**REL: December 4, 2020**



# SUPREME COURT OF ALABAMA

## OCTOBER TERM, 2020-2021

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## 1190670

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**TitleMax of Alabama, Inc.**

**v.**

**Michael Falligant, as next friend of Michelle McElroy**

**Appeal from Jefferson Circuit Court**
**(CV-19-904794)**

MENDHEIM, Justice.

Michael Falligant, as next friend of Michelle McElroy, who Falligant alleges is an incapacitated person, filed an action in the Jefferson Circuit

Court against TitleMax of Alabama, Inc. ("TitleMax"), alleging that TitleMax wrongfully repossessed and sold McElroy's vehicle. TitleMax filed a motion to compel arbitration of Falligant's claims, which the circuit court denied. TitleMax appeals. We reverse and remand.

Facts and Procedural History

Falligant's affidavit testimony is crucial to his claims, brought on behalf of McElroy, against TitleMax. Falligant is the director of mental-health services for the Crisis Center, a nonprofit organization that "provides a variety of community-based services for people experiencing personal crisis or mental health issues." Based on his work at the Crisis Center, Falligant stated that he has "known Ms. McElroy for several years at the Crisis Center and ha[s] had numerous occasions to be with her." Falligant's affidavit testimony states that McElroy "suffers from a variety of mental and emotional illnesses which make her extremely vulnerable and incapable of handling [her] finances." Falligant's affidavit testimony further states that, "[t]hroughout [the] 2017 period of time, [McElroy] has been, in my opinion, mentally incompetent due to her mental illness to

conduct her own business and financial affairs or to understand business contracts and terms."

McElroy receives Social Security disability benefits, but the disability for which she receives the benefits is unclear from the record. In his affidavit testimony, Falligant asserts that McElroy is mentally ill, but he does not state that her mental illness is the basis for her receipt of Social Security disability benefits. In a letter dated September 1, 2016, the Social Security Administration indicated that "C[h]risti Naslund for ... McElroy" will receive $1,251 per month; the letter does not indicate the reason McElroy is to receive the monthly payments. Falligant's affidavit testimony provides the following explanation of a specific service it provides as related to McElroy:

> "In this mission, we also serve as a payee for many of these mentally ill consumers for their Social S[ecurity] Disability Benefits. We receive referrals from Social Security for individuals who have had a history of instability and mental illness, and are not competent to handle their own financial affairs or the SSI benefits or other Social Security benefits being paid to them. In that capacity, the Crisis Center serves as a payee for approximately 300 people in the greater Birmingham area. Those persons for which the Crisis Center serves as payee include Ms. Michelle McElroy. In my capacity at the Crisis Center, I am very familiar with that program and

> the payees who we serve. The Social Security payee program tries to provide financial management for beneficiaries such as Ms. McElroy who due to mental illness are incapable of managing their Social Security or SSI payments. The Crisis Center, as the designated payee for Ms. McElroy, receives her monthly disability check from Social Security on her behalf and provides financial management for those funds and her needs."

On May 8, 2017, McElroy entered into a "pawn-ticket" contract with TitleMax ("the original contract"). McElroy was receiving Social Security disability benefits at the time she entered into the original contract, and Christi Naslund was the payee for McElroy's benefits; the Crisis Center became the payee in the fall of 2017. Falligant's affidavit testimony indicates that McElroy "provided to TitleMax documentation showing that she had [S]ocial [S]ecurity disability income being paid to ... Naslund." Id. Under the original contract, TitleMax agreed to loan McElroy $500 at an annual percentage interest rate of 170.21% that McElroy was to pay back on June 7, 2017; the finance charge for the repayment period amounted to $69.95. In exchange for the loan, the original contract required McElroy to deliver to TitleMax the title to her vehicle, a 2007 Toyota Camry. The original contract stated that TitleMax would return to

McElroy the title to her vehicle if McElroy paid the $500 loan principal and the $69.95 finance charge on June 7, 2017. The original contract further stated that, if McElroy did not repay the loan in its entirety on June 7, 2017, the parties could enter into a new pawn-ticket contract. The original contract states that, in order to enter into a new contract, McElroy "must pay the pawnshop charge provided in your previous pawn ticket [contract]."

