercise of authority. On the contrary, Mary continued to reside at Beachwood Pointe until early May 2012 when she was transferred to Lutheran Hospital. She died on May 27, 2012.

C. Daniel Lang, as the executor of Mary's estate, sues Beachwood Pointe; Beachwood Pointe moves to stay pending arbitration.

In March 2013, Lang, as the personal representative of Mary's estate, sued Beachwood Pointe, and several other entities, including Beachwood Nursing & Rehab, Brook Pointe Health and Rehab, BCFL Holdings, Inc., Provider Services Holdings, LLC, and several John Doe defendants. Lang alleged that Beachwood Pointe acted negligently in the care and treatment of Mary Stevens while she was a resident there.

Because an arbitration agreement had been executed as part of Mary's admission to Beachwood Pointe, it and the other entity defendants moved to stay proceedings and compel arbitration. The motion was supported by copies of the Admission Agreement and the Arbitration Agreement.

Lang opposed the motion. He argued that the Arbitration Agreement was not enforceable because Mary was not a party to the agreement and Stevens, who executed it, did not have actual authority to do so. He supported his brief with an affidavit from Stevens who averred that she told Beachwood Pointe at the time of signing the Agreement that she did not have power of attorney for Mary.

In reply, Beachwood Point argued that even if Stevens did not possess actual authority, she had apparent authority because Mary "knowingly permitted" Stevens to act on her behalf. And Beachwood Pointe reasonably believed that Stevens had that authority based on the decision-making authority Stevens exercised during the pre-admission process, and Mary's acquiescence in the exercise of that authority.

D. The trial court denies the motion and the Eighth District affirms.

The trial court summarily denied Beachwood Pointe's motion to stay without opinion. *See* 7/2/13 J. Entry, Appx. 10.

The Eighth District affirmed. In reaching its decision, the Eighth District found that there was no evidence that Mary "caused, allowed, or held" Stevens out to the public as possessing authority to bind her to arbitrate disputes. 3/27/14 Op. at ¶ 5, Appx. 5. But Beachwood Pointed never argued, in brief or in oral argument, that Mary ever did so. Instead, it relied on the alternative option for proving apparent authority—i.e., that Mary "knowingly permitted" Stevens to act on her behalf and effect her move to Beachwood Pointe. And as to the analysis for this alternative option, the Eighth District interjected two new requirements for apparent authority that are either contrary to Ohio arbitration law or do not otherwise exist. First, it said that there must be evidence that the arbitration agreement is "a necessary precondition" for admission for Mary to have "knowingly permitted" Stevens to act.

> Even if [Mary] Stevens knew that her stepdaughter would sign necessary admission papers, medical authorizations, and applications for federal benefits, there is no evidence that [the] agreement to arbitrate disputes was a necessary precondition for admission to Beachwood Pointe.

3/27/14 Op. at ¶ 6, Appx. 6. There was no such evidence because it would violate R.C. 2711.23(A) if this evidence existed.

The second requirement the Eighth District interjected was that the principal must "reasonably expect" and have "actual knowledge" that an arbitration agreement would be part of the admission process before there can be a finding that the agent acted with apparent authority.

> Nor was the arbitration agreement one that [Mary] Stevens, or anyone else in her place, might reasonably expect to be a part of the admission process. So [Mary] Stevens could not give her stepdaughter authority to bind her to an arbitration clause that she knew nothing about.

3/27/14 Op. at ¶ 6, Appx. 6.

The Eighth District provided no Ohio authority to support this statement. Instead, it relied on a decision from the Massachusetts Supreme Judicial Court—*Licata v. GGNSC Malden Dexter, LLC*, 466 Mass. 793, 802, 2 N.E.3d 840 (Mass.2014). *See* 3/27/14 Op. at ¶ 6, Appx. 6. But *Licata* reached its decision by confusing actual authority for a specific purpose with apparent authority, noting that the resident "was not in the same room as [the agent] when he signed the admissions documents" and could not by silence consent to actions of which the resident had no knowledge. *Licata*, 466 Mass. 792, 802, 2 N.E.3d 840; *see also id.* at 802, fn. 6.

The court then relied on the lack of a power of attorney and transformed Mary's times of forgetfulness into mental incapacity to find that Beachwood Pointe's belief was not reasonable.

> [W]e fail to see why Beachwood Pointe would think that [Mary] was nonetheless competent to authorize the stepdaughter to act for her, particularly when [Mary] did nothing affirmative from Beachwood Pointe's perspective to give the stepdaughter authority to act for her.

