

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

JOAN RISTER and FRED RISTER,
Plaintiffs / Respondents,

vs.

NHC HEALTHCARE-OSAGE BEACH, LLC,
d/b/a OSAGE BEACH REHABILITATION & HEALTHCARE CENTER
Defendant / Appellant.

On Appeal from the Circuit Court of Camden County
Honorable Matt P. Hammer, Circuit Judge; Case No. 21CM-CC00077

BRIEF OF THE RESPONDENTS

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Statement of Facts

A. Overview

This is an appeal from the denial of a defendant in a personal injury case's motion to stay the litigation and compel arbitration (D11 p. 1).

Joan and Fred Rister, husband and wife, sued a care facility for damages for her injuries and his loss of consortium, alleging that while a resident of the facility, Mrs. Rister fell and suffered a broken femur (D2). The care facility moved to stay and compel arbitration, attaching what it argued was a binding arbitration agreement covering Mrs. Rister's claims, which Mrs. Rister did not sign, but which it claimed Mr. Rister signed as her legal representative (D3; D4; D5).

After briefing (D7; D9; D10), the trial court entered an order on the docket denying the care facility's motion (D1 p. 6). It held there was no evidence Mr. Rister had legal authority to sign the agreement on his wife's behalf, and Mrs. Rister's mere status as a third-party beneficiary, even if it could be shown, was insufficient to bind her to arbitration (D1 p. 6). The care facility now appeals (D11 p. 1).

B. The Risters' claims against Osage Beach

In April 2021, husband and wife Joan and Fred Rister filed a petition for damages in the Circuit Court of Camden County against NSC Healthcare Osage Beach, LLC ("the LLC"), doing business as Osage Beach Rehabilitation and Healthcare Center ("Osage Beach") (D2 p. 1). The Risters alleged the LLC owned or operated Osage Beach, a skilled nursing facility (D2 p. 2).

They stated one count for Mrs. Rister's personal injury by Osage Beach and one count for Mr. Rister's loss of consortium (D2 pp. 2-3).

The following are the allegations in the Risters' petition (D2 pp. 2-4).

In September 2020, Mrs. Rister was admitted and accepted as a resident to Osage Beach (D2 p. 2). Osage Beach therefore owed Mrs. Rister a duty to provide her nursing and medical care consistent with their own policies and procedures, the laws of Missouri and the United States, and the applicable standard of care, and the exercise of that degree of skill and learning ordinarily used under the same or similar circumstances (D2 p. 2).

Between September 16 and 20, 2020, Osage Beach's records documented Mrs. Rister was at high risk for falling, because she had cognitive deficits, muscle wasting, and other debilitating conditions (D2 p. 2). These records also documented she was suffering from sepsis and encephalopathy (D2 p. 2). On September 19, 2020, Mrs. Rister sustained a distal midshaft spiral fracture of her right femur (D2 p. 2).

Through its agents, servants, and employees, Osage Beach was professionally negligent in ten respects:

- *Per se* by violating federal and state regulations with regard to its treatment of Mrs. Rister;
- Failing to protect Mrs. Rister from fracturing her right leg;
- Failing completely and accurately to document Mrs. Rister's medical records;
- Failing to provide sufficient quantity and quality of staff to meet all Mrs. Rister's needs;

- Failing to complete Mrs. Rister’s MDS with accuracy;
- Failing to train its agents, servants and employees to provide patient care to residents with regard to preventing falls;
- In further unknown particulars that will be discovered in the litigation;
- Failing to have adequate fall risk precautions in place to prevent Mrs. Rister from falling at all times before and on September 19, 2020;
- Failing properly to take necessary and appropriate fall risk precautions; and
- Failing to make an accurate, comprehensive, multi-disciplinary, and individualized care plan for Mrs. Rister.

(D2 p. 3).

As a direct result of Osage Beach’s negligence, Mrs. Rister suffered damages, including physical and mental pain and suffering both to the time of filing her petition and in the future, and substantial medical bills both to the time of filing her petition and in the future (D2 pp. 3-4). Osage Beach’s negligence also directly caused or contributed to cause Mr. Rister a loss or diminishment of comfort, companionship, and consortium (D2 p. 4).

C. Osage Beach’s request to compel arbitration

Osage Beach moved to stay the case and compel arbitration, alleging, “Included in the admission documents executed prior to Plaintiff Joan Rister’s residency at the facility, is an agreement to arbitrate future disputes,” under which “the parties agreed to arbitrate any and all disputes between Plaintiffs and the facility, including disputes for personal injury” (D3 p. 1).

1. Osage Beach's documents

Osage Beach provided an affidavit from its administrator, Luke Bucher, to which he attached 18 pages of what he said were four admissions documents (D5 p. 1). Mr. Bucher stated Fred Rister signed each of these documents (D5 p. 1).

a. Preadmission Agreement

The first document Mr. Bucher attached to his affidavit contains both a "Preadmission Agreement" and a "Voluntary Agreement to Arbitrate and Waive Jury Trial," collectively numbered pages one through eight (D5 pp. 4-12).

The "Preadmission Agreement" states "Name of Patient" is "Joan Rister," and leaves "Name of Legal Representative" blank (D5 p. 5):

PREAMISSION AGREEMENT	
Name of Center	Osage Beach Rehabilitation and Health Care Center
Name of Patient	JOAN RISTER
Social Security Number	REDACTED SSN
Name of Legal Representative (if applicable)	
Additional Signature (if applicable)	

It then has a section for identifying a legal representative such as a guardian or power of attorney, including "anyone authorized by the Patient or by law to act on the Patient's behalf," requesting "check the type and scope of authority for anyone other than the Patient who signs this contract," all of which is blank (D5 p. 5):

Identification of Legal Representative [if applicable]:

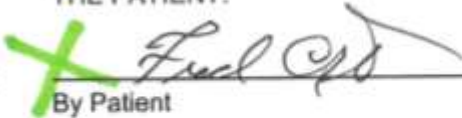
The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:

TYPE (check one)	SCOPE (check all that apply)
<input type="checkbox"/> Guardianship	<input type="checkbox"/> Routine health care
<input type="checkbox"/> Limited, Durable POA	<input type="checkbox"/> Unlimited health care
<input type="checkbox"/> Unlimited/Durable POA	<input type="checkbox"/> Limited access to income/finance
<input type="checkbox"/> Power of Attorney	<input type="checkbox"/> Authorized to accept income and control financial resources of patient
<input type="checkbox"/> Health Care Agent/Proxy	
<input type="checkbox"/> Surrogate	

The Legal Representative, by signing this contract, acknowledges acceptance of the duties and responsibilities of this role. The Legal Representative who is authorized to accept the Patient's finances will not incur personal financial liability except for breach of duty or contract in properly directing the Patient's resources to pay for the Patient's care.

Attach a copy of all written authorizations to this agreement.