The original contract also contained an arbitration provision. The original contract notes that TitleMax drafted the arbitration clause "in question and answer form so it is easier to understand." The questions and answers constituting the arbitration clause fill more than two pages of the original contract. Of particular note in this case is the following question and answer:

> "What disputes does the [arbitration] clause cover?
>
> "....
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> "This clause covers disputes that would usually be decided in court and are between [TitleMax] (or a related party) and you. In this clause, the word disputes has the broadest meaning. It includes all claims related to your application, this pawn ticket [contract], the motor vehicle, the

> pawn, any other pawn or your relationship with us. It includes claims related to any prior applications or agreements. It includes extensions, renewals, refinancings, or payment plans. It includes claims related to collections, privacy, and customer information. It includes claims related to the validity of this pawn ticket [contract]. But, it does not include disputes about the validity, coverage, or scope of this clause or any part of this clause. These are for a court and not the [third-party arbiter] to decide. Also, this clause does not cover our taking and selling the vehicle. It does not cover any individual case you file to stop us from taking or selling the vehicle."

(Emphasis in original.)

Rather than repay the loan on June 7, 2017, McElroy elected to enter into new pawn-ticket contracts with TitleMax on six different occasions: June 7, 2017; July 7, 2017; August 5, 2017; September 8, 2017; October 6, 2017; and November 6, 2017 (all contracts, including the original contract, are hereinafter referred to collectively as "the contracts"). Each of the subsequent contracts contains the same arbitration clause as does the original contract.

In his affidavit testimony, Falligant states that "[i]t is my opinion that throughout [the transaction underlying the original contract] and the ones that followed in 2017, Ms. McElroy lacked a mental capacity to understand the contract terms with TitleMax due to her mental illness

and disability." Regardless, at McElroy's request, the Crisis Center, now serving as the payee of McElroy's Social Security disability benefits, issued a cashier's check on November 6, 2017, to TitleMax on behalf of McElroy in the amount of $105.40 in an effort, according to Falligant's affidavit testimony, "to help Ms. McElroy maintain possession of her vehicle." Falligant states in his affidavit that he was unaware at the time the Crisis Center issued the check that McElroy had entered into the November 6, 2017, contract with TitleMax. Falligant's affidavit testimony states: "When I learned of these transactions, I requested Alexandria Parrish of The Evans Law Firm to write TitleMax and further alert them of Ms. McElroy's incapacity and her obvious disability since the proof of income provided was based upon a Social Security [d]isability payee program"; the referenced letter does not appear in the record.

Ultimately, McElroy failed to pay the balance owed under the contracts and TitleMax exercised its option to repossess and sell McElroy's vehicle.

On October 28, 2019, Falligant, as next friend of McElroy, filed a complaint against TitleMax asserting claims of conversion, "wrongful

repossession," and "recovery of chattels in specie" and requesting that the circuit court "declare the contracts between Ms. McElroy and TitleMax to be void ab initio and award to her restitution of the payments she made to TitleMax and for the value of her vehicle which was wrongfully taken."

On December 18, 2019, TitleMax filed an answer to Falligant's complaint. On the same day, TitleMax also filed a motion to compel arbitration of Falligant's claims based on the arbitration clause in the contracts and in accordance with the relevant provisions of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("the FAA"). On February 3, 2020, Falligant filed a response to TitleMax's motion to compel arbitration arguing that McElroy, based on her alleged mental incompetency, lacked the capacity to enter into the contracts and, thus, that the contracts -- including the arbitration clause -- were void ab initio. Falligant also argued that the language of the arbitration clause in the contracts excluded the claims asserted by Falligant against TitleMax. On February 5, 2020, TitleMax filed a reply to Falligant's response arguing that Falligant had failed to present evidence of McElroy's alleged mental

incompetency and arguing that the arbitration clause in the contracts did, in fact, apply to Falligant's claims.

