Rel: June 21, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170856

Alabama Psychiatric Services, P.C., and Managed Health Care Administration, Inc.

v.

Sheri Lynn Lazenby et al.

1171150

Alabama Psychiatric Services, P.C., and Managed Health Care Administration, Inc.

v.

Sheri Lynn Lazenby et al.

Appeals from Jefferson Circuit Court
(CV-16-901279)

BRYAN, Justice.

Several former employees of Alabama Psychiatric Services, P.C. ("APS"), filed a putative class action against APS and Managed Health Care Administration, Inc. ("MHCA"), an affiliate of APS, in the Jefferson Circuit Court. The complaint alleged that APS had not paid the former employees for unused vacation time after they lost their jobs when APS went out of business. APS and MHCA moved the circuit court to compel arbitration pursuant to arbitration agreements the plaintiffs had entered into with APS. APS and MHCA asked the circuit court to determine, as a threshold question, whether class arbitration is available in this case. The arbitration agreements did not expressly mention class arbitration. The circuit court issued an order granting the motion to compel arbitration. In that same order, the circuit court declined to decide whether class arbitration is available, concluding that that issue was to be decided by the arbitrator.

The case proceeded to arbitration, which was governed by the rules of the American Arbitration Association ("the AAA"). Under Rule 3 of the AAA's Supplementary Rules for Class Arbitration, a party may ask the arbitrator for a "clause-

construction award" determining whether class arbitration is available; the plaintiffs here asked the arbitrator to issue such an award. The arbitrator subsequently issued a clause-construction award ("the award"), concluding that the relevant arbitration agreements authorize class arbitration in this case. Rule 3 also allows for the immediate judicial review of a clause-construction award. Accordingly, APS and MHCA sought review of the award in the circuit court.

Rule 71B, Ala. R. Civ. P., establishes the procedure for appealing an arbitration award to the circuit court. Under Rule 71B,

> "(1) [a] party must file a notice of appeal with the appropriate circuit court within 30 days after service of the notice of the arbitration award; (2) the clerk of the circuit court shall promptly enter the award as the final judgment of the circuit court; (3) the aggrieved party may file a Rule 59, Ala. R. Civ. P., motion to set aside or vacate the judgment, and such filing is a condition precedent to further review by any appellate court; (4) the circuit court grants or denies the Rule 59 motion; and (5) the aggrieved party may then appeal from the circuit court's judgment to the appropriate appellate court."

Guardian Builders, LLC v. Uselton, 130 So. 3d 179, 181 (Ala. 2013).

This case has various procedural irregularities that initially must be sorted out. First, APS and MHCA, in appealing the award, did not file a document titled "notice of appeal" with the circuit court. Instead, on January 5, 2018, APS and MHCA filed with the circuit court a "motion to vacate" the award. This Court has considered a "motion to vacate" as a notice of appeal for purposes of Rule 71B when the motion was in substance a notice of appeal. Honea v. Raymond James Fin. Servs., Inc., 240 So. 3d 550, 559 (Ala. 2017). See also Guardian Builders, 130 So. 3d at 182; and J.L. Loper Constr. Co. v. Findout P'ship, LLP, 55 So. 3d 1152 (Ala. 2010). The motion to vacate was in substance a timely filed notice of appeal (in addition to being a motion to vacate); thus, the requirement in Rule 71B that a notice of appeal be filed with the circuit court was satisfied.

Under Rule 71B, the clerk of the circuit court, as a ministerial matter, should have promptly entered the award as the judgment of the circuit court. However, the award was not promptly entered as the judgment of the circuit court, but the appeal proceeded as if it had been. On April 11, 2018, the circuit court purported to deny the motion to vacate the

