IN THE SUPREME COURT OF MISSOURI

BROOK CHATEAU,

Defendant-Appellant,

v. **Case No.: SC97812**

THERON INGRAM,

Plaintiff-Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Justine E. Del Muro
Case No.: 1816-CV04052 and

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

This appeal arises out of the trial court's denial of Appellant's Motion to Dismiss and Compel Arbitration. (D4 p. 1-3). Appellant is seeking to have this Court overturn the trial court's Order denying Appellant's Motion to Dismiss and Compel Arbitration and to enforce a "Voluntary Arbitration Agreement" [hereinafter "Arbitration Agreement"] allegedly signed by Andrea Hall, who allegedly was acting as Respondent's attorney-in-fact based on a Durable Power of Attorney [hereinafter "DPOA"]. (App. Sub. Br. p. 15-16).

Respondent is of sound mind, and Appellant has made no allegations to the contrary. (App. Sub. Br. p. 9-12). There is no evidence that a physician certified Theron Ingram as incapacitated prior to the execution of the Arbitration Agreement, and Appellant has not argued that such a certification occurred. (App. Sub. Br. p. 17-55). The is no evidence suggesting that the Arbitration Agreement was signed by Respondent, and Appellant has made no allegation that he did sign it. (App. Sub. Br. p. 9-12).

The Durable Power of Attorney Agreement

Respondent believes Appellant has accurately set forth the terms of the alleged DPOA. (App. Sub. Br. p. 9-10; D10 p. 1-6).

The Arbitration Agreement

Appellant sets forth some of the terms contained within the alleged Arbitration Agreement, but does not set forth all material terms of the agreement. (App. Sub. Br. p. 10-12; D5 p. 1-4). The Voluntary Arbitration Agreement also states in pertinent part:

> **2. Demand for Arbitration**: shall be written, sent to the other Party by certified mail, return receipt requested.
>
> ******
>
> **4. Arbitration Panel:** Three (3) arbitrators (the "Panel") shall conduct the arbitration. Each Party will select one Arbitrator, the two selected Arbitrators will select a third. Each Arbitrator must be a retired State or Federal Judge or a Member of the State Bar where the Center is located with at least 10 years of experience as an attorney. The Panel will elect a Chief Arbitrator who will be responsible for establishing and resolving issues pertaining to procedure, discovery, admissibility of evidence, or any other issue.
>
> ******
>
> **6. Procedural Rules and Substantive Law: …**The Panel's award **must be unanimous**…The failure of the Panel to issue a unanimous award creates an appealable issue, appealable to the appropriate court, in addition to those set forth in paragraph 7, below. In the event the appellate court finds a non-unanimous award invalid as against law or this Agreement, the award shall be vacated and the arbitration dismissed without prejudice.

(D5 p. 1). Also, with regards to the Arbitration Agreement, it is allegedly signed by Andrea Hall as "Patient's Legal Representative in his/her Representative Capacity." However, the Arbitration Agreement also states: "Patient's Legal Representative should sign on both lines above containing the phrase 'Patient's Legal Representative'." (D5 p. 2 at FN 1). There is no signature contained on the second line. (D5 p. 2).

The Petition

For the purposes of this Appeal, Respondent agrees with Appellant's recitation of the Petition.

Pertinent Procedural History

For the purposes of this Appeal, Respondent agrees with Appellant's recitation of the pertinent procedural history except where it states "[a] hearing on all motions was set for June 22, 2018 . . ." (App. Sub. Br. p. 13). That statement requires some context. Early in the case (on February 26, 2018) the trial court *sua sponte* set a case management conference for June 22, 2018. (D1 p. 6). On May 25, 2018 (more than a week after all of the briefs were submitted) Appellant filed a Notice of Hearing to address its pending Motion at the June 22, 2018 case-management conference. (D1 p. 8; D18 p. 1). On May 31, 2018 the trial court entered its order based on the record before it. (D18 p.1; D19 p.1-2).

ARGUMENT

I. IN RESPONSE TO APPELLANT'S FIRST POINT RELIED ON RESPONDENT ARGUES THAT THE TRIAL COURT'S ORDER DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT'S RULING DID NOT CONSTITUTE "A RULE OF LAW DISCRIMINATING AGAINST ARBITRATION AGREEMENTS" IN THAT THE TRIAL COURT'S ORDER MERELY MEANT THAT APPELLANT FAILED TO MEET ITS BURDEN OF PROOF.