On April 24, 2020, following a hearing, the circuit court entered an order denying TitleMax's motion to compel arbitration. In its order, the circuit court noted that McElroy entered into the original contract, and the subsequent contracts, "[i]n 2017 after ... McElroy became a recipient of Social Security [d]isability benefits, based upon her mental disability, and [after] the Social Security Administration appoint[ed] a payee to receive and manage funds for ... McElroy...." In denying TitleMax's motion, the circuit court stated:

> " 'If the validity or scope of an arbitration agreement is in issue, the parties are entitled to a trial by jury on those questions.' Ex parte Williams, 686 So. 2d 1110, 1111 (Ala. 1996), citing Allied-Bruce Terminix Companies v. Dobson, 684 So. 2d 102 (Ala. 1995).
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> "Here, the issue is whether ... McElroy had the capacity to enter the agreement for the $500.00 loan. The validity of the arbitration agreement depends upon [McElroy's] capacity to contract. This court concludes that [TitleMax's] MOTION is due to be DENIED."

On the same day, the circuit court entered an order setting the matter for a status conference to occur on May 26, 2020; the order stated, in

pertinent part, that "a trial scheduling order shall be considered" at the status conference. On May 22, 2020, TitleMax appealed the denial of its motion to compel arbitration.

Standard of Review

" 'Our standard of review of a ruling denying a motion to compel arbitration is well settled:

> " ' " 'This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. "[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question." Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (opinion on application for rehearing).' "

> " 'Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)).'
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> "SSC Montgomery Cedar Crest Operating Co. v. Bolding, 130 So. 3d 1194, 1196 (Ala. 2013)."

Rainbow Cinemas, LLC v. Consolidated Constr. Co. of Alabama, 239 So. 3d 569, 573 (Ala. 2017).

Discussion

The question presented in this case is whether the circuit court properly determined that Falligant is entitled to a trial on the issue whether the contracts are void ab initio based on McElroy's alleged mental incapacity to contract with TitleMax. Of course, implicit in the circuit court's determination is that the circuit court, and not an arbitration proceeding, is the proper forum in which to determine whether the contracts are void. In other words, the circuit court implicitly determined that the parties did not agree to submit the issue of the voidness of the contracts to arbitration. TitleMax has not challenged this aspect of the circuit court's order. We recognize that TitleMax mentions the issue of arbitrability generally in its original appellate brief by noting that "[t]he

FAA requires arbitration agreements to be liberally enforced and any doubts concerning arbitrability should be weighed in favor of compelling arbitration." TitleMax's brief, at p. 14. However, TitleMax makes no specific argument concerning the appropriate forum in which to determine whether the contracts are void in light of the specific facts and issues in this case. Instead of addressing that conclusion of the circuit court, TitleMax simply sets forth generally applicable principles of arbitration law to establish the uncontroversial position that arbitration agreements are to be liberally construed and any question as to the arbitrability of an issue should be resolved in favor of arbitration.[1] Accordingly, we will

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[1]We note that TitleMax makes a more in-depth argument relying upon numerous additional authorities in its reply brief. See TitleMax's reply brief, at pp. 3-10. The argument in TitleMax's reply brief is essentially a new argument and, thus, will not be considered on appeal. See Steele v. Rosenfeld, LLC, 936 So. 2d 488, 493 (Ala. 2005) (" '[A]n argument may not be raised, nor may an argument be supported by citations to authority, for the first time in an appellant's reply brief.' Improved Benevolent & Protective Order of Elks v. Moss, 855 So. 2d 1107, 1111 (Ala. Civ. App. 2003), abrogated on other grounds, Ex parte Full Circle Distribution, L.L.C., 883 So. 2d 638 (Ala. 2003)."); see also Meigs v. Estate of Mobley, 134 So. 3d 878, 889 n. 6 (Ala. Civ. App. 2013) (noting that "Rule 28(a)(10)[, Ala. R. App. P.,] requires compliance in an appellant's initial brief").

assume that the circuit court is the proper forum in which to determine whether a contract calling for arbitration exists.[2] See

[2]Although TitleMax has failed to put this issue before us, we note that there is authority for concluding that the circuit court, and not an arbitration proceeding, is the appropriate forum for determining whether McElroy had the mental capacity to contract with TitleMax. In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), the United States Supreme Court, citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), noted that a challenge to a contract as a whole, as distinguished from a challenge to an arbitration clause within a contract, is to be "considered by the arbitrator in the first instance." 546 U.S. at 446. However, the United States Supreme Court made the following significant distinction: "The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents ..., which hold that it is for courts to decide ... whether the signor lacked the mental capacity to assent, Spahr v. Secco, 330 F.3d 1266 (C.A.10 2003)." Buckeye Check Cashing, 546 U.S. at 444 n. 1 (emphasis added.)

