No. SC97812

IN THE SUPREME COURT OF MISSOURI

THERON INGRAM

Plaintiff-Respondent

v.

BROOK CHATEAU

Defendant-Appellant

Appeal from the Circuit Court of Jackson County
The Honorable Justine E. Del Muro

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an interlocutory appeal under Section 435.440 RSMo and 9 U.S.C. § 16(a)(1) from a circuit court's order denying a motion to compel arbitration filed by Defendant-Appellant Brook Chateau ("Brook Chateau"). In particular, this matter concerns an order entered on May 31, 2018 by the Circuit Court of Jackson County denying Brook Chateau's motion to compel arbitration. D19 p.1, A1.

Section 435.440 permits an interlocutory appeal from an order denying an application to compel arbitration. *Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 366 (Mo. App. S.D. 2015). Likewise, 9 U.S.C. § 16(a)(1) permits this type of interlocutory appeal. *See VCW, Inc. v. Mutual Risk Management, Ltd.*, 46 S.W.3d 118 (Mo. App. W.D. 2001) (holding that the Federal Arbitration Act is applicable in Missouri state courts).

Jurisdiction is proper before this Court, which granted transfer upon timely application by Brook Chateau following a per curiam memorandum issued by the Missouri Court of Appeals, Western District.

STATEMENT OF FACTS

The Parties

Brook Chateau operates a skilled nursing care facility located in Jackson County, Missouri. D2 p.1. In his petition, Plaintiff-Respondent Theron Ingram ("Mr. Ingram" or "Ingram") states he was involved in a severe motor vehicle collision on November 6, 2015, which resulted in quadriplegia. D2 p.2. After the collision, Ingram was hospitalized at Select Specialty Hospital until March 15, 2016. D2 p.2. On the day of his discharge from the hospital, he was moved to the Brook Chateau facility. D2 p.2.

The Durable Power of Attorney and Voluntary Arbitration Agreement

Before his discharge from the hospital, Ingram executed a "Durable Power of Attorney for Health Care and Health Care Directive of Theron Ingram" (the "Durable Power of Attorney"). D10 p.1-6. The Durable Power of Attorney, which was executed on March 11, 2016, provides in relevant part as follows (D10 p.1-6):

> 1. Selection of Agent. I, Theron Ingram, currently resident of Jackson County, Missouri, appoint the following person as my true and lawful attorney-in-fact ("Agent"):
>
> Name: Andrea Nichole Hall
>
> * * *
>
> 3. Durability. This is a Durable Power of Attorney, and the authority of my Agent, when effective, shall not terminate or be void or voidable if I am or become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive.
>
> 4. Effective Date. This Durable Power of Attorney is effective immediately and continues if I am incapacitated and unable to make and communicate a health-care decision as certified by two physicians.

5. Agent's Powers. I grant my Agent full authority to:

A. Give consent to, prohibit, or withdraw any type of health care, long-term care, hospice or palliative care, medical care, treatment, or procedure, either in my residence or a facility outside of my residence, even if my death may result, including but not limited to, an out of hospital do-not resuscitate order[…];

B. Make all necessary arrangements for health care services on my behalf and to hire and fire medical personnel responsible for my care;

C. Move me into, or out of, any health care or assisted living/residential care facility or my home (even if against medical advice) to obtain compliance with the decisions of my Agent;

D. Take any other action necessary to do what I authorize here, including, but not limited to, granting any waiver or release from liability required by any health care provider and taking any legal action at the expense of my estate to enforce this Durable Power of Attorney for Health Care;

E. Receive information regarding my health care, obtain copies of and review my medical records, consent to the disclosure of my medical records, and act as my "personal representative" as defined in the regulations [45 C.F.R. 164.502(g)] enacted pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")…

Andrea Nichole Hall ("Ms. Hall"), in her capacity as Mr. Ingram's attorney-in-fact, later executed a "Voluntary Arbitration Agreement" with Brook Chateau on March 15, 2016. D5 p.1-2. The Voluntary Arbitration Agreement provides in relevant part as follows (D5 p.1-2):

THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL BEFORE A JUDGE OR JURY OF ANY DISPUTE BETWEEN THEM. PLEASE READ CAREFULLY BEFORE SIGNING. THE PATIENT WILL RECEIVE SERVICES IN THIS CENTER WHETHER OR NOT THIS AGREEMENT IS SIGNED.

ARBITRATION IS DESCRIBED IN THE VOLUNTARY ARBITRATION PROGRAM BROCHURE COPY, ATTACHED AND MADE PART OF THIS AGREEMENT.

1. **Agreement to Arbitrate "Disputes":** All claims arising out of or relating to this Agreement, the Admission Agreement or any and all past or future admissions of the Patient at this Center, or any sister Center operated by any subsidiary of Brook Chateau's, Inc. ("Sister Center"), including claims for malpractice, shall be submitted to arbitration. Nothing in this Agreement prevents the Patient from filing a complaint with the Center or appropriate governmental agency or from seeking review under any applicable law of any decision to involuntarily discharge or transfer the Patient.

* * *

3. **FAA:** The Parties agree and intend that this Agreement, the Admission Agreement and the Patient's stays at the Center substantially involve interstate commerce, and stipulate that the Federal Arbitration Act ("FAA") and applicable federal case law apply to this Agreement, preempt any inconsistent State law and shall not be reverse preempted by the McCarren-Ferguson Act; United States Code Title 15, Chapter 20, or other law. Any amendment to such version of the FAA is hereby expressly waived.

* * *

5. **Sole Decision Maker**: Except as otherwise provided in 6 below, the Panel is empowered to, and shall, resolve **all** disputes, including without limitation, any disputes about the making, validity, enforceability, scope, interpretation, voidability, unconscionability, preemption, severability, and/or waiver of this Agreement or the Admission Agreement, as well as resolve the Parties' underlying disputes, as it is the Parties' intent to avoid involving the court system….

* * *

8. **Right to Change Your Mind:** This Agreement may be cancelled by written notice sent by certified mail to the Center's Administrator within 30 calendar days of the Patient's date of admission. If alleged acts underlying the dispute occur before the cancellation date, this Agreement shall be binding with respect to those alleged acts. If not cancelled, this agreement shall be binding on the Patient for this and all

of the Patient's subsequent admissions to the Center or any Sister Center without any need for further renewal.

* * *

14. **Health Care Decision**: The Parties hereby stipulate that the decision to have the Patient move into this Center and the decision to agree to this Agreement are each a health care decision. The Parties stipulate that there are other health care facilities in this community currently available to meet the Patient's needs.

Finally, immediately above the signature line, the Voluntary Arbitration Agreement provides in bold, capitalized font as follows (D5 p. 2):

THE PARTIES CONFIRM THAT EACH OF THEM UNDERSTANDS THAT EACH HAS WAIVED THE RIGHT TO TRIAL BEFORE A JUDGE OR JURY AND THAT EACH CONSENTS TO ALL OF THE TERMS OF THIS VOLUNTARY AGREEMENT. PATIENT ACKNOWLEDGES THE RIGHT TO REVIEW THIS AGREEMENT WITH AN ATTORNEY OR FAMILY BEFORE SIGNING.

The Petition

Mr. Ingram alleges that during the entirety of his stay at Brook Chateau, he was quadriplegic and unable to turn independently. D2 p.2. Mr. Ingram further alleges that while in Brook Chateau's care, he developed wounds on his right and left buttocks and coccyx, which caused him pain and suffering. D2 p.3. Specifically, he alleges Brook Chateau failed to exercise reasonable care in providing medical care to him and in managing its employees, agents, physicians, therapists, nursing staff, and other medical personnel by (among other things) failing to hydrate and nourish him, failing to keep his pressure ulcers free from infection, failing to evaluate his condition, failing to reposition his body, failing to obtain a specialist consultation, failing to upgrade his bed mattress,

failing to transfer him to another facility, and failing to implement policies and train staff to prevent his alleged injuries. D2 p.4-5.