Standard of Review

The Court should affirm the circuit court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. The judgment is presumed correct, and the appellant bears the burden of proving it is erroneous. As to claims that there is no substantial evidence to support the judgment or that it is against the weight of the evidence this court should defer to the circuit court's credibility determinations, and accept as true the evidence and inferences favorable to the prevailing party and disregard contrary evidence and inferences. A review of a claim that the trial court erroneously declared or applied the law should be *de novo*. *Randall v. Randall*, 497 S.W.3d 850 (Mo.App. W.D. 2016) (internal citations omitted).

Argument

Respondent agrees with Appellant that **if** the Arbitration Agreement had been timely executed by somebody with authority and was otherwise enforceable that: (1) the Federal Arbitration Act ("FAA") would apply; and (2) the claims asserted by Respondent would fall within the scope of the arbitration agreement. It is also true that an arbitration agreement must be placed "on equal footing with all other contracts" and a state law cannot discriminate against an arbitration agreement. *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421, 1423 (2017).

In *Kindred*, the Supreme Court held that Kentucky's "clear-statement rule" failed "to put arbitration agreements on an equal plane with other contracts." *Id*. at 1426-27. *Kindred* involved an attorney-in-fact with broad authority pursuant to a power of attorney

("POA") who signed admission paperwork into a nursing home that included an arbitration agreement. *Id*. at 1425. The Kentucky Supreme Court acknowledged that signing the arbitration agreement was within the scope of the authority granted to the attorney-in-fact, but held that under the Kentucky constitution in order for a POA to grant authority to sign an arbitration agreement the POA would have to expressly state the authority to waive the principal's right to "adjudication by judge or jury." *Id*. at 1426. This interpretation of the Kentucky constitution was called the "clear-statement rule" and, while not a statutory provision was based on the Kentucky high-court's interpretation of the state's constitution. The United States Supreme Court held that even though the "clear statement rule" purported not to single out arbitration agreements as the target, the rule had that effect of disfavoring arbitration agreements. "Such a rule is too tailor-made to arbitration agreements . . ." *Id*. at 1427. The Court pointed out that it was hard to even imagine another type of agreement, other than an arbitration agreement, that would be affected by the state law. *Id*.

This case is much different and has nothing to do with a rule-of-law disfavoring arbitration agreements. There are multiple theories upon which the trial court could have properly based its ruling and none implicate a Missouri law or rule that disfavors arbitration agreements. First, as argued *infra* in subsection "A" section I, there was no evidence upon which the trial court could have determined that Appellant met its burden-of-proof that a valid enforceable arbitration agreement existed. Second, as argued *infra* in subsection "B" of section I, the trial court could have rightly determined that the Arbitration Agreement was unconscionable and thus unenforceable. Third, as argued *infra* in Section II, the trial

court could have correctly interpreted the DPOA as a "springing" DPOA pursuant to RSMo. section 404.825 with powers that had not been triggered at the time the Arbitration Agreement was signed. Lastly, as argued *infra* in Section III the trial court could have properly determined that even if the DPOA was in effect and triggered it still did not grant the attorney-in-fact the authority to sign the Arbitration Agreement because it was voluntary, therefore, not necessary to access health care. None of the aforementioned bases for ruling in favor of Respondent involve a Missouri rule of law disfavoring arbitration agreements. In each section *infra*, Respondent will provide additional analysis regarding the applicability of the holding in *Kindred* and federal preemption as it relates to that argument.

A. The Trial Had to Deny Appellant's Motion Because There Was NO Evidence to Support Appellant's Claim That a Valid Enforceable Arbitration Agreement Existed.

At the trial-court level Appellant had the burden to prove the existence of a valid enforceable arbitration agreement. *Whitworth v. McBride & Sons Homes, Inc.,* 344 S.W.3d 730 (Mo.App.W.D. 2011). RSMo. section 435.355 specifically requires the trial court to determine summarily whether an agreement to arbitrate exists.