We note that there is some disagreement among the federal courts of appeals as to the specific issue of the arbitrability of an individual's alleged mental incapacity to contract; the following language from Spahr v. Secco, 330 F.3d 1266, 1272 (10th Cir. 2003), highlights the rift:

> "In Primerica [Life Insurance Co. v. Brown, 304 F.3d 469 (5th Cir. 2002)], the Fifth Circuit recently concluded that a mental capacity defense to a contract that contains an arbitration clause is 'part of the underlying dispute between the parties,' and must be submitted to the arbitrator. 304 F.3d at 472. Relying on Prima Paint [Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)], the court held that 'unless a defense

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) ("The question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide

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> relates specifically to the arbitration agreement, it must be submitted to the arbitrator as part of the underlying dispute.' Id. We disagree, and hold that the rule announced in Prima Paint does not extend to a case where a party challenges a contract on the basis that the party lacked the mental capacity to enter into a contract."

See also generally Burden v. Check Into Cash of Kentucky, LLC, 267 F.3d 483, 488 (6th Cir. 2001) ("Several of our sister circuits have found that Prima Paint [Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967),] does not apply to allegations of nonexistent contracts. See Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 590-91 (7th Cir. 2001); Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000); Three Valleys [Mun. Water Dist. v. E.F. Hutton & Co.], 925 F.2d [1136,] 1140 [(9th Cir. 1991)]; Chastain v. Robinson-Humphrey Co., Inc., 957 F.2d 851, 855 (11th Cir. 1992); I.S. Joseph Co. v. Mich. Sugar Co., 803 F.2d 396, 400 (8th Cir. 1986). ... [T]he the Fifth Circuit has found that Prima Paint applies even to contracts that are 'void from ... inception.' See Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1162 (5th Cir.1987)." ) .

In the present case, TitleMax has not presented an argument requiring us to reach a definitive answer as to the issue at this time. Based on TitleMax's failure to present an argument, we will assume that the circuit court is the appropriate forum in which to determine whether McElroy had the mental capacity to contract with TitleMax.

otherwise.' AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986) (emphasis added) ....").

Assuming the circuit court as the appropriate forum, we next consider TitleMax's arguments pertaining to whether the contracts are void ab initio based on McElroy's alleged mental incapacity to contract with TitleMax. TitleMax argues that the circuit court erred in concluding that there is an issue as to the voidness of the contracts and erred in ordering a trial concerning that issue. Specifically, TitleMax argues that Falligant failed to produce sufficient evidence to create an issue of fact concerning the existence of a contract calling for arbitration. As a result, TitleMax argues, the circuit court should have granted TitleMax's motion to compel arbitration of Falligant's substantive claims rather than ordering to trial the issue whether the contracts are or are not void.[3]

[3]We do not decide in this opinion the scope of the arbitration agreement as it relates to the claims asserted by Falligant, and neither did the circuit court. Our decision is limited to whether the circuit court erred in determining whether the evidence presented by Falligant is sufficient to create an issue of fact concerning the voidness of the contracts. Whether the scope of the arbitration includes Falligant's claims is yet to be determined.

In Premiere Automotive Group, Inc. v. Welch, 794 So. 2d 1078, 1081 (Ala. 2001), this Court stated: "Under the provisions of § 4 of the [Federal Arbitration Act], '[i]f the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof.' " In Allied-Bruce Terminix Cos. v. Dobson, 684 So. 2d 102, 108 (Ala. 1995), this Court set forth the process by which a circuit court determines if "the making of the arbitration agreement" is in issue:

> "A court's duty in determining whether the making or the performance of an agreement to arbitrate is in issue is analogous to its duty in ruling on a motion for summary judgment. Cf. Par–Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 n. 9 (3d Cir. 1980). The court is to hold a hearing and determine whether there are genuine issues concerning the making or performance of an agreement to arbitrate, as a federal court would in proceeding under § 4. Mere demand for a jury trial is insufficient to create a triable issue on these questions. Saturday Evening Post Co. v. Rumbleseat Press, 816 F.2d 1191, 1196 (7th Cir. 1987) (noting that the party demanding a jury trial 'can get one only if there is a triable issue concerning the existence or scope of the agreement'). As to the threshold issue of whether an arbitration agreement exists between the parties (the 'making' of an agreement), federal courts have held: 'To make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial,' Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945); and 'the party must

> make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true [and] he must [also] produce at least some evidence to substantiate his factual allegations.' Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992)."

This Court stated in Southern Energy Homes, Inc. v. Harcus, 754 So. 2d 622, 626 (Ala. 1999):

> " ' "[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question." ' Ryan's Family Steak Houses, Inc. v. Regelin, 735 So. 2d 454, 457 (Ala. 1999) (quoting Jim Burke Automotive, Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995)) (alteration in Regelin)."

In the present case, it is undisputed that TitleMax met its initial burden of producing the contracts, which contain the arbitration agreement and are signed by McElroy. Further, there is no dispute that the contracts affect interstate commerce. Accordingly, the burden then shifted to Falligant to present evidence indicating that the arbitration agreement is void or does not apply to the dispute in question. To this end, Falligant argued that, because of McElroy's alleged mental illness, McElroy lacked the capacity to enter into the contracts and, thus, the

contracts, including the arbitration agreement, are void. To be entitled to a trial on the question of the voidness of the contracts, Falligant must have presented evidence sufficient to create a question of fact concerning McElroy's capacity to contract.

In Stephan v. Millennium Nursing & Rehab Center, Inc., 279 So. 3d 532, 539-40 (Ala. 2018), this Court applied the following principles set forth in Troy Health & Rehabilitation Center v. McFarland, 187 So. 3d 1112, 1119 (Ala. 2015), to determine whether an individual was mentally competent at the time an arbitration agreement was signed on his behalf:

> "In Troy Health & Rehabilitation Center v. McFarland, 187 So. 3d 1112 (Ala. 2015), this Court discussed the enforceability of an arbitration agreement and whether a nursing-home resident was mentally competent when he executed a durable power of attorney naming his nephew as his attorney-in-fact. We find the following reasoning from that case to be analogous:
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> > "'"[T]he standard for determining whether a person is competent to execute a power of attorney is whether that person is able to understand and comprehend his or her actions. Queen v. Belcher, 888 So. 2d 472, 477 (Ala. 2003). The burden initially falls on the party claiming that the person who executed the power of attorney was

> incompetent when he or she executed the power of attorney. Id. If, however, it is proven that the person who executed the power of attorney was habitually or permanently incompetent before executing the power of attorney, the burden shifts to the other party to show that the power of attorney was executed during a lucid interval. Id."

" 'Yates v. Rathbun, 984 So. 2d 1189, 1195 (Ala. Civ. App. 2007).'

"187 So. 3d at 1119.

"We held that the presumption is that every person has the capacity to understand until the contrary is proven. McFarland, 187 So. 3d at 1119 (citing Yates v. Rathbun, 984 So. 2d 1189, 1195 (Ala. Civ. App. 2007), Thomas v. Neal, 600 So. 2d 1000, 1001 (Ala. 1992), and Hardee v. Hardee, 265 Ala. 669, 93 So. 2d 127 (1956)). The Court differentiated between the burden of proving permanent incapacity and temporary incapacity. Specifically, we held that proof of incapacity

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

"McFarland, 187 So. 3d at 1119.

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

Stephan, 279 So. 3d at 539-40 (footnote omitted).

In his response to TitleMax's motion to compel arbitration and on appeal, Falligant argues that McElroy lacks the mental capacity to enter into a contract. It appears that Falligant is arguing that McElroy suffers permanent incapacity. Based on the above authority, Falligant must present substantial evidence indicating that McElroy does not have the capacity to "understand and comprehend" her actions at all times.