judgment. Then, 42 days later, on May 23, 2018, APS and MHCA filed a notice of appeal to this Court from the order purporting to the deny the motion to vacate the judgment; that appeal was docketed as appeal no. 1170856. The problem here is that, because the award had not yet been entered as the judgment of the circuit court, there actually was no judgment that formed the basis for the motion to vacate. However, that problem is not fatal, because a postjudgment motion filed before the entry of a judgment quickens upon the entry of the judgment, New Addition Club, Inc. v. Vaughn, 903 So. 2d 68, 72 (Ala. 2004), and that is what happened here. On June 7, 2018, the clerk of the circuit court entered the arbitrator's award as the judgment of the circuit court. At that point, the motion to vacate quickened and was ripe for a decision by the circuit court under Rule 71B. Id. See also Ex parte Cavalier Home Builders, LLC, [Ms. 1170847, November 16, 2018] ___ So. 3d ___, ___ (Ala. 2018) (noting, in an appeal from an arbitration award, that a premature Rule 59(e), Ala. R. Civ. P., motion quickened when the circuit court later entered the award as the judgment of the circuit court). On July 17, 2018, the circuit court, perhaps realizing that its earlier

motion purporting to deny the motion to vacate had been premature, entered an order denying the motion to vacate.

Complicating matters is the fact that APS and MHCA had filed a notice of appeal on May 23 (appeal no. 1170856), before the motion to vacate quickened on June 7. Rule 4(a)(4), Ala. R. App. P., provides that "[a] notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after the entry and on the day thereof." In this case, the circuit court essentially announced its decision by purporting to deny the motion to vacate the first time around, on April 11. However, the motion to vacate did not actually quicken until June 7, when the circuit clerk performed the ministerial duty of entering the award as the judgment of the circuit court. The circuit court then denied the motion to vacate on July 17, and, under Rule 71B, that is the judgment from which the appeal lies. Under Rule 4(a)(4), the notice of appeal filed on May 23 was, in effect, suspended until the circuit court denied the motion to vacate on July 17. Pursuant to Rule 4(a)(4), we will treat the notice of appeal in appeal no. 1170856 as having been filed on July 17.

We now address another procedural irregularity regarding the notice of appeal in appeal no. 1170856. The notice of appeal listed the appellants as "Alabama Psychiatric Services, P.C., et al." and listed the appellees as "Sheri Lynn Lazenby, et al." Rule 3(c), Ala. R. App. P., was amended effective January 1, 2017, to provide that "[a]n appellant may not use the terms 'et al.' or 'etc.' to designate multiple appellants or appellees in lieu of naming each appellant or appellee." In light of that provision, this Court on June 20, 2018, ordered that appeal no. 1170856 be docketed only as to those parties specifically identified in the notice of appeal, i.e., APS as the sole appellant and Sheri Lynn Lazenby as the sole appellee. On July 16, 2018, APS filed a motion seeking to amend the notice of appeal to specifically list all the parties in this case, in compliance with Rule 3(c). This Court denied that motion by order on August 10, 2018. However, as explained above, when APS filed its motion to amend the notice of appeal on July 16, the notice of appeal not yet become effective; it would not become effective until the following day, July 17, when the circuit court denied the motion to vacate. Thus, in retrospect, APS should have been

allowed to amend the notice of appeal in appeal no. 1170856. Accordingly, we rescind our order of June 20, 2018, which ordered that the appeal be docketed only as to those two parties specifically identified in the notice of appeal. Further, we amend the notice of appeal to include all the parties in this case. Accordingly, the appellants in appeal no. 1170856 are APS and MHCA, and the appellees are the plaintiffs, Sheri Lynn Lazenby, Robert Doyle, Latanya Renee Keith, Margie Dukes, January Simpson, Mary Ferdon, Lisa Marlowe, Anita Clark, Debra McAuliffe, Dolores Bray, Judith Madelyn Basham, Patricia Nowlin, and Elizabeth Wood.

On August 28, 2018, 42 days after the circuit court's July 17 order denying the motion to vacate, APS and MHCA filed a second notice of appeal, listing all the parties in this case, in compliance with Rule 3(c); this Court docketed that appeal as appeal no. 1171150. In the second appeal, like the first appeal, APS and MHCA challenge the circuit court's denial of the motion to vacate, and they present the same arguments. The second notice of appeal appears to have been filed out of uncertainty regarding the unusual procedural history in this case. However, as explained above, the second

notice of appeal is redundant, given that the first notice of appeal has now been amended to include all the parties. Accordingly, we dismiss appeal no. 1171150.