> On application of a party showing an agreement…and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, **but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised** and shall order arbitration if found for the moving party; otherwise the application shall be denied.

RSMo § 435.355(1) (emphasis added). Additionally, 16th Circuit local rule 33.5 states that a request for hearing or oral argument "**shall** be filed with suggestions of the party

requesting the same." Finally, exhibits attached to a motion and the attorney's arguments and assertions in the briefs **are not evidence**. *Ryan v. Raytown Dodge*, 296 S.W.3d 471 (Mo.App. W.D. 2009). Respondent has always contended that Appellant failed to prove the existence of a valid enforceable arbitration agreement and referenced the DPOA, but Respondent has also argued in the alternative and assumed *arguendo* that the purported documents were valid. Respondent never conceded or stipulated that the either document was admitted evidence. (D9 p. 1-7; D16 P. 1-10).

At the trial-court level, Appellant filed its *Motion to Dismiss and Compel Arbitration* pursuant to RSMo section 435.355, but did not requests a hearing at that time, so pursuant to Circuit 16 local rule 33.5, Appellant waived his right to a hearing on the motion. (D1 p. 6-8). In support of this *Motion,* Appellant attached to its motion, as an exhibit, the purported Arbitration Agreement. (D1 p. 6-7; D4; D5). In opposition to Appellant's motion, Respondent specifically denied the existence of an enforceable arbitration agreement due to the failure of Appellant to meet its burden of proof. (D.9 p. 2-3). When the trial court denied Appellant's Motion to Dismiss and Compel Arbitration the only question in front of it was whether there was sufficient evidence upon which the court could find that there was a valid enforceable arbitration agreement. There was no evidence of any kind in front of the court because all that had been filed with the court were briefs with attached exhibits which are, by themselves, not evidence. In fact, the court had no choice at that point, but to deny the motion, because to rule in favor of Appellant would have required the existence of substantial evidence. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976).

In *Kindred*, there was no dispute whether a valid enforceable arbitration agreement existed or whether that the attorney-in-fact had authority to sign the arbitration agreement. The Kentucky Supreme Court's trouble came when they created a rule of law (the "clear-statement rule") that required a POA to explicitly state authority to waive the principal's right to access the judicial system with an eye toward arbitration agreements. In this case no statute or rule is implicated. Appellant simply failed to prove there was a valid enforceable agreement.

B. The Arbitration Agreement was Unconscionable Because it Robs Respondent of a Reasonable Chance of Receiving a Fair Remedy.

"Generally applicable state law contract defenses, such as fraud, duress and unconscionability, may be used to invalidate arbitration agreements without contravening the FAA." *Swain v. Auto Servs., Inc.* 128 S.W.3d 103, 107 (Mo.App. E.D. 2003).

> An unconscionable arbitration provision in a contract will not be enforced. There are procedural and substantive aspects to unconscionability. Under Missouri law, unconscionability can be procedural, substantive or a combination of both. Procedural unconscionability relates to the formalities of making an agreement and encompasses, for instance, fine print clauses, high pressure sales tactics or unequal bargaining positions. Substantive unconscionability refers to undue harshness in the contract terms. The total degree of procedural and substantive unconscionability are considered together in determining whether an arbitration clause is generally unconscionable, though there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone.

Manfredi v. Blue Cross and Blue Shield of Kansas City, 340 S.W.3d 126, 132 (Mo.App. W.D. 2011) (internal citations and quotations omitted).

The determination of substantive unconscionability is gauged by what an ordinary person could reasonably expect. *Manfredi* 340 S.W.3d at 134. An ordinary person could

"reasonably expect general arbitration provisions in an adhesion contract;" however, an ordinary person would not reasonably expect those arbitration provisions to be an absolute bar on any recovery for the negligence of Appellant. *Id.* at 134-35. If the practical effect of the provisions of an arbitration agreement is to grant the tortfeasor immunity for its negligent conduct, "forcing a case to arbitration would be to deny the injured party a remedy" and "requiring the case to be arbitrated is unconscionable." *Id.*