Falligant's argument that McElroy suffers permanent incapacity is based, in part, on the fact that McElroy receives Social Security disability benefits and that a payee has been named to receive and manage those benefits on McElroy's behalf. In his brief before this Court, Falligant states that, "[i]n order to receive these benefits, [McElroy's] mental illness had to be established to the Social Security Administration." Falligant's brief, at p. 19. Falligant then proceeds to make extensive argument concerning the method and evidence by which a mental disability is

proven to the Social Security Administration to receive disability benefits based on a mental disability. Falligant also relies upon his own opinion of McElroy's mental disability, as set forth in his affidavit.

Initially, we note that nothing in the record indicates that McElroy is receiving Social Security disability benefits based on her mental disability. To be sure, there is no question that McElroy is receiving a monthly Social Security disability benefit, but nothing indicates that she is receiving those benefits based on a mental disability. For instance, the letter from the Social Security Administration informing McElroy of the amount that she would be receiving per month does not indicate the reason McElroy is receiving that monthly benefit. Falligant's affidavit testimony likewise indicates that McElroy is receiving a monthly Social Security disability benefit, but nothing in Falligant's affidavit testimony indicates that McElroy is receiving that benefit based on a finding by the Social Security Administration that McElroy has a mental disability. We note that the circuit court also stated that McElroy "became a recipient of Social Security Disability benefits, based upon her mental disability," (emphasis added), but, again, nothing in the record before us indicates

that McElroy's receipt of the benefits is actually based on a mental disability. The circuit court did not receive any oral testimony; it made its decision upon the same documentary evidence we have before us. Therefore, under our de novo review, the circuit court's factual determinations are not entitled to any deference. We cannot assume, as Falligant does, that McElroy's receipt of Social Security disability benefits is based on a finding by the Social Security Administration that McElroy suffers from a mental disability. Falligant's argument that McElroy is receiving Social Security disability benefits based on a mental disability is simply not established in the record; thus, any argument built upon that premise is unavailing.

Other evidence Falligant says indicates that McElroy suffers from a mental disability is the fact that the Crisis Center was appointed payee of McElroy's Social Security disability benefits. The only evidence concerning the implications of McElroy's having a payee to receive her Social Security disability benefit comes from Falligant's affidavit testimony, which states, in pertinent part:

> "The Social Security payee program tries to provide financial management for beneficiaries such as Ms. McElroy who due to mental illness are incapable of managing their Social Security or SSI payments. ... Each of these payees has exhibited a history of instability and a lack of competence to handle their financial affairs, resulting in Social Security making this assignment through the payee program to the Crisis Center."

As TitleMax points out in its brief, however, the Social Security Administrative "may appoint a representative payee even if the beneficiary is a legally competent individual." 20 C.F.R. § 404.2001(b)(2) (emphasis added). Therefore, the mere fact that the Crisis Center was appointed McElroy's payee does not, in and of itself, indicate that McElroy is permanently incapacitated.

Falligant's affidavit testimony further includes Falligant's opinion as to McElroy's mental state and her ability to enter into contracts generally. Falligant's affidavit testimony indicates that he has "known Ms. McElroy for several years" and that his opinion is that McElroy "suffers from a variety of mental and emotional illnesses which make her extremely vulnerable and incapable of handling [her] finances." Falligant's affidavit testimony states that McElroy "has had a long history of mental illness." It is also Falligant's opinion that McElroy "will sign

anything placed in front of [her]" and that she "lacked a mental capacity to understand the contract terms with TitleMax due to her mental illness and disability."

We cannot say that the evidence presented by Falligant demonstrates that McElroy lacks the mental capacity to understand and comprehend her actions. Reading Falligant's affidavit testimony in a light most favorable to him, we can perhaps conclude that McElroy suffers from some undefined mental illness and lacks the mental capacity to appropriately manage her financial affairs. We can even conclude that McElroy is vulnerable and did not understand the terms of the contracts she entered into with TitleMax. However, Falligant's affidavit testimony gives no specifics as to McElroy's mental capacity or whether she is able to generally understand and comprehend the actions she takes. The fact that McElroy did not understand the terms of the contracts is not necessarily evidence that she cannot understand and comprehend her actions generally; there are many competent people who would have difficulty understanding a contract full of legal terms of art. In fact, Falligant's affidavit testimony indicating that McElroy sought financial

help from the Crisis Center to pay off what she owed under the contracts is an indication that she does have the capacity to understand and comprehend her actions.