3/27/14 Op. at ¶ 9, Appx. 7.

Beachwood Pointe's perspective, however, was that Mary "knowingly permitted" Stevens to effect her admission to Beachwood Pointe. It was therefore justified in believing that she acted with authority—authority that she had previously exercised and exercised successfully.

Because the Eighth District misapplied, and created new requirements for, the test for apparent authority, this appeal followed.

III. Argument

Proposition of Law

> **An arbitration agreement executed in a nursing home setting is enforceable to the same extent any other arbitration agreement executed in any other setting is enforceable, and is enforceable when the resident as principal knowingly permits an agent to execute documents, including an arbitration agreement, to effect the resident's residency at the nursing home even though the resident may not be present when the agreement is signed and may have not actual knowledge of its contents.**

A. Stevens acted with apparent authority when she executed the Arbitration Agreement.

Under Ohio law, an agency relationship may be created when the principal causes or allows a third person to act as an apparent agent. *Johnson v. Tansky Sawmill Toyota, Inc.*, 95 Ohio App.3d 164, 167-68 (10th Dist.1994). To establish this relationship, it must be shown that (1) the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, *or* knowingly permitted the agent to act as having such authority, and (2) the person dealing with the agent knew of the facts and, acting in good faith, had reason to believe and did believe that the agent possessed the necessary authority. (Emphasis added.) *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570 (1991), syllabus. The test then becomes whether a "person of ordinary prudence, conversant in the nature of the particular business, is justified in assuming that the agent is authorized to perform on behalf of the

principal" so that the principal is estopped as against the third party from denying the agent's authority to act. *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, ¶ 47 (5th Dist.).

Beachwood Pointe was justified in making that assumption here. Mary, as principal, knowingly permitted Stevens to exercise authority to act as her representative. Indeed, Stevens executed an application form as Mary's "authorized representative" to obtain government benefits through PASSPORT so that Mary could reside in a long-term care facility as a Medicaid recipient instead of the assisted living facility where she had resided previously. This application, as signed, allowed the Western Reserve Area Agency on Aging to release the results of its assessment of Mary to Beachwood Pointe.

Furthermore, Mary was aware that her living arrangements were changing and that Stevens made those living arrangements possible. Indeed, Mary left her previous residence and began residing at Beachwood Pointe on March 1, 2012. And Stevens, exercising her authority, requested that Mary and Jacob share a room at Beachwood Pointe, Beachwood Pointe complied with this request, and Mary and Jacob thereafter shared a room.

If Stevens did not act with Mary's permission or if Mary objected, Western Reserve could not have released any PASSPORT information to Beachwood Pointe, Beachwood Pointe would not have received any information, and Mary would not have been admitted to the facility. But Western Reserve did release the information to Beachwood Pointe, Beachwood Pointe received copies of both the assessment and relevant records containing Mary's protected health information, and, based on Western Reserve's recommendation that she was an appropriate candidate for long-term care, Mary's Medicaid benefits covered eligible services while she

resided there. The only conclusion that can be reasonably drawn from this successful exercise of authority is that Stevens possessed the requisite authority to act on Mary's behalf.

From the time that Mary moved into Beachwood Pointe on March 1, 2012 until she left for Lutheran Hospital in early May 2012, these documents were never revoked or withdrawn by Stevens or Mary, or any other person with any authority to do so.

B. The additional requirements imposed by the Eighth District to satisfy the "knowingly permit" part of the test for apparent authority are unsupported by Ohio law.

The Eighth District acknowledged that Mary knowingly permitted Stevens to execute documents necessary for her admission to Beachwood Pointe. *See* 3/27/14 Op. at ¶ 6, Appx. 5-6. Yet the court nonetheless said this was insufficient because there was no evidence that the arbitration agreement "was a necessary precondition for admission to Beachwood Pointe" or that Mary would "reasonably expect" and have "actual knowledge" that the documents Stevens executed would contain an arbitration provision. *Id.*; *see also id.* at ¶ 9, Appx. 7-8. This type of evidence has never been required to establish apparent authority under this part of the test, nor can there be "precondition" evidence for an arbitration agreement used by a nursing home.

1. Nursing homes are prohibited from conditioning admission on signing an arbitration agreement.

Ohio law makes clear that a valid and enforceable arbitration agreement covering a medical claim is required to include a provision that care "will be provided whether or not the patient signs the agreement to arbitrate." R.C. 2711.23(A). Because a claim against a nursing home is a medical claim under R.C. 2305.113(E)(3), Beachwood Pointe, like any nursing home that uses an arbitration agreement, is prohibited by this law from making its arbitration agreement "a necessary precondition" to providing care.

