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COMMONWEALTH OF KENTUCKY
SUPREME COURT
2010 – SC – 000558 – D
(2009 – CA – 1361 & 2009 – CA – 1379)

DONNA PING, Executor of the Estate
of ALMA CALHOUN DUNCAN, Deceased — MOVANT

v.

BEVERLY ENTERPRISES, INC.; et al. — RESPONDENTS

** ** ** ** ** ** ** ** ** ** **

BRIEF FOR MOVANT

** ** ** ** ** ** ** ** ** ** **

This is to certify that a true and accurate copy of the foregoing document has been served by mailing same on August 8, 2011 to: The Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, Franklin County Courthouse, 214 St. Clair Street, Frankfort, Kentucky, 40601-1857; Hon. Robert Y. Gwin, Steinmetz & Baird, PLLC, 401 West Main Street, Suite 1000, Louisville, Kentucky, 40202, George E. Fowler, Jr., Clerk of Ky Court of Appeals, 360 Democrat Drive, Frankfort, Ky 40601 and **VIA FEDERAL EXPRESS OVERNIGHT DELIVERY to : Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, New Capitol Building, 700 Capital Avenue' Frankfort, Kentucky 40601.** It is further certified that the record on appeal has not been withdrawn by counsel for the Movant.

Respectfully submitted,

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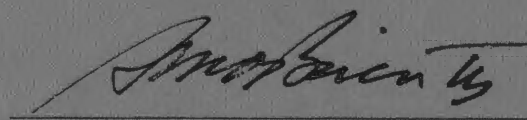

STEPHEN M. O'BRIEN, III

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INTRODUCTION

This case concerns the enforceability of an arbitration agreement in a claim involving the abuse and neglect and ultimate wrongful death of a nursing home resident. Movant seeks review of the Court of Appeals' Opinion, reversing and remanding the Franklin Circuit Court's Order denying the Respondents' Motion to Compel arbitration.

STATEMENT CONCERNING ORAL ARGUMENT

Movant requests oral argument. Movant is of the opinion that an oral argument would assist the Court in understanding both the factual and legal reasons why the Arbitration Agreement if unenforceable.

STATEMENT OF THE CASE

Movant is the daughter of Alma Duncan who died in September, 2007, as a result of injuries that she received at the Respondents' nursing home. Movant was appointed Executor of her mother's estate by the Anderson County District Probate Court and brought suit against the Respondents pursuant to the Survival of Actions Statute (K.R.S. § 411.140) and the Wrongful Death Statute (K.R.S. § 411.130). In her Complaint, Movant sought damages for personal injury, wrongful death and for violation of several statutes and regulations relating to the protection of nursing home residents, including KRS 216.515, the Residents Rights Statute.

The Respondents answered the Complaint and moved the Franklin Circuit Court to compel Movant to arbitrate her claims pursuant to an Arbitration Agreement (ADR) which Movant had signed as Power of Attorney (POA) for her mother. Thereafter, the Trial Court directed that proof be taken on the issue of the enforceability of the arbitration agreement. Movant's deposition was taken by counsel for the Respondents. Counsel for the Movant deposed Joshua Brand, the Respondents' admissions clerk who had helped Movant complete the admission paperwork, which contained the ADR.

Movant testified that Ms. Duncan broke her leg in February of 2006 and was sent to another facility, Heritage Hall, for rehabilitation. During that admission process, Movant had actually gone over all of the documents with the admission counselor, taking "several hours". Following a stroke, Ms. Duncan was admitted to Beverly on March 17, 2006. Movant signed the admission documents as POA for her mother. Before that admission, Movant stated that Mr. Brand, the Admissions Clerk, said "he realized that I was there from work and he had the paperwork already filled out and all I had to do was

sign it." She signed the documents "as he handed them to me." Mr. Brand told her that it was "a standard application packet." The whole process "didn't take 10 minutes". Movant stated, "I did not read the documents. I signed where he told me to sign." Mr. Brand did not tell her about arbitration. Rather, he would simply fold the pages of the packet over to show her where to sign.

Movant confirmed that Mr. Brand did not say anything to her about the arbitration agreement. He did not tell her that by signing it she could be waiving an important constitutional right. He did not tell her to read it. He did not advise her to take it to a lawyer to have it reviewed. He did not tell her that she needed to review it and had the right to revoke within thirty (30) days. Mr. Brand never explained the reason why Beverly wanted her to sign an arbitration agreement. He did not explain the difference between an arbitration and a jury trial. He did not suggest that she had any right to alter the arbitration agreement. He did not explain how an arbitration would work. He did not give her a copy of the arbitration forum rules or even explain to her how she could obtain those rules.

Mr. Brand acknowledged that he had started work at Beverly only about a month and a half before Ms. Duncan's admission. He admitted that he had very minimal training in the admissions process and in the contents of the documents used for admission. He received training from the business office manager and from an assistant bookkeeper, which consisted of him going over the admissions paperwork, being quizzed about it and watching his mentors do admissions "a couple of times".

In his training, the only explanation he received was that the ADR was not a condition of admission, that it was an expedited process and that it did not limit damages.

He also acknowledged that admitting someone to a nursing home is "a very hectic time in someone's life". He stated that very few individuals ever asked questions about any of the documents they were signing. He also acknowledged that the ADR was at the end of all the paperwork and that "it was a lot of paperwork"

Mr. Brand also admitted that he was given no written documents explaining the arbitration process; that he had no documents relating to the arbitration process available; that he did not have the arbitration forum rules; that he had never participated in an arbitration; that he was not familiar with the National Arbitration Forum (NAF); that he was not familiar with the Rules of Civil Procedure and that he could only explain the difference between a civil trial and an arbitration as being an expedited procedure with an arbitrator instead of a judge and jury.

Mr. Brand was not aware that the right to a jury trial was a constitutionally protected right and he acknowledged that he would not have told Ms. Ping that she was waiving one of Ms. Duncan's constitutional rights. He also acknowledged that other than an arbitration being an "expedited process", he wouldn't know any other benefit that he would believe arbitration has over a civil trial. He actually does not know if arbitration is quicker than going to trial.

The Trial Court relied upon the foregoing facts in reaching its opinion. *See* [Appendix 1, pp. 8, 9].

In the POA, Ms. Duncan gave Movant authority to conduct her financial and real estate business and authority to make medical decisions and to do those things consistent with that authority. There is no express authority contained in the POA which would permit Movant to waive Ms. Duncan's constitutionally protected right to a jury trial.

The Trial Court denied Respondents' Motion to Enforce the ADR, citing several bases for its opinion. The Court analyzed the POA as it related to the ADR. The Court first observed that there was no specific or express language giving Ms. Ping the authority to enter into an ADR or to waive Ms. Duncan's constitutional rights to a trial by jury. [Appendix 1]. Therefore, the Trial Court concluded that there was no express authority to enter into an ADR contained in the POA. [Appendix 1]

The Court then considered the issue of implied authority. Relying on the case of *Mogg v. Farley,* 265 S.W. 449 (Ky., 1924), the Trial Court held that there was no implied authority in the POA which would have authorized Movant to agree to arbitration. The Court observed that waiver of a constitutionally protected right to trial by jury is unrelated either to health care or investment decisions. It further held that the liberal construction language of the POA was restricted to investment or medically related decisions. The Court also contrasted this POA to one which could contain authorization for the POA to sue or be sued or to pursue actions and "adjust, settle, discharge or compromise " claims. [Appendix 1, p. 7]. Based on its analysis of the POA and the context of its execution, the Court held that Movant did not have capacity to bind Ms. Duncan to the ADR [Appendix 1, p. 8]

The Court next considered facts which would permit Movant to avoid the ADR even if she had authority to enter into such a contract. Relying on the facts regarding the execution of the ADR, as set forth above, the Court found that the circumstances of Movant's execution of the ADR supported a finding of fraud in factum or in the execution of the ADR. Most importantly, the Court found that Respondents' Admission Director identified the admission documents, including the ADR, as the "standard

admission packet", that he did not tell her about the ADR, and that he simply folded pages over to the place at which she was to sign. [Appendix 1, p. 8 – 11]

Finally, the Court observed that since the ADR itself specifies that it is not a condition for admission, there was no consideration for the agreement. In support of this ruling, the Court cited *Beverly Health & Rehabilitation Services, Inc., et al. v. Smith,* 2008-CA-000604-MR (Ky. Ct. App., April 10, 2009). In *Beverly,* the Court of Appeals had held that since the ADR was not a precondition for admission, the patient derived no benefit from the agreement and, therefore, there was no consideration and his estate was not bound by its terms. Movant is aware that this case is not yet final and is presently before this Court on a Motion for Discretionary Review. Therefore, it is not being cited as authority herein.