The "Preadmission Agreement" then contains consents and acknowledgements by "The Patient" or "Patient" (D5 pp. 5-6). Finally, its signature page features separate lines for "The Patient" and "Other Persons Signing on Behalf of Patient" (D5 p. 7). The signature on the line for "The Patient" reads "Fred C. Rister," and all the other lines are blank (D5 p. 7):

THE CENTER: <small>Designated by:</small> <u>Madison Bell</u> <small>Physician/Physician Assistant</small>	THE PATIENT: 
By Administrator/Social Worker	By Patient
Date: <u>9/16/2020</u>	Date: _____
	Other Persons Signing on Behalf of Patient (please specify authority to sign): _____ _____ _____
Administrator Review (initial)	
Date: _____	

b. Voluntary Agreement to Arbitrate and Waive Jury Trial

Pages four through eight of the same document as the “Preadmission Agreement” are titled “Voluntary Agreement to Arbitrate and Waive Jury Trial” (D5 p. 8). It provides, “Execution of this agreement by or on behalf of the Patient is not a condition of admission to, or a requirement to continue receiving care at, the Center. In other words, the resident has the right not to sign this agreement and still be admitted to, or continue receiving care at, the center” (D5 p. 8) (capitalization removed). Two blank lines for initials are below that statement (D5 p. 8):


<p>VOLUNTARY AGREEMENT TO ARBITRATE AND WAIVE JURY TRIAL EXECUTION OF THIS AGREEMENT BY OR ON BEHALF OF THE PATIENT IS NOT A CONDITION OF ADMISSION TO, OR A REQUIREMENT TO CONTINUE RECEIVING CARE AT, THE CENTER. IN OTHER WORDS, THE RESIDENT HAS THE RIGHT NOT TO SIGN THIS AGREEMENT AND STILL BE ADMITTED TO, OR CONTINUE RECEIVING CARE AT, THE CENTER.</p> <p>_____ _____ Initials Initials</p>

It then states, “By signing this agreement, both parties waive their constitutional right to a jury trial and consent to binding arbitration, or, if the agreement to arbitrate is invalid, to trial by the court without a jury,” and “This is an Agreement to arbitrate disagreements (also called a ‘Claim’ in this Agreement) that might arise between Joan Rister (‘Patient’) and Osage Beach Rehabilitation and Health Care Center (‘Center’)” (D5 p. 8) (some capitalization removed). It states in a parenthetical, “The Patient or the Patient’s Authorized Legal Representative, together with the Patient’s heirs and wrongful death beneficiaries, may be referred to as the ‘Patient’” (D5 p. 8). Below this are two initial lines, one of which is filled out “FCR” (D5 p. 8):

BY SIGNING THIS AGREEMENT, BOTH PARTIES WAIVE THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL AND CONSENT TO BINDING ARBITRATION, OR IF THE AGREEMENT TO ARBITRATE IS INVALID, TO TRIAL BY THE COURT WITHOUT A JURY.

This is an Agreement to arbitrate disagreements (also called a "Claim" in this Agreement) that might arise between
 JOAN _____ RISTER _____ ("Patient") and
 Osage Beach Rehabilitation and Health Care Center _____ ("Center").
 (The Patient or the Patient's Authorized Legal Representative, together with the Patient's heirs and wrongful death beneficiaries, may be referred to together as the "Patient." The Center and the Patient may be referred to together as the "Parties" or separately as a "Party").

EXHIBIT 2


 FCR _____
 Initials Initials

The next three pages state the terms of the arbitration agreement, including that it covers all Claims between the parties against each other or others "arising out of or in any way related or connected to the Patient's stay and the care provided at the Center, including but not limited to any Claims concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice and wrongful death" (D5 pp. 9-11). It also provides, "If the Patient's Legal Representative is signing, then he or she declares that he or she has been given authority by the Patient when the Patient was competent to act on behalf of the Patient, and/or is qualified to act as the Patient's surrogate by reason of special care or concern for the Patient, familiarity with the Patient's personal values, reasonable ability, and willingness to serve, and/or has provided documentation evidencing the right to sign" (D5 p. 10). It also provides, "The Patient and/or Patient's Legal Representative may rescind this Agreement by signing the revocation provision below during normal business hours or by other written notice within thirty (30) calendar days of signing this Agreement" (D5 p. 10).

Each of these three pages contains two initial lines at the bottom; the first page's initial lines are blank, and the second and third each contains one line initialed "FCR" (D5 pp. 9-11).

Finally, the signature page to the arbitration agreement contains lines for "the Patient" and "Other persons signing on behalf of the Patient and in their individual capacity," requesting, "please specify authority to sign" (D5 p. 12). The signature line for "the Patient" is blank, the line for "other persons" reads, "Fred C. Rister," and all other lines are blank (D5 p. 12):

VOLUNTARY AGREEMENT TO ARBITRATE AND WAIVE JURY TRIAL Continued...	
THE UNDERSIGNED ACKNOWLEDGE THAT THEY HAVE READ OR HAVE HAD READ TO THEM AND THAT THEY UNDERSTAND THIS AGREEMENT TO ARBITRATE AND WAIVE JURY TRIAL, AND THAT BY SIGNING THIS VOLUNTARY AGREEMENT, THEY HAVE WAIVED THE RIGHT TO A TRIAL BEFORE A JURY, AND THAT THEY KNOWINGLY AND VOLUNTARILY CONSENT TO ALL OF THE TERMS OF THIS AGREEMENT.	
THE PATIENT:	THE CENTER:
_____	<small>DocuSigned by:</small> <i>Madison Bell</i> <small>EBCE80C402084C0</small>
By Patient	By Administrator/Social Worker
Date: _____	Date: 9/16/2020
OTHER PERSONS SIGNING ON BEHALF OF THE PATIENT AND IN THEIR INDIVIDUAL CAPACITY (please specify authority to sign):	
 <i>Fred C Rister</i>	_____
_____	_____
Signature	Capacity
Date: _____	Date: _____

c. Admission and Financial Agreement

The other document Mr. Bucher attached to his affidavit is titled “Admission and Financial Agreement” (D5 p. 13). It states the name of the Patient is “Joan Rister,” and contains a blank section for identification of a legal representative (D5 p. 14):

ADMISSION AND FINANCIAL AGREEMENT	
Name of Center	Osage Beach Rehabilitation and Health Care Center
Name of Patient	JOAN RISTER
Social Security Number	REDACTED SSN
Name of Legal Representative (if applicable)	
Additional Signature (if applicable)	

...

Identification of Legal Representative [if applicable]:	
The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:	
<input type="checkbox"/> Confirm Legal Representative information from Preadmission Agreement.	
TYPE (check one)	SCOPE (check all that apply)
<input type="checkbox"/> Guardianship	<input type="checkbox"/> Routine healthcare
<input type="checkbox"/> Limited, Durable POA	<input type="checkbox"/> Unlimited healthcare
<input type="checkbox"/> Unlimited/Durable POA	<input type="checkbox"/> Limited access to income/finance
<input type="checkbox"/> Power of Attorney	<input type="checkbox"/> Authorized to accept income and control financial resources of patient
<input type="checkbox"/> Health Care Agent/Proxy	
<input type="checkbox"/> Surrogate	

The “Admission and Financial Agreement” provides Osage Beach’s charge structure for the Patient’s stay and the terms of their payment (D5 pp. 15-21). One page contains a form that “must be completed if Patient has a Medicare card or number,” and boxes are checked indicating the Patient does have a Medicare card or number and is being placed in a Medicare-certified bed (D5 p. 18). The signature lines on that page are blank (D5 p. 18):

Patient understands that Patient or someone acting on Patient's behalf may request that the Center file a claim for Medicare benefits. Based upon this claim, Medicare will make a formal determination and advise whether any benefits are payable.

Patient Signature _____

Legal Representative Signature _____

Additional Signature (if applicable) _____

Date _____

The “Admission and Financial Agreement” ends with a signature page featuring separate lines for “The Patient” and “Other Persons Signing on Behalf of Patient” (D5 p. 21). The signature on the line for “The Patient” reads “Fred C. Rister,” and all the other lines are blank (D5 p. 21):

Patient and other parties signing this agreement have reviewed this ADMISSION AND FINANCIAL AGREEMENT, have had opportunity to ask questions of Center personnel about the agreement and understand that admission to this Center constitutes agreement to be bound by said ADMISSION AND FINANCIAL AGREEMENT.