In this case, the terms of the Arbitration Agreement make the agreement substantively unconscionable. Within the Arbitration Agreement, each party is to pick an arbitrator, and the two arbitrators will then select a third. (D5 p. 1). The arbitrators then must decide **unanimously** on any award, meaning that the arbitrator selected solely by Appellant would have to agree to any award. (D5 p. 1). If the award is not unanimous, it creates an appealable issue to determine whether a non-unanimous award is invalid as against the Arbitration Agreement. (D5 p. 1). If the Appellate Court determines the non-unanimous award is invalid as against the Arbitration Agreement's provision requiring unanimity, the award is vacated, and the arbitration is dismissed without prejudice. (D5 p. 1). On its face, the Arbitration Agreement creates a real possibility that an aggrieved patient will have no ability to be made whole and completely shelters Appellant from having any liability for any injuries suffered by a patient due to Appellant's negligence. The terms of this Arbitration Agreement likely rob the Respondent of any remedy for his claim which makes the agreement unconscionable.

Appellant argues that no Missouri court has held that a "pre-dispute arbitration agreement" was unconscionable and that to do so would be in "clear conflict" with the

holding in *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012). (App. Sub. Br. p. 21). Neither statement is accurate.

In *Marmet*, the United States Supreme Court held that the FAA preempted a West Virginia law that outright prohibited arbitration of personal injury and wrongful death claims. *Id*. at 533. The West Virginia Supreme Court had held that West Virginia's public policy disfavoring predispute arbitration agreements in a personal injury or wrongful death claim was not preempted by the FAA's policy in favor of arbitration agreements. *Id*. at 532. "The [United States] Supreme Court remanded the case for consideration of whether, absent the public policy rationale, the arbitration clauses at issue 'are unenforceable under state common law principals that are not specific to arbitration and pre-empted by the FAA,'" which included the issue of unconscionability. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. banc 2012). There is nothing about the holding in *Marmet* that suggests that an arbitration agreement is incapable of being substantively unconscionable. In fact, the holding implies that there could have been facts to support a finding of unconscionability, but the case had to be remanded to find out. As a result, the Supreme Court remanded the case to determine whether the agreement was unconscionable. *Marmet*, 132 S.Ct. at 1204. Subsequently, this Court held in *Brewer v. Missouri Title Loans* that assessing the unconscionability of an arbitration agreement required a "case-by-case approach." 364 S.W.3d 486, 490-91 (Mo. banc 2012)

Missouri courts **have** found pre-dispute arbitration agreements that were both procedurally and substantively unconscionable. See *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012); and *Manfredi v. Blue Cross and Blue Shield of Kansas City*,

340 S.W.3d 126 (Mo.App. W.D. 2011). In *Brewer* this court held that a class arbitration waiver (agreement) in a loan agreement was unconscionable because "it is a contract that no person in his senses and not under delusion would make." 364 S.W.3d at 495-96 (internal quotations and citations omitted). This Court did not specifically state whether the holding was based on procedural or substantive unconscionability, but this courts analysis suggests that the contract was substantively unconscionable. *Id*. at 495. Similarly, in *Manfredi*, the Western District Court of Appeals held that a provider agreement between a chiropractor and a health insurance administrator was a combination of procedurally and substantively unconscionable because "limitations placed on arbitrators' authority prevent arbitration from providing, much if any remedy at all." 340 S.W.3d at 129, 135.

C. The Western District's Holding Does NOT Have the Effect of Putting Appellant in a "damned if you do, damned if you don't" Situation

Appellant argues that the Western District Court of Appeal's holding is unfair because it creates a "damned if you do, damned if you don't" situation. Appellant argues that in order to avoid the "contract of adhesion" argument, Appellant chose to make the arbitration agreement optional. Of course, Appellant could just leave out the arbitration agreement considering almost no consumer knows what it means and people entering into nursing homes often are going through a difficult physical and mental life experience and do not have the energy or capacity to read all of the fine print, but that is beside the point. The argument does not hold up to scrutiny if examined. Appellant assumes that it has some kind of right to have a pre-dispute arbitration agreement as part of the contract between the

patient and the facility. That is not the case. The idea behind any contract is that there is consent by both parties and a meeting of the minds.