Brook Chateau vehemently denies the allegations in the petition, which attempts to state three counts based on the above factual allegations: negligence, negligence *per se*, and a separate count for punitive damages. D2 p. 3,6, 10. The negligence *per se* count arises out of Brook Chateau's alleged violations of the Missouri Omnibus Nursing Home Act, Section 198.003 RSMo *et seq.*, and regulations promulgated by the Missouri Department of Health and Senior Services, 19 CSR 30-85.042. D2 p.6-7. The punitive damages count alleges that the acts and omissions of Brook Chateau were outrageous and showed indifference or reckless disregard of Ingram's rights. D2 p.10. The petition includes a demand for jury trial. D2 p.10.

Pertinent Procedural History

The petition was filed on February 15, 2018. D2 p.1. After being served, Brook Chateau filed a motion to compel arbitration on April 19, along with a supporting memorandum. D4 p.1; D6 p.1. Ingram filed a response on May 8. D9 p.1. Brook Chateau then filed a reply in further support of its motion on May 14, and Mr. Ingram submitted a sur-reply on May 18. D14 p.1; D15 p.1.

A hearing on all motions was set for June 22, 2018, but before that date, the Circuit Court entered an order denying the motion to compel arbitration (without opinion) on May 31, 2018. D18 p.1; D19 p.1, A1.

An appeal followed in the Missouri Court of Appeals, Western District. After briefing, the Western District heard oral argument on February 6, 2019, and on February

26, 2019 issued a per curiam memorandum affirming the trial court's order. In its memorandum, the Western District determined that as attorney-in-fact, Ms. Hall had authority to sign all of the documents presented during the admissions process—save for the one that concerned arbitration. The Western District reasoned that the document referring to arbitration did not relate to health care, because Brook Chateau did not require that the document be signed as a condition to admission to the facility.

Brook Chateau timely filed a motion for rehearing or transfer in the Western District on March 13, 2019, which was overruled and denied on March 26, 2019. Brook Chateau then filed its application for transfer with this Court on April 9, 2019. This Court sustained the application on June 4, 2019.

POINTS RELIED ON

I. The trial court erred in denying Brook Chateau's motion to compel arbitration, because the Voluntary Arbitration Agreement was in effect and enforceable as to each claim asserted, in that the Federal Arbitration Act applies and prohibits a rule of law discriminating against arbitration agreements.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)

Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S.Ct. 1421 (2017)

Marmet Health Care Center, Inc. v. Brown, 565 U.S. 530 (2012)

II. The trial court erred in denying Brook Chateau's motion to compel arbitration, because the Durable Power of Attorney was effective when the Voluntary Arbitration Agreement was executed, in that the Durable Power of Attorney complied with statutory requirements and took effect when Mr. Ingram signed it.

Dunn Indus. Grp., Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003)

In re Estate of Collins, 405 S.W.3d 602 (Mo. App. W.D. 2013)

Sections 404.703(4) & 404.705.1 RSMo

III. The trial court erred in denying Brook Chateau's motion to compel arbitration, because the Durable Power of Attorney granted Ms. Hall authority to enter into the Voluntary Arbitration Agreement, in that executing the Voluntary Arbitration Agreement involved a health care decision.

Allen ex rel. Dockins v. Hooe, 11 S.W.3d 831 (Mo. App. S.D. 2000)

Estate of Linck v. Carr, 645 S.W.2d 70 (Mo. App. S.D. 1982)

Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. banc 2009)

ARGUMENT

I. The trial court erred in denying Brook Chateau's motion to compel arbitration, because the Voluntary Arbitration Agreement was in effect and enforceable as to each claim asserted, in that the Federal Arbitration Act applies and prohibits a rule of law discriminating against arbitration agreements.

Standard of Review

Whether the Circuit Court should have granted a motion to enforce an arbitration agreement is a question of law to be reviewed *de novo. Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 510 (Mo. banc 2012). Missouri contract law applies to determine whether the parties entered into a valid agreement to arbitrate. *Id.* In addition, whether the Circuit Court erred in the interpretation of a written power of attorney is reviewed *de novo*. *Randall v. Randall*, 497 S.W.3d 850, 854 (Mo. App. W.D. 2016).

Argument

A. The Federal Arbitration Act applies to the claims asserted in the petition and mandates arbitration under the Voluntary Arbitration Agreement.

The interpretation of an arbitration agreement affecting interstate commerce is governed by the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1 *et seq*. The FAA states a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotations omitted). The statute and U.S. Supreme Court precedents applying it recognize the "fundamental principle that arbitration is a matter of contract." *Id.* (internal quotations omitted). These principles require courts to place

arbitration agreements on an equal footing with all other contracts, and make arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1424, 1426 (2017) (citing 9 U.S.C. § 2).

Accordingly, the FAA requires state courts to enforce written agreements to arbitrate when the transaction involves or affects interstate commerce, unless there is a basis under state law or in equity that (1) applies to all other contracts; and (2) renders the agreement revocable or unenforceable. *CPK/Kupper Parker Commc'ns, Inc. v. HGL/L. Gail Hart*, 51 S.W.3d 881, 883 (Mo. App. E.D. 2001). Stated another way, the FAA "establishes an equal treatment principle: a court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* As an initial matter, the Voluntary Arbitration Agreement is subject to the FAA because (A) it is a contract that affects interstate commerce; (B) the claims asserted in Mr. Ingram's petition fall within the scope of the agreement; and (C) it is not subject to any generally applicable contract defenses.

1. The FAA is applicable to the Voluntary Arbitration Agreement because the contract affects interstate commerce.

There is no dispute as to the FAA's application to the Voluntary Arbitration Agreement. The document states that "the Parties intend that this Agreement, the Admission Agreement and the Patient's stay at the Center substantially involve interstate commerce, and stipulate that the Federal Arbitration Act ("FAA") and applicable federal

case law apply to this Agreement…" D5 p.1. When the parties stipulate that the contract between them involves interstate commerce, the reviewing court must enforce the stipulation and apply the FAA to the arbitration provision of the contract. *See, e.g., Staples v. The Money Tree, Inc*. 936 F.Supp. 856, 858 (M.D. Ala. 1996) (contract acknowledged interstate commerce was involved "because [the parties] have stipulated that the contract between them involves interstate commerce within the meaning of the FAA"). Here, the Voluntary Arbitration Agreement contains a stipulation that it involves interstate commerce within the meaning of the FAA.

2. The petition's claims are within the scope of the Voluntary Arbitration Agreement.

Under the FAA, before a party may be compelled to arbitrate, the reviewing court must determine that the claims at issue fall within the scope of the agreement to arbitrate. *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-28 (Mo. banc 2003). In determining the agreement's applicability to the claims alleged, courts look to the agreement's language to determine what disputes it covers—and in doing so, must apply the usual rules and canons of contract interpretation. *Id*. at 428. As our Supreme Court has explained,

> A motion to compel arbitration of a particular dispute should not be denied *unless it may be said with positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts as to arbitrability should be resolved in favor of coverage.

Id. at 428-29 (emphasis added).

In line with the above guidance, when considering the Voluntary Arbitration Agreement at issue here, its plain language shows the parties intended for "[a]ll claims

arising out of or relating to this Agreement, the Admission Agreement or any and all past or future admissions of the Patient at [Brook Chateau] … including claims for malpractice, [to] be submitted to arbitration." D5 p.1. Moreover, the claims *must* be submitted to arbitration unless it can be said with "positive assurance" that the Voluntary Arbitration Agreement is susceptible of no interpretation that would cover the asserted claims. *Dunn*, 112 S.W.3d at 428.

In this case, Mr. Ingram's petition asserts three claims. To date in this matter, he has not argued that these claims fall outside the scope of the Voluntary Arbitration Agreement. Regardless, in support of Brook Chateau's position in this Point I, the following brief analysis is provided.

