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 REPLY BRIEF

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SUMMARY OF REPLY

Defendant-Appellant Brook Chateau ("Brook Chateau") asks this Court to reverse the Circuit Court's order denying Brook Chateau's motion to compel arbitration, because the parties entered into an arbitration agreement (the "Voluntary Arbitration Agreement") that applies to the claims at issue. The Voluntary Arbitration Agreement was executed by Andrea Hall in her capacity as attorney-in-fact for Plaintiff-Respondent Theron Ingram ("Mr. Ingram"), after he executed a Durable Power of Attorney granting Ms. Hall authority to make his health care decisions (the "Durable Power of Attorney").

In his brief, Mr. Ingram misstates the standard of review. Appellate courts in Missouri review the denial of a motion to compel arbitration *de novo*, not under the *Murphy v. Carron* standard. Furthermore, he mistakenly attempts to avoid enforcement of the Voluntary Arbitration Agreement that Ms. Hall entered into on his behalf by claiming that (1) the Circuit Court somehow had insufficient evidence before it to consider the motion to compel arbitration; (2) the Durable Power of Attorney somehow was ineffective, despite its plain terms showing the contrary; and (3) the Voluntary Arbitration Agreement's terms are substantively unconscionable.

All of Mr. Ingram's arguments fail because there is no dispute as to the existence of the Voluntary Arbitration Agreement; the Durable Power of Attorney complied with relevant statutory requirements and was effective immediately based on its plain language; and the agreement's terms are not unconscionable under Missouri or federal law. For these reasons and those stated in Brook Chateau's opening brief, the Court should reverse and remand with directions to compel the parties to proceed to arbitration.

ARGUMENT

I. The standard of review for the denial of a motion to compel arbitration is *de novo*.

Mr. Ingram misstates the standard of review, setting forth the standard of review for a judgment in a court-tried case under *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). This assertion is incorrect, because no judgment was rendered in this case. Rather, as Missouri courts have repeatedly held and as set forth in Brook Chateau's opening brief, 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). Mr. Ingram correctly acknowledges that this Court reviews *de novo* a claim that the trial court erroneously declared or applied the law. (Brief at 9, citing *Randall*, 497 S.W.3d at 854).

II. The Circuit Court properly considered the Voluntary Arbitration Agreement because there is no dispute as to the existence or terms of the agreement, and Brook Chateau complied with the "application" requirements of the Federal Arbitration Act and Missouri Uniform Arbitration Act.

Mr. Ingram mistakenly asserts in his brief that the Voluntary Arbitration Agreement was not properly before the Circuit Court, because an evidentiary hearing was not held at the time the Circuit Court denied Brook Chateau's motion to compel arbitration. This argument must fail because the parties dispute only the legal effect of the document; in contrast, the existence of the Voluntary Arbitration Agreement and the

veracity of the exhibit to Brook Chateau's motion to compel arbitration are not disputed by any party. Under these circumstances, the Missouri Uniform Arbitration Act ("Missouri UAA") and the Federal Arbitration Act ("FAA") mandate summary determination by the trial court of the applicability of an arbitration agreement.

In his substitute brief before this Court, Mr. Ingram does not dispute the existence of the Voluntary Arbitration Agreement or the validity of the exhibit. During all phases of this litigation, he has acknowledged the Voluntary Arbitration Agreement. He disputes only the legal significance of the document: namely, whether Ms. Hall had authority to enter into the agreement. Indeed, in his own brief, Mr. Ingram states as follows (Brief at 9):

> 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.

The Missouri Uniform Arbitration Act ("Missouri UAA"), Section 435.355 RSMo, contemplates that the trial court should "summarily" determine whether an agreement to arbitrate exists upon "application" of a moving party (emphasis added):

> 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.

Unlike some other Missouri statutes and rules, this provision of the Missouri UAA does not set forth any specific evidentiary requirements requiring an arbitration

agreement to be proven up by affidavit or live testimony. *Compare, e.g.*, Rule 74.04 (governing procedure for summary judgment and explicitly requiring motion to be supported by "specific references to the pleadings, discovery or affidavits"). A court's decision on a motion to compel arbitration is entirely a question of law. *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 775 (Mo. banc 2005). Inserting an evidentiary requirement into a pure issue of law would render the motion a question of fact.

On this basis, Missouri courts routinely rule on motions to compel arbitration based on a party's "application" within the meaning of the statute, whereby the party attaches the agreement as an exhibit when (as here) there is no dispute as to the existence of the agreement itself. *See, e.g., id.* (deciding arbitration on the basis of party's motion to compel arbitration); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. banc 2006) (same); *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427 (Mo. banc 2003); (same); *Eaton v. CHM Homes, Inc.*, 461 S.W.3d 426, 431 (Mo. banc 2015).