It seems disingenuous for Appellant to complain that a supposedly voluntary arbitration agreement was not validly executed in this case. Yes, that is an option; to choose NOT to sign the Arbitration Agreement. A DPOA can, be need not be, limited to health care. A DPOA can grant the attorney-in-fact power to do almost anything if the language of the DPOA expressly grants the authority, including signing an arbitration agreement. *See* RSMo. § 404.710.7 (stating those limited actions DPOA cannot authorize). A patient in a nursing home should have the right to choose whether to grant his attorney-in-fact authority beyond that necessary for his health care. If a principal wants to grant broader authority he can, but the DPOA would need to have the appropriately broad language. In this case, Respondent chose to limit his grant of authority to only contracts **necessary** to procure health care, which would prohibit authority to sign *most* contracts. He has that right.

II. IN RESPONSE TO APPELLANT'S SECOND POINT RELIED ON RESPONDENT ARGUES THAT THE VOLUNTARY ARBITRATION AGREEMENT CANNOT BE ENFORCED AGAINST RESPONDENT BECAUSE WHEN THE ARBITARION AGREEMENT WAS SIGNED THE AUTHORITY GRANTED TO THE ATTORNEY-IN-FACT HAD NOT BEEN TRIGGERED IN THAT THE RESPONDENT HAD NOT BEEN DETERMINED TO BE INCAPACITATED PURSUANT TO RSMO SECTION 404.825.

Standard of Review

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

Argument

A. The Alleged DPOA Was a Springing DPOA That Had NOT Been Triggered Because There Was NOT a Finding of Incapacitation.

In order for the Arbitration Agreement to be enforceable against Respondent, there must be an Arbitration Agreement to enforce. In Missouri, "competency of the parties to contract" is an "essential element[s] of a contract." *See D.15* at pp.2 *quoting Bldg. Erection Servs. Co. v. Plastic Sales & Mfg. Co.,* 163 S.W.3d 472, 477 (Mo.App. W.D. 2005). In order to be competent to sign on behalf of another person the signer must have the authority to do so. In this case the DPOA was "springing," because there was a condition precedent that triggered the powers – a finding of incapacitations by two physicians – which had not

occurred. As a result, Ms. Hall was not competent to execute the Arbitration Agreement on behalf of Respondent and, as such, it is not enforceable.

RSMo. section 404.825 applies to all health care DPOAs and creates a presumption that the powers granted in a health care DPOA do not commence until the principal is determined to be incapacitated by two physicians, unless the DPOA "expressly authorizes otherwise." RSMo. §§ 404.810 and 404.825. Once a health care DPOA is signed it "becomes effective" but the authority granted in the DPOA will only **commence** if the condition precedent has triggered it.

> **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. One of the certifying physicians may be the patient's attending physician. The certification shall be made according to accepted medical standards. The determination of incapacity shall be periodically reviewed by the attending physician. The certification shall be incorporated into the medical records and shall set forth the facts upon which the determination of incapacity is based and the expected duration of the incapacity. Other provisions of this section to the contrary notwithstanding, certification of incapacity by at least one physician is required.

RSMo. § 404.825 (emphasis added).

In this case the DPOA is clearly a health care DPOA and so it should be construed as a "springing" DPOA because there is no language "expressly stating otherwise." Appellant argues that the DPOA does expressly state otherwise based on the following language:

> 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.

(D11 p. 1). The confusion arises over the meaning of the word "effective" in the context of when the powers are triggered. It is like a testamentary will; it is "effective" when its signed, but the provision are not triggered until a future event occurs. It is the same in the context of this DPOA in light of RSMo section 404.825.

In this case, the DPOA was "in effect" upon signature, but the powers would not "commence" unless and until two doctors determined that the principal was incapacitated. In order to expressly authorize the powers to commence immediately the DPOA would have to say that the powers "commence" immediately not merely that the DPOA is "effective immediately." Further, the language "and continues if I am incapacitated" is simply a recognition that this is a *durable* power of attorney that survives incapacitation even if the incapacitation occurs after the DPOA is "in effect" but before the powers commenced.