<p>THE CENTER:</p> <p>DocuSigned by:  <small>FBCE00CA0228EA79</small></p> <p>By Administrator/Social Worker</p> <p>Date: 9/16/2020</p> <p>_____</p> <p>Administrator Review (initial)</p>	<p>THE PATIENT:</p> <p> </p> <p>By Patient</p> <p>Date: _____</p> <p>Other Persons Signing on Behalf of Patient (please specify authority to sign):</p> <p>_____</p> <p>_____</p> <p>_____</p>
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2. The parties' arguments

Osage Beach argued these three documents constituted a binding arbitration agreement for Mrs. Rister's claims of personal injury, and “Fred Rister signed the Arbitration Agreement on September 16, 2020, as Legal Representative for Joan Rister” (D4 p. 3). It argued the plain language of the

agreement required enforcement of arbitration on Mrs. Rister's specific claims in this case (D4 pp. 3-4). It argued this was true both under Missouri law and under the Federal Arbitration Act (D4 pp. 5-7).

The Risters opposed Osage Beach's motion to stay and compel arbitration (D7 p. 1). They argued Mrs. Rister never entered into any contract with Osage Beach, let alone one waiving her right to a jury trial (D7 p. 1). They argued that as a non-signatory, she could not be bound to arbitrate claims related to personal injuries she never agreed to arbitrate (D7 pp. 1-2). They argued the documents Osage Beach provided only show signatures by Fred Rister, not Joan Rister, and do not show Fred Rister was legally authorized to waive her right to a jury trial and bind her to arbitration (D7 p. 2). They argued the agreement itself showed this by specifically requesting the signatory to specify his authority to sign the agreement, which was blank (D7 p. 2).

Osage Beach replied (D9 p. 1). It argued Mrs. Rister was a third-party beneficiary of the admission agreements, which included the arbitration agreement, so she was bound by estoppel to the arbitration agreement even though she did not sign it (D9 pp. 2-4). It argued this was because she "was the direct beneficiary of those agreements, as she was the person who was admitted to NHC Osage Beach for health care services and rehabilitation" (D9 p. 4). It did not make any argument about apparent agency (D9).

The Risters filed a sur-reply in opposition (D10 p. 1). They argued Mrs. Rister did not qualify as a third-party beneficiary, as receipt of care was the consideration necessary to create the contract between Osage Beach and the

individual signing the arbitration agreement, and Mr. Rister was not the patient receiving care (D10 p. 1). They also argued she did not qualify as a third-party beneficiary because the arbitration agreement Mr. Rister signed specifically provided that signing it was not a required condition of Mrs. Rister being admitted to Osage Beach's facility or receiving care there (D10 pp. 1-2). They argued, "Joan Rister cannot be bound by an arbitration agreement that (1) she did not sign, (2) was signed by a person who lacked legal authority to act on Ms. Rister's behalf, and (3) does not provide any benefit to Ms. Rister as a third party" (D10 p. 2).

3. Trial court's decision

In December 2021, the trial court held a hearing on Osage Beach's motion to stay and compel arbitration (D1 p. 6). It then entered an order on the docket denying Osage Beach's motion, stating:

Court takes up Defendant's Motion to Stay Proceedings and Compel Arbitration. Having considered the motion and the legal arguments and memorandums submitted by the parties, the Court denies Defendant's Motion. It is undisputed that Plaintiff Joan Rister did not sign the Arbitration Agreement that Defendant seeks to enforce. Further, there is no evidence attached to Defendant's [sic] Motion or otherwise in the record that establishes that Plaintiff Fred Rister had legal authority to sign such agreement on Plaintiff Joan Rister's behalf. While Defendant asserts that Plaintiff Joan Rister should be bound as a Third-Party Beneficiary of the contract, mere status as a third-party beneficiary, which the Court declines to address at this time, is insufficient in and of itself to support binding an unwilling nonsignatory to an arbitration agreement. *Central Trust Bank v. Graves*, 495 S.W.3d 797, 803 (Mo. App. W.D. 2016). Defendant's Motion is denied. So ordered. MPH

(D1 p. 6). Osage Beach then timely appealed to this Court (D11 p. 1).

Argument

Standard of Review as to All Points

Generally, “[w]hether the trial court should have granted a motion to compel arbitration is a question of law decided de novo.” *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016). “However, issues relating to the existence of an arbitration agreement are factual and require our deference to the trial court's findings.” *Trunnel v. Mo. Higher Educ. Loan Auth.*, 635 S.W.3d 193, 197 (Mo. App. 2021) (citations omitted).

So, as in any other case in which a trial court has resolved factual issues, “in an appeal from a circuit court’s order overruling a motion to compel arbitration when there is a dispute as to whether the arbitration agreement exists, the circuit court’s judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 436 (Mo. banc 2020) (footnote omitted) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

Finally,

[a]n appellate court is primarily concerned with the correctness of the trial court’s result, rather than the route taken by the trial court to reach that result. Therefore, [this Court] will affirm the trial court’s judgment under any reasonable theory supported by the evidence, even if the reasons advanced by the trial court were wrong or insufficient.

Guengerich v. Barker, 423 S.W.3d 331, 334 (Mo. App. 2014) (internal citation omitted).

I. The trial court correctly denied Osage Beach’s motion to compel arbitration on the basis that Fred Rister’s signature on the arbitration agreement did not bind Joan Rister or waive her right to a jury trial, because there is no evidence Fred Rister had any actual legal authority to bind Joan Rister to arbitration and waive her right to a jury trial.

(Response to Appellant’s Point I)

In its first point on appeal, Osage Beach argues the trial court should have granted its request to compel arbitration because Fred Rister, who signed the agreement, qualified as Joan Rister’s legal representative due to language in the agreement allowing it to be signed by a person’s legal representative (Brief of the Appellant [“Aplt.Br.”] 15-25).

Osage Beach’s argument is in error. The law of Missouri is a signatory to an arbitration agreement cannot bind a non-signatory to arbitration and waive that other person’s right to a jury trial unless the signatory had actual legal authority to do so. The only evidence Osage Beach presented in support of its request to compel Joan Rister to arbitrate her personal injury claim was an arbitration agreement signed by her husband, Fred Rister. The agreement’s spaces where Mr. Rister could explain how he had legal authority to bind his wife to arbitration were blank. There is no additional evidence Fred Rister had any kind of authority to sign on her behalf.

Therefore, the trial court correctly denied Osage Beach’s motion to compel arbitration. Joan Rister cannot be bound by an arbitration agreement she did not sign, and which was signed by someone who there is no evidence had legal authority to act on her behalf.

A. A person cannot bind another person to an arbitration agreement he signed and waive that other person's right to a jury trial unless the signatory had legal authority to do so.

It is not in dispute that, as a general proposition, a person's legal claim must be submitted to arbitration where there is a valid arbitration agreement binding that person and the claim at issue falls within the scope of that agreement. Osage Beach spends the first half of the argument over its first point arguing that both under Missouri law and the Federal Arbitration Act, a claim must be submitted to arbitration where there is a valid arbitration agreement, and claims for personal injury are within the scope of the arbitration agreement it invokes here (Aplt.Br. 15-19). The Risters agree that Missouri and federal law do provide this, and that the personal injury claim Mrs. Risters has brought below would fall under the arbitration agreement Osage Beach invokes if she had signed it.

What *is* in dispute is whether Mrs. Rister is bound by the agreement, which Osage Beach concedes she *did not* sign, and *only* Mr. Rister signed. The law of Missouri is that the trial court correctly held she is not so bound.