In response to Respondents' Motion to Dismiss in the Trial Court, the Movant also asserted (1) that she did not make a knowing and voluntary waiver of Ms. Duncan's rights, when viewed in the context of the analysis required by the case of *Walker, et al. v. Ryan's Family Steak House, Inc.*, 400 F.3d 370 (6th Cir., 2005); (2) that the terms of the ADR are illusory based on the analysis of that issue contained in the case of *Floss v. Ryan's Family Steak House, Inc.,* 211 F.3d 306 (6th Cir., 2000); (3) that the Respondents had breached their fiduciary duty to Ms. Duncan by not adequately explaining the ADR to Movant, citing *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476,485 (Ky., 1991) and *Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d, 682 (Ky., 2003); and finally (4) that the ADR is substantively unconscionable based on the analysis of the circumstances of its execution as analyzed in *Walker, Supra.* The Trial Court did not address those issues.

In her brief to the Court of Appeals, the Movant discussed all of the issues which are set forth above. In addition, the Movant raised the jurisdictional issue that the ADR did not comply with KRS 417.200 as discussed and interpreted in *Ally Cat, LLC. V. Chauvin*, 274 S.W.3d 451 (Ky., 2009) which provides that in order to be enforced by a Kentucky court, an arbitration agreement must contain a clause which requires that the arbitration be held exclusively in Kentucky. The Movant also raised the issue of the guarantee of a civil trial contained in the Residents Rights Act, KRS 216.515 (26).

The Court of Appeals rejected as without merit or not warranting discussion the Trial Court's opinion that the admissions clerk "manipulated the [admission] process in such a way as to amount to concealment" and Movant's additional arguments that the terms of the agreement are illusory and that the Respondents breached their fiduciary duty to Ms. Duncan by not explaining the ADR. [Appendix 2]

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION TO ENFORCE THE ARBITRATION AGREEMENT

CR 12.08(3) states "whenever it appears that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action". [Emphasis supplied] Consistent with that Rule, the issue of subject matter jurisdiction may be raised at any time. "A party will not be estopped to show lack of subject matter jurisdiction at any time". *L. T. Duncan, et al. v. O'Nan,* 451 S.W.2d 626 (Ky., 1970).

The ADR at issue here provides that the parties may agree to arbitration somewhere other than Kentucky. Specifically, the agreement provides that the arbitration ". . . be conducted at a place agreed upon by the parties or in the absence of such an agreement, at the facility . . .". Because the agreement does not comply with the literal

provisions of KRS 417.200, the Court lacks subject matter jurisdiction to enforce the agreement. In *Ally Cat,* this Court held that an arbitration agreement must specifically include a clause providing for arbitration to be held exclusively within Kentucky. *Id @ 454.* In earlier opinions, the Court of Appeals had reached the same conclusion. *Tru Green Corp. v. Sampson,* 802 S.W.2d 951, 952. (Ky. App. 1991); *Artrip v. Samons Construction, Inc.*, 54 S.W.3d 169, 171 (Ky. App. 2001) In reaching its opinion in *Ally Cat*, this Court noted:

> We hold that the Court of Appeals in *Tru Green* and *Artrip* got it right. Subject matter jurisdiction to enforce an agreement to arbitrate is conferred upon a Kentucky court only if the agreement provides for arbitration in this state. Thus, an agreement to arbitrate which fails to include the required provision for arbitration within this state is unenforceable in Kentucky courts. *True Green* and *Artrip* held that arbitration awards arising from such agreements are unenforceable in Kentucky Courts when the arbitration occurred outside the state. We hold now that the parties need not suffer the expense and delay of the arbitration hearing, only to find that the award is unenforceable. When the issue arises prior to the arbitration hearing, as it has in this case, and the agreement upon which arbitration is sought fails to comply with the literal provisions of KRS 417.200, the courts of Kentucky are, pursuant to KRS 417.200, without jurisdiction to enforce the agreement to arbitrate. *Alley Cat* @ p. 455 – 456.

KRS 417.200 requires that an arbitration agreement provide for arbitration "in this state" in order to confer jurisdiction on the Court. In this case, the Court of Appeals held that because the ADR contained language which could result in an arbitration being held in Kentucky, even though, as the Court acknowledged, it did not contain language requiring that it be held in the Commonwealth, it satisfied KRS 417.200 and was consistent with the holding in *Ally Cat.* The Court of Appeals reached this conclusion even though it cites, with emphasis, this Court's holding in *Ally Cat* is that if an arbitration agreement "fails to comply with the literal provisions of KRS 417.200", the

Court lacks jurisdiction to enforce the agreement. [Emphasis supplied by the Court] [Appendix 2, p. 15]

Of interest is the fact that the ADR addressed by this Court in *Ally Cat*, which according to that Opinion, was totally silent as to the location of the arbitration would, under the Court of Appeals' reasoning, satisfy the requirements of KRS 417.200 because an arbitration under that agreement could result in an arbitration in Kentucky. What the Court of Appeals seem to have ignored is the fact that under the ADR here and, in fact, under the ADR in *Ally Cat*, the arbitration could be held in some other state and therefore, clearly "fails to comply with the literal provisions of KRS 417.200" *Id. @ 455 – 456*.

II. THE ARBITRATION AGREEMENT IS UNENFORCEABLE DUE TO THE FAILURE OF THE ARBITRAL FORUM.

The ADR provides that disputes arising out of "any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum (NAF) Code of Procedure, which is hereby incorporated into this agreement . . .". [Emphasis supplied]

The Franklin Circuit Court entered its Opinion and Order denying the Respondents' Motion to Dismiss and to Enforce Arbitration Agreement on June 25, 2009. On July 19, 2009, NAF entered a consent decree with the Attorney General of the State of Minnesota in which the NAF agreed that after July 24, 2009, it would cease to participate in any new consumer arbitration which was defined as "any arbitration involving a dispute between a business entity and a private individual which relates to

goods, services or property of any kind allegedly provided by any business entity to the individual . . ." *See* Consent Judgment, p. 2 [Appendix 3] Therefore, the ADR, even if otherwise enforceable, cannot be performed according to its terms and cannot be enforced.

The Respondents may be anticipated to argue that with the failure of the arbitral forum, the Court should look to the Federal Arbitration Act (FAA) for authority to appoint a substitute arbitral forum. 9 U.S.C. § 5 authorizes a court to "appoint an arbitrator or arbitrators" in the event that the agreement does not specify a method for naming the arbitrator or if there is some "lapse in the naming of an arbitrator . . . or in filling a vacancy . . .". However, as will be discussed below, failure of the exclusively named arbitral forum does not equate with a "lapse . . . in filling a vacancy".