The court *In re Estate of Collins* acknowledged that "the Durable Power of Attorney for Health Care Act only requires a physician's certification on incapacitation before the attorney in fact may **commence** making a health care decision for the individual executing the power of attorney." 405 S.W.3d 602, 606 (Mo.App. W.D. 2013) (emphasis added). The court determined that it was clear from the language of the DPOA that the intent of the drafter of the DPOA was for the powers to commence upon a finding of incapacitation pursuant to RSMo. section 404.825. *Id*. The court mirrored the language of the DPOA stating that "the durable powers of attorney became effective when two physicians certify"

incapacitation. *Id*. at 603. In that case it was clear from the language of the DPOA that the drafter was referring to the provision found in RSMo section 404.825, but misstated language and used the word "effective" instead of the statutorily accurate "shall commence," but that was not the issue so it was not relevant for the analysis. Further, because the default in Missouri is that a health care DPOA is "springing" the DPOA should have been construed as such regardless, because there was no language stating otherwise.

In this case there is no evidence that there was a finding of incapacitation in compliance with RSMo. section 404.825 prior to Ms. Hall allegedly signing the Arbitration Agreement, therefore, Ms. Hall lacked the capacity and the Arbitration Agreement is unenforceable. Without an enforceable Arbitration Agreement, the trial court was prohibited from compelling Respondent to arbitrate. Finally, holding that this DPOA was a springing DPOA does not single out or disfavor arbitration agreements. If Ms. Hall lacked the capacity to sign the arbitration agreement, she lacked the capacity to sign any agreement, including the other admission documents the facility presented to her.

B. Appellant's Apparent Authority Argument Was NOT Preserved for Appeal and Lacks Evidentiary Support.

When Appellant filed its Motion to Enforce Arbitration it filed a brief and did not raise the "apparent authority" argument. (D6 p. 1-7). When Appellant filed its reply, it did not raise the "apparent authority" argument. (D15 p. 1-5). When Appellant filed its initial Appellant's Brief, it did not raise the "apparent authority" argument. Finally, even in Appellant's Substitute Brief the argument of apparent authority was not included in the Points Relied On (App. Sub. Br. p. 15) and; therefore, cannot be raised for the first time in

the argument section in the substitute brief. *See State v. Stevenson*, 589 S.W.2d 44, 47 (Mo.App. E.D. 1979).

Assuming *arguendo* that the argument had been preserved it still fails because: (1) there is zero evidence supporting the claim; and (2) the trial court did not have to consider apparent authority because there were multiple other reasons to deny Appellant's Motion to Enforce Arbitration.

Assuming *arguendo* that this argument was preserved for appeal and there were not multiple other reasons to deny Appellant's motion, in order to prevail on an apparent authority theory, Appellant would have to prove each of three elements.

> (1) the [apparent] principal manifested his consent to the exercise of such authority or knowingly permitted the [apparent] agent to assume the exercise of such authority; (2) the person relying on this exercise of authority knew of the facts and, acting in good faith, had reason to believe, and actually believed, the agent possessed such authority; and (3) the person relying on the appearance of authority changed his position and will be injured or suffer loss if the transaction executed by the agent does not bind the principal.

Alexander v. Chandler, 179 S.W.3d 385, 388 (Mo.App. W.D. 2005). "[A]pparent authority cannot be based on an agent's unauthorized claim of authority." *Id*. at 508.

There is no evidence supporting any of the elements. There is no evidence in the record at all, but even if one assumes the DPOA and Arbitration Agreement are evidence, there still is no evidence from which a reasonable person could infer that any of the elements of apparent authority have been proven. Even the second element, which seems to be the Appellant's strongest of the three, cannot be proven based on the evidence. There is nothing beyond the Appellant's attorney's arguments that would prove that the Appellant had actually believed the attorney-in-fact had the authority to sign the arbitration

agreement, or was acting in good faith for that matter. The most that can be said is that someone signed the Arbitration Agreement under unknown circumstances which is hardly enough to determine what Appellant knew or believed.

Appellant cites *Kahn v. Royal Banks of Missouri*, 790 S.W.2d 503 (Mo.App. E.D. 1990) to support its argument. In *Kahn*, the principal was the wife of the attorney-in-fact and his actions were based on powers granted by a POA that was valid and enforceable. The attorney-in-fact had actual authority. The issue was whether the attorney-in-fact was outside of the scope of his authority because he was in violation of his fiduciary duty. *Id*. at 507. The holding in *Kahn* provides nothing helpful to the Appellant's argument.