When a party moves to compel arbitration, "a court must determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement." *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-28 (Mo. banc 2003). "In determining whether or not a valid arbitration agreement exists, [this Court] appl[ies] the usual rules of state contract law and cannons of contract interpretation." *Ramirez-Leon v. GGNCS, LLC*, 553 S.W.3d 318, 322 (Mo. App. 2018).

Generally, only parties to an arbitration agreement are bound to arbitrate. *Finney v. Nat'l Healthcare Corp.*, 193 S.W.3d 393, 395 (Mo. App. 2006). “A party cannot be compelled to arbitration unless they have agreed to do so.” *Id.*

“But where ‘[a] willing signatory seek[s] to arbitrate with a non-signatory that is unwilling[, the signatory] must establish at least one of the [following] five theories’[:] ... (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; [or] (5) estoppel.” *Central Tr. Bank v. Graves*, 495 S.W.3d 797, 802 (Mo. App. 2016) (citation omitted).

Accordingly, if the party seeking to compel arbitration on a signatory can establish that a signatory had legal authority to act on the non-signatory’s behalf and bind her to the arbitration agreement, then the non-signatory is bound. *See, e.g., Ramirez-Leon*, 553 S.W.3d at 325-26 (nursing home resident’s court-appointed legal guardian had authority to bind resident to arbitration agreement with nursing home as authorized legal representative); *Ingram v. Brook Chateau*, 586 S.W.3d 772, 775-76 (Mo. banc 2019) (residential care facility resident’s attorney-in-fact for healthcare decisions under durable power of attorney had authority to bind resident to arbitration agreement with residential care facility as authorized legal representative); *but see id.* at 777-80 (Russell, J., dissenting) (disagreeing that durable power of attorney was sufficient to be legal authority to bind resident to arbitration agreement).

But absent evidence of that actual legal authority, the signatory’s signature on the arbitration agreement does not bind the non-signatory, even

when the two are husband and wife. *See Scharf v. Kogan*, 285 S.W.3d 362, 369-72 (Mo. App. 2009) (husband’s signature on escrow and funding agreements containing arbitration clauses did not bind wife to arbitrate, where no evidence husband had actual legal authority to bind wife; reversing confirmation of arbitration award against wife); *cf. Dunn*, 112 S.W.3d at 435-37 (guarantor of agreement containing arbitration clause who did not sign arbitration clause was not bound to arbitrate).

B. There is no evidence Fred Rister had any legal authority to bind Joan Rister to arbitrate and waive her right to a jury trial.

Osage Beach argues that per some of these authorities, Fred Rister had legal authority to bind his wife, Joan Rister, to arbitration (Aplt.Br. 20-23). But it never explains exactly what that legal authority was – i.e., a guardianship, a power of attorney, etc. – a besides just a conclusory statement that “the Arbitration Agreement’s plain language provides it may be executed by a patient’s ‘Legal Representative,’ which is broadly defined” (Aplt.Br. 20). Indeed, the agreement did allow for that: an authorized legal representative of a patient could sign the agreement and therefore bind that patient (D5 p. 12). Though it also required the signatory to “specify authority to sign,” which Mr. Rister did not (D5 p. 12). And in all other places where the admission documents required stating *how* the signatory was the resident’s legal representative, all fields were blank (D5 pp. 5, 14).

Osage Beach’s reasoning is circular: the agreement allows a legal representative to sign it on a resident’s behalf, a person signed as legal representative, and therefore that person automatically has authority to do so. It is also wrong. The law of Missouri is that simply signing an

arbitration agreement as a person's legal representative does not give one actual legal authority to bind that person, *unless the signatory is the person's actual legal representative*. See *Sennett v. Nat'l Healthcare Corp.*, 272 S.W.3d 237, 245-46 (Mo. App. 2008).

In *Sennett*, a nursing home patient's son signed an arbitration agreement with the nursing home "on the line designated for 'Legal Representative's Signature' on behalf of Patient." *Id.* at 245. But "there [was] nothing in the record showing that [he] had been legally appointed as Patient's legal guardian or representative," nor was there "evidence suggesting he had apparent authority to do so." *Id.* Therefore, the son lacked authority to bind the patient. *Id.* at 245-46.

The Illinois Appellate Court, Third District, later collected cases, including *Sennett*, and observed this is the majority rule in the United States: absent specific legal authority such as a guardianship or power of attorney,

a spouse or other family member did not have actual authority to sign an arbitration agreement on the resident's behalf. *Koricic v. Beverly Enters.-Neb., Inc.*, 773 N.W.2d 145 (Neb. 2009) (decendent's son did not possess authority necessary to sign arbitration agreement); *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So.2d 211 (Miss. 2008) (daughter did not have authority to enter arbitration agreement where there was no declaration of resident's inability to manage his affairs and no power of attorney in the record); *Mt. Holly Nursing Ctr. v. Crowdus*, 281 S.W.3d 809 (Ky. App. 2008) (spouse lacked authority to bind resident to arbitration agreement); *Goliger v. AMS Props., Inc.*, 123 Cal.App.4th 374 (2004) (daughter was not acting as mother's agent when she signed arbitration agreement without some evidence of authority beyond merely signing admission contracts). See also *Compere's Nursing Home, Inc. v. Est. of Farish*, 982 So.2d 382 (Miss. 2008); *Sennett*, 272 S.W.3d at

237; *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. App. 2007); *Flores v. Evergreen at San Diego, LLC*, 148 Cal.App.4th 581 (2007); *Landers v. Integrated Health Servs. of Shreveport*, 903 So.2d 609 (La. App. 2005); *Pagarigan v. Libby Care Ctr., Inc.*, 99 Cal.App.4th 298 (2002).

Curto v. Illini Manors, Inc., 940 N.E.2d 229, 234 (Ill. App. 2010) (format of internal citations modified) (also citing *Dickerson v. Longoria*, 995 A.2d 721 (Md. 2010)).

Decisions since *Sennett* and *Curto* have continued to apply this rule and hold that unless there is evidence a spouse or other family member had a guardianship, power of attorney, or other actual legal authority, that person signing an arbitration agreement on a nursing home resident's behalf does not bind the resident. *See, e.g., Lynn v. Lowndes Cnty. Health Servs.*, 840 S.E.2d 623, 628-29 (Ga. App. 2020); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 813 S.E.2d 292, 304-08 (S.C. App. 2018); *Broadway Health & Rehab, LLC v. Roberts*, 524 S.W.3d 407, 410-11 (Ark. App. 2017); *Thompson v. Pruitt Corp.*, 784 S.E.2d 679, 685-86 (S.C. App. 2016); *Barrow v. Dartmouth House Nursing Home, Inc.*, 14 N.E.3d 318, 322-23 (Mass. App. 2014); *Licata v. GGNSC Malden Dexter LLC*, 2 N.E.2d 840, 843-46 (Mass. 2014); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 590-94 (Ky. 2012).

Osage Beach offers no explanation in its first point how Fred Rister had any authority to sign the arbitration agreement for Joan Rister and thereby bind her to arbitration and waive her right to a jury trial. It only says, "the language of the contract here does not require 'legal authority' to act on the Patient's behalf," and Mr. Rister signing on the line for a legal representative was enough (Aplt.Br. 23). Osage Beach is wrong in both respects. First, the

agreement *does* require the signatory to “specify authority to sign,” which Mr. Rister did not (D5 p. 12), nor did he specify anywhere else on any admission document how he qualified as his wife’s legal representative. And second, regardless of the agreement’s language, per above *the law* requires a signatory have actual legal authority to bind a non-signatory to arbitration.