APS and MHCA's first argument on appeal does not address any decision the circuit court made in its order denying the motion to vacate the arbitrator's award. Rather, APS and MHCA first argue that the circuit court, in its earlier order compelling arbitration, erred by declining to decide the threshold issue whether class arbitration is available. As noted, the circuit court concluded that the arbitrator, not the circuit court, should decide the availability of class arbitration. However, the issue whether the circuit court erred in this regard is not properly before us. Rule 4(d), Ala. R. App. P., provides:

> "An order granting or denying a motion to compel arbitration is appealable as a matter of right, and any appeal from such an order must be taken within 42 days (6 weeks) of the date of the entry of the order, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure."

An order granting a motion to compel arbitration is a final judgment, Bowater, Inc. v. Zager, 901 So. 2d 658, 667 (Ala. 2004), and "failure to take an appeal from it within the

42-day time period forecloses later appellate review." 901 So. 2d at 664. APS and MHCA now attempt to challenge that part of the order compelling arbitration in which the circuit court declined to decide the availability of class arbitration. However, to properly challenge that aspect of the earlier order, APS and MHCA should have appealed from the order, pursuant to Rule 4(d). APS and MHCA failed to appeal from that order, and the time for such an appeal has long since expired. Thus, the issue whether the circuit court properly declined to decide the availability of class arbitration is not properly before us in this appeal.

APS and MHCA argue that this issue is properly before us because, they say, the order compelling arbitration was not a final judgment and, therefore, was not appealable. As noted, that position is unsupported by Alabama law, which considers such an order to be a final judgment. Bowater, 901 So. 2d at 667. In making their argument, APS and MHCA cite federal caselaw discussing federal procedural law regarding the appealability of various arbitration decisions. Thus, APS and MHCA seem to imply that federal procedural law regarding arbitration -- not Alabama procedural law -- applies in this

case. The pertinent federal provision, 9 U.S.C. § 16, which is a part of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("the FAA"), lists the types of arbitration decisions from which an appeal may and may not be taken in federal court. Under that provision, a federal-court order compelling arbitration generally is not appealable unless the federal court also dismisses the underlying action. Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 84-89, n.2 (2000) (determining that an order compelling arbitration is appealable as a "final decision" under 9 U.S.C. § 16(a)(3) if the federal district court dismisses the underlying action but is not appealable if the federal district court enters a stay instead of a dismissal). However, although the FAA contains federal substantive law that is applicable in both state and federal courts, Southland Corp. v. Keating, 465 U.S. 1, 12 (1984), the FAA's procedural rules are simply inapplicable in this case.

"States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." Howlett v. Rose, 496 U.S. 356, 372 (1990). As the United States Supreme Court has explained, "[t]he FAA contains

no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989). Nevertheless, the FAA preempts a state provision "to the extent that it actually conflicts with [the FAA] -- that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The United States Supreme Court has observed that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." Volt, 489 U.S. at 479. The Court has further stated that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." Id. at 476. In sum, as the Supreme Court of South Carolina succinctly explained, "[t]he FAA's substantive provisions apply to arbitration in federal or state courts, but a state's procedural rules apply in state court unless they conflict with or undermine the

purpose of the FAA." Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 450, 748 S.E.2d 221, 226-27 (2013). Many other state courts have reached a similar conclusion. See, e.g., Morgan Keegan & Co. v. Smythe, 401 S.W.3d 595, 605-607 (Tenn. 2013) (collecting cases). Particularly relevant here, other state courts have concluded that state procedural rules allowing for the immediate appeal of an order compelling arbitration -- like our Rule 4(d) -- do not run afoul of the FAA. See, e.g., Kremer v. Rural Cmty. Ins. Co., 280 Neb. 591, 597-603, 788 N.W.2d 538, 546-50 (2010); Wells v. Chevy Chase Bank, F.S.B., 363 Md. 232, 241-50, 768 A.2d 620, 624-29 (2001); and Simmons Co. v. Deutsche Fin. Servs. Corp., 243 Ga. App. 85, 87-89, 532 S.E.2d 436, 438-40 (2000).