Falligant relies upon Stephan, supra, in support of his argument. In Stephan, this Court considered whether a man who had been diagnosed with dementia had the mental capacity to authorize a family member to sign an arbitration agreement on his behalf. In considering whether a diagnosis of dementia was sufficient from which to conclude that the man lacked the mental capacity to authorize his family member to sign the contract, this Court stated:

> "This Court recognizes that [the man's] diagnosis of dementia, by itself, does not establish permanent incapacity. [Troy Health & Rehab. Ctr. v.] McFarland, 187 So. 3d [1112,] 1120 [(Ala. 2015)] (citing Ex parte Chris Langley Timber [& Mgmt., Inc.], 923 So. 2d [1100,] 1106 [(Ala. 2005)]). Although it may be apparent that [the man's] dementia was chronic in nature as distinguished from temporary, it is not so apparent that the state of [the man's] dementia constituted 'permanent incapacity' as that term is used to describe the mental incapacity necessary to justify the avoidance of the arbitration provision. See Ex parte Chris Langley Timber, 923 So. 2d at 1106. The Court is unable to discern from the medical records whether [the man's] mental-health condition had progressed to the level of 'permanent incapacity' by the time he was admitted to Crestwood. Dr. Hitchcock's notes indicate that

> [the man's] dementia caused no more than short-term memory loss. The notations during visits to the clinic between August 2014 and September 2015 indicate that [the man] was 'not oriented'; however, the record also indicates that [the man's] condition was 'slowly progressive' and that he was able to follow commands and sometimes converse with the physician. Thus, this Court cannot conclude that [the appellant] has overcome her burden of proving that [the man's] condition rose to the level of permanent incapacity as that term is used under the law to void a contract."

Stephan, 279 So. 3d at 540.

In Stephan, medical records were submitted into evidence explaining the specific impact of the man's dementia on him and the mental capacities that it effected. This permitted the Court to analyze whether the man's mental capacity was such that he could understand and comprehend his actions. In the present case, however, there is no evidence explaining the specifics of McElroy's mental illness or how it affects her mental capacities. Falligant's affidavit testimony is conclusory and generally asserts that McElroy is not able to manage her personal financial affairs and that she did not understand the terms of the contracts. But there is no evidence explaining McElroy's mental illness and whether the reasons she is unable to manage her personal finances

or understand the terms of the contracts mean that she is unable to understand and comprehend her actions generally. The details concerning the alleged mental incapacity set forth in Stephan are lacking in Falligant's general and conclusory statements concerning McElroy's alleged mental incapacity in the present case.

In short, evidence indicating that McElroy suffers from an undefined mental illness, that she lacks the ability to manage her financial affairs, and that she did not understand the terms of the contracts is not sufficient evidence to create a genuine question of fact as to whether she is permanently incapacitated and, thus, unable to contract; Falligant has failed to meet his evidentiary burden.[4]

[4]We note that TitleMax also argues that the circuit court erred in granting a trial on the issue of McElroy's mental capacity to contract with TitleMax because Falligant never requested a jury trial on that issue. We need not address that argument, however, based on our determination that Falligant failed to present sufficient evidence creating a question as to McElroy's mental capacity to contract.

## Conclusion

TitleMax met its burden of proving that a contract affecting interstate commerce existed and that that contract was signed by McElroy and contained an arbitration agreement. The burden then shifted to Falligant to prove that the arbitration agreement is void. Falligant failed to present substantial evidence indicating that McElroy is permanently incapacitated and, thus, lacked the mental capacity to enter into the contracts. Because Falligant has failed to create a genuine issue of fact, the circuit court erred in ordering the issue of McElroy's mental capacity to trial. Accordingly, we reverse the circuit court's decision and remand the cause to the circuit court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Bolin, Wise, and Bryan, JJ., concur.

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

Parker, C.J., and Stewart, J., dissent.

Mitchell, J., recuses himself.