Furthermore, Mr. Ingram has never "den[ied] the existence of the agreement to arbitrate" within the meaning of the Missouri UAA. Before the Circuit Court, Mr. Ingram did not contest the existence of the Voluntary Arbitration Agreement or the validity of the exhibit. Rather, Mr. Ingram acknowledged the validity of the exhibit and made a wholly unrelated evidentiary argument, asserting Brook Chateau failed to attach the Durable Power of Attorney as an exhibit. He continued to maintain that evidentiary argument before the Western District.

Further acknowledging the existence of the agreement, Mr. Ingram raised the same *substantive* arguments that are currently before this Court: namely, that the Durable Power of Attorney was not effective, and the terms of the Durable Power of Attorney did not grant Ms. Hall the authority to enter an arbitration agreement.

The procedure under the FAA similarly does not impose Mr. Ingram's proposed evidentiary requirement. Like the Missouri UAA, the FAA provides that "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, [the court] shall *on application* of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement[.]" 9 U.S.C.A. § 3 (emphasis added). Further, the FAA specifically requires the "application" be brought as a motion by the party seeking arbitration. 9 U.S.C.A. § 7.

Accordingly, the FAA does not require the moving party to submit separate evidence via affidavit or testimony. In fact, longstanding FAA precedent specifically requires that the reviewing court consider the operative pleadings "as affidavits submitted in support of a motion" to arbitrate. *In re Worcester Silk Mills Corp.*, 50 F.2d 966, 967 (S.D.N.Y. 1927). Therefore, under the FAA, if the party opposing the arbitration does not deny the statements regarding the *existence* of the agreement, the reviewing court must treat the moving party's statements as true. *Id.*

Because Mr. Ingram does not deny the existence of the contract (the parties merely dispute its legal effect), Mr. Ingram's reliance on *Ryan v. Raytown Dodge Co.*, 296 S.W.3d 471 (Mo. App. W.D. 2009), is misplaced. Notably, the Western District there did not refer to the terms of the FAA or the Missouri UAA in its decision, or the

"application" requirement contained in both statutes. Significantly, when the Western District has addressed a motion to compel arbitration under those statutes, it has properly considered the arbitration agreement as an exhibit to a motion, as here. *See, e.g., Ramirez-Leon v. GGNSC, LLC*, 553 S.W.3d 318, 326 (Mo. App. W.D. 2018) (discussing the arbitration agreement attached to the defendants' motion to compel arbitration).

Because there is no dispute regarding the existence of the Voluntary Arbitration Agreement, and because Brook Chateau's motion to compel arbitration complied with the "application" requirement in both the FAA and Missouri UAA, the Circuit Court and this Court may properly consider the Voluntary Arbitration Agreement.

III. The Voluntary Arbitration Agreement was not unconscionable.

Mr. Ingram next asserts another new argument: that the terms of rendering an award under the Voluntary Arbitration Agreement are substantively unconscionable. Specifically, Mr. Ingram claims the way an award is issued by the panel of arbitrators denies him a remedy and "grant[s] the tortfeasor immunity for its negligent conduct." (Brief at 14). This argument grossly misreads the terms of the Voluntary Arbitration Agreement.

No alleged tortfeasors are released from liability under the Voluntary Arbitration Agreement, and no remedies are excluded, other than those damages prohibited by Missouri law. The agreement provides that a panel of three arbitrators shall apply Missouri rules of evidence, Missouri Rules of Civil Procedure, and Missouri substantive law except where preempted by the FAA. (D5 P1). If the panel's award is not unanimous, certain review provisions are triggered. If the award is not unanimous, it may be reviewed

on appeal to an appropriate court. (D5 P1). If invalidated by the reviewing court, the arbitration award shall be dismissed *without prejudice*, allowing a claimant or plaintiff to pursue further relief. (D5 P1).

The Voluntary Arbitration Agreement sets forth the procedural framework for a claimant to pursue relief through an arbitration panel. It does not provide for immunity as to any potential defendant, or seek to limit liability as to any party except as provided by the substantive, procedural, and evidentiary rules of the State of Missouri. The Voluntary Arbitration Agreement does not "rob" Mr. Ingram of a remedy as to Brook Chateau or any of its agents. (Brief at 13). It merely sets forth the arbitration procedures for resolution of the dispute, pursuant to the agreement between Brook Chateau and Ms. Hall, the individual whom Mr. Ingram designated to make all of his health care decisions. Further, no party was under any obligation to enter into the Voluntary Arbitration Agreement. It was not a condition for entry to the facility. (D5 P1).