Accordingly, the FAA does not preempt Rule 4(d), which, unlike § 16 of the FAA, always allows for the appeal of an order granting a motion to compel arbitration. Rule 4(d) does not conflict with or undermine the purposes of the FAA, in particular the "primary purpose of ensuring that private arbitration agreements are enforced according to their terms." Volt, 489 U.S. at 479. "The timing of the right to appeal from an order compelling arbitration is a procedural matter

which may delay but does not prevent enforcement of a valid arbitration agreement." Simmons Co., 243 Ga. App. at 89, 532 S.E.2d at 440. As the Supreme Court has observed: "[T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, ... but to ensure that commercial arbitration agreements, like other contracts, '"are enforced according to their terms"' ... and according to the intentions of the parties." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54 (1995), quoting in turn Volt, 489 U.S. at 479). Further, allowing for an immediate appeal of an order compelling arbitration is consistent with the fundamental principle that a party "'cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986) (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)). Rule 4(d) allows for the appellate review of an order compelling arbitration, and it applies in this case; APS

and MHCA's failure to appeal from that earlier order precludes our review of the aspect of that order they now challenge.

APS and MHCA next argue that the circuit court, in denying their motion to vacate the award, erred by failing to apply a de novo standard of review. As we discuss more below, judicial review of an arbitration award is generally very limited. J. Don Gordon Constr., Inc. v. Brown, 196 So. 3d 228, 232 (Ala. 2015). APS and MHCA do not dispute that general point, but they do argue that the circumstances here allowed the circuit court to apply a de novo standard of review of the award. APS and MHCA contend that the issue decided by the arbitrator -- whether class arbitration is available -- is a type of question that the United States Supreme Court has called a "question of arbitrability." Unless the parties clearly and unmistakably provide otherwise, questions of arbitrability are to be decided by a court, not an arbitrator. AT&T Techs., Inc., 475 U.S. at 649. Thus, APS and MHCA argue, a reviewing court should give no deference to an arbitrator's decision regarding a question of arbitrability. The United States Supreme Court "has not decided whether the availability of class action is a so-

called 'question of arbitrability,'" Lamps Plus, Inc. v. Varela, ___ U.S. ___, ___ n.4, 139 S. Ct. 1407, 1417 n.4 (2019), which presumably would be for a court to decide, or a "procedural question," which presumably would be for an arbitrator to decide, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). Similarly, this Court has not directly decided whether the availability of class action is a question of arbitrability or a "procedural question," and lower federal courts and state courts are split on this issue. See Determination of Whether Availability of Class, Consolidated, or Collective Arbitration Is Question of Arbitrability, 4 A.L.R. 7th Art. 7 (2015). Even assuming, without deciding, that the availability of class arbitration is a question of arbitrability, the circuit court did not err by failing to apply a de novo standard of review.

The United States Supreme Court has discussed the proper standard of review of this issue:

> "[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute .... But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.

> See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers) ....
>
> "... Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583, n. 7 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, e.g., 9 U.S.C. § 10. If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."

First Options, 514 U.S. at 942-43.

Thus, assuming, as we are, that the availability of class arbitration is a question of arbitrability, if the parties agreed to submit the question regarding the availability of class arbitration to the arbitrator, the circuit court's review of the arbitrator's decision on that issue would be considerably deferential. However, if the parties did not agree to submit that question to the arbitrator, then the circuit court's review of the arbitrator's decision on that

specific issue would be de novo. In this case, whether the parties had contractually agreed to submit the class-action question to the arbitrator was disputed by the parties when APS and MHCA moved the circuit court to compel arbitration. The circuit court, in its earlier order compelling arbitration, resolved that dispute by concluding that the arbitrator should decide whether class arbitration is available. As noted, APS and MHCA could have appealed the circuit court's order and argued on appeal that the parties had never agreed to submit the class-action question to an arbitrator; however, APS and MHCA did not do that, thus precluding any further judicial review of that issue. Accordingly, APS and MHCA cannot establish that the circuit court should have applied a de novo standard of review based on a conclusion that the parties had never agreed to submit the class-action issue to the arbitrator.[1]

[1]APS and MHCA also briefly argue that, insofar as the AAA's Class Supplemental Rules apply, the parties contracted for judicial review outside the parameters of the AAA. APS and MHCA argue that "if a court was limited to the FAA's rules of review, the judicial review proposed under Rule 3 of the Class [Supplemental] Rules would be superfluous as the Parties could seek review at any time for the reasons set forth in the FAA." APS and MHCA's brief, at 29. Thus, APS and MHCA argue, the circuit court should have applied a de novo standard of review. APS and MHCA's brief argument is undeveloped and

APS and MHCA next present arguments grounded on their contention that the circuit court should have applied a de novo standard of review. That is, they argue that, if de novo is the correct standard or review, the circuit court erred by not vacating the award for various reasons. However, we will not consider those arguments further because they are based on a premise we have rejected, i.e., that the circuit court should have conducted a de novo review. As we will explain below, the relevant standard of review here is much different than the de novo standard.