Each of Mr. Ingram's claims arises from his allegations that Brook Chateau and its agents failed to provide adequate medical care. Count I asserts a claim for negligence in providing medical care; Count II alleges negligence *per se* in failing to provide medical care in violation of Sections 198.003 *et seq.* and regulations promulgated by the Missouri Department of Health and Senior Services, 19 CSR 30-85.042. Count III, in turn, seeks punitive damages in connection with the first two counts. D2 p. 3,6, 10. Each claim sounds in medical malpractice, which is expressly within the scope of the Voluntary Arbitration Agreement.

This Court's decision in *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. banc 2009), is instructive. There, at the time of a nursing home resident's admission, the resident's daughter signed an arbitration agreement providing that "all claims, disputes and controversies" arising out of the services provided would be subject to arbitration.

273 S.W.3d at 526. The daughter's signature was made "on behalf of her mother, acting in her capacity as her mother's agent under a power of attorney" given before entry into the facility. *Id.* The Supreme Court held that any tort claims made by the resident would be covered by the arbitration agreement, as well as any derivative claims. *Id.* at 527. The only claims not subject to arbitration were those independent of the resident's claims, such as wrongful death (a statutory claim not belonging to the resident and "distinct from any underlying tort claims"). *Id.* at 527-28.

The circumstances are substantially similar here. Ms. Hall signed the Voluntary Arbitration Agreement under express authority granted by the Durable Power of Attorney, acting as Mr. Ingram's attorney-in-fact. Her execution of the agreement binds him and applies to all tort claims he may assert arising out of his residency at Brook Chateau, including those alleged in the petition here.

3. The Voluntary Arbitration Agreement is not unconscionable.

Substantively, no Missouri court has held that pre-dispute arbitration agreements are unconscionable. In fact, any such holding would be in clear conflict with U.S. Supreme Court precedent. As that Court unanimously held in *Marmet Health Care Center, Inc. v. Brown*, "State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, with respect to all arbitration agreements covered by that statute," including those entered into in the context of delivering long term care. 132 S.Ct. 1201, 1202 (2012). In *Marmet*, West Virginia's high court misread and disregarded federal precedents interpreting the FAA, and held that all pre-dispute arbitration agreements applying to claims alleging personal injury or wrongful death against nursing

homes were unenforceable. *Id.* In so doing, that court incorrectly limited the FAA's coverage, leading the U.S. Supreme Court to countermand the attempt to ignore federal law. *Id*. When the federal high court "has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Id.* (citing U.S. Const., art. VI, cl. 2). The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Id.* at 1203 (quoting *KPMG LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011)).

West Virginia's high court had reasoned that the FAA was not intended to apply to personal injury or wrongful death actions that "only collaterally derive" from written agreements. *Id*. The U.S. Supreme Court rejected this reasoning. *Id*. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id*. at 533 (quoting *Concepcion*, 565 U.S. at 341. Because the West Virginia rule of law was a categorical prohibition imposed upon arbitration of a particular type of claim, the rule was contrary to the terms and coverage of the FAA. *Marmet Health Care*, 565 U.S. at 533. Significantly, the U.S. Supreme Court also vacated the West Virginia Supreme Court's alternative grounds for its holding (*i.e.*, that the particular arbitration clauses were unconscionable), because it was "unclear…to what degree the state court's alternative holding was influenced by the invalid, categorical rule" against pre-dispute arbitration agreements.

B. The FAA prohibits a rule of law discriminating against arbitration agreements, including the interpretation of power of attorney documents.

Despite the clear application of the FAA to the claims at issue, the Western District affirmed the trial court's denial of Brook Chateau's motion to compel arbitration. In so doing, the Western District determined that Ms. Hall had authority to sign nearly all of the documents presented to her during the admissions process—just not the one concerning arbitration. The basis of this holding was that the Durable Power of Attorney authorized Ms. Hall to "[m]ake all necessary arrangements for health care services on [Mr. Ingram's] behalf and to hire and fire medical personnel responsible for [Mr. Ingram's] care." D10, P2. According to the Western District, executing the Voluntary Arbitration Agreement was not a "necessary" arrangement, because it was not a required condition for entry to the facility.

This holding directly conflicts with multiple U.S. Supreme Court holdings—namely, *Kindred Nursing Centers*, *Concepcion*, and *Marmet Health Care Center*—because it creates a rule of state law interpreting a power of attorney document in a discriminatory manner against arbitration agreements.

In *Kindred Nursing Centers*, the U.S. Supreme Court reaffirmed the principle that the FAA preempts any rule of state law—whether declared by a legislature or court—discriminating against arbitration agreements. *Id*. at 1426. As Justice Kagan explained for the 7-1 majority, the FAA displaces any rule that "covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id*. (colloquialism in original).

Notably, the same preemptive doctrine applies when interpreting power of attorney documents collateral to arbitration agreements, such that a state court may not employ an interpretation having a discriminatory impact against arbitration agreements. *Id*. Though a state court may invalidate an arbitration agreement based on "generally applicable contract defenses" such as fraud or unconscionability, a court may not fashion legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id*. at 1426 (quoting *Concepcion*, 563 U.S. at 339).

As here, the underlying issue in *Kindred Nursing Centers* concerned the interpretation of a power of attorney document. There, the Kentucky Supreme Court held that an attorney-in-fact could not deprive a principal of a constitutional right to "adjudication by judge or jury" by executing an arbitration agreement, unless the power of attorney "expressly so provided." 137 S.Ct. at 1426. The U.S. Supreme Court held that the Kentucky Supreme Court's interpretation of the power of attorney discriminated against arbitration agreements, in violation of the FAA. *Id*. at 1429. The Court emphasized that the FAA preempts *any* rule of state law that has the effect of discriminating against arbitration agreements. *Id*. at 1428-29. This prohibition applies with equal force to interpretations of other documents in a manner that would invalidate arbitration agreements by "rely[ing] on the uniqueness of an agreement to arbitrate as [its] basis." *Id*. (quoting *Concepcion*, 563 U.S. at 341).

Like the Western District's per curiam memorandum here, the Kentucky Supreme Court's rationale purported to hinge not on the interpretation of the arbitration agreement itself, but rather on the interpretation of another document (*i.e.*, a power of attorney),

which the court refused to apply in a way that would permit arbitration of a dispute unless it contained special language. *Kindred Nursing Centers*, 137 S. Ct. at 1426-27. By creating a rule of interpretation that had a discriminatory effect on arbitration agreements, the Kentucky Supreme Court showed the kind of "hostility to arbitration" that led Congress to enact the FAA in the first place. Id. at 1428 (quoting *Concepcion*, 563 U.S. at 339).

Stated differently, the Kentucky Supreme Court created an enhanced requirement applying to powers of attorney when a question about arbitration existed. In particular, the court allowed attorneys-in-fact to conduct business with nursing homes, but not to agree to arbitrate disputes unless there was special language in the power of attorney. *Kindred Nursing Centers*, 137 S. Ct. at 1428 (noting that such interpretations would give state courts free rein to decide—irrespective of the FAA's equal-footing principle—whether arbitration agreements were validly created in the first instance, merely by purporting to interpret another document). As the Supreme Court explained, "[b]oth the FAA's text and our case law interpreting it say otherwise." *Id.* Any other approach, such as the one attempted in *Kindred Nursing Centers* (or by the Western District here), "would make it trivially easy for States to undermine the Act—indeed, to wholly defeat it." *Id.*

1. The Western District's rule of law discriminates against arbitration agreements.

The rule of law set forth by the Western District in its per curiam memorandum has a similarly discriminatory impact upon the enforcement of arbitration agreements.

Like the power of attorney at issue in *Kindred Nursing Centers*, the Durable Power of Attorney here afforded Ms. Hall the authority to make all decisions for Mr. Ingram related to health care. Nevertheless, the Western District interpreted the Durable Power of Attorney in a way that (A) authorized Ms. Hall to conduct business with Brook Chateau and execute paperwork in the admissions process; but (B) did not authorize Ms. Hall to execute an arbitration agreement. Thus, as in *Kindred Nursing Centers*, an enhanced requirement applied to a power of attorney (a document separate from the arbitration agreement) when a question about arbitration existed. See *id*. at 1426-28 (refusing to permit a state court to interpret a power of attorney in such a fashion); see also *Marmet Health Care Center*, 565 U.S. at 534 (reversing West Virginia Supreme Court's interpretation of state law in a way that precluded arbitration of a case involving a nursing home).