And it did not do so here. The Agreement, in clear terms, states that care will be provided regardless of whether the arbitration agreement is executed, as is required by R.C. 2711.23(A). This new evidentiary requirement imposed by the Eighth District then can never be satisfied for an arbitration agreement executed in a nursing home setting. Nursing homes cannot be expected to satisfy an evidentiary burden that is contrary to Ohio law.

2. Agency law has never imposed an "actual knowledge" requirement when acting with apparent authority.

By relying on *Licata v. GGNSC Malden Dexter, LLC*, 466 Mass. 793, 2 N.E.3d 840 (Mass.2014)—a decision from the Massachusetts Supreme Judicial Court—the Eighth District interjected an "actual knowledge" requirement when it stated that Mary could not give Stevens authority to bind to an arbitration provision "that she knew nothing about." 3/27/14 Op. at ¶ 6, Appx. 6; *see also id.* at ¶ 9, Appx. 7-8. *Licata* said as much when it found the arbitration agreement executed in that case—also executed in a nursing home setting— unenforceable under apparent authority because the resident was not in the same room when the resident's son executed the arbitration agreement and the resident could not "through silence alone consent to actions of which the patient lacks knowledge[.]"*Licata*, 466 Mass. at 802, 2 N.E.3d 840; *see also id.* at 802, fn. 6.

By interjecting an "actual knowledge" requirement, the Eighth District is conflating actual authority with apparent authority, and then actual authority expressly granted for a specific purpose. Even actual authority granted under a general power of attorney does not require the principal to "witness" or have "actual knowledge" of the agent's actions.

Apparent authority and actual authority are separate and distinct legal principles. Apparent authority, by definition, can be created by law when no actual authority has been conferred. *See* Black's Law Dictionary 128 (7th Ed.1999); *see also Miller v. Wick Bldg. Co.*, 154

Ohio St. 93 (1950), paragraph two of the syllabus. That is why the existence of a power of attorney—which grants actual authority and then broadly if under a general power of attorney—is irrelevant to the analysis for apparent authority. Apparent authority, just like actual authority granted under a general power of attorney, does not require that the principal be aware that documents executed by the agent contain certain provisions, nor does it otherwise require the principal to witness the agent's actions. Indeed, this Court imposed no such requirements in *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570 (1991), syllabus. Instead, apparent authority may exist when the principal "knowingly permits" the agent to act as having that authority such that the person dealing with the agent reasonably believes the agent is acting with the requisite authority. *Id.* at the syllabus.

The Eighth District's decision in *Stocker v. Castle Inspections, Inc.*, 99 Ohio App.3d 735 (8th Dist.1995), illustrates the correct analysis for apparent authority. In that case, the plaintiff contracted with a home inspection company to inspect a home the plaintiff had conditionally agreed to purchase. When the plaintiff could not attend the inspection as scheduled, he arranged for his father to be present in his stead. While there, the father signed a pre-inspection agreement on the plaintiff's behalf, which contained a broadly worded arbitration clause. *Id.* at 736. When the plaintiff thereafter sued the inspection company claiming it had negligently conducted the inspection, the company moved to compel arbitration consistent with the arbitration clause.

The plaintiff argued that his father had no authority to agree to arbitrate any future claims because the plaintiff did not sign the agreement. The appellate court, relying on well-established agency principles, reaffirmed that even when an agent has no actual authority to act, the principal will be bound by the agent's contract if "'by his words or conduct, reasonably interpreted'" caused the other party to the contract to believe that the agent "'had the necessary authority to

make the contract.'" *Stocker*, 99 Ohio App.3d at 738, quoting *Cascioli v. Cent. Mut. Ins. Co.*, 4 Ohio St.3d 179, 181 (1983). Finding that the plaintiff satisfied this standard, the court found that the father, acting outside the plaintiff's presence but as plaintiff's agent, "could sign the contract on plaintiff's behalf and, in the process, bind plaintiff to arbitrate any disputes arising from that contract." *Stocker*, 99 Ohio App.3d at 738. That the plaintiff was not present when his father signed the contract was a fact of no consequence to the enforceability of the arbitration provision.