APS and MHCA finally argue that the arbitrator exceeded his powers by deciding that class arbitration is available in this case. "Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568 (2013) (quoting First Options, 514 U.S. at 942). Section 10(a) of the FAA provides the very limited grounds on which a court may vacate an

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unsupported by authority (the one case cited stands for a general proposition of law that does not lead to APS and MHCA's conclusion). This Court will not "create legal arguments for a party based on undelineated general propositions unsupported by authority or argument." Spradlin v. Spradlin, 601 So. 2d 76, 79 (Ala. 1992). Thus, we will not consider this argument further.

arbitrator's award. APS and MHCA argue that the award should be vacated under § 10(a)(4), which allows a court to vacate an arbitration award "where the arbitrator[] exceeded [his] powers." The United States Supreme Court has explained that this review is exceedingly narrow:

> "A party seeking relief under [§ 10(a)(4)] bears a heavy burden. 'It is not enough ... to show that the [arbitrator] committed an error -- or even a serious error.' Stolt-Nielsen [S.A. v. AnimalFeeds International Corp.], 559 U.S. [662,] 671 [(2010)]. Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits. Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000) (quoting Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960); Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987); internal quotation marks omitted). Only if 'the arbitrator act[s] outside the scope of his contractually delegated authority' -- issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract' -- may a court overturn his determination. Eastern Associated Coal, 531 U.S., at 62 (quoting Misco, 484 U.S., at 38). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."

Oxford Health, 569 U.S. at 569.

The relevant contract here is the employment arbitration policy ("the policy") found in each of the plaintiffs'

employee handbooks. The plaintiffs also signed an acknowledgment recognizing that the policy is a contract between each plaintiff and APS. Although the policy requires the arbitration of the plaintiffs' claims against APS, it does not expressly address class arbitration. The arbitrator was called on to determine whether the policy permits class arbitration in the absence of an express reference to class arbitration in the policy. To do that, the arbitrator interpreted the policy, as we will discuss below. Some of APS and MHCA's arguments on this issue are simply arguments that the arbitrator erred legally. However, those arguments are beyond the scope of our review. Our review, like the circuit court's review below, is limited to "whether the arbitrator (even arguably) interpreted" the policy. Oxford Health, 569 U.S. at 569.

In relevant part, the arbitrator interpreted the policy as follows:

> "Contracts are seldom so clear that they shout 'yes' or 'no.' And when they are less than clear, contract interpretation becomes a nuanced endeavor under Alabama law as elsewhere. Homes of Legend v. McCullough, 776 So. 2d 741, 746 (Ala. 2000), illustrates Alabama's approach. It discusses a number of common rules of construction that are to be followed; e.g., '[u]nder general Alabama rules of

> contract interpretation, the intent of the contracting parties is discerned from the whole of the contract' Id. 'Where there is no indication that the terms of the contract are used in a special or technical sense, they will be given their ordinary, plain, and natural meaning.' Id. On the other hand, 'if the court determines that the terms are ambiguous (susceptible of more than one reasonable meaning), then the court must use established rules of contract construction to resolve the ambiguity.' Id. Pertinent here is that 'if all other rules of contract construction fail to resolve the ambiguity, then, under the rule of contra proferentem, any ambiguity must be construed against the drafter of the contract.' Id.
>
> "Turning to the contract at hand, the Handbook[, which contains the policy,] and the Acknowledgement do not address class actions explicitly. The question is whether the agreement evidenced by those documents, when taken as a whole[,] can be said to evidence an intention to permit class proceedings. There are several things that can be said about the Arbitration Policy.
>
> "First, it is a contract of adhesion, a condition imposed on an employee joining or continuing to work for APS. There was no bargaining over the agreement. An employee, such as Debra M. McAuliffe, who was hired in 1998 before the Policy was adopted, was bound by the Arbitration Policy simply because she continued to work at APS after the adoption of that policy. ... Because this is an adhesion contract, ambiguities are to be construed against the drafter, APS. Western Sling and Cable Co., Inc. v. Hamilton, 545 So. 2d 29, 32 (Ala. 1989) (quoting Joyner v. Adams, 361 S.E.2d 902, 905-906 (N.C. App. 1987)).
>
> "Second, the Policy's referral of employee claims to arbitration is written in very broad language. It covers all claims that could be