Instead, Osage Beach makes this into a game of signature lines (Aplt.Br. 21-23). It argues “The fact that [Mr. Rister] did not fill in the blank defining his capacity or may have signed on the ‘Patient’ line in other areas of the agreements is immaterial under the Arbitration Agreement’s terms and under Missouri law” (Aplt.Br. 21). For this, it cites *Ramirez-Leon*’s holding that a guardian signing on the wrong line on a nursing home admission form – the “patient” line rather than the legal representative line – did not mean it did not bind the guardian’s ward (Aplt.Br. 21-22) (citing 533 S.W.3d at 321). But as Osage Beach notes, in *Ramirez-Leon* the patient’s mother who signed the agreement “was appointed his guardian and conservator” (Aplt.Br. 21). “As the resident’s legal guardian, the guardian had authority to enter into contracts on his behalf” (Aplt.Br. 22) (emphasis removed).

As in *Sennett*, *Scharff*, and other decisions cited above, Osage Beach presents no evidence Fred Rister had any authority to enter into a binding arbitration agreement on his wife Joan Rister’s behalf, and in so doing waive her right to a jury trial. (This also disposes of Osage Beach’s brief argument that Mr. Rister had “actual agency authority” (Aplt.Br. 32).) The trial court correctly denied Osage Beach’s motion to compel arbitration on this basis.

This Court should affirm the trial court’s decision.

II. The trial court correctly denied Osage Beach’s motion to compel arbitration on the basis that the third-party beneficiary doctrine did not make Fred Rister’s signature on the arbitration agreement bind Joan Rister or waive her right to a jury trial, as there was no evidence she manifested any agreement to arbitrate, and the arbitration agreement stated it was not a condition of her admission to or care at the facility.

(First Response to Appellant’s Point II)

In its second point, Osage Beach argues the trial court should have granted its request to compel arbitration because Joan Rister was a third-party beneficiary of the agreement (Aplt.Br. 26-32).¹

Osage Beach’s argument is in error. First, to be a third-party beneficiary of an arbitration agreement, the agreement’s terms must clearly express an intent to benefit that party. Here, the arbitration agreement Fred Rister signed stated it was not a requirement for Joan Rister to be admitted or receive care. Therefore, Mrs. Rister did not receive any benefit from the arbitration agreement, and she does not qualify as a third-party beneficiary.

Second, the law of Missouri is third-party beneficiary status alone is insufficient to bind an unwilling non-signatory to an arbitration agreement unless the evidence shows she manifested consent to it. There is no evidence Mrs. Rister manifested any form of consent to arbitrate. All Osage Beach points to is her admission and receiving care. But the arbitration agreement Fred Rister signed stated it was not necessary for this. Therefore, the third-party beneficiary doctrine does not bind Mrs. Rister to arbitrate.

¹ Osage Beach also includes in this an argument that Fred Rister acted as Joan Rister’s “apparent agent” (Aplt.Br. 33-38). That argument is addressed separately below at p. 40 because it is not preserved for appeal.

A. Joan Rister does not qualify as a third-party beneficiary of the arbitration agreement, because the arbitration agreement was not a valid contract between Fred Rister and Osage Beach, and by its own terms Joan Rister received no benefit from the arbitration agreement.

As noted above at p. 24, “where ‘[a] willing signatory seek[s] to arbitrate with a non-signatory that is unwilling[, the signatory] must establish at least one of the [following] five theories’[:] ... (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; [or] (5) estoppel.” *Graves*, 495 S.W.3d at 802 (citation omitted).

Third-party beneficiary status is not an additional reason for this, but instead is a separate way of showing one or more of these theories. “[A] third-party beneficiary theory might support enforcement of an arbitration agreement *by* a nonsignatory, but it is, alone, insufficient to support enforcement *against* a nonsignatory.” *Id.* at 802 n.6 (emphasis in the original). Rather,

[m]ere status as a third-party beneficiary, alone, is *not* sufficient to support binding an unwilling nonsignatory to an arbitration agreement. Even if a party is a third-party beneficiary of an agreement containing an arbitration provision, the third-party [*sic*] must still manifest some agreement to arbitrate or otherwise be bound (e.g., through any of the five theories identified [above]) before a signatory may bind the third-party beneficiary.

Id. at 803 (emphasis in the original). The party seeking to compel arbitration must identify which of the five theories it believes show how the third party manifested its agreement to arbitrate. *Id.*

Still, to bind someone as a third-party beneficiary under this rubric, the party seeking to compel arbitration first must show she *is* a third-party

beneficiary of the arbitration agreement. *Id.* “To be bound as a third-party beneficiary, the terms of the contract must clearly express intent to benefit that party or an identifiable class of which the party is a member.” *Id.* (quoting *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006)).
So,

“In cases where the contract lacks an express declaration of that intent, there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves.” *Id.* “Furthermore, a mere incidental benefit to the third party is insufficient to bind that party.” *Id.* “Incidental beneficiaries are parties benefitting only collaterally from the contract” *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 140 (Mo. banc 1987). “Third party beneficiary status depends not so much on a desire or purpose to confer a benefit on the third person, but rather on an intent that the promisor assume a direct obligation to him.” *Chesus v. Watts*, 967 S.W.2d 97, 106 (Mo. App. 1998).

Id. (format of internal citations modified).

In *Graves*, for example, the defendant’s employment agreement with an investment product firm, INVEST, contained the arbitration clause at issue. *Id.* at 799-800. Central, a bank, also employed the defendant to market and sell investment products, which it acquired from INVEST. *Id.* at 799. When the defendant left work at Central and began working for a different bank selling those same products and taking customers with him, Central sued the defendant for promissory estoppel and breach of contract. *Id.* at 799-800. The defendant moved to compel arbitration, arguing Central was a third-party beneficiary of his contract with INVEST, which the trial court denied. *Id.* at 802.

This Court affirmed the denial of the defendant's motion to compel arbitration. First, it held Central was not a third-party beneficiary of the defendant's contract with INVEST. *Id.* at 802-03. No part of the INVEST agreement containing the arbitration clause imposed a direct obligation on behalf of either INVEST or the defendant in favor of Central, meaning at best the defendant established the agreement provided for incidental benefits from the contractual relationship between himself and INVEST, and not from the contract itself. *Id.* at 803.

Here, Osage Beach argues the arbitration agreement, which was contained in the same packet as the "Preadmission Agreement," was one and the same with that document, which it calls the "Preadmission and Arbitration Agreement" (Aplt.Br. 28). So, it argues that because Mrs. Rister "accepted the benefits of those agreements by receiving health care services and rehabilitation at NHC Osage Beach," she therefore was a third-party beneficiary of the arbitration agreement, too (Aplt.Br. 28).

Osage Beach's conflation of these two documents into one unitary agreement is in error. It argues that generally, "[t]wo instruments executed contemporaneously, as part of the same transaction, justify construing both together as if one instrument" (Aplt.Br. 29). While that is true generally, here Osage Beach ignores the plain language in the arbitration agreement that "Execution of this agreement by or on behalf of the Patient is not a condition of admission to, or a requirement to continue receiving care at, the Center. **In other words, the resident has the right not to sign this**

agreement and still be admitted to, or continue receiving care at, the center” (D5 p. 8) (emphasis added).

Osage Beach’s own express reservation that the arbitration agreement *was not* a condition of Mrs. Rister’s admission or receipt of care plainly distinguishes the agreement at issue here from the few on which Osage Beach relies, all of which concerned a single agreement with an arbitration clause, and a third party accepted benefits under that single agreement. *See Solis v. AT&T Mobility LLC*, No. 4:15-cv-1343-RLW, 2015 WL 6739141 (E.D. Mo. Nov. 3, 2015) (customer’s AT&T service contract containing arbitration clause bound third-party user on that customer’s account).