Stevens's exercise of authority outside of Mary's presence and without her actual knowledge that the documents executed by Stevens contained an arbitration provision is no different here. The analysis for apparent authority has never contained a "witness" or an "actual knowledge" requirement and they should not be imposed here merely because the arbitration agreement at issue was executed in a nursing home setting as opposed to any other commercial setting. *Hayes* made clear that arbitration agreements executed in a nursing homes setting are enforceable to the same extent as any other arbitration agreement executed in any other commercial setting. No additional requirements can be imposed based solely on the setting in which the agreement is executed.

IV. Conclusion

Accepting jurisdiction in this case can make clear that arbitration agreements executed in nursing home settings are subject to the same analysis for enforceability that arbitration agreements executed in other commercial settings are enforceable, including enforceability under apparent authority. And because apparent authority imposes no "pre-condition" or "actual knowledge" evidentiary burdens for other commercial parties seeking to enforce an arbitration agreement executed by an agent acting with apparent authority, these same burdens cannot be

imposed on nursing home parties seeking to enforce arbitration agreements executed in a nursing home setting.

Beachwood Pointe and the remaining appellants therefore respectfully request that this Court accept jurisdiction in this case to clarify this area of the law.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing was served on May 12, 2014 per S.Ct.Prac.R. 3.11(B) by mailing it by United States mail and electronically by e-mail to:

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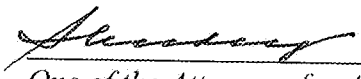

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100109

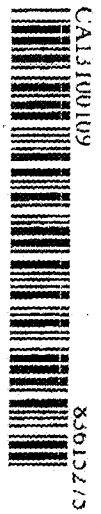
DANIEL P. LANG, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY L. STEVENS (DECEASED)

PLAINTIFF-APPELLEE

vs.

BEACHWOOD POINTE CARE CENTER, ET AL.

DEFENDANTS-APPELLANTS



JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-803569

BEFORE: Stewart, J., Blackmon, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: March 27, 2014

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MELODY J. STEWART, J.:

{¶1} When decedent Mary Stevens was admitted to defendant-appellant Beachwood Pointe Care Center for nursing care, her stepdaughter signed the admission paperwork as Stevens's "representative." Among the papers signed by the stepdaughter was an agreement to arbitrate all disputes between Stevens and Beachwood Pointe. Stevens later died from injuries she suffered while a resident at Beachwood Pointe — injuries that her estate, through its representative Daniel Lang, alleged were caused by Beachwood Pointe's negligence. Beachwood Pointe filed a motion to stay proceedings and refer the matter to arbitration. It is undisputed that Stevens did not sign any paperwork nor is it disputed that the stepdaughter did not have a power of attorney to make decisions for Stevens. Beachwood Pointe argued that the stepdaughter had apparent authority to bind Stevens to arbitration. The court disagreed and its refusal to stay the proceedings and order arbitration is the sole issue on appeal. We find no error and affirm.

{¶2} The general legal proposition applicable to this appeal is that arbitration is a matter of contract and a party cannot be forced to arbitrate that which the party has not agreed to arbitrate. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). When the parties dispute whether an agreement to arbitrate exists, that dispute presents a mixed question of fact and law — the

courts determine whether a contract to arbitrate exists as a matter of fact, *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995), but once an agreement to arbitrate is found to exist, the terms of that agreement are construed as a matter of law. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus.

{¶3} Stevens did not sign any paperwork when admitted to Beachwood Pointe, so she did not expressly agree to arbitration. Nor did Stevens expressly appoint the stepdaughter as her agent to sign the admission papers in her stead. Beachwood Pointe argues that the stepdaughter had apparent authority to sign documents because it believed in good faith that the stepdaughter had the necessary authority to bind Stevens.

{¶4} In the absence of direct authorization to act on behalf of another, principles of agency law state that an agent may act on behalf of a principal when the agent has apparent authority to do so. An agent's authority to act always flows from the principal, so it is the acts of the principal, not the agent, that determine whether apparent authority had been given. *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, 886 N.E.2d 827, ¶ 41. Apparent authority for an agent's act will be found when (1) the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted the agent to act as having

such authority, and (2) the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St.3d 570, 575 N.E.2d 817 (1991), syllabus. This test is set forth in the conjunctive, so the failure to establish both parts of the test is fatal to a claim that an agent acted with apparent authority.

{¶5} As to the first part of the apparent authority test, there was no evidence that Stevens caused, allowed, or held her stepdaughter out to the public as possessing sufficient authority to bind her to arbitrate any disputes with Beachwood Pointe. Beachwood Pointe concedes that Stevens had not granted anyone a power of attorney either before or at the time of her admission. Stevens did execute a power of attorney, but not until after all of the admission documentation, including the contested arbitration agreement, had been signed by the stepdaughter. There is simply no evidence of any kind that Stevens held the stepdaughter out at the time as having sufficient authority to sign the admission papers and agree to binding arbitration. On this basis alone, the court did not err by finding that the stepdaughter lacked apparent authority to bind Stevens to arbitrate any disputes with Beachwood Pointe.