Mr. Ingram asserts the remedy provisions of the Voluntary Arbitration Agreement somehow rob him entirely of a remedy for his claims, despite the clear provisions of the agreement to the contrary. Furthermore, no arbitration has yet occurred. The "robbing" of Mr. Ingram's purported remedy is therefore entirely speculative and his claim is not ripe. As such, Mr. Ingram's argument must be that the agreement to arbitrate is unconscionable on its face, a position repeatedly rejected by the courts of this state and explicitly rejected by the United States Supreme Court in *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 1202 (2012). 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)). Because the West Virginia rule of law in *Marmet* 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. Significant to Mr. Ingram's assertions here, 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. Because no arbitration has occurred, Mr. Ingram has not and cannot articulate what remedy he has allegedly been denied.

On this ground, Mr. Ingram's citation to *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 495 (Mo. banc 2012), is also misplaced, because the plaintiff in that case was actually denied a remedy: namely, the right to pursue class relief. *Id.* The "extremely one-sided" arbitration clause at issue there was unconscionable because it served to actually deny the claimant a remedy. *Id.* at 393:

> Arbitration is required for any dispute, at the cost of the customer, while the title company has a choice of simply repossessing the collateral by force or through suit in court rather than using arbitration. The title company never pays the costs of arbitration or attorney's fees for the customer, even if the customer wins. The obstacle to dispute resolution posed by these provisions is illustrated by the simple fact that no customer has utilized the arbitration clause to recover.

By contrast, the Voluntary Arbitration Agreement is binding on both parties. It mandates the application of substantive Missouri law, as well as its rules of evidence and Rules of Civil Procedure. Most significantly, the parties retain the right to appeal the award in the event the panel cannot reach a unanimous decision. Mr. Ingram's right to pursue a

remedy for his claims has not been waived and no party has been released. Accordingly, Mr. Ingram's arguments are not well taken.

IV. The Durable Power of Attorney was effective immediately based on the plain language of the document.

Mr. Ingram also misunderstands the operation of Section 404.825 of the Durable Power of Attorney for Health Care Act ("DPAHCA"). As set forth in Brook Chateau's opening brief, Mr. Ingram's Durable Power of Attorney explicitly provides that its effectiveness is *not* contingent on a determination of his incapacity. In particular, the Durable Power of Attorney provides as follows (D10 p. 1) (emphasis added):

> 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.

Mr. Ingram argues the Durable Power of Attorney was somehow not in effect upon its execution, despite the clear and unambiguous "effective immediately" language. Mr. Ingram's interpretation of Section 404.825 is also unavailing. 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 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.

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.

Finally, contrary to Mr. Ingram's assertions, the plain language of the Durable Power of Attorney makes clear that it 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 his execution of the document.

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 demonstrates that Ms. Hall properly gained her power of attorney to make health care decisions for Mr. Ingram under the terms of the instrument, 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.

V. Entering into the Voluntary Arbitration Agreement was a medical decision within the scope of the Durable Power of Attorney.

As set forth in Brook Chateau's opening brief, a wide variety of jurisdictions have addressed this question and have overwhelmingly decided that an attorney-in-fact's decision to enter into an arbitration agreement, *made in conjunction* with the decision to admit the principal into a long-term care facility, is a health care decision. The artificial distinction between "medical" and "legal" decisions in administering an individual's health care is unworkable, and would substantially reduce certainty for the attorney-in-fact, the principal, and the facility. Brook Chateau incorporates by reference its arguments and citations on this issue in its opening brief.

In light of the abundance of holdings on this issue, Mr. Ingram's reliance on *Johnson v. Kindred Healthcare, Inc.*, 2 N.E.3d 849, 854 (Mass. 2014), is misplaced. As Mr. Ingram himself observes (Brief at 27), that case hinged on the court's interpretation of the Massachusetts health care proxy statute, G.L. c. 201D, §§ 1–17. Specifically, the Massachusetts court held the attorney-in-fact's decision to enter into an "arbitration agreement is not a health care decision as that term is defined and used in the health care proxy statute," specifically because the state statutory scheme limited "health care decisions" to "those that directly involve the provision of responsible medical services, procedures, or treatment of the principal's physical or mental condition." *Johnson*, 2 N.E.3d at 854.

Here, neither the Durable Power of Attorney Law of Missouri ("DPALM") nor the Durable Power of Attorney for Health Care Act ("DPAHCA") contains any such restriction or limitation on the definition of a "health care decision." Mr. Ingram's attempt to create a distinction between legal and medical decisions regarding health care 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.

CONCLUSION

As explained above and in Points I, II, and III of Brook Chateau's opening brief, the Circuit Court erred in denying Brook Chateau's motion to compel arbitration. The parties entered into a contract that under Missouri and 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 3,644 words excluding the cover, the certificate required by Rule 84.06(c), and the signature block. 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 July 24, 2019 using the Court's electronic filing system, causing automated delivery to counsel of record in this matter.

/s/ Timothy C. Sansone