In the case of *Grant v. Magnolia Manor – Greenwood, Inc., et al*, 578 S.E. 2d 435 (S.C. 2009), the South Carolina Supreme Court dealt with the failure of a different arbitral forum named in an ADR in a nursing home context. [Appendix 4] In that case, the ADR included a statement that the arbitration be administered by the National Health Lawyers Association (NHLA). Shortly after the ADR was executed, the NHLA changed its rules and determined that it would only arbitrate claims if the ADR was entered into after the injury claim arose. It also changed its name to American Health Lawyers Association (AHLA) *Id. p 437*

In dealing with the issue of the failure of the arbitration forum, and the impact of Section 5 of the FAA 9 U.S.C. § 5 (2007) on the failure of the arbitral forum, the Court acknowledged some dispute in case law, nationally, as to whether § 5 applies to this issue. In analyzing the cases which stand for the proposition that § 5 would permit a

court to name a new arbitrator, upon the failure of the forum named in the agreement, the *Grant* Court observed that those cases identify an exception to that rule when the choice of forum is considered "an integral part of the agreement to arbitrate". *Id. p. 438* citing *Brown v. ITT Consumer Fin Corp.*, 211 F. 3d 1217 (1220) (11th Cir. 2000). The *Grant* Court emphasized that exception as follows:

> Importantly, "[n]one of these cases . . . stand for the proposition that District Courts may use § 5 to circumvent the parties' designation of an exclusive arbitral forum" citing *In re Salomon Inc. S'holder Derivative Litig.*, 68 F. 3d 554, 560 (2d Cir. 1995)

In support of its holding that the parties' agreement to arbitrate exclusively before the AHLA had significant implications on the process, the Court stated:

> Furthermore, the designation of a forum such as the AHLA "has wide-ranging substantive implications that may affect, *inter alia* the arbitrator selection process, the law, procedures and rules that govern the arbitration, the enforcement of the arbitral award and the cost of arbitration". *Id. p. 439* citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333 2009 WL 996015, (D. Conn. 2009)

The ADR at issue here makes the selection of NAF an integral requirement of the agreement. The integral nature of the requirement for arbitration under the Rules of Procedure of the NAF in an ADR has been extensively analyzed by the Supreme Court of New Mexico in an opinion dated July 27, 2011, styled *Kim Rivera v. American General Financial Services a/k/a American General Finance, Inc., et al*, No. 32, 340. [Appendix 5] As part of its analysis, the New Mexico Supreme Court observed that to determine the enforceability of an arbitration provision, consideration must be given both to the state contract law and substantive Federal case law interpreting the FAA. After an extensive review of both Federal substantive law interpreting the FAA and in review of case law from other states, the Court held that because the NAF was precluded from participating

in the arbitration of consumer cases, and because the selection of the NAF was an integral requirement of the arbitration agreement, the arbitration agreement was unenforceable. In support of its ruling, the New Mexico Court cited the references in the ADR to the NAF, the selection of the NAF rules and the mandatory language of the requirement that the dispute be arbitrated by the NAF rules as supporting its holding that the selection of the NAF was integral to the agreement to arbitrate. *Riveria*, p. 22

In *Riveria*, the Defendants/Respondents urged the Court not to consider whether the NAF's unavailability rendered the Arbitration Agreement unenforceable because the issue had not been raised at the trial level. However, the Court observed that because the NAF had become unavailable after the trial court had issued its order compelling arbitration, Riveria had been unable to raise that claim before the trial court. As mentioned above, the consent decree which terminated the NAF's participation in consumer cases, such as this, was entered on July 19, 2009, after the Franklin Circuit Court entered its opinion on June 25, 2009.

The Court also justified its consideration of the issue of the failure of the arbitral forum based upon its conclusion that "the NAF's withdrawal from all consumer arbitrations affects millions of arbitration provisions currently in force". Thus, the Court concluded that the issue presented a legal matter of general public interest which the Court decided to consider in exercise of its discretion. *Id. p. 11.*

In November, 2010, the Superior Court of Pennsylvania entered an opinion in a nursing home case against a Golden Living facility, in which several of the respondents here were also named defendants. In that case, the Court was asked to address the impact of the failure of NAF as the arbitral forum. In that case, the Plaintiff argued that NAF's

withdrawal from the arbitration of consumer cases, in accordance with the above discussed consent decree, rendered the ADR which had been signed by the resident, unenforceable. As in the *Riveria* case, discussed above, the Court dealt with the relationship of the Federal Arbitration Act (FAA) to relevant state contract law and with the issue of whether the choice of the NAF as sole arbitral forum was an integral part of the ADR or merely a "ancillary logistic concern". In reaching its decision, the Appellate Court adopted the opinion of the Trial Court. A copy of the Trial Court's Opinion, in the case of *Stewart v. GGNSC - Cannonsburg, L.P. d/b/a Golden Living Center – South Hill, et al.* No. 2009 – 1667, Court of Common Pleas of Washington County, Pennsylvania. [Appendix 6 & 7, respectively]

The Court interpreted the ADR as expressing the clear intent of the facility defendants to arbitrate before the NAF. In holding that the ADR was unenforceable, the Court rejected claims by the facility defendants that the provision of the FAA concerning a "lapse . . . in filling a vacancy" (9 U.S.C. § 5 (2009) or a severability clause of the ADR would permit the Court to substitute an arbitral forum. The full text of the forum selection clause of the ADR at issue in *Stewart* is included in the Court's Opinion, and is identical to the clause at issue here. The Court rejected the claim that the selection of the NAF and its rules as the exclusive arbitral forum was ancillary to the contract.

In the case of *Ranzy v. Tijerina*, 393 F. App. 174 (5th Cir., 2010), the Court upheld a District Court Order denying a Motion to Compel Arbitration in a substitute forum, after the NAF become unavailable because "the parties explicitly agreed that the NAF shall be the exclusive forum for arbitrating disputes" *Id. @ 176* In the instant case, with the selection of the NAF Rules of Procedures, the mandatory "shall be resolved" and the

"exclusively by binding arbitration in accordance with the National Arbitration Forum Code of Procedure" terms of the ADR, it cannot be questioned that the selection of the NAF is integral to the agreement. The failure of that forum renders the arbitration agreement unenforceable.

III. THE COURT OF APPEALS IMPERMISSIBLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE TRIAL COURT ON EVIDENTIARY MATTERS, RULING THERE WAS NO EVIDENCE OF FRAUD IN THE FACTUM.

Beginning at page 11 of its opinion, the Court of Appeals expresses its disagreement with the Trial Court as to the facts of the case and as to the reasonable inferences to be made there from. Significantly, the Court of Appeals only cites the testimony of the admissions clerk, that he presented the "standard admissions packet" and then makes the statement that "this was not a misrepresentation". The Court then goes on to describe the ADR as though the Movant had actually been presented with that agreement and offered the opportunity to read it. To the contrary, as the Movant testified, and as the Trial Court found as fact, the ADR, which is described as a stand alone document, was placed "behind a stack of papers presented to the Plaintiff as relating to the admission of her mother to the facility for continued medical care". (Appendix 1, p. 7).

The Trial Court found that the admissions clerk did not tell Movant about the ADR but simply folded pages over, pointing to where she should sign them. The Court found that the admissions clerk "did not give minimal adequate information (or even warning) that one document standing alone, yet mixed in the stack, will bind her mother and her mother's successors-in-interest to arbitration, and constitute a waiver of her mother's constitutional rights". (Appendix 1, p. 8, 9)

Such facts, having been found by the Trial Court, clearly support the Court's finding that there was "fraud in *factum* and therefore the ADR was void". The Trial Court found that the Movant was not actually shown the ADR but was simply shown lines on the bottom of a page for signature. She was also not told that she had signed an ADR and was not alerted to any reason why she should review the documents which she had signed or that she should consult with an attorney to explain the import of those documents. Also, it is clear that she made no knowing and voluntary waiver of her mother's rights. *Floss v. Ryan's Family Steak Houses, Inc.,* 211 F.3d 306, 315 - 316 (Cir. 2000).

> "The credibility of the witnesses and the weight to be given their testimony were within the province of the Trial Judge. It is a familiar rule that his finding of facts must be considered as a verdict of a properly instructed jury, and unless palpably against the weight of the evidence, his findings, if supported by substantial competent evidence, must be upheld by this Court. *Life & Casualty, Co. of Tenn v. Farthing*, 261 78, 81 (Ky. 1935).

The Court of Appeals simply disagreed with the Trial Court's findings of fact on the fraud issue, thereby substituting its judgment for that of the Trial Court. The Court of Appeals did not find that the Trial Court was clearly erroneous or that its factual findings amounted to an abuse of discretion which is the only basis upon which the Trial Court's ruling could be reversed. *Bennett v. Horton,* 592 S.W.2d 460 (Ky., 1979); *Bickel v. Bickel,* 95 S.W.3d, 925, 928 (Ky. App., 2002); C.R. 52.01

IV. THE COURT OF APPEALS IMPERMISSIBLY FAILED TO ADDRESS THE ISSUE OF THE ILLUSORY NATURE OF THE ADR

The issue of the illusory nature of the ADR was argued at some length to the Court of Appeals in Movant's brief to that Court. However, the Court failed to address this issue.