> asserted by an employee against APS founded on any legal theory. The Agreement moves those claims from a court to an arbitral forum wholesale. The Policy gives a benign reason for this move. It states that 'APS believes the resolution of such disagreements [between APS and an employee] is best accomplished by binding private arbitration. APS and its employees both benefit from the use of private arbitration because it usually results in quicker, less costly resolution of disagreements than litigation in state or federal courts. For these reasons, APS has adopted this Employment Arbitration Policy (the "Policy") pursuant to the Federal Arbitration Act.' ...
>
> "It goes on to reassure the employees that '[i]t is not the intent of Policy to affect in any respect either the substantive legal rights of an employee or the substantive legal obligations of APS.' Id. ... And in the final section of the policy, where it sharply limits discovery in the apparent interest of 'quicker, less costly resolution of disagreements,' it informs employees that '[i]n all other respects, the rules and procedures to be used by the parties in an arbitration subject to this Policy are the Employment Arbitration Rules and Mediation Procedures (the "Rules") of the American Arbitration Association ("AAA") at http://www-adr.org/RulesProcedures.'[2] Id. at 2.
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> "When read by a lay person, which is what the employee must be considered, the Policy describes a simple change of the forum in which disputes between employees and APS are to be decided, and a streamlining of discovery procedures in that new forum. Reference to the AAA rules cited in the Policy would not assist the reader in knowing whether the change in forum would somehow truncate

[2]The Web address in the arbitrator's award is invalid. As of the date this opinion was released, the correct address is https://www.adr.org/Rules.

> the employee rights to class proceedings[,] for there is nothing in those rules barring class proceedings. In fact, the strongest statement in the Policy about the intention of the agreement is APS's express assurance to the employee that the Policy and its substitution of arbitration for court-sited litigation is not intended to 'affect in any respect either the substantive legal rights of the employee, or the substantive legal obligations of APS.' Id. at 1. Yet under the reading APS would give the Policy, the employee, who would have had the right to proceed in Alabama state court via a class action if the claim met the relevant criteria, would certainly conclude that his or her legal rights had been 'affect[ed]' if told the move to a new forum resulted in a denial of that right. And APS's assertion in this arbitration that it is free from the threat of aggregated claims brought by employees denied a right to accrued vacation pay solely by reason of the Policy and the Acknowledgment flatly contradicts the Policy's statement that the Policy has not 'affect[ed]' APS's legal 'obligations.' It is notable that the Policy reserves to APS alone the right to choose to proceed in arbitration or in court against an employee for any reason. This fact is not pertinent to claims in this arbitration, but it is pertinent to the nature of the way the agreement between APS and its employees is drafted. It is an express example of a provision that is inconsistent with the declared intention of APS that the Policy does not 'affect' the substantive legal posture of the employee and APS vis-à-vis each other.
>
> "Based on the foregoing, the arbitrator finds the Policy to be written in deceptively reassuring language. The most straightforward, express statement of intent it contains contradicts the operation of some key provisions of the Policy. The statement of intent also contradicts the construction for which APS argues. APS asserts that the rights abridged by a denial of the ability to