Conversely, where, as here, a nursing home arbitration agreement provides it *is not* a condition of admission or receipt of care under an accompanying agreement, the two agreements are always treated as separate. *See, e.g., Hodge*, 813 S.E.2d at 308-11; *Pine Hills Health & Rehab. LLC v. Talley*, 546 S.W.3d 492, 496-97 (Ark. App. 2018); *Thompson*, 784 S.E.2d at 688; *Coleman v. Mariner Health Care, Inc.*, 755 S.E.2d 450, 455 (S.C. 2014); *Licata*, 2 N.E.3d at 843; *GGNSC Omaha Oak Grove, LLC v. Payich*, 708 F.3d 1024, 1026-27 (8th Cir. 2013); *Ping*, 376 S.W.3d at 593; *State ex rel. AMFM, LLC v. King*, 740 S.E.2d 66, 75-76 (W.Va. 2013).

In a footnote (Aplt.Br. 27, n.2), Osage Beach cites two decisions actually involving nursing home admissions in which a resident was found to be a third-party beneficiary of an arbitration agreement: *Trinity Mission Health & Rehab. of Clinton v. Est. of Scott*, 19 So.3d 735, 740 (Miss. App. 2008), and *Alterra Healthcare Corp. v. Linton*, 953 So.2d 574, 578 (Fla. App. 2007). In

neither one, however, was there language like in Osage Beach's agreement that signing it was not a condition of admission or receiving care.²

Moreover, *both decisions were later overruled by higher courts* – a fact Osage Beach fails to disclose to the Court (Aplt.Br. 27, n.2).

The Supreme Court of Mississippi overruled *Trinity* in *Hattiesburg Health & Rehab Center, LLC v. Brown*, 176 So.3d 17, 21 n.3 (Miss. 2015). Instead, it held third-party beneficiary status cannot exist where a signatory lacked authority to sign an agreement for that third party in the first place, and therefore a nursing home resident for whom an unauthorized person signs an arbitration clause as part of the resident's admission cannot be a third-party beneficiary to that agreement. *Id.* at 21-22.

The Supreme Court of Florida emphatically overruled *Alterra* in *Mendez v. Hampton Court Nursing Center, LLC*, 203 So.3d 146, 148-50 (2016), holding *Alterra* did not “squar[e] with the principles of justice and equity underlying the third-party beneficiary doctrine,” because it “permit[ted] contracting parties to bind the non-contracting party without the non-contracting party's consent.” Rather, “[t]he third-party beneficiary doctrine does not permit two parties to bind a third – without the third party's agreement – merely by conferring a benefit on the third party.” *Id.* Therefore, in *Mendez*, the Court held a son signing an arbitration agreement

² In the third decision Osage Beach cites in that footnote, *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 599-600 (5th Cir. 2007), the resident was not competent to sign any documents, and her mother had legal authority to sign on her behalf. As explained in response to Osage Beach's first point above at pp. 25-28, there is no evidence either that Joan Rister was incompetent in any way or that Fred Rister had any legal authority to act on her behalf.

as part of his mother's admission into a nursing home without legal authority to do so did not bind his mother as a third-party beneficiary or otherwise. *Id.*

It is unsurprising that the only two decisions Osage Beach can find to support its second point were later overruled as unjust and inequitable incorrect statements of the law. As with Osage Beach's first issue, the great majority of decisions nationwide, including the Eighth Circuit in *Payich*, 708 F.3d at 1026-27, hold that in the absence of actual legal authority such as a guardianship or a power of attorney, a signatory on nursing home admission documents for a non-signatory resident cannot bind the resident to arbitration under a theory of third-party beneficiary *because there is no valid agreement to arbitrate in the first place*. *See*:

- *Ashley Operations, LLC v. Morphis*, 639 S.W.3d 410, 415-16 (Ark. App. 2021) (third-party beneficiary doctrine did not apply to bind nursing home resident to arbitration agreement signed by resident's son);
- *Colonel Glenn Health & Rehab, LLC v. Aldrich*, 599 S.W.3d 344, 349-50 (Ark. App. 2020) (same re: resident's wife);
- *Lynn*, 840 S.E.2d at 632-33 (same re: patient's mother);
- *Hickory Heights Health & Rehab, LLC v. Cook*, 557 S.W.3d 286, 290-92 (Ark. App. 2018) (same re: resident's daughter);
- *Hodge*, 813 S.E.2d at 308-11 (same re: resident's husband, especially where it provided it was not a precondition to resident's admission or receipt of care);

- *Talley*, 546 S.W.3d at 496-97 (same re: resident's daughter, especially where it provided it was not a precondition to resident's admission or receipt of care);
- *Roberts*, 524 S.W.3d at 411-12 (same re: resident's daughter);
- *Moen v. Bradenton Council on Aging, LLC*, 210 So.3d 213, 216 (Fla. App. 2017) (same re: resident's daughter);
- *Thompson*, 784 S.E.2d at 688 (same re: resident's son);
- *Washburn v. N. Health Facilities, Inc.*, 121 A.3d 1008, 1016 (Pa. Super. 2015) (same re: resident's wife);
- *Barrow*, 14 N.E.3d at 323-24 (same re: resident's son);
- *Licata*, 2 N.E.3d at 848 (same re: resident's son);
- *Ping*, 376 S.W.3d at 593 (same re: resident's daughter);
- *King*, 740 S.E.2d at 75-76 (same re: resident's healthcare surrogate);
- *Adams Cmty. Care Ctr., LLC v. Reed*, 37 So.3d 1155, 1160 (Miss. 2010) (same re: resident's sons);
- *Dickerson*, 995 A.2d at 741-42 (same re: woman living with resident);
- *Crowdus*, 281 S.W.3d at 815-17 (same re: resident's healthcare surrogate);
- *Compere's Nursing Home*, 982 So.2d at 385 (same re: resident's nephew); and
- *Warfield v. Summerville Senior Living, Inc.*, 158 Cal.App.4th 443, 448-49 (2007) (same re: resident's wife).

Just as in all these decisions, the third-party beneficiary doctrine does not apply at all. Fred Rister was not acting in his individual capacity in

signing the arbitration agreement, but instead purportedly as Joan Rister's legal representative. But he lacked any authority to act as her representative, so there was no valid contract in the first place. Moreover, the arbitration agreement did not benefit Joan Rister's receipt of care, because it provided specifically that it was not a condition of her admission or receipt of care.

B. Joan Rister is not estopped to manifest an agreement to arbitrate, because the arbitration agreement specifically provided it was not a precondition to her admission to Osage Beach or receipt of care there.

To bind Mrs. Rister to arbitrate under the third-party beneficiary doctrine, beyond showing she was a third-party beneficiary of the arbitration agreement, Osage Beach also would have to show she manifested some agreement to arbitrate or otherwise be bound by specifically stating and showing (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, or (5) estoppel. *Graves*, 495 S.W.3d at 802.

In the briefing below, the only one of these five grounds Osage Beach invoked was estoppel, arguing "Plaintiffs should be estopped from claiming the Arbitration Agreement is invalid, because they accepted the benefits of the agreement" (D9 p. 3).³ Osage Beach now repeats this, arguing "Mrs. Rister was a third-party beneficiary of the Admission Agreements, and she accepted the benefits of those agreements by receiving health care services and rehabilitation at NHC Osage Beach. Therefore, she is third-party

³ In its second point, Osage Beach includes an argument about apparent agency, too. This was not raised before the trial court and so is not preserved for appeal, as the Risters explain below at pp. 40-42.

beneficiary to the agreement and is bound to its terms by estoppel” (Aplt.Br. 28).