Significantly, though the Western District's holding does not explicitly create a rule applicable only to an arbitration agreement on its face, the holding nevertheless has a discriminatory impact on the arbitration agreement at issue, in that the language stating "THE PATIENT WILL RECEIVE SERVICES IN THIS CENTER WHETHER OR NOT THIS AGREEMENT IS SIGNED" is specific to the arbitration agreement, and is designed to prevent its construction as a contract of adhesion (as discussed in greater detail below).

Under the U.S. Supreme Court's decision in *Concepcion*, the FAA prohibits rules of law that have a discriminatory impact on arbitration agreements, even if a rule is facially applicable to all contracts. In *Concepcion*, the Supreme Court analyzed an

agreement in a cell phone contract providing for arbitration of disputes and prohibiting class-based claims. *Concepcion*, 563 U.S. at 336. The District Court and Ninth Circuit held the provision was unconscionable under a California law stating that contractual provisions disallowing class proceedings are unconscionable. *Id*. 338. The Ninth Circuit held that this rule of state law did not violate the FAA, because it was a general rule of unconscionability analysis applicable to all California contracts. *Id*.

Justice Scalia, writing for the U.S. Supreme Court, disagreed and observed that under the FAA, a court must carefully evaluate whether a doctrine thought to be generally applicable to all contracts, such as duress or unconscionability, is applied by a rule of state law "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341. A state court "may not rely on the *uniqueness* of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot." *Id*. at 341 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 (1987)) (emphasis added).

As an example of an improper rule of state law, the Court referred to a rule finding unconscionable a consumer arbitration agreement that fails to provide for judicially monitored discovery. *Id*. at 341-42. Such a rule would purportedly apply to any contract, including one restricting discovery in litigation, but "[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements[.]"*Id*. at 342. Such examples were not "fanciful" to the Court, because judicial hostility toward arbitration agreements (which prompted the FAA's enactment) may "manifest[] itself in a great variety of devices and formulas declaring arbitration against public policy." *Id*. (internal

quotations omitted). Therefore, though the FAA preserves generally applicable contract defenses, "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id*. at 343.

2. The Western District's rule of law has the effect of discriminating against arbitration agreements, because it puts Brook Chateau in a "damned if you do, damned if you don't" situation.

Here, the rule set forth by the Western District—namely, that the decision to execute an arbitration agreement is not "necessary" within the meaning of a power of attorney document—has a discriminatory effect on arbitration agreements. This effect particularly impacts long-term care facilities such as Brook Chateau, because they typically include language that signing such an agreement is not a condition to enter the facility (to avoid the risk of being construed as a contract of adhesion).

A common argument in cases involving nursing homes—not only in Missouri but nationally (as illustrated in *Kindred Nursing Centers* and *Marmet Health Care Center*)—is that if a nursing home requires a patient (directly or through an agent) to sign an arbitration agreement during the admission process, then that agreement is invalid as a contract of adhesion. Putting aside for a moment whether that argument is actually valid under the FAA and under the U.S. Supreme Court's decisions in *Kindred Nursing Centers* and *Marmet Health Care Center*, many nursing homes (like Brook Chateau here) have made the signing of an arbitration agreement voluntary to avoid any question about validity.

This concern by long-term care facilities such as Brook Chateau, when combined with the per curiam memorandum's rule of law allowing an attorney-in-fact to execute

only "necessary" documents, results in a discriminatory impact on arbitration agreements. In particular, this rule of law places long-term care facilities in a "damned if you do, damned if you don't" position. Specifically, either (A) the arbitration agreement is a requirement of admission—and therefore (the argument goes) unenforceable as an adhesion contract or due to unconscionability; or (B) the agreement is not a requirement, and thus not "necessary" in the context of another document (here, the Durable Power of Attorney)—such that the arbitration agreement is (once again) unenforceable.

Under approach (A) or (B) above, the result is the same, and the Western District's per curiam memorandum has a discriminatory impact upon the arbitration agreement at issue, in violation of the U.S. Supreme Court's application of the FAA in *Kindred Nursing Centers* and *Concepcion*. The only alternative for long-term care facilities is to require that a power of attorney explicitly authorize the attorney-in-fact to execute alternative dispute resolution agreements. But this rule was precisely the one the U.S. Supreme Court rejected in *Kindred Nursing Centers*. Furthermore, *Kindred Nursing Centers* is only the latest in a string of U.S. Supreme Court cases reversing courts that treated decisions to enter into arbitration agreements differently than decisions to enter into other agreements. *See also DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015) (reversing California Court of Appeal holding that disfavored arbitration in context of class-based grievances); *Marmet Health Care Center*, 565 U.S. at 534 (reversing West Virginia Supreme Court holding that disfavored arbitration in context of personal injury claims involving nursing homes); *Concepcion*, 563 U.S. at 339 (reversing Ninth Circuit's

attempt to apply California law disfavoring arbitration in contexts similar to those presented in *DIRECTV*).

Conclusion as to Point I

The FAA "empower[s] a court to stay a judicial proceeding and to enforce an agreement to arbitrate." *Id.* Determining the validity of an arbitration clause is a question of law. *Vill. of Cairo v. Bodine Contracting Co.*, 685 S.W.2d 253, 258 (Mo. App. W.D. 1985). If the court finds there is an agreement to arbitrate, and finds the dispute is encompassed by the agreement, the court must order arbitration. *Id.* The obligation to arbitrate, by the very terms of the FAA, rests on the acceptance of an agreement to do so. *Id.* Therefore, "the subsistence and validity of an arbitration clause is governed by the usual rules and canons of contract interpretation." *Id.; see also State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 808 (Mo. banc 2015) (an arbitration agreement is treated like any other contract and is enforced according to its terms, and the terms of a contract are to be read as a whole to determine the intention of the parties, giving the terms their plain, ordinary, and usual meaning).

As this Court stated in *Dunn*, "A court must compel arbitration if it determines that the parties agreed to arbitrate the dispute." 112 S.W.3d at 428. Here, if Ms. Hall held a valid power of attorney concerning Mr. Ingram's health care when she signed the Voluntary Arbitration Agreement (the subject of Point II below, focusing on the effectiveness of the Durable Power of Attorney), and was lawfully exercising that authority when entering into the Voluntary Arbitration Agreement (the subject of Point III below, focusing on the health care decision involved), then the claims must be

submitted to arbitration under the FAA. (This Point I focuses on the validity and enforceability of the Voluntary Arbitration Agreement under the FAA.)

Because the FAA applies in this situation, the Voluntary Arbitration Agreement should be enforced under federal law. The Voluntary Arbitration Agreement applies to each of Mr. Ingram's claims, and is not unconscionable or otherwise unenforceable. The Court should sustain Point I, hold that the Circuit Court erred in denying Brook Chateau's motion to compel arbitration, and reverse and remand with directions to enter an order compelling the parties to adhere to the terms of the Voluntary Arbitration Agreement.

II. The trial court erred in denying Brook Chateau's motion to compel arbitration, because the Durable Power of Attorney was effective when the Voluntary Arbitration Agreement was executed, in that the Durable Power of Attorney complied with statutory requirements and took effect when Mr. Ingram signed it.

Standard of Review

The standard of review for Point II is the same standard applying to Point I.

Argument

A. The Durable Power of Attorney complied with the statutory requirements to be effective and enforceable.

A durable power of attorney is generally one that does not terminate in the event the principal is disabled or incapacitated. Section 404.703(4) RSMo. To be enforceable, a durable power of attorney must be in compliance with the Durable Power of Attorney Law of Missouri ("DPALM") codified at Sections 404.700-404.735. Missouri also has a Durable Power of Attorney for Health Care Act ("DPAHCA"), which more specifically provides for the designated attorney-in-fact to make health care decisions for the principal. There is overlap between DPALM and DPAHCA to the extent that Section 404.810 of the DPAHCA incorporates certain provisions of DPALM.