> proceed on behalf of a class are procedural and not 'substantive,' and therefore the Policy is not ambiguous. But using a word of art familiar to a sophisticated employment lawyer to distinguish between procedure and substance, and then using plain language to reassure the non-legally trained employee that it is not 'the intent' of the Policy to 'affect in any respect' their rights or the employer's obligations, is about as close to an affirmative misstatement as is possible, particularly when relied upon to claim an intent to foreclose class proceedings in an adhesion contract. That false reassurance makes ambiguous, if it does not flatly contradict, the meaning of the term 'substantive' and clouds the question of what the parties agreed to. It tips the construction question into territory where the arbitrator is called upon to avoid a construction that would make the agreement deceptive.
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> "And, as noted above, the APS drafters of the Policy took care to cabin available discovery permitted by the AAA rules, while adding the statement that '[i]n all other respects, the rules and procedures to be used' are those set out on the AAA website. ... Under the circumstances, where the entire Policy is said not to be intended to 'affect' the employees rights, the failure to address class action procedures that may be available in AAA arbitration and readily discoverable by a lay reader further buttresses the conclusion that the Policy and Acknowledgement are pervaded by deeply deceptive ambiguity and convey false assurances to employees regarding their rights and remedies. The arbitrator, therefore, will construe the Policy and Acknowledgment against the drafter and in accordance with the several clear statements of intention in the agreement that are facial assurances to the employee.
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> "As the Alabama Supreme Court has said, a clear statement of intention in a contract is to be

> honored, and is to serve as a tool for resolving ambiguity. Homes of Legend, 776 So. 2d at 746. And a later statement of intention is to control over an earlier when it is explicit. Id.
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> "APS wrote in the 'Statement of Intent' the following: 'APS and its employees both benefit from the use of private arbitration because it usually results in quicker, less costly resolution of disagreements than litigation in state or federal courts.' In the concluding paragraph of the 'Exceptions and Clarifications' portion of the Policy, APS made a more clear and unqualified statement of the intended operation of the Policy: 'It is not the intent of this Policy to affect in any respect either the substantive legal rights of an employee or the substantive legal obligations of APS.'
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> "In light of the foregoing, the arbitrator rejects APS's proposed construction of the Policy and Acknowledgment that the failure of the agreement to expressly address class proceedings means the parties intended the transfer of the dispute resolution forum from a court to an arbitral tribunal was intended to operate to deprive the employee of class action proceedings. Rather, in light of the stated intention, and the misleading ambiguities written into the agreement by APS, the more reasonable and appropriate construction is that those rights were intended to be carried into the new forum. The arbitrator concludes that the Policy does contemplate class proceedings."

(Footnotes omitted.)

We quote the above analysis simply to show that, correctly or incorrectly, the arbitrator's interpretation of the policy was extensive. APS and MHCA disagree, arguing that

the arbitrator exceeded his powers because, they say, the arbitrator's award "'"simply reflect[s] [his] own notions of [economic] justice"' rather than '"draw[ing] its essence from the contract."'" Oxford Health, 569 U.S. at 569 (quoting Eastern Associated Coal Corp. v. United Mine Workers of America, District 17, 531 U.S. 57, 62 (2000), quoting in turn United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987)). More specifically, APS and MHCA argue that the arbitrator relied on his own personal notions of fairness by discussing the parties' relative sophistication and bargaining power. However, the award does draw its essence from the policy. For instance, consider one of the arbitrator's findings that APS and MHCA take exception to: the finding that the policy is a contract of adhesion, i.e., a contract that lacks a meaningful choice. See, e.g., Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 667 (Ala. 2004). Whether a contact is adhesive "is an aid in contract interpretation," 1 Domke on Commercial Arbitration § 8:8 (3d ed. 2018), and the arbitrator used that aid in this case. Whether the arbitrator correctly concluded that the policy is adhesive and correctly interpreted the policy is

beyond the scope of our review. Oxford Health, 569 U.S. at 569. What matters is that the arbitrator interpret the contract -- and he did that. Id. On this particular issue, the arbitrator found that, because the policy is adhesive, ambiguities are to be construed against APS, as the drafter. See Western Sling & Cable Co. v. Hamilton, 545 So. 2d 29, 32 (Ala. 1989).

The remainder of the arbitrator's analysis also shows that the award draws its essence from the policy. The central part of the analysis is the arbitrator's determination that the language of the policy is ambiguous. In making that determination, the arbitrator construed the policy's language according to the plain meaning a layperson would attach to the language. Again, "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Oxford Health, 569 U.S. at 569. The arbitrator here interpreted the policy; our review of the award goes no further than that determination. In other words, "[t]he arbitrator's construction holds, however good, bad, or ugly." 569 U.S. at 573.