The ADR provides, in pertinent part, as follows:

> It is understood and agreed by "Facility and Resident that any and all claims, disputes and controversies [hereafter collectively referred to as a "claim" or collectively "claims"] arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or heath care provided by the Facility to Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the parties, or in the absence of such an agreement, at the facility, in accordance with the National Arbitration Form Code of Procedure, which is hereby incorporated into this agreement / 1, and not by a lawsuit or a resort to a court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U. S. C. S. § 1 – 16. [Emphasis supplied]

The identity of the arbitrator is not disclosed in this ADR. Rather, there is reference only to the NAF Code of Procedure which is not actually made a part of the admission document, but is only incorporated by reference. Indeed, as Respondents' admission clerk acknowledged, he did not even have access to a copy of that code[1]. Movant's counsel has obtained a copy of that code from the NAF website. A copy is attached as an Appendix to Movant's brief to the Court of Appeals. However, the date on that document is August 1, 2008. There is no indication that the Code, as it existed on August 1, 2008, was the same Code which was in effect in March 2006, when the ADR was signed. The applicable rules are not set, the identity of the forum is not set and the nature of the proceeding is not specified. The language of these rules render the terms of the ADR illusory.

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[1] In the above quoted paragraph refers the reader to the bottom of the first page of the ADR where the website of the NAF is identified.

In Rule 1, (1)(a) of this Code, the NAF makes it possible for some other entity, which NAF could select, to administer the code and to be the arbitral forum. In addition, at (1)(c), the Code provides that arbitrations will be conducted in accord with the rules in effect at the time the claim is filed, not the rules at the time the ADR is signed. In addition, there is no fee schedule included with these rules. This same subpart of Rule 1 provides that the fee schedule in effect when a case proceeds, if it has been adjourned for a period of time, is the fee schedule which will govern the proceedings, not the fee schedule that was in effect at the time of the signing of the ADR.

In Rule 2, Definitions, (S), "Forum" is defined as the NAF or some other entity or individual that might enter into an agreement with the NAF. Therefore, again consistent with the Forum's Rule 1(a), the identity of the arbitral forum is not set or clearly disclosed.

At (T) of that rule, the Code describes two types of hearings, one a document hearing in which the parties are not present and participating and the other, a participatory hearing in which the parties directly participate. At Part 2, (d), it provides that the party selecting either of those types of hearings must pay a fee, which again is listed in a fee schedule which is not made a part of the rules. This clearly is a substantial difference between this ADR process and a civil trial which could not be reasonably anticipated by a layperson, even if that person was otherwise aware of the general nature of an ADR. Obviously, this was not something that was explained to Ms. Ping.

Finally, in Part 4, Arbitrations, Rule 21, the rules deny a party's right to strike or seek a removal of a particular arbitrator based upon a number of stated grounds, many of which would be an acceptable basis in a particular type of case, for striking a juror or

seeking recusal of a judge, again, a substantial difference between the ADR process and a civil trial.

In light of the 2009 consent decree, none of the NAF Forum Rules apply. The ADR agreement suggests that the applicable NAF Rules are those in force when the claim is submitted to arbitration. But the NAF admits - through the consent decree and even its own web page - it will no longer conduct consumer arbitrations pursuant to the Rules.

The ADR agreement incorporates the NAF Rules by reference as if set out wholly therein. The ADR agreement is 2 pages long - but the 2008 version of the Rules is 74 pages long. Therefore, because of the consent decree, and the concomitant inapplicability of the Rules, more than 97% of the ADR agreement is now invalid. There are no alternatives identified for the missing terms, and none should be supplied by the court. Without a forum or rules governing arbitration, the ADR agreement is illusory.

The 6th Circuit has declared that the selection of an arbitral forum is fatally indefinite where the forum has unfettered discretion in choosing the nature of that forum. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F. 3d 306 (6th Cir. 2000). The ADR rules in the *Floss* case reserved the right of the forum to "alter the applicable rules and procedures without any obligation to notify, much less receive consent from" the Plaintiff. Therefore, the promise was illusory and did not create a binding obligation. *Id.* at 315-316. In *Floss,*

> EDSI has reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from, Floss and Daniels. EDSI's right to choose the nature of its performance renders its promise illusory. As Professor Williston has explained:

> Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory.
>
> 1 SAMUEL WILLISTON, CONTRACTS § 43, at 140 (3d ed. 1957). EDSI's illusory promise does not create a binding obligation. The purported arbitration agreement therefore lacks a mutuality of obligation. Without a mutuality of obligation, the agreement lacks consideration and, accordingly, does not constitute an enforceable arbitration agreement.

Floss v. Ryan's Family Steak Houses, Inc., 211 F. 3d at 315-16

The ADR rules in this case are virtually the same as in Floss and require that the agreement be struck.

V. BY NOT INFORMING MS. PING OF THE RAMIFICATIONS OF THE ADR, DEFENDANTS BREACHED THEIR FIDUCIARY DUTY TO MS. DUNCAN AND HER FAMILY.

Ms. Duncan was admitted to Golden Living Center - Frankfort in March 2006. Respondents are engaged in the custodial care of elderly, helpless individuals who are chronically infirm, mentally impaired, and in need of nursing care and health care treatment. While a resident at Golden Living Center - Frankfort, Ms. Duncan was both physically and mentally weak, causing her to be totally dependent upon Respondents to provide for her every need. Respondents had a fiduciary and confidential relationship with Ms. Duncan and her family.

As recognized by the Kentucky Supreme Court in *Grubbs, Supra*

> The relationship of a patient to his physician is by its nature one of the most intimate. Its foundation is the theory that the physician is learned, skilled, and experienced in the afflictions of the body about which the patient ordinarily knows little or nothing but which are of the most vital importance to him. Therefore, the patient must necessarily place great reliance, faith and confidence in the professional word, advice and acts of his doctor. It is

> the physicians' duty to act with the utmost good faith and to speak fairly and truthfully at the peril of being held liable for damages for fraud and deceit.
> *Id.* at 688.

Just as a physician has a fiduciary duty to his patients, so does a nursing home which provides medical care to its residents. The relationship between Ms. Duncan and Golden Living Center - Frankfort created an affirmative duty on Respondents to place Ms. Duncan's interests above their own and to not entice her or her family to waive her constitutional rights in order to receive medical care.

The Kentucky Supreme Court has stated:

> [I]t is extremely difficult, if not impossible, to formulate a comprehensive definition of [a fiduciary relationship] that would fully and adequately embrace all cases. Nevertheless, as a general rule, we can conclude that such a relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another and which also necessarily involves an undertaking in which a duty is created in one person to act primarily for another's benefit in matters connected with such undertaking.
> *Steelvest, Supra*

The *Steelvest* court also held that fraud may be established when the defendant is in a confidential or fiduciary relationship with the plaintiff and the defendant conceals or fails to disclose a material fact to the plaintiff. The relationship between Golden Living and Ms. Duncan was one of trust and confidence, and Golden Living had a higher duty to affirmatively speak the truth to Ms. Duncan and her family because of Ms. Duncan's age and infirmities. Under the terms of the ADR, Defendants obtained a benefit at the expense of Ms. Duncan and her family. This benefit, the waiver of constitutional rights, is above and beyond the duties to be taken in the underlying transaction, the admission of Ms. Duncan for long-term care.

As previously discussed, Golden Living Center - Frankfort also had the benefit of selecting the ADR forum, NAF. Golden Living's relationship with NAF is not disclosed in the ADR, nor did Golden Living disclose to Ms. Ping any such relationship. The NAF Rules of Procedure are incorporated into the agreement, but they are not attached to it. Because of the fiduciary relationship between Ms. Duncan and Golden Living, Golden Living had an affirmative duty to disclose all of the terms of the agreement that worked to their benefit, including the applicable rules of procedure. Respondents should not be able to impose such requirements on a resident without disclosing to the resident what the implication of submitting to the ADR will be. This runs afoul of the requirement of mutual understanding. See *Rosenberg v. Merrill-Lynch,* 170 F.3d 1 (1st Cir. 1999).

It cannot be seriously argued that the Respondents did not owe a fiduciary obligation to Ms. Duncan. It is clear from both Ms. Ping's testimony and from the testimony of Respondents' Admissions Clerk, Mr. Brand, that the obligation to "act with the utmost faith and speak fairly and truthfully" has not been met.