In particular, Section 404.705.1 provides that a durable power of attorney is effective and not terminated if:

(1) The power of attorney is denominated a "Durable Power of Attorney";

(2) The power of attorney includes a provision that states in substance one of the following:

(a) "THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY-IN-FACT SHALL NOT TERMINATE IF I BECOME DISABLED OR INCAPACITATED OR IN THE EVENT OF LATER UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE";

or

(b) "THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY-IN-FACT, WHEN EFFECTIVE, SHALL NOT TERMINATE OR BE VOID OR VOIDABLE IF I AM OR BECOME DISABLED OR INCAPACITATED OR IN THE EVENT OF LATER UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE";

and

(3) The power of attorney is subscribed by the principal, and dated and acknowledged in the manner prescribed by law for conveyances of real estate.

Here, the Durable Power of Attorney executed by Mr. Ingram complies with the statutory requirements to be enforceable under DPALM and DPAHCA: (1) It is entitled "Durable Power of Attorney for Health Care and Health Care Directive of Theron Ingram"; (2) it contains a clause that follows Section 404.705.1(2)(b) precisely; and (3) it is signed and dated by the principal, Mr. Ingram, with signatures by two witnesses and a notary acknowledgment. D10 p.1-6. The Durable Power of Attorney therefore complied with all statutory requirements to be effective immediately and to continue in the event of Mr. Ingram's incapacity.

B. The Durable Power of Attorney became effective when Mr. Ingram executed it.

Section 404.714.8 of DPALM provides that "[a]n attorney-in-fact *may* be instructed in a power of attorney that the authority granted shall not be exercised until, or

shall terminate on, the happening of a future event, condition or contingency, as determined in a manner prescribed in the instrument" (emphasis added). Therefore, a durable power of attorney for healthcare *may*, but need not, condition its effectiveness on a future event, condition, or contingency, and the existence of such a condition precedent is to be determined by the express language of the instrument itself. *See Dunn*, 112 S.W.3d at 428 (discussing principles of contract interpretation, as further discussed below).

Mr. Ingram has asserted that the Durable Power of Attorney was not effective as of March 15, 2016 (the date on which the Voluntary Arbitration Agreement was executed), because there had been no adjudication regarding his incapacity. D9 p.3-5. But this argument fails under the express terms of the Durable Power of Attorney. Notably, that document provides in pertinent part as follows:

> 4. Effective Date. This Durable Power of Attorney *is effective immediately* and continues if I am incapacitated and unable to make and communicate a health-care decision as certified by two physicians.

D10 p.1 (emphasis added). The language of the document is clear: Mr. Ingram granted Ms. Hall the enumerated powers contained in the Durable Power of Attorney, effective on the date of its execution, March 11, 2016. D10 p.5. The Durable Power of Attorney contained an express provision to ensure it remained effective in the event of his incapacity, consistent with the requirements of the statutes cited above. Mr. Ingram's argument fails because his interpretation of the Durable Power of Attorney would render the language in Paragraph 4 meaningless.

The cardinal principle of contract interpretation is to ascertain the intention of the parties and give effect to that intent. *Dunn*, 112 S.W.3d at 428. The terms of the contract are read as a whole to determine the parties' intention, and are given their plain, ordinary, and usual meaning. *Id*. Each term of a contract is construed to avoid rendering other terms meaningless. *Id*. A construction that attributes reasonable meaning to all provisions of the agreement is preferred to one that leaves some of the provisions without function or use. *Id.*

Again, the Durable Power of Attorney provides that it is effective immediately and "continues" in the event that Mr. Ingram becomes incapacitated. D10 p.1. But if Mr. Ingram's argument were correct, the Durable Power of Attorney could become effective only upon a certification of his incapacity. It could not, therefore, "continue" to be effective; rather, it could only "become" effective upon the happening of a condition precedent. Such a reading of Paragraph 4 is nonsensical. It selectively eliminates essential language, including "effective immediately" and "continues."

Notably, Paragraph 3 of the document supports the above conclusions. That provision provides as follows:

> 3. Durability. This is a Durable Power of Attorney, and the authority of my Agent, *when effective*, *shall not terminate* or be void or voidable if I am or become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive.

D10 p.1 (emphasis added). This language explains that after the powers enumerated in the document become effective, they do not terminate upon Mr. Ingram's incapacity. D10 p.1. As such, the powers must be effective before a finding of incapacity; otherwise,

Paragraph 3 would be meaningless. There are no conditions precedent to be met, including any finding of incapacity. By its own terms, the Durable Power of Attorney was effective when it was executed by Mr. Ingram. And it continued to be in effect when Ms. Hall—exercising the powers conferred to her as Mr. Ingram's agent—signed the Voluntary Arbitration Agreement.

Additional Instructive Case Law

Missouri courts have addressed the language a power of attorney must use if an incapacity finding is required as a condition precedent. Specifically, in the case of *In re Estate of Collins*, 405 S.W.3d 602 (Mo. App. W.D. 2013), the decedent executed a durable power of attorney appointing an agent for health care choices. *Id*. at 603. The durable power of attorney provided as follows: "This durable power of attorney becomes effective when two physicians certify that I am incapacitated and unable to make and communicate health care choices." *Id*. The document also provided an option (which the decedent initialed) whereby one physician's opinion regarding incapacity would suffice. *Id*. After executing the durable power of attorney, the decedent passed away suddenly, before any physician could make a capacity determination; a dispute then arose regarding the disposition of the decedent's remains. *Id*. at 604.

The Court held that the power of attorney never became effective, because no physician ever certified the decedent as incapacitated. *Id*. at 607. The Court reasoned that the decedent could have executed a power of attorney granting the right of sepulcher to the agent "without the inclusion of that, or any other, condition precedent for the conveyance of that right"; nonetheless, the clear, unambiguous language of the durable

power of attorney expressly provided that it was not effective without a physician's certification. *Id*. at 606. As the Court explained,

> Had [decedent] wished to establish a different condition precedent for the grant of the right of sepulcher *or to have no condition precedent for the conveyance of that right*, such provisions could easily have been written into the power of attorney. They were not.

Id. at 607 (emphasis added).

Here, unlike the decedent in *Collins*, Mr. Ingram elected to have "no condition precedent" to confer powers to his agent. There was no physician's certification required to confer those powers. He had the option to make the Durable Power of Attorney effective upon execution, and chose that option by explicitly stating that the Durable Power of Attorney became effective immediately.

C. Mr. Ingram's reading of Section 404.825 would require all health care powers of attorney to be "springing."

Mr. Ingram has asserted and will likely assert that the "effective immediately" language is somehow unenforceable under Section 404.825, despite the plain and unambiguous language of the Durable Power of Attorney and the statute (and despite what the Court said above in the *Collins* case). In pertinent part, Section 404.825 provides as follows (emphasis added):

> *Unless the patient expressly authorizes otherwise in the power of attorney*, the powers and duties of the attorney in fact to make health care decisions shall commence upon a certification by two licensed physicians based upon an examination of the patient that the patient is incapacitated and will continue to be incapacitated for the period of time during which treatment decisions will be required and the powers and duties shall cease upon certification that the patient is no longer incapacitated.…Other provisions of this section to the contrary notwithstanding, certification of incapacity by at least one physician is required.

This statute provides (as a general rule) that a patient cannot be deemed incapacitated without a physician's certification to that effect. The statute also provides that an attorney-in-fact's power to make health care decisions begins upon such a certification of incapacity, *unless* the patient expressly authorizes otherwise in the power of attorney (*i.e.*, the exception to the general rule).