III. IN RESPONSE TO APPELLANT'S THIRD POINT RELIED ON RESPONDENT ARGUES THAT THE VOLUNTARY ARBITRATION AGREEMENT CANNOT BE ENFORCED AGAINST RESPONDENT BECAUSE THE ATTORNEY-IN-FACT WAS NOT COMPETENT TO EXECUTE THE ARBITRATION AGREEMENT IN THAT THE ARBITRATION AGREEMENT WAS OUTSIDE OF THE SCOPE OF THE AUTHORITY GRANTED IN THE POWER OF ATTORNEY.

Standard of Review

The standard of review for Argument III is the same standard as applying to Argument I.

Argument

Authority granted in a DPOA must be specific and is strictly construed. *See Randall v. Randall*, 497 S.W.3d 850 (Mo.App. W.D. 2016); *Mercantile Trust v. Harper*, 622 S.W.2d 345 (Mo.App. E.D. 1981); RSMo. § 404.710.6. The alleged Arbitration Agreement is limited to health-care issues and expressly limits the scope of the authority to "[m]ake all **necessary** arrangements for health care services on my behalf . . ." (D11 p. 2). In this case, assuming *arguendo* that the attorney-in-fact was competent to sign the admission paperwork based on the DPOA, she only had authority to sign agreements **necessary** to arrange the health care of Respondent Theron Ingram. The alleged Arbitration Agreement was **not necessary** for admittance into the facility. The Western District Court of Appeals agreed and ruled accordingly.

Appellant argues that signing the Arbitration Agreement was a "health care decision." For support, Appellate points to paragraph D of the alleged DPOA that grants the attorney-in-fact the authority to "[t]ake any other action necessary to do what I authorize here . . ." and argues that the language translates into meaning to make all "health care decisions" but fails to mention the important qualifying word, "necessary." (App. Sub. Br. p. 47-48; D11 p. 2). If the DPOA had said "to make any decision that is related to the procurement of health care" then the Alleged Arbitration Agreement might be enforceable but that is not what the DPOA says.

Appellant cites various cases in and out of Missouri to support its position. *Estate of Linck v. Carr* is inapplicable because the POA involved a general power of attorney and the issue was whether a general grant of authority was valid. 645 S.W.2d 70, 79 (Mo.App. S.D. 1982). In this case, the issue is almost the opposite; whether a specific grant of authority was broad enough. Next Appellant urges this court to follow the Massachusetts high court and cites *Brookfield Production Credit Ass'n v. Weisz*, 658 S.W.2d 897,898-99 (Mo.App. W.D. 1983) which is also not helpful because the POA in *Brookfield* specifically authorized the attorney-in-fact to do what was done.

Next, Appellant cites a pair of California cases as way of persuasive authority. In *Garrison v. Superior Court*, 132 Cal.App.4th 253 (Cal. App. 2d Dist. 2005) the DPOA at issue had different language. The DPOA granted authority "to make health care decisions for me as authorized in this document" which is broader language then the case at bar. *Id.* at 258. In *Hogan v. Country Villa Health Services*, 55 Cal.Rpt.3d 450 (Cal. App. 4th Dist. 2007) the DPOA is based on the statutory interpretation of California Probate law that says

absent a specific limitation the DPOA will grant authority to "make all health care decisions." *Id*. at 452. The law is different in Missouri, Pursuant to RSMo. section 404.710.6 only allows the authority to grant powers "if the actions are expressly enumerated and authorized in the power of attorney." This provision of law has been interpreted to mean that the authority granted in all POA's, durable or not, are to be narrowly construed. *See e.g. Randall v. Randall*, 497 S.W.3d 850 (Mo.App. W.D. 2016); *Mercantile Trust v. Harper*, 622 S.W.2d 345 (Mo.App. E.D. 1981)