VI. THE TRIAL COURT PROPERLY FOUND THERE WAS NO CONSIDERATION AND A LACK OF MUTUALITY IN THE EXECUTION OF THE ADR

In this case, the Trial Court found that since the ADR itself specifies that it is not a condition for admission, there was no consideration for the agreement and, therefore, the Movant was not bound by it. In support of this ruling, the Trial Court cited *Beverly Health & Rehabilitation Services, Inc., et al. v. Smith*, 2008-CA-000604 – MR (KY. CT. APP. April 10, 2009). In *Beverly,* the Court of Appeals held that since this same ADR was not a condition for admission, the patient derived no benefit from the ADR and,

therefore, there was no consideration and that his estate was not bound by the terms. That case is presently before this Court on a Motion for Discretionary Review.

An essential element of every contract is consideration. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000), citing *Price v. Mercury Supply Co.*, 682 SW 2d 924, 933 (Tenn. Ct. App. 1984) and *Cuppy v. General Accident Fire & Life Assurance Corp.*, 378 SW 2d 629, 632 (Ky. 1964). A promise, the courts have held, constitutes consideration for another promise only when it creates a binding obligation. Id. citing *Dobbs v. Guenther*, 846 S.W. 2d 270, 276 (Tenn. Ct. App. 1992) and *David Roth's Sons, Inc. v. Wright and Taylor*, 343 S.W. 2d 389, 390 (Ky. 1961).

Additionally, if there is no mutuality of obligation then a contract based on reciprocal promises lacks consideration. The of lack of mutuality of obligation is determined by an analysis of the contract in its entirety. *David v. Roth's Sons, Inc.* at 391 *citing Montanus v. Buschmeyer,* 158 Ky. 53, 164 S.W. 802 (Ky. App. 1914). In its opinion, the Trial Court held that to have a binding contract, there must be a meeting of the minds. A party to a contract cannot be bound by uncommunicated terms without his consent. Citing *Harlan Public Service Co. v. Eastern Cost Co.,* 71 S.W. 2d 24, 29 (Ky., 1934)

In *Beverly v. Santa, Supra,* the Court properly interpreted the context of the ADR in relation to its role as a tool for admission into the nursing home:

> The arbitration agreement plainly states that the execution of the arbitration agreement was not a precondition to the admission of the patient for services rendered to the patient. Consequently, Sylvester derived no benefit from the arbitration agreement, and his estate is not bound by the agreement signed by Thomas. Id.

The Trial Court, using *Beverly* in analyzing the relevant facts, found:

> If the ADR is not a condition for admission, as the Defendants say it is what is the consideration for the Plaintiff to submit arbitration and waiver her constitutional rights? See *Beverly Health and Rehabilitation Service, Inc., et al. v. Smith* 2008-CA-000604-MR (Ky. Ct. App., April 10, 2009) If in fact there is no return promise or legal detriment on the part of the Defendants, the Plaintiff (whose principal gained nothing), can clearly avoid the ADR for lack of consideration. [Appendix 1 @ p. 13]

In addition to Kentucky courts analyzing this issue, the U.S. Sixth Circuit, in *Walker, Supra*, took up the same issue. Analogous to Duncan, who was not yet a resident of Golden Living when the ADR was presented to Ping, in *Walker*, the prospective employees were presented the application packet and ADR in a hurried fashion and told where to sign. *Walker @ 384* Furthermore, the employees were not told of their Constitutional rights. The application was also presented as a "take it or leave it" agreement. *Id.* Lastly, although the employees nominally were given the opportunity to consult with an attorney, in reality they could not because they were required to sign the agreement on the spot. *Id.* The Court held that the employer/defendant failed to demonstrate that, under Tennessee law, an employer's promise to consider an employment application is adequate consideration for a promise to arbitrate employment disputes that are wholly unrelated to the application or hiring process. *Id. @ 381*

Although both parties in this case signed the ADR Agreement, there never was any consideration given between them. Even if this Court does consider the ADR to be part of the admission process, the agreement to arbitrate cannot be held as valid consideration for Duncan's application and subsequent admission into Golden Living, when this claim arose from the negligence of Golden Living in caring for Duncan, not related to the admission process or to the admission documents.

The Trial Court also considered the issue of mutuality:

> Contrary to the Defendants' assertion, the knowledge of the terms of the ADR Agreement by the agent of the Defendants contracting in their behalf is a critical one. If both agents here are unaware of the terms of the contract they are purportedly executing, how can the Court conclude that there was a meeting of the minds or that the contract was sufficiently formed? [Appendix 1 @ p. 11].

Here, both agents had no knowledge of what the terms were. Brand was unaware of the Constitutional right to a jury trial. He also acknowledged that he believed that the arbitration process an "expedited process," but he did not know of any other benefit that he believed arbitration has over a civil trial, including if it is actually quicker than a civil trial. He did not understand the language of the ADR, including what equitable relief is, what statutes might be applicable, what constitutes a tort and what warranties apply. He was also unaware of what damages might be available under either state or federal law. Ping also did not have any knowledge or understanding of the terms of the ADR, as Brand hurried through the paperwork, not explaining any of the terms or conditions of the ADR.

In *Walker*, Supra, the Court found that there was no mutual assent of the parties in their bargaining over the arbitration agreement. *Walker @ p. 383.* Here, Ping was presented the ADR in a hurried fashion and simply told where to sign. Ping, if she had been informed of the conditions of the ADR by Brand, could have consulted an attorney and could have rescinded the ADR within the thirty days allowed. However, because of her reliance on Brand and his explanation of the documents she was signing, she was rightfully relying upon a fiduciary who undertook the obligation to explain the ADR.

In *Howell v. NHC Health Care Ft. Sanders, Inc.* 109 S.W.3d 731 (Tenn. App. Ct. 2003), the court found that the ADR did not bind the parties, focusing on the action of a nursing home employee, who "pushed" the ADR upon the patients' husband and had him

sign without any explanation. Id. at 735. The court held that the ADR was not bargained for, nor could it have been, under the reasonable expectation of an ordinary person under the circumstances.

While the husband could not read, this, the court found this would not excuse him from the contract. However, since the nursing home employee took it upon herself to explain the contract, rather than ask the plaintiff to read it, she failed in her obligation to explain he was waiving his wife's Constitutional right to a jury trial against the nursing home. Here, Brand admitted in this deposition that he did not explain that Ping was waiving Duncan's right to a jury trial, but he stated he gave her his "spiel" about the terms and conditions. Not only did he fail to give Ping the opportunity to understand the ADR, but he failed to allow her to properly bargain for any of its terms. Thus, the Trial Court properly found that there was no consideration bargained for and there was a lack of mutuality between the parties.

In its opinion, the Court of Appeals found that the Respondents' agreement to submit its own claims to arbitration was sufficient consideration to the Movant to make the ADR enforceable. However, according to published reports, the Consent Decree which the NAF entered into with the Minnesota Attorney General's Office, resulted from an investigation into the relationship between NAF and those business entities naming NAF as the sole arbitral forum. It was alleged that NAF conspired to rule in favor of creditor companies in order to insure that it would be named the sole arbitral forum in their contracts. According to the published report of an investigative committee of the U.S. House of Representatives, consumers won only a tiny fraction of their cases in California when the NAF was involved in the arbitration. The committee also found that

as many as seventy (70%) percent of the arbitration cases should have been dismissed rather than be resolved in favor the creditor entity. The report also criticized the NAF for assigning cases to particular arbitrators to maximize the Corporate client's chance of success. [Appendix 8]

In addition, in a complaint against NAF filed by the City Attorney of San Francisco, California in August 2008, based on an analysis of NAF's own reports, it is alleged that consumers won only 30 out of 18,075 arbitrations, a rate of 0.2%. A copy of the Complaint styled *People of California v. National Arbitration Forum, Inc. et al.* Case No. CGC-08-473569, Superior Court of the State of California, County of San Francisco, is attached as Appendix 9. By submitting claims against them to NAF arbitration, the Respondents virtually guaranteed their own success in that process. This could hardly be considered sufficient consideration for Movant giving up Ms. Duncan's right to a jury trial.