Here, Mr. Ingram's Durable Power of Attorney plainly complies with the statute. First, the Durable Power of Attorney states that it is effective immediately, thereby invoking the exception contained in the first sentence of Section 404.825. Second, the Durable Power of Attorney provides that if Mr. Ingram is later unable to make and communicate a health care decision—as certified by two physicians—then the Durable Power of Attorney remains in effect. This latter provision provides a safeguard if there is later a question concerning Mr. Ingram's ability to make his own health care decisions. There is no need for such a safeguard *before* any incapacity, when the patient remains able to revoke the attorney-in-fact's authority.

If Mr. Ingram's suggested reading of Section 404.825 were correct, no one could gain a power of attorney to make health care decisions for a patient until the patient becomes incapacitated and is certified as such. But if Missouri's legislature had intended such a broad and sweeping meaning, the legislature would have used explicit language to that effect. *See Brown v. Melahn*, 824 S.W.2d 930, 933 (Mo. banc 1992) (legislature is presumed to have intended what the statute says, and courts must give effect to the statute as written and presume the legislature intended the result).

Mr. Ingram's suggested reading of Section 404.825 is not supported by the rest of the statutory scheme. The ability to delegate health care decision-making authority is plainly contemplated by the rest of the DPALM and DPAHCA, the latter of which incorporates relevant provisions of DPALM. As explained by the Court in *Collins*, a "durable power of attorney" by definition is one that does not terminate in the event the principal becomes disabled or incapacitated. 405 S.W.3d at 606; Section 404.703(4).

Of course, not every power of attorney is durable, and not every health care power of attorney must be durable. DPALM contemplates that there may be durable or non-durable powers of attorney granted for health care decisions. Section 404.714.8 illustrates this fact, providing in pertinent part as follows:

> Any power of attorney, *whether durable or not durable*, and whether or not it grants general powers for all subjects and purposes or with respect to express subjects or purposes, shall be construed to grant power or authority to an attorney in fact to carry out any of the actions described in this subsection *if the actions are expressly enumerated and authorized* in the power of attorney. Any power of attorney may grant power of authority to an attorney in fact to carry out any of the following actions *if the actions are expressly authorized in the power of attorney*:
>
> * * *
>
> (10) To give consent to or prohibit any type of health care, medical care, treatment or procedure to the extent authorized by sections 404.800 to 404.865…

(emphasis added); *see also Randall*, 497 S.W.3d at 855. The statutory scheme under DPALM thus contemplates the existence of non-durable powers of attorney (*i.e.*, powers that do not continue after incapacity) for health care decisions, so long as the actions are expressly enumerated and authorized in the power of attorney document. But under Mr.

Ingram's reading of the pertinent statutes, the reference to "durable or not durable" powers in Section 404.714 would be inconsistent with the statutory scheme (as he understands it).

Additionally, DPALM explicitly provides that a principal may elect to condition the effectiveness of a power of attorney on the happening of a future event, or may elect to make it effective immediately. A power of attorney conditioned on a future event is generally referred to as a "springing" power of attorney. Section 404.714.8 provides that durable powers of attorney *may* (but need not) be springing (*i.e.*, contingent upon a triggering event), as follows (emphasis added):

> 8. An attorney in fact *may be instructed* in a power of attorney that the authority granted shall not be exercised until, or shall terminate on, the happening of a future event, condition or contingency, as determined in a manner prescribed in the instrument.

The above provision of DPALM is explicitly incorporated into DPAHCA, in that Section 404.810 provides that Section 404.714 and certain other relevant sections "shall apply to powers granted under [DPAHCA]." Mr. Ingram's suggested reading of DPAHCA plainly contradicts the legislature's decision to include springing powers of attorney as an *option* under DPAHCA. If a determination of incapacity were *required* before all health care powers of attorney could take effect, the inclusion of this section in DPAHCA would be unnecessary, because all powers of attorney would be *required* to be springing (rather than being merely an option as provided in subsection 8 above). Certainly such a situation would come as a surprise to estate planning attorneys and their clients across Missouri.

D. Mr. Ingram's Durable Power of Attorney is not a springing power.

The Durable Power of Attorney at issue here is not a springing power. As explicitly provided in Section 404.714.8, the determination of whether a durable power of attorney is springing or non-springing is to be made "in a manner prescribed in the instrument." Accordingly, Mr. Ingram's Durable Power of Attorney must be given its plain meaning—namely, that it became effective immediately upon execution by Mr. Ingram.

Importantly, nothing in the record indicates or suggests that Mr. Ingram was incapacitated when (1) he executed the Durable Power of Attorney; (2) Ms. Hall executed the Voluntary Arbitration Agreement; or (3) anytime between. The record shows that Ms. Hall properly gained her power of attorney to make health care decisions for Mr. Ingram, and held (and properly used) that power as Mr. Ingram's agent when entering into the Voluntary Arbitration Agreement. As such, the Voluntary Arbitration Agreement is enforceable.

E. Brook Chateau had the right to rely on Ms. Hall's apparent authority to execute the Voluntary Arbitration Agreement.

In addition to Ms. Hall's actual authority to enter into the Voluntary Arbitration Agreement (by virtue of Mr. Ingram's Durable Power of Attorney), she also had apparent authority to enter into it. Based on representations made to Brook Chateau, it had a right to rely on (1) Mr. Ingram's representation in the Durable Power of Attorney that Ms. Hall was his attorney-in-fact; and (2) Ms. Hall's representation in the Voluntary Arbitration Agreement that she was Mr. Ingram's legal representative.

Apparent agency is established when (1) the principal manifests consent to the exercise of authority or knowingly permits the agent to assume the exercise of such authority; (2) the party relying on this exercise of authority knows of the facts and, acting in good faith, has reason to believe, and actually believes, the agent possesses such authority; and (3) the party relying on the appearance of authority changes its position and would be injured or suffer loss if the transaction executed by the agent does not bind the principal. *Link v. Kroenke*, 909 S.W.2d 740, 745 (Mo. App. W.D. 1995). Apparent agency cannot be created by the acts of the supposed agent alone. *Ottawa Charter Bus Service, Inc. v. Mollet*, 790 S.W.2d 480, 483–84 (Mo. App. W.D. 1990). To be bound, the principal must have created the appearance of authority. *Id.*

The DPAHCA specifically contemplates and endorses the common law principle of apparent agency to protect third parties such as Brook Chateau:

> A third person, if acting in good faith, may rely and act on the instruction of and deal with the attorney in fact acting pursuant to the authority granted in a power of attorney for health care without liability to the patient or the patient's successors in interest.

Section 404.855. The circumstances here fall within this provision. Brook Chateau was presented with a facially valid Durable Power of Attorney executed by Mr. Ingram, which provides in explicit terms that it was "effective immediately." Based on the plain terms of the document and his execution of it, Brook Chateau had the right to rely on it in entering into the Voluntary Arbitration Agreement executed by Ms. Hall. Upon her presentation of the Durable Power of Attorney, Brook Chateau entered into the Voluntary Arbitration Agreement. Because the DPAHCA provides protection from liability to third

parties acting in reliance on an agent's apparent authority, Brook Chateau had the reasonable right to rely on Ms. Hall's signature on the Voluntary Arbitration Agreement, and it should be enforced accordingly.[1]

Missouri courts have applied this principle in favor of third parties such as Brook Chateau. The case of *Kahn v. Royal Banks of Missouri*, 790 S.W.2d 503 (Mo. App. E.D. 1990), is instructive. There, a wife executed two powers of attorney naming her husband as attorney-in-fact: a durable power of attorney and a general power of attorney to convey real estate. *Id*. at 506. Under that authority, the husband executed two notes totaling $1.4 million in favor of a third-party bank. *Id*. After a default occurred, the wife asserted she was not liable for the debt because the durable power of attorney was void from the outset as part of the husband's scheme to defraud his creditors. *Id*. Nevertheless, the Court held that even if the husband had no actual authority to bind the wife (because doing so violated his fiduciary obligations), his conduct was still binding on her from the perspective of the bank, because he had apparent authority in light of the facially valid power of attorney documents presented to the bank. *Id*. at 508.[2]

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[1] Consider too that if Ms. Hall truly lacked authority to enter into agreements and make health care decisions on behalf of her principal Mr. Ingram, then she lacked authority to have him admitted to Brook Chateau in the first place. What she appears to be arguing is that she had authority to make some health care decisions but not others—an untenable position.