Additionally, Appellant cites *Moffett v. Life Care Centers of America*, 187 P.3d 1140 (Colo. 2009) which held that the attorney-in-fact did NOT have authority to sign an arbitration agreement because the agreements were not part of the record (like in this case) and the case turned on the interpretation of Colorado statute which is not especially helpful for a Missouri case. Next, Appellant cites *Briarcliff Nursing Home, Inc*. v. Turcotte, 894 So.2d 661 (Ala. 2004) which is inapplicable because the issue in *Briarcliff* was whether an administrator of an estate could be bound by an arbitration agreement agreed to by the decedent. *Id*. at 665. *Sanford v. Castleton Health Care Ctr.*, LLC, 813 N.E.2d 411 (Ind. Ct. App. 2004) is also a case that dealt with a different issue then what the Appellant purports that is does. In *Sanford*, the closest related issue was whether a wrongful death beneficiary was bound by the arbitration agreement signed by agent of the decedent. *Id*. at 420. There was not a dispute about whether the attorney-in-fact had authority. *Id.*

In *Owens v. National Health Corp.*, 263 S.W.3d 876,879-80 (Ind. Ct. App. 2004) the court did access whether a DPOA granted authority to sign an arbitration agreement as part of admission to enter a nursing home. *Owens* is not helpful because the language of

the DPOA did not contain the word "necessary" and the holding turned on interpretation of Tennessee law specifically related to health-care POAs. *Id*. at 884. Finally, in *Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014, 1016-19 (Wyo. 2017) the Supreme Court of Wyoming held that a DPOA granting authority to the attorney-in-fact to make "all lawful health care decisions" possessed the authority to sign an optional arbitration agreement related to the admission of the principal into a nursing home. Like the other cases cited by Appellant, *Boyd* is not helpful because the DPOA had language that granted broader authority then the DPOA in this case.

There is a case from the Supreme Judicial Court of Massachusetts that is helpful. In *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779 (Mass. 2014) the court held that a DPOA granting the attorney-in-fact authority "to make and health care decisions on the principal's behalf that the principal could make . . ." did not include signing an optional arbitration agreement. *Id*. at 783. The court had to interpret state statutory law in order to reach its holding, but the court's analysis is still helpful. The court determined that health-care decisions were limited "to those that directly involve the provision of responsible medical services, procedures or treatments of the principal's physical or mental condition." *Id*. at 854. The court reasoned that the health care DPOA would not grant authority to make decisions "affecting the principal's business, estate, finances and legal relationships in a variety of contexts." *Id*. at 785.

Additionally, if this Court were to agree with Respondent and the Western District Court of Appeals and hold that the language in this DPOA was not broad enough to grant authority to the alleged attorney-in-fact to sign an optional Arbitration Agreement, there would be no conflict with the FAA because the holding would not single out or disfavor arbitration agreements. The health care DPOA in this case was very limited and only applied to agreements necessary to procure health care. Under the language of the DPOA the alleged attorney-in-fact would not have authority to sign most contracts. For example, the attorney-in-fact could not sign a contract related to real estate, the principal's business, selling his car or any other personal assets. In *Kindred*, the plaintiff had difficulty thinking of types of contract, other than arbitration agreements, that would be affected by the rule. In this case, its hard to think of contracts that the alleged attorney-in-fact would be competent to sign other than the admission paperwork necessary for admission into the nursing home.

CONCLUSION

As set forth in the arguments above, the trial court received no evidence of an enforceable contract to arbitrate, the alleged DPOA for Health Care was not competent to execute a contract to arbitrate disputes on behalf of Respondent, and the contract which was executed was unconscionable. Further, a holding on any of the aforementioned grounds would not treat arbitration agreements disfavorably.

For these reasons, Respondent hereby moves this Court for its Order **affirming** the trial court's denial of Appellant's *Motion to Dismiss and Compel Arbitration* and Ordering this case to proceed in the Circuit Court of Jackson County, Missouri, for its costs and fees incurred from defending this Motion and Appeal, and for such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, Kevin T. Young, certify this brief complies with the provisions of Rules 55.03 and 84.06(b). This Brief contains 6,960 words, all inclusive. Counsel has relied upon the word-counting software of Microsoft Word in making this certification. I hereby certify that this document is being filed electronically with the Court through Missouri Casenet. Opposing counsel is served through the electronic filing system as provided in Missouri Supreme Court Rule 103.08. Service by the electronic filing system is complete upon transmission except that, for the purpose of calculating the time for filing a response, a transmission made on a Saturday, Sunday, or legal holiday, or after 5:00p.m., shall be considered complete on the next day that is not a Saturday, Sunday, or legal holiday.

/s/ Kevin T. Young
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