VII. MOVANT WAS NOT A SIGNATORY TO THE ADR AND CANNOT BE BOUND BY ITS TERMS

A. ALMA DUNCAN'S ESTATE IS NOT A SIGNATORY TO THE ADR AND IS NOT BOUND BY ITS TERMS

The Movant directs this Court's attention to the second holding in *Ally Cat* in which the Court addressed a question as to whether the agreement in that case actually amounts to a "written contract to submit to arbitration any controversy thereafter arising between the parties" citing KRS 417.050. *(Ally Cat p. 456).* This Court noted that the purported arbitration agreement was not signed by any of the real parties in interest or by their agents, including *Ally Cat, LLC* which was the actual purchaser of the real estate at

issue and was the Defendant in the trial court action, even though the purported arbitration agreement was not signed by a representative of the LLC. (Id. p. 453, 456.)

In this case, Movant, as representative of Ms. Duncan's Estate, is pursuing a wrongful death claim, which belongs to the wrongful death beneficiaries described in KRS 411.130. Ms. Duncan's Estate is not a signatory to this ADR and is not bound by its terms.

A claim for wrongful death did not exist at common law. Such a claim came into being with the adoption of § 241 of the Kentucky Constitution in 1891. In Chapter 1, § 6 of the Kentucky Statutes of 1903, which is now KRS 411.130, the legislature directed that a wrongful death action could only be brought by the personal representative of the deceased and then provided for the distribution of any damages recovered, identifying the wrongful death beneficiaries in that statute.

In his concurring opinion in *Robertson v. Vinson*, 58 S.W.3d 432 (Ky., 2001), beginning at page 435, Justice Cooper points out that those persons listed as the wrongful death beneficiaries in KRS 411.130 (2) are "the only persons 'legally entitled to recover' damages for wrongful death . . ." It is also clear that recovery for wrongful death damages does not become a part of the deceased's estate. *Emmerke's Adm'r v. Dnunzio*, (2 cases) 302 Ky. 832, 835 (Ky., 1946).

Although counsel for the Plaintiff finds no Kentucky case that has addressed the issue of the applicability of an arbitration agreement in a wrongful death case, courts in other jurisdiction have considered that question. In the case of *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009), the Missouri Supreme Court was asked to consider that question. In that case, a nursing home resident's son filed a wrongful death suit

under the Missouri wrongful death statue against the nursing home in which his mother was a resident at the time of her death. As part of the admission process, the deceased's daughter had signed an arbitration agreement on her behalf. As in the instant case, that agreement contained a clause suggesting that it would bind numerous entities related in some way to the deceased, including, as here, representatives and heirs. Id. p. 526

In answering the question whether the arbitration agreement was binding on the parties in a wrongful death suit, the Missouri court first reviewed the Missouri wrongful death statute, the language of which is similar to that of Kentucky's. Id. p. 527 The Court also reviewed prior cases in which the Missouri court had held that the wrongful death statute creates a new cause of action, which did not exist at common law and does not simply revive an action that belonged to the deceased. Id. p. 527 The Court then cited numerous Missouri cases standing for the proposition that a wrongful death claim does not belong to the deceased or to the deceased's estate.[2]

More recently, an appellate court in Washington reached a similar conclusion. In *Woodall v. Avalon Center – Federal Way, LLC*, 231 P. 3d. 1252 (Wash. App. Div. 1, 2010), the Washington Court of Appeals held that when otherwise enforceable, an arbitration agreement applies to the claims of the signing party but does not bind the wrongful death beneficiaries. In that case, the Court in Washington was dealing with a wrongful death statute very similar to Kentucky's. The Court observed that the wrongful death statute created "new causes of action for the benefit of specific surviving relatives to compensate for losses caused to them by the decedent's death ". *Id. p. 5* In reaching

[2] In a compelling concurring opinion, Special Judge Glenn A. Norton would hold that mandatory arbitration clauses which would require a nursing home resident to arbitrate any personal injury claim are procedurally and substantively unconscionable and therefore unenforceable.

this conclusion, the Court cites with approval the case of *Lawrence v. Beverly Manor*, cited above. The Court also cites, again with approval, the case of *Peters v. Columbus Steel Castings Co.,* 873 N.E. 2d 1258 (2007) holding that the wrongful death beneficiaries were not bound to arbitrate their claims by an arbitration agreement signed by the decedent. Clearly, Movant's claim, which she pursues on behalf of the wrongful death beneficiaries, is not subject to the ADR, even if this agreement was otherwise enforceable.

B. THE POWER OF ATTORNEY DID NOT GIVE PING THE AUTHORITY TO WAIVE MS. DUNCAN'S CONSTITUTIONAL AND STATUTORY RIGHTS TO TRIAL BY JURY

In Kentucky, as elsewhere, before a third party can bind a person to a contract, the third party must have some authority to do so. It is well-established in Kentucky that agency must be proven by the party asserting it, and cannot be proven by the declarations of the alleged agent. *White Plains Coal Co. v. Teague,* 173 S.W. 360 (Ky.App. 1915); *Cumnock-Duncan Co. v. Lewis*, 128 S.W.2d 926, 930 (Ky.App. 1939). Both the United States Supreme Court and the Kentucky courts have required analogous, heightened showings of authority when an agent gives up important rights of a principal, such as the constitutional right to trial by jury. *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989).

> Now a general agent cannot bind his principal, by a reference to arbitration, without his special authority. No case has gone so far. The interest of the principal, in the general, cannot require and his safety oftentimes forbids it. It is true that arbitrations are convenient and dispatchful; but it is equally true that they are extremely hazardous. And the errors and injustice which unlearned referees may commit, however enormous, admit of no correction. It is a dangerous jurisdiction, to which principals themselves seldom resort, and too often with well founded regret. That there is no redress of an unjust award, however ruinous,

> presents an invincible argument against the power of a general agent to bind his principal by a submission, without his special consent. *Southard v. Steele*, 3 T.B.Mon. 435 (Ky. App. 1826).

Capacity is an issue Respondents cannot overcome in this case because Ping simply did not have the capacity to enter into a binding arbitration agreement on behalf of her mother. While it is true that Ping held a power of attorney, that document only granted her authority over her mother's decisions, as set forth therein. It simply was not sufficient to grant her the power to waive her mother's constitutional right to a jury trial.

"Authority to submit a principal's disputes to arbitration is not within the powers of a general agent." 4 AMJUR2d Alternative Dispute Resolution § 103. "To bind a principal by a submission, the agent's authority to submit must be specially conferred, either expressly or by implication." *Id.* The circumstances in this refute any argument that Respondent had a good faith belief that Ping possessed such authority. Certainly, Ping's status as Duncan's daughter did not vest in her the authority to waive her mother's constitutional right to a jury trial any more than it granted her the authority to waive her right to counsel, to waive her right to remain silent, or to waive or assert any constitutional right. Moreover, a power of attorney cannot, and this one does not, vest in the agent such authority.

POA is ineffective to waive a constitutional/statutory rights such as the right to trial by jury guaranteed by Section 7 of the Kentucky Constitution and the rights enumerated in the Resident's Rights statute, KRS 216.515. The Court of Appeals' Opinion is premised on the idea that an attorney-in-fact has unlimited rights if the POA document says so. Kentucky law holds otherwise.

The statutory basis for a POA is found in KRS 386.093, contained in Chapter 386 titled "Administration; Investments." The statutory subsection pertains to the making financial decisions for others. Importantly, a POA appointed pursuant to KRS 386.093 does not have the same powers as a guardian/conservator appointed under Chapter 387. The Supreme Court, in *Rice v. Floyd,* 768 S.W.2d 57, 58-60 (Ky., 1989), held that KRS 386.093 was designed to abrogate the common law rules regarding POAs. The Court then delineated the different rights/responsibilities of an attorney-in-fact versus a statutory guardian/conservator.