[2] Like Mr. Ingram here, the wife in *Kahn* argued she was not liable because her husband did not indicate he was signing her name in his representative capacity. The *Kahn* Court held this fact was immaterial. 790 S.W.2d at 509; *see also Ramirez-Leon v. GGNSC, LLC*, 553 S.W.3d 318, 326 (Mo. App. W.D. 2018) (similar holding in context of case brought against nursing home). Here, Ms. Hall signed the Voluntary Arbitration Agreement in her representative capacity for Mr. Ingram. D5 p.2. Whether she signed in her individual capacity as well, or what line she signed on, is immaterial.

The circumstances are substantially similar here. Mr. Ingram executed the Durable Power of Attorney, which according to its plain terms granted Ms. Hall authority to act on his behalf. Ms. Hall presented that document to Brook Chateau and proceeded to enter into agreements and execute documents with Brook Chateau, including the admission paperwork and the Voluntary Arbitration Agreement. Brook Chateau acted in reliance on the representations of each party (Mr. Ingram and Ms. Hall) based on the facially valid documents provided, which affirmatively represented to Brook Chateau that Ms. Hall had actual authority that Mr. Ingram had granted her.

Based on the representations made by Mr. Ingram and Ms. Hall, the plain and explicit terms of the Durable Power of Attorney, and DPAHCA's statutory scheme (including express protection for third parties who rely on powers of attorney), Ms. Hall had apparent authority (in addition to actual authority) to enter into the Voluntary Arbitration Agreement, and Mr. Ingram is accordingly bound.

Conclusion as to Point II

The Durable Power of Attorney complied with the statutory requirements to be effective and enforceable. According to the express, plain language of the document, the Durable Power of Attorney became effective when Mr. Ingram executed it.

Because the Durable Power of Attorney was effective upon execution, it continued to be in effect when Ms. Hall—exercising the powers conferred to her as Mr. Ingram's agent—signed the Voluntary Arbitration Agreement. The Court therefore should sustain Point II, hold that the Circuit Court erred in denying Brook Chateau's motion to compel

arbitration, and reverse and remand with directions to enter an order compelling the parties to adhere to the terms of the Voluntary Arbitration Agreement.

III. The trial court erred in denying Brook Chateau's motion to compel arbitration, because the Durable Power of Attorney granted Ms. Hall authority to enter into the Voluntary Arbitration Agreement, in that executing the Voluntary Arbitration Agreement involved a health care decision.

Standard of Review

The standard of review for Point III is the same applying to Points I and II.

Argument

When a valid power of attorney grants someone specific authority and he or she exercises the authority granted, the resulting transaction is binding on the person who executed the power of attorney. *See Brookfield Production Ass'n v. Weisz*, 658 S.W.2d 897, 899 (Mo. App. W.D. 1983) (emphasizing that "the power of attorney exercised … was specifically set forth in the instruments"). Missouri courts have repeatedly held that individuals granted a power of attorney may execute binding arbitration agreements. *Lawrence*, 273 S.W.3d 525 at 528-29; *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. App. S.D. 2006). Therefore, if Ms. Hall had the authority to enter into the Voluntary Arbitration Agreement, then her signature on behalf of Mr. Ingram is binding on him regarding his claims—and forms a valid, enforceable contract.[3]

[3] Ms. Hall signed the Voluntary Arbitration Agreement on the line indicating "Signature of Patient's Legal Representative in his/her Representative capacity," but not in her individual capacity. D5 p.2. Only her representative capacity is at issue here, in that Mr. Ingram is the only plaintiff. Furthermore, Missouri courts have recently made clear that a representative's signature under similar circumstances is sufficient to bind the resident. *Ramirez-Leon*, 553 S.W.3d at 326.

A. Executing the Voluntary Arbitration Agreement was a health care decision under the plain terms of the document.

As explained in Point II above, the Durable Power of Attorney was in effect at the time Ms. Hall executed the Voluntary Arbitration Agreement. The Durable Power of Attorney granted her numerous powers in connection with Mr. Ingram's health care decisions and long term care. In particular, Ms. Hall had the authority to make all of Mr. Ingram's health care decisions, including consenting to health care or any treatment such as at a long-term care facility, and to make all arrangements related to obtaining health care services for him. D10 p.1-2. Additionally, in Paragraph D, Mr. Ingram authorized Ms. Hall to take any and all actions necessary to effectuate her decisions regarding his health care:

> D. Take any other action necessary to do what I authorize here, including, but not limited to, granting any waiver or release from liability required by any health care provider and taking any legal action at the expense of my estate to enforce this Durable Power of Attorney for Health Care[.]

D10 p. 2. His authorization included the power to make legal decisions related to his care, including resolving disputes by waiving or releasing liability, and pursuing dispute resolution as necessary to enforce the Durable Power of Attorney. D10 p.2.

This broad authorization conferred upon Ms. Hall sufficient authority to ensure the purposes of the Durable Power of Attorney were effectuated. Under Missouri law, though the general rule is that powers of attorney are strictly construed, "[t]he rule of strict construction is not absolute and should not be applied to the extent of destroying the very purpose of the power." *Allen ex rel. Dockins*, 11 S.W.3d at 835; *Brookfield*, 658 S.W.2d

at 899-900. "If the language will permit, a construction should be adopted which will carry out, instead of defeat, the purpose of the appointment." *Id*.

An instructive case is *Estate of Linck v. Carr*, 645 S.W.2d 70, 79 (Mo. App. S.D. 1982), holding that the general grant of power "to perform all acts whatsoever concerning my property," combined with "[specific] grants [of] authority to perform acts relating to personal property and banking," was sufficient authorization for the attorney-in-fact to convert the grantor's personal savings accounts, checking accounts, and certificates of deposit into property jointly held by both of them.

Additionally, Missouri courts have also favorably cited the Massachusetts high court's holding that a power conferred "to do anything of any name or nature in relation to selling, conveying, transferring, [or] mortgaging both real and personal property of any name and nature" was sufficient authority for the holder to borrow money and execute notes in the name of the grantor. *Brookfield*, 658 S.W.2d at 899, *citing Malaguti v. Rosen*, 262 Mass. 555, 160 N.E. 532 (1928).

Similarly, under the general authority conferred to manage Mr. Ingram's health care, Ms. Hall made the decision to place him into the care of Brook Chateau. In conjunction with that decision, and under her general "authorizing" power, Ms. Hall made the decision to enter into the Voluntary Arbitration Agreement as a means to resolve future disputes arising out of his care at the facility. That decision was made under Ms. Hall's explicit authority to make all arrangements in connection with Mr. Ingram's care.

Notably, the Voluntary Arbitration Agreement also reflects what Ms. Hall decided, and what type of decision she made:

> **14**. **Health Care Decision**: The Parties hereby stipulate that the decision to have the Patient move into this Center and the decision to agree to this Agreement are each a health care decision. The Parties stipulate that there are other health care facilities in this community currently available to meet the Patient's needs.

D5 p2. As indicated above, Ms. Hall had the opportunity and ability to select from a variety of health care providers to meet Mr. Ingram's needs while exercising her medical and health care decision-making power. In exercising that power, she elected to execute the Voluntary Arbitration Agreement. As an authorized decision-maker concerning Mr. Ingram's health care needs, she was authorized to make that choice.

B. Case law from other jurisdictions addressing this issue likewise provides that executing the Voluntary Arbitration Agreement was a health care decision.