Osage Beach’s argument is in error. Even if Osage Beach somehow showed Mrs. Rister was a third-party beneficiary of a valid arbitration agreement (which it did not), Mrs. Rister is not estopped to manifest an agreement to arbitrate due to receipt of benefits, because the arbitration agreement specifically provided that entry into it was not a precondition for her receiving those benefits.

“By accepting benefits, a party may be estopped from questioning the existence, validity, and effect of a contract.” *Graves*, 495 S.W.3d at 803 (quoting *Dunn*, 112 S.W.3d at 437). But where a non-signatory to an arbitration agreement does not actually receive any benefits under it, that party is not estopped to agree to arbitrate. *Id.* In *Graves*, the Court noted Central did not actually receive any direct benefits from the defendant’s contract with INVEST, so even if it were a third-party beneficiary, it was not estopped to arbitrate per the clause in that agreement. *Id.*

The sole benefit Mrs. Rister received that Osage Beach identifies was admission to its facility and receipt of care. But the arbitration agreement provided it was wholly separate from those benefits, as “Execution of this agreement by or on behalf of the Patient is not a condition of admission to, or a requirement to continue receiving care at, the Center” (D5 p. 8).

Accordingly, Mrs. Rister received no benefit of admission and receipt of care from the arbitration agreement, and cannot be estopped to agree to

arbitrate. Many of the decisions cited above at pp. 35-36 also rejected estoppel theories for exactly the same reason.

As the South Carolina Court of Appeals explained in *Thompson*, construing an arbitration agreement a son signed without authority for his mother that also specified it was not a precondition to the mother's admission or receipt of care,

The two agreements are independent of one another, as reflected in the language of the AA indicating its execution is not a condition for being admitted to the nursing home. Further, any possible benefit emanating from the AA alone is offset by the AA's requirement that Mother waive her right to access to the courts and her right to a jury trial. Therefore, equitable estoppel under federal substantive law has no application to the present case.

784 S.E.2d at 60; *see also Ping*, 376 S.W.3d at 595 (“where, as here, the Arbitration Agreement was not a condition of admission, the nursing home has failed to show that its mistaken belief regarding [the resident]’s authority resulted in the sort of detriment that would support an estoppel”).

The same is true here. By Fred Rister signing the arbitration agreement, Joan Rister did not receive any direct benefits, let alone the benefits of health care services and rehabilitation Osage Beach identifies. She is not estopped to agree to arbitrate.

The Court should affirm the trial court's order denying Osage Beach's motion to compel arbitration.

III. Osage Beach never raised its argument that Fred Rister had apparent agency authority and therefore qualified as Joan Rister’s agent before the trial court, and that argument therefore is not preserved for appeal.

(Second Response to Appellant’s Point II)

In its second point, Osage Beach also argues Joan Rister should be bound by the arbitration agreement as a third-party beneficiary because in signing it, Fred Rister acted as her “apparent agent” (Aplt.Br. 33-38). This argument is not preserved for appeal because Osage Beach did not raise it at any time below.⁴ Even if it somehow were preserved, there is no evidence Joan Rister manifested her consent to Fred Rister signing the arbitration agreement, or of any of Missouri’s other elements of apparent authority.

A. Osage Beach’s apparent agency authority argument was not raised below and so is not preserved for appeal.

“An appellate court will not, on review, convict a trial court of error on an issue which was not put before it to decide.” *Brackney v. Walker*, 629 S.W.3d 834, 842 (Mo. App. 2021) (citation omitted). “Even in a court-tried case, where a post-trial motion is not necessary to preserve *an otherwise properly raised issue* for appellate review, the appellant must make some effort to bring the alleged error to the trial court’s attention.” *Id.* (citation omitted) (emphasis in the original).

So, where a party moving to compel arbitration does not raise a specific ground for compelling arbitration in the proceedings over the motion to compel arbitration, it cannot raise that ground for the first time on appeal.

⁴ Rule 84.04(e) requires each of an appellant’s arguments to “include a concise statement describing whether the error was preserved for appellate review” and “if so, how it was preserved” Osage Beach fails to do this at all.

A-1 Premium Acceptance, Inc. v. Hunter, 557 S.W.3d 923, 925 n.2 (Mo. banc 2018). In *A-1*, the Supreme Court refused to reach an argument in support of arbitration that the appellant arbitration movant had not raised in any of its filings in the trial court, holding “[t]his point is not preserved, however, because it was not ‘presented to or decided by the trial court.’” *Id.* (citation omitted). The party did not “put the circuit court on notice A-1 was asserting” that argument “as a separate and independent basis for its application to compel arbitration.” *Id.*

So, where an arbitration movant does not argue in the trial court that a signatory of an arbitration agreement was acting as a non-signatory’s apparent agent, it cannot make that argument for the first time on appeal from the denial of a motion to compel arbitration. *See Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494 (Tex. App. 2011) (where LLC’s director failed to assert in trial court that LLC was compelled to arbitrate claims because it was an agent of a party who signed agreement containing an arbitration provision, issue was not preserved for appeal from denial of director’s motion to compel arbitration); *Fifth Third Bank v. Senvisky*, 2014-Ohio-1233 at ¶ 21, n.2, 2014 WL 1340410 at *6 n.2 (App.) (appellate court could not address new argument on appeal that arbitration agreement was enforceable because plaintiff was third-party beneficiary of it); *Grenada Living Ctr., LLC v. Coleman*, 961 So.2d 33, 37-38 (Miss. 2007) (where nursing home failed to argue in trial court that actions of resident’s half-sister could bind resident through implied agency, argument was not preserved for appeal from denial of nursing home’s motion to compel arbitration).

Here, of Missouri's five recognized theories for holding a third-party beneficiary to an arbitration agreement manifested her agreement to arbitrate, the sole one Osage Beach raised below was estoppel (D9 p. 3). Not once in any of its filings below did Osage Beach once mention agency, let alone argue Fred Rister was acting as Joan Rister's "apparent agent" (D3; D4; D9). So, Osage Beach did not "put the circuit court on notice [it] was asserting" apparent agency authority "as a separate and independent basis for its application to compel arbitration," and that argument is not preserved for appeal. *A-1*, 557 S.W.3d at 925 n.2.

Accordingly, as in *A-1*, and especially *Coleman*, which is directly on point, the Court cannot reach Osage Beach's apparent agency argument.

B. The Court should decline to review Osage Beach's unpreserved argument for plain error.

While this Court has discretion to review Osage Beach's unpreserved argument for plain error, *Parciak v. Parciak*, 553 S.W.3d 446, 452-53 (Mo. App. 2018), it should decline to do so.

Osage Beach does not request plain-error review, which is "discretionary and rarely granted in civil cases," *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 617 (Mo. App. 2009), and "should be used sparingly." *MB Town Ctr., LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 602 (Mo. App. 2012) (citation omitted). Osage Beach first would have to explain: (1) what error was evident, obvious, and clear; and (2) how it resulted in a manifest injustice or miscarriage of justice. *State v. Massa*, 410 S.W.3d 645, 657 (Mo. App. 2013).

Osage Beach has not made these arguments. The Court cannot “become an advocate for” it and “scour the record and devise arguments on [its] behalf.” *Id.* And if it seeks to argue for plain error review for the first time in its reply brief, the Risters will “have no opportunity to address” them. *Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995).

Osage Beach’s apparent agency authority argument is not preserved, and the Court should decline to review it at all.