> The scope of authority, duties and accountability of a guardian is much broader than that of a traditional power of attorney, even one intended to survive disability. The crucial phrase of K.R.S. 386.093 is found in the last sentence which states that, "[I]f a fiduciary is thereafter appointed by the court for the principal, the power of the attorney in fact shall thereupon terminate and he shall account to the court's appointed fiduciary."
>
> It was not the purpose of K.R.S. 386.093 to permit an attorney-in-fact to undertake all the obligations of a legally appointed guardian. A "durable power of attorney is not limitless." Matter of Wilhelm, New York Surr.Ct., 134 Misc.2d 448, 511 N.Y.S.2d 510, 511 (1987).
>
> The process of appointing a guardian or conservator is the legal means by which the court applies due process to avoid the possible invasion of civil or legal rights in regard to a partial disability. K.R.S. 387.500(2). The courts have always had the inherent duty to protect the rights and interests of incompetents. Metcalf v. Metcalf, 301 Ky. 817, 193 S.W.2d 446 (1946).
>
> The position enunciated by the district court that a durable power of attorney can be substituted for a guardianship does not properly recognize the distinctions between the two statutory positions.
>
> This Court notes that the guardian is answerable to a court and must file accountings at least annually. The attorney-in-fact is answerable and accountable only to the principal who may be mentally disabled. It is obvious that there must be adequate safeguards and control on the person who manages an incompetent's estate and that a great disparity exists between the durable power of attorney and a guardian.

A guardian must comply with K.R.S. 389A.010 et seq. whenever the sale of real property is involved. The attorney-in-fact may sell real estate as if it were his own. The guardian must also file biennial accounts with the district court. K.R.S. 387.670 and K.R.S. 387.710. An attorney-in-fact is not a fiduciary as defined in K.R.S. 395.001, nor is he a fiduciary subjected to the reporting requirements of K.R.S. 387.500 et seq. The attorney-in-fact is accountable only to his principal, who in this case appears to be incompetent.

The guardianship provides for broad powers and duties such as the power to select the place of living and the restrictions of personal freedom of the disabled. K.R.S. 387.660. Such powers have never been encompassed in the traditional power of attorney even the durable power of attorney. The attorney-in-fact is not restricted.

An incompetent cannot be sued and an attorney-in-fact cannot defend an action on behalf of an incompetent. Civil Rule 17.03. Defense must be completed by a legally appointed guardian or committee.

The legal and personal requirements of a disabled person are not well satisfied by an attorney-in-fact as they might be by a guardian. We do not believe they accomplish the same goals as those expressed in the guardianship statutes.

In Kentucky, the durable power of attorney statute states that if a fiduciary is thereafter appointed for the principal, the attorney-in-fact is terminated and he must account to the court-appointed fiduciary. The appointment of a guardian was contemplated by the legislature as part of the durable power of attorney.

As indicated in *Rice*, Kentucky has not adopted the Uniform Power of Attorney Act. The Uniform Act gives specific powers to attorney-in-fact to compromise/settle claims and submit claims for alternative dispute resolution. See Power of Attorney Act, Section 212 (2006) available at *http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm* For example, Tennessee has adopted much of the Uniform Act, and Tennessee's "Uniform Durable Power of Attorney Act", TCA 34-6-101 et seq, contains a specific statutory section which allows an attorney-in-fact to compromise/settle disputes and sue/defend on behalf of the

principal. TCA 34-6-109(17). Kentucky has nothing similar. Indeed, there is no indication the General Assembly intended a POA to have such rights – especially since a guardian/conservator is the only entity statutorily-authorized "[t]o act with respect to the ward in a manner which limits the deprivation of civil rights," KRS 387.660(4), and "prosecute or defend actions, claims or proceedings in any jurisdiction," KRS 387.700(1); see also KRS 387.500(2). Therefore KRS 386.093, when read in conjunction with KRS Chapter 387, demonstrates a legislative intent that only statutorily-appointed guardians/conservators may affect a ward's civil rights or assert/defend claims on behalf of the ward. Accordingly, guardians/conservators should be the only entities capable of waiving a ward's constitutional right to trial by jury and the civil rights guaranteed by KRS 216.515.[3]

If only a guardian/conservator can waive the constitutional right to trial by jury and the statutory rights in KRS 216.515, then Ping did not have actual authority to enter into the agreement. Moreover, because Ping represented herself as POA for Duncan – rather than guardian/conservator – she had no apparent authority to enter the agreement either.

The power of attorney in this case grants to Ping authority to make certain, specific decisions on behalf of Duncan. It does not confer any greater authority. Nor could it. A "durable power of attorney is not limitless." *Id.* (quoting Matter of Wilhelm,

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[3] In 1998, the legislature amended KRS 386.093 to allow an attorney-in-fact to exercise authority even after a guardian/conservator is appointed. However, nothing in the amended version of KRS 386.093 gives an attorney-in-fact the same rights/responsibilities as a guardian/conservator. This is important because, presumably, the General Assembly was aware of *Rice*, yet chose not to give an attorney-in-fact the same rights/responsibilities of a guardian/conservator or otherwise adopt the consistent portions of the Uniform Act.

The power of attorney in this case grants to Ping authority to make certain, specific decisions on behalf of Duncan. It does not confer any greater authority. Nor could it. A "durable power of attorney is not limitless." *Id.* (quoting Matter of Wilhelm, New York Surr.Ct., 134 Misc.2d 448, 511 N.Y.S.2d 510, 511 (1987)). Furthermore, the proper authority in this case would not have been a power of attorney, but a guardian. As noted above, a power of attorney does not have limitless power, whereas a guardian, has the broad powers and duties to place restrictions of personal freedom and living arrangements, as set forth by KRS 387.660.

Moreover, there is ample authority for the proposition that where an agent does not have authority to bind a party to an arbitration agreement, or where the party otherwise does not sign the agreement, the party cannot be bound by its terms.

C. THE TRIAL COURT PROPERLY FOUND THAT PING DID NOT HAVE ACTUAL OR IMPLIED AUTHORITY UNDER THE POA TO EXECUTE THE ADR AGREEMENT.

In its opinion, the trial court properly determined that Golden Living erroneously relied on Kindred Hosp. Ltd. P'ship v. Luttrell, 2006-CA-0002210-MR (Ky. Ct. App., July 27, 2001), which is an instructive opinion, in both its factual and legal assertions. In Luttrell, the supposed agent signed an arbitration agreement on behalf of her mother. This Court ruled that the daughter, who held the POA, did not have any actual, apparent, implied or statutory authority to bind her mother or her estate to the ADR Agreement. This Court suggested that subsequent courts reviewing the validity of an ADR Agreement would require some specific granting of authority to agree to waive the right to trial before enforcing it. Luttrell is further instructive in that this Court determined that an ADR "does not involve healthcare decisions" as defined by KRS 311.621(8), because it

The trial court properly found that Luttrell does not create the rule that every authorized power of attorney constitutes evidence of an express authority to arbitrate.

> Here the Plaintiff had a general power of attorney to act on behalf of Ms. Duncan on specific matters. In the enumeration of powers, however, an express authority to arbitrate and waive constitutional rights were lacking. It is erroneous for the Defendants to extrapolate from the opinion or ruling in *Luttrell*, supra., the proposition that any POA, regardless of the language contained (or lacking) therein, grants the agent specific or express power to submit any or all claims to arbitration, or to waive a principal's constitutional rights. To conclude otherwise is inconsistent with the fundamental principal that an agent cannot bind its principal for acts outside the scope of its actual authority. For a principal to be bound by an act of its agents, the latter must have acted with either express or implied authority of his principal. Bottoms v. Bottoms, 880 S.W. 2d 559, 561 (Ky. Ct. App. 1994). Express authority arises from direct, intentional granting of specific authority from a principal to an agent. Mill Street Church of Christ v. Hogan, 785 S.W. 2d 263 (Ky. Ct. App. 1990). [Appendix 9]

In Kentucky, actual authority arises from a direct, intentional granting of specific authority from a principal to an agent. Millstreet at 267. The general rule is that any power of attorney which delegates authority to perform specific acts that also contains general words, are limited to the particular acts authorized. Harding v. Kentucky River Hardwood Co. Buskirk, et. al., 265 S.W. 429, 431 (Ky. App., 1924).