Lastly, we briefly distinguish this case from Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), a decision APS and MHCA cite extensively, and Lamps Plus, Inc. v. Varela, ___ U.S. ___, 139 S. Ct. 1407 (2019), a recent decision also cited by APS and MHCA. In Stolt-Nielsen, the United States Supreme Court reviewed an arbitration award in which the arbitration panel had ordered a party to submit to class arbitration. In a rare determination, the Supreme Court concluded that the arbitration panel had exceeded its powers under 9 U.S.C. § 10(a)(4) by ordering class arbitration. Crucially, "[t]he parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on class arbitration." Oxford Health, 569 U.S. at 571. That is, the parties stipulated that they had not agreed, either explicitly or implicitly, on the issue of class arbitration at all. That is not the situation in this case; here, the plaintiffs argued to the arbitrator that the language of the policy evidenced an implicit agreement allowing class arbitration. The arbitrator then interpreted the policy to determine the parties' intent. However, in Stolt-Nielsen, "the panel's decision was not -- indeed, could

not have been -- 'based on a determination regarding the parties' intent,'" Oxford Health, 569 U.S. at 571, because the parties had stipulated that they had never reached an agreement on class arbitration. The panel in that case did nothing "other than impose its own policy preference" in ordering class arbitration. Stolt-Nielsen, 559 U.S. at 676. The Court in Stolt-Nielsen "overturned the arbitral decision there because it lacked any contractual basis for ordering class procedures." Oxford Health, 569 U.S. at 571. As we have shown above, that is not true of the award here.

The United States Supreme Court issued Lamps Plus after the briefing in this case had ended. APS and MHCA submitted a letter notifying this Court of the issuance of Lamps Plus, pursuant to Rule 28B, Ala. R. App. P.[3] In Lamps Plus, the United States Supreme Court reversed a judgment of the United

[3]Rule 28B provides, in relevant part:

> "If pertinent and significant authority comes to a party's attention after the party's brief has been filed -- or after oral argument but before a decision has been rendered by the appellate court -- a party may promptly advise the clerk of the appellate court in which the proceeding is pending by letter, with a copy to all other parties, setting forth the citation or citations of the new authority."

States Court of Appeals for the Ninth Circuit ordering class arbitration. The Ninth Circuit had found the arbitration provision regarding the availability of class arbitration to be ambiguous. To resolve the ambiguity, the Ninth Circuit applied the state contract rule of contra proferentem, which required the arbitration provision to be construed against the drafter. On appeal, the Supreme Court rejected the use of the contra proferentem rule, concluding that the "rule cannot be applied to impose class arbitration in the absence of the parties' consent." ___ U.S. at ___, 139 S. Ct. at 1418. The Supreme Court determined that the rule of contra proferentem is "triggered only after a court determines that it cannot discern the intent of the parties" and that the rule "provides a default rule based on public policy considerations." ___ U.S. at ___, 139 S. Ct. at 1417. But the Supreme Court went further, concluding broadly that an ambiguous agreement cannot provide the necessary contractual basis for compelling class arbitration and that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." ___ U.S. at ___, 139 S. Ct. at 1419. However, in our view, we need not grapple with the relevant

scope of Lamps Plus because the procedural posture of this case is crucially distinct. In Lamps Plus the Supreme Court reviewed de novo a court's interpretation of the arbitration provision. Here we are reviewing an arbitrator's interpretation of an arbitration provision. As noted above, our review of an arbitrator's award is very limited under 9 U.S.C. § 10(a)(4), see Oxford Health; that was not a factor in Lamps Plus.

Accordingly, in appeal no. 1170856, we affirm the circuit court's judgment denying the motion to vacate the arbitrator's award. We dismiss appeal no. 1171150 as redundant.

1170856 -- AFFIRMED.

Parker, C.J., and Bolin, Shaw, Mendheim, and Stewart, JJ., concur.

Sellers and Mitchell, JJ., concur in the result.

Wise, J., recuses herself.

1171150 -- APPEAL DISMISSED.

Parker, C.J., and Bolin, Shaw, Mendheim, Stewart, and Mitchell, JJ., concur.

Sellers, J., concurs in the result.

Wise, J., recuses herself.