C. If Osage Beach’s apparent agency argument is somehow preserved, it fails because there is no evidence either that Joan Rister manifested her consent to Fred Rister signing the arbitration agreement and binding her to arbitrate, or of any of the other elements of apparent agency.

Osage Beach argues Fred Rister’s signature on the arbitration agreement bound Joan Rister’s to arbitrate as her apparent agent because Mrs. Rister “manifested her consent to her agent’s exercise of authority by accepting the care offered by NHC Osage Beach under the terms of the agreements,” “Osage Beach had the right to rely on Mr. Rister’s apparent agency in entering into the Arbitration Agreement,” and Osage Beach “had the reasonable right to rely on Mr. Rister’s signature on the Arbitration Agreement, and it should be enforced accordingly” (Aplt.Br. 33-34).

At the outset, because Osage Beach’s apparent agency argument is predicated on Joan Rister being a third-party beneficiary of the arbitration agreement (Aplt.Br. 14), and the Risters already showed she is not above at pp. 30-37, Osage Beach’s apparent authority argument fails, too. Its second point argues “Respondent Joan Rister was a third-party beneficiary to the agreement in that ... Respondent Fred Rister was Respondent Joan Rister’s

actual or apparent agent” (Aplt.Br. 14). But the arbitration agreement was invalid in the first place, and Mrs. Rister received no benefit for it. Mrs. Rister cannot be held a third-party beneficiary of it. *See above* at pp. 30-37.

Regardless, Osage Beach’s apparent agency argument is in error. It bases its argument entirely on Mrs. Rister having accepted care. But as with all its other arguments, it ignores the arbitration agreement provided it was *not* a precondition to her being admitted to Osage Beach’s facility or receiving any care. Accordingly, Joan Rister never manifested any consent to Fred Rister’s binding her to arbitration or waiving her right to a jury trial.

In Missouri, to establish an agent’s apparent authority so as to bind another as that person’s principal, a party must show:

(1) the principal manifested his consent to the exercise of such authority or knowingly permitted the 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.

Pitman Place Dev., LLC v. Howard Invs., LLC, 330 S.W.3d 519, 527 (Mo. App. 2010) (citation omitted).

Here, there is no evidence Joan Rister ever manifested her consent to Fred Rister binding her to arbitration or waiving her right to a jury trial. Osage Beach’s only argument that did is that she “manifested her consent to her agent’s exercise of authority by accepting the care offered by NHC Osage Beach under the terms of the agreements” (Aplt.Br. 33). But the arbitration agreement was wholly independent of that offer of care, as “Execution of this

agreement by or on behalf of the Patient is not a condition of admission to, or a requirement to continue receiving care at, the Center” (D5 p. 8).

As the West Virginia Supreme Court of Appeals noted in rejecting a similar apparent agency argument where a nursing home’s arbitration agreement stated it was not a precondition to admission or receipt of care, “To the extent [the nursing home] believed that [signatory]’s authority extended to” agreeing to arbitrate, “its belief was not reasonable in light of ... its own concession that the subject Arbitration Agreement was not a precondition for [the resident]’s receipt of services.” *King*, 740 S.E.2d at 76 n.10.

Moreover, Osage Beach’s rehashing its receipt-of-care argument does not qualify as a required manifestation of consent. “[A]pparent authority cannot be created by the acts of the supposed agent alone,” but instead “[t]he one sought to be held as principal must have created the appearance of authority in order to be held liable for the acts of the agent.” *Earl v. St. Louis Univ.*, 875 S.W.2d 234, 238 (Mo. App. 1994). The law of Missouri only recognizes three ways of a principal’s manifestation of consent to an apparent agent’s action: (1) “direct, express statements” that “create the agent’s apparent authority”; (2) “allow[ing] an agent to occupy a position which, according to the ordinary habits of people in the locality, trade or profession, carries a particular kind of authority;” or (3) “allowing an agent to carry out prior similar transactions, a principal creates the appearance that the agent is authorized to carry out such acts subsequently.” *Id.*

Osage Beach has not presented any evidence of any direct, express statements by Mrs. Rister, any actions by Mrs. Rister allowing her husband to occupy a position authorizing him to execute binding arbitration agreements on her behalf, or any prior actions by Mrs. Rister allowing her husband to execute arbitration agreements for his wife. Her receipt of care, of which signing the arbitration agreement was not a condition, cannot suffice.

Osage Beach argues “[n]umerous jurisdictions” have agreed in like circumstances that a signatory on a nursing home arbitration agreement had apparent authority to bind a non-signatory resident (Aplt.Br. 36). But the only four decisions it cites (Aplt.Br. 36-37) are inapposite.

In *Carraway v. Beverly Enters. Ala., Inc.*, 978 So.2d 27, 31 (Ala. 2007), there was no language making the arbitration agreement optional, and the resident ratified her brother’s authority to enter into it by shortly thereafter making him her power of attorney. In *Broughsville v. OHECC, LLC*, 2005-Ohio-6733 at ¶¶ 7-11, 2005 WL 3483777 at *2 (App.), there was no language making the arbitration agreement optional, there was evidence of a prior course of conduct between the resident and her daughter of the daughter signing agreements for the resident that the nursing facility had observed previously, and there was evidence the resident was present when the daughter signed the arbitration agreement and did not object. Osage Beach again cites *Trinity*, 19 So.3d at 740, which the Supreme Court of Mississippi overruled in *Brown*, 176 So.3d at 21 n.3, and Osage Beach again fails to disclose this to the Court (Aplt.Br. 37). Finally, in *Necessary v. Life Care*

Ctrs. of Am., Inc., No. E2006-00453-COA-R3CV, 2007 WL 3446636 at *5 (Tenn. App. Nov. 16, 2007), the Court held the signatory had *actual* authority, not apparent authority – that she “had the [resident]’s express authority to sign the admission documents at the healthcare facility,” and therefore “also had the authority to sign the arbitration agreement on the [resident]’s behalf as one of those admission documents,” which did not have language making it optional.

Conversely, there actually are *numerous* jurisdictions – the nationwide majority – that have rejected the notion that an unauthorized signatory on a nursing home arbitration agreement had apparent agency or apparent authority to bind the non-signatory resident to arbitration. *See: Lynn*, 840 S.E.2d at 629-31; *Hodge*, 813 S.E.2d at 303-08; *Roberts*, 524 S.W.3d at 411; *Moen*, 210 So.3d at 216; *Thompson*, 784 S.E.2d at 685-86; *Brown*, 176 So.3d at 21-22; *Washburn*, 121 A.3d at 1012-15; *Barrow*, 14 N.E.3d at 323; *Licata*, 2 N.E.3d at 846-47; *Ping*, 376 S.W.3d at 594; *King*, 740 S.E.2d at 76 n.10; *Reed*, 37 So.3d at 1160; *Dickerson*, 995 A.2d at 740; *Crowdus*, 281 S.W.3d at 813-15; *Compere’s Nursing Home*, 982 So.2d at 384-85.

As in all these decisions, there is no evidence of any acts by Joan Rister before, during, or after Fred Rister’s execution of the arbitration agreement that manifested her consent to authorize him to bind her to arbitrate and waive her right to a jury trial. The doctrine of apparent agency authority does not apply.

The Court should affirm the trial court’s order denying Osage Beach’s motion to compel arbitration.

Conclusion

The Court should affirm the trial court's order denying Osage Beach's motion to compel arbitration.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 11,053 words.

/s/Jonathan Sternberg
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Certificate of Service

I certify that I signed the original of this brief of the respondents, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on May 27, 2022, I filed a true and accurate Adobe PDF copy of this brief of the respondents via the Court’s electronic filing system, which notified the following of that filing:

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