> This was a formal power of attorney, apparently deliberately executed, attested, and recorded. It will therefore be strictly construed and in view of the controlling purpose, and the addition of general words will not be construed to extend the authority so as to add new and distinct powers different from those expressly delegated.
>
> It is the law that a formal instrument conferring authority will be strictly construed, and can be held to include only those powers which are plainly given, and those which are necessary, essential and proper to carry out those expressly given. It will be presumed that the principal, in conferring a power intended to confer with it the right to do those things without which the object contemplated could not be accomplished, but beyond this the authority will not be extended by construction. Mechem on Agency, §

308.Id.

Absent actual authority, the Courts can determine if an agent has been granted any implied authority which is "actual authority circumstantially proven which the principal actually intended the agent to possess and includes such powers as are practically necessary to carry out the duties delegated." Millstreet at 267. The trial court did not find any specific or express language that suggested that Ping could agree to arbitrate Duncan's estate claims against Golden Living.

The Court of Appeals held that because the POA contained a clause that stated: "the language of [the POA] be liberally construed with respect to the power and authority granted...," this gave Ping the authority to enter into the ADR. As evidenced by the POA, there was never an intentional granting of specific authority that would bind Duncan to the ADR. The POA contained eight specific grants of authority, but did not state with specificity that Ping could undertake any legal action on behalf of Duncan or her estate. As the Court held in Harding *Supra,* Respondents cannot rely upon the "general language" clause of the POA to bind Duncan.

Contrary to the Court of Appeal's holding, there was never any clause granting actual or implied authority to Ping. When the POA was executed, it granted Ping the specific authority to make medical and financial decisions for Duncan. White the POA also contained the language that Ping's authority to act was to be "liberally construed," and "the specific items, rights, or acts or powers herein is not intended to be, nor does it limit or restrict the general and full power herein granted to my attorney-in-fact," the trial court properly narrowed its focus:

> Thus, the question to be ascertained is whether from the language in the POA, (which is the agency contract between the Plaintiff and Ms.

Duncan), specifically: "...to make any and all decisions of whatever kind, nature or type regarding [Ms. Duncan's] medical care, and to execute any and all documents, including but not limited to, authorizations and releases, related to medical decisions affecting [her]..." may be reasonably interpreted as conferring an authority to submit pre-dispute claims to arbitration, and to waive Ms. Duncan's constitutional rights.

In supporting its decision, the trial court directed its attention to the construction of contracts in Kentucky:

> Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and accordingly they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described. It is therefore an established canon of construction that in order to arrive at the intention of the parties the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted as to their meaning and application. And the contract must be so construed as to give it such effect, and none other, as the parties intended at the time it was made." Opinion at 6, citing Mogg v. Farley, 265 S.W. 449 (Ky. 1929) citing 6 R. C. L. 849.

With regard to the trial court's opinion holding that Ping had no actual or implied authority to enter into the ADR, the Movant can do no better than simply cite the trial court's opinion:

> Applying the foregoing, the Court does not find that any authority to arbitrate or to waive Ms. Duncan's constitutional rights may be reasonably inferred or implied. First, nowhere in the POA is there any mention that the Plaintiff was authorized to sue or be sued on behalf of Ms. Duncan. In fact, the word "action" or "actions" is nowhere mentioned in the POA. Second the POA is also silent on whether the Plaintiff, as Ms. Duncan's attorney-in-fact, can adjust, settle, discharge or compromise any of Ms. Duncan's accounts, debts, claims and demands....The Court agrees with the Plaintiff that the matter of agreeing to arbitrate pre-dispute legal claims and to waive constitutional rights is unrelated to making either healthcare or investment decisions. Even if the POA dealt with Ms. Duncan's financial interests (a point raised by the Defendants), this did not remove

attorney-in-fact, can adjust, settle, discharge or compromise any of Ms. Duncan's accounts, debts, claims and demands....The Court agrees with the Plaintiff that the matter of agreeing to arbitrate pre-dispute legal claims and to waive constitutional rights is unrelated to making either healthcare or investment decisions. Even if the POA dealt with Ms. Duncan's financial interests (a point raised by the Defendants), this did not remove the fact that the Plaintiff's authority "to sign any and all documents and papers" are restricted either by that which is (1) "necessary to carry out the handling of any investments, or interest in such investments," or (2) "related to medical decisions affecting [Ms. Duncan]." The attachment of a stand alone document, i.e., the ADR Agreement here, behind a stack of papers presented to the Plaintiff as relating to admission of her mother to the Facility for continued medical care can be misleading, if not deceptive. These facts, which put in proper context the purpose for which the specific authorities were intended (by Ms. Duncan) to be used, should restrict the breadth of her implied authority to carry out her principal's, (Ms. Duncan), intentions. Because it is reasonable to construe that healthcare-or investment-related considerations restrict the reach of the Plaintiff's authority to sign documents, it cannot be reasonably inferred that the authority to arbitrate or to waive constitutional rights were contemplated or intended by Ms. Duncan in her POA.

Accordingly, the Court concludes that Plaintiff did not have the capacity to bind her principal to a arbitration nor to a waiver of constitutional rights.

D. PING DID NOT HAVE APPARENT AUTHORITY TO BIND DUNCAN TO THE ADR

There was no evidence that Ping had apparent authority to enter into the ADR agreement. In Kentucky:

> Apparent authority is not actual authority, but rather is that which by reason of prevailing usage or other circumstance, the agent is in effect held out by the principal as possessing. It is a matter of appearances, fairly chargeable to the principal and by which person dealt with are deceived, and on which they rely." Estell v. Barrickman, 571 S.W.2d 650, 652 (Ky. App. 1978)

Acting as this Commonwealth's highest Court in 1924, the Court of Appeals dealt with the appearance of authority:

> It is equally well settled that a person dealing with an agent must ascertain the extent of the agent's authority.

> Parties dealing with an agent known by them to be acting only under an express grant, whether the authority conferred be general or special, are bound to take notice of the extent of the authority conferred. They must be regarded as dealing with the grant before them and are bound at their peril to notice the limitations thereto prescribed either by its own terms or by construction of law. Mechem on Agency, (2d Ed) § 707. Harding at 432.

It was not reasonable for Respondents' agent, Brand, to believe that Ping was the authorized agent to sign the admission documents. Based on the specific powers granted by Duncan, Ping did not have the any authority to sign the ADR. In his deposition, Brand, in response to questioning if he had reviewed Duncan's POA, stated:

> To the extent to make sure that it was, in fact durable both financially and medically, or at least medically at the time. And the one she presented to the facility was both. (Brand depo pg. 35).

By reviewing the POA, during the brief ten minutes he was with Ping, Brand had notice that none of the powers granted authorized Ping to submit Duncan to any arbitration or to waive her statutory or Constitutional rights. Respondents were at their own peril when they hired Brand and subsequently trained him to handle their facility admissions. While at their own peril, Respondent failed to recognize and inquire into the language granting Ping's authority. As required by Harding, Brand failed to take notice of the limitations of the POA.

As the Movants have established, Ping did not have any authority, either actual, implied or apparent to bind Duncan to the ADR agreement. The POA expressly and with specificity, authorized Ping to have limited authority. At their own peril, Respondents failed to recognize the limited powers of the POA. Thus, the trial court held that because Ping did not have the capacity to enter into the ADR agreement or to subsequently waive Duncan's Constitutional rights, Respondents' motion to compel was properly denied.

CONCLUSION

Wherefore, this Court is respectfully requested to review the Court of Appeals' Opinion, because of its conflict with established precedent in *Ally Cat*, *Supra*; because of the failure of the arbitration forum; because of its conflict with another Court of Appeals' Opinion presently pending in this Court (*Smith*, *Supra)*; because of the Court of Appeals' impermissible substitution of its judgment for that of the Trial Court as to a determination as to the facts of this case and its finding of fraud in factum; because the terms of the ADR are illusory; because the circumstances surrounding the ADR and the agreement itself amount to a breach of a fiduciary obligation; and because the Movant and the wrongful death beneficiaries were not signatory to the ADR and therefore, cannot be bound by its terms.

Respectfully submitted,

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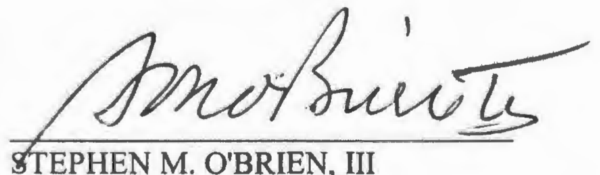

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