Mr. Ingram asserted before the trial court (and likely will assert here) that because the enumerated powers in the Durable Power of Attorney do not specifically refer to "arbitration agreements," Ms. Hall did not have the authority to enter into one. This argument fails, because the Durable Power of Attorney broadly confers upon her the power to make whatever arrangements she deems appropriate in connection with Mr. Ingram's health care. Moreover, in addition to the FAA and the U.S. Supreme Court precedents discussed above (which prevent courts from discriminating against arbitration agreements and powers of attorney executed in conjunction with them), a majority of states, like Missouri, uphold broad powers for attorneys-in-fact to make decisions in conjunction with other medical decisions.

In particular, California courts have frequently confirmed the broad nature of powers of attorney to make health care decisions. For example, in *Garrison v. Superior Court*, 33 Cal.Rptr.3d 350 (Cal. App. 2d Dist. 2005), a durable power of attorney for health care decisions signed by a patient allowed the patient's attorney-in-fact to make all "health care decisions" for the patient. *Id*. at 353–54. In addition, the power of attorney conferred the authority to execute documents involving the refusal to permit treatment or "to sign '[a]ny necessary waiver or release from liability required by a hospital or physician,'" along with permission to review and disclose the patient's medical information. *Id*. at 354. The appellate court concluded that an agent with authority to make health care decisions may "enter into optional revocable arbitration agreements in connection with placement in a health care facility"—and that such a decision was a "proper and usual" exercise of an agent's authorized powers made in conjunction with a health care decision. *Id*. at 361.

Similarly, in *Hogan v. Country Villa Health Services*, 55 Cal.Rptr.3d 450 (Cal. App. 4th Dist. 2007), the attorney-in-fact signed agreements providing for the arbitration of medical malpractice claims and other claims against the facility. *Id*. at 451–52. Like the power of attorney in *Garrison* and the one at issue here, the power of attorney in *Hogan* authorized the agent to make "all health care decisions" for the patient, unless the patient limited that authority (which was not the case). *Id*. The court concluded that an agent acting under a health care power of attorney, in selecting a long term health care facility, was empowered to execute all admissions forms, including arbitration agreements, unless that power was explicitly restricted by the principal. *Id*. at 453.

The circumstances involved in the above cases are factually analogous to the circumstances here. Under Missouri law, Ms. Hall's authority to make Mr. Ingram's health care decisions included the power to enter into a voluntary, revocable arbitration agreement if she deemed it prudent. When an agent such as Ms. Hall, acting on behalf of a prospective long term health care facility resident such as Mr. Ingram (*i.e.*, the principal), reviews and evaluates contracts of admission in deciding whether to place the principal at the facility, that decision-making process may include the review and evaluation of arbitration agreements of the facility. The agent, as attorney-in-fact, has the authority to decide whether the arbitration of disputes arising from the health care services provided is in the patient's best interests; such a decision involves the "proper and usual" exercise of her powers.

California's approach, like Missouri's, is neither unique nor surprising. For example, courts in Colorado, Alabama, Indiana, Wyoming, and Tennessee have reached the same conclusion. *See, e.g. Moffett v. Life Care Centers of Am.*, 187 P.3d 1140, 1146-47 (Colo. App. 2008), *aff'd*, 219 P.3d 1068 (Colo. 2009) ("a person who holds a medical durable power of attorney, in selecting a long-term health care facility, has the power to execute applicable admissions forms, including arbitration agreements, unless that power is restricted by the principal"); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 665 (Ala. 2004) (patient's attorney-in-fact, pursuant to a power of attorney, validly executed an admission contract containing an arbitration provision on behalf of the patient, so as to bind the patient's estate when bringing a wrongful death claim against a nursing home); *Sanford v. Castleton Health Care Ctr., LLC*, 813 N.E.2d 411, 420 (Ind.

Ct. App. 2004) (by signing a nursing home's admission agreement that contained an arbitration clause, a patient's attorney-in-fact waived the right to have an action against the nursing home heard by a jury); *Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014, 1021 (Wyo. 2017) (general law of agency authorized the execution of an arbitration clause; the court did not need to address whether a health care decision was involved); *Owens v. National Health Corp.*, 263 S.W.3d 876 (Tenn. 2007) (discussed in subsection C below).[4]

C. A different approach in the circumstances presented here would be unworkable.

To the extent Mr. Ingram may ask this Court to distinguish between (A) medical decisions; and (B) legal decisions made in the context of obtaining health care, there is no bright line to be drawn, and attempting to create a distinction would yield an unworkable standard. In addition, such a distinction would diminish certainty (despite certainty being a key purpose of having a durable power of attorney) as an attorney-in-fact attempts to fulfill his or her duties to make important decisions on behalf of the principal.

The Tennessee Supreme Court articulated this point in *Owens v. National Health Corp.* In that case, the plaintiff argued that a power of attorney authorized the attorney-in-fact to make health care decisions, but not legal decisions. 263 S.W.3d at 884. The court rejected that argument, holding that any purported distinction between (A) making a health care decision; and (B) making a legal decision, fails to appreciate that signing a

[4] A minority of jurisdictions have taken a different approach. Nonetheless, in many cases from those jurisdictions, the underlying facts or the terms of the documents at issue render those cases distinguishable.

contract for health care services—even one without an arbitration provision—is itself a "legal decision." *Id*. The Court further noted that each provision of a contract signed by an attorney-in-fact could be subject to question, in that accepting particular provisions could be construed as involving the making of a "legal decision" rather than a "medical decision." *Id*. And any holding that an attorney-in-fact can make some "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by attorneys-in-fact, likely having negative effects on their principals—including making it more difficult to obtain health care services. *Id*. Incapacitated principals could be caught in "legal limbo," whereby the principal would not have the capacity to enter into a contract, and the attorney-in-fact would not be authorized to do so. *Id*. This result would defeat the very purpose of having a durable power of attorney for health care. *Id.*

The same concerns are present here. The "medical vs. legal" distinction Mr. Ingram may wish this Court to draw would lead to similar adverse consequences. A patient in Mr. Ingram's position (and any health care provider or long term care facility to which he would be taken) would have no legal certainty regarding whether his appointed attorney-in-fact possessed the authority to select the means to resolve disputes arising out of future care. An attorney-in-fact in Ms. Hall's position would have the same uncertainty. And a provider in Brook Chateau's position would have no certainty concerning whether an arbitration agreement entered into via an attorney-in-fact would have any binding effect for disputes that may later arise. This uncertainty would defeat the purpose of the durable power of attorney as it exists under Missouri law.

Conclusion as to Point III

Ms. Hall had the authority to execute the Voluntary Arbitration Agreement in making health care decisions for her principal, Mr. Ingram. She acted within the broad scope of powers conferred upon her under the Durable Power of Attorney. And the Voluntary Arbitration Agreement confirms she was making a health care decision. Thus, the plain language of the documents at issue, and cases from Missouri and other states, confirm that the Voluntary Arbitration Agreement was validly entered into and is enforceable.

Because the Durable Power of Attorney granted Ms. Hall the authority to enter into the Voluntary Arbitration Agreement, the Court should sustain Point III, hold that the Circuit Court erred in denying Brook Chateau's motion to compel arbitration, and reverse and remand with directions to enter an order compelling the parties to adhere to the terms of the Voluntary Arbitration Agreement.

CONCLUSION

As explained in Points I, II, and III above, the Circuit Court erred in denying Brook Chateau's motion to compel arbitration. The parties entered into a contract that under federal law is valid, enforceable, and applicable to all claims alleged in the petition.

For these reasons, Brook Chateau seeks a reversal of the Circuit Court's order denying the motion to compel arbitration, and a remand with directions to enter an order compelling the parties to adhere to the terms of the Voluntary Arbitration Agreement.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify this brief complies with the provisions of Rules 55.03 and 84.06(b). This brief contains 12,869 words, excluding the cover, certificate of compliance and service, signature block, and substitute appendix. Counsel has relied upon the word-counting utility of Microsoft Word in making this certification.

I further certify that a copy of this brief was filed electronically on June 24, 2019 using the Court's electronic filing system, causing automated delivery to counsel of record in this matter.

/s/ Timothy C. Sansone