{¶6} Beachwood Pointe argues that the stepdaughter signed other documents without Stevens challenging her authority to do so; notably, authorizations on a PASSPORT form to release to Beachwood Pointe Stevens's

private medical information. Even if Stevens knew that her stepdaughter would sign necessary admission papers, medical authorizations, and applications for federal benefits, there is no evidence that Stevens's agreement to arbitrate disputes was a necessary precondition for admission to Beachwood Pointe. Nor was the arbitration agreement one that Stevens, or anyone else in her place, might reasonably expect to be a part of the admission process. So Stevens could not give her stepdaughter authority to bind her to an arbitration clause that she knew nothing about. *See Licata v. GGNSC Malden Dexter LLC*, 466 Mass. 793, 802, 2 N.E.3d 840 (2014).

{¶7} As for the second part of the apparent authority test, we find no evidence to prove that Beachwood Pointe had reason to believe that the stepdaughter possessed the necessary authority to bind Stevens to arbitrate all disputes. The stepdaughter claimed that on more than one occasion she told Beachwood Pointe that she had no authority to sign the papers that contained the arbitration clause. She claimed that Beachwood Pointe told her it needed her to sign the papers for "general purposes." Beachwood Pointe disagreed — its admission's director stated in an affidavit that she asked the stepdaughter to sign the papers because the stepdaughter "appeared to have decision making authority for Mary Stevens."

{¶8} The resolution of this factual conflict as to what Beachwood Pointe believed concerning Stevens's delegation of authority to the stepdaughter rests

on Beachwood Pointe's acknowledgment that Stevens appeared to lack the mental capacity necessary to delegate authority to the stepdaughter. The admission director's affidavit stated that at the time of admission, Stevens was "sometimes forgetful and questions remained about her ability to understand and remember the information contained in the Admission Agreement and Arbitration Agreements or my explanations thereof."

{¶9} Beachwood Pointe knew that Stevens had not given a power of attorney to the stepdaughter prior to admission. It also conceded that Stevens lacked the ability to understand the admission procedure, much less that she was being asked to arbitrate any disputes that might arise between her and Beachwood Pointe. This being so, we fail to see why Beachwood Pointe would think that Stevens was nonetheless competent to authorize the stepdaughter to act for her, particularly when Stevens did nothing affirmative from Beachwood Pointe's perspective to give the stepdaughter authority to act for her. If Stevens could not understand the admission papers because of a mental incapacity, it is difficult to comprehend how Beachwood Pointe can argue that she nonetheless had the mental capacity to appoint the stepdaughter to sign that which she did not understand. *See Diversicare Leasing Corp. v. Cooper*, W.D.Ark. No. 6:12-cv-6055, 2013 U.S. Dist. LEXIS 59989 (Apr. 26, 2013). And to the extent that Stevens's acquiescence to some of the stepdaughter's actions might be viewed as passive assent to the stepdaughter's authority, we agree

with the Supreme Judicial Court of Massachusetts, which recently disagreed with the proposition that "a patient may through silence alone consent to actions of which the patient lacks knowledge * * *." *Licata*, 466 Mass. at fn. 6, 2 N.E.3d 840.

{¶10} The court did not err by finding the arbitration agreement was not binding on Stevens.

{¶11} Judgment affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., and
TIM McCORMACK, J., CONCUR

The State of Ohio, Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 3-27-14 CA 100109 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 3-27-14 CA 100109 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 28th day of March A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By C. Pinsak Deputy Clerk

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DANIEL P. LANG, AS THE PERSONAL REPRESENTATIVE,ETC
Plaintiff

BEACHWOOD POINTE CARE CENTER, ET AL
Defendant

Case No: CV-13-803569

Judge: CAROLYN B FRIEDLAND

JOURNAL ENTRY

DEFENDANTS BEACHWOOD POINTE CARE CENTER, BEACHWOOD NURSING & REHAB, BROOK POINTE HEALTH AND REHAB, BROOK POINTE HEALTH AND REHAB, INC., BCFL HOLDINGS INC., AND PROVIDER SERVICES HOLDINGS , LLC MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION IS DENIED.

Carolyn B. Friedland

Judge Signature 07/02/2013

07/01/2013

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