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

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

MOVANT'S REPLY BRIEF

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

This is to certify that a true and accurate copy of the foregoing document has been served by mailing same on October 25, 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 **HAND 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 It is further certified that the record on appeal has not been withdrawn by counsel for the Movant.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,

COUNSEL FOR PLAINTIFF

Hon. Stephen M. O'Brien,III
sobrien@smolawky.com
Hon. William J. George
wgeorge@smolawky.com
Hon. Aaron J. Bentley
abentley@smolawky.com
271 West Short Street, Suite 510
Lexington, Kentucky 40507
Telephone: (859) 523-4336
Facsimile: (859) 523-4713

STEPHEN M. O'BRIEN, III

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. THE CIRCUIT COURT'S FINDINGS OF FACT ARE REVIEWED UNDER A CLEARLY ERRONEOUS STANARD OF REVIEW.

Respondents argue that because the Circuit Court did not prepare formal findings of fact, the proper standard of review is *de novo*.[1] They rely on *Consultants and Builders, Inc. v. Paducah Federal Credit Union*, 266 S.W.3d 837 (Ky. App. 2008) for this proposition. However, that case makes no mention of "formal findings of fact." Instead, it appears from the one sentence mention of findings of facts in that opinion that the trial court made no findings of fact whatsoever. Similarly, the *Consultants and Builders* court cites to *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335 (Ky. App. 2001) on that point. The *Conseco* court noted that "the trial court made no factual findings in this case, but based its ruling solely on the application of certain principles of contract law to the arbitration clause quoted above." *Id.* at 340. In this case, while the Circuit Court did not prepare "formal findings of fact," throughout its fifteen-page Opinion and Order, the court made multiple findings of fact that it then applied to the law to reach its conclusions. The Circuit Court's ruling was not based "solely on the application of certain principles of contract law," as in *Conseco*. Therefore, complete *de novo* review is not appropriate.

While this Court reviews questions of law *de novo*, CR 52.01 dictates that a trial court's findings of fact will "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

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[1] Brief of Respondents, p. 6

II. MOVANT DID NOT HAVE AUTHORITY TO WAIVE MS. DUNCAN'S CONSTITUTIONAL RIGHTS.

Respondents either misunderstand or misstate Movant's argument regarding authority.[2] Movant does not dispute that a person can waive their right to a jury trial as well as other of their constitutional rights. However, for an agent to waive the constitutional rights of a principal, the authority to do so must be specially conferred. Respondents cite several cases that they represent as holding that a POA has the ability to enter into contracts that implicate constitutional rights. However, each of those cases appear to involve normal real estate and financial contracts that were within the powers granted to the POA in each case. In this case, however, Movant did not have the right, either expressly or impliedly, to waive Ms. Duncan's constitutional right to a trial by jury.

Respondents state that *Webner v. Black*, 7 S.W.3d 379 (Ky. 1999) holds that the clear and unambiguous language in a POA should be honored.[3] That case is very instructive. In *Webner*, this Court held that where a principal instructed his POA "to collect his Evansville bank accounts and certificates of deposit into a local bank account naming her as joint owner with right of survivorship," she had the right to do that. *Id.* at 380, 382. Similarly, Respondents rely on *Ingram v. Cates*, 74 S.W.3d 783 (Ky. App. 2002).[4] There, the court held that a POA had the power to pay his personal debts with the principal's money because the POA granted him the power to "convey any personal property that [the principal] now or hereafter own[ed]...." *Id.* at 787. In each of those cases, the POA had the right to do precisely what the language of the POA granted. In

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[2] *Id.*, p. 22
[3] *Id.*, p. 25

this case, however, as Respondents admit, Ms. Duncan's POA granted Movant the right to make decisions relating to Ms. Duncan's property, finances, and medical care.[5] That does not include the right to waive Ms. Duncan's constitutional right to trial by jury.

Respondents list a number of mostly unpublished cases that they say show that Kentucky courts have recognized that a POA can be evidence of authority to sign an arbitration agreement on behalf of an individual being admitted to a long-term care facility.[6] The cases listed simply do not support Respondents' reading of them. For example, in *Stanford Health and Rehabilitation Center v. Brock*, 334 S.W.3d 883 (Ky. App. 2010), the court found an arbitration agreement to be unenforceable because the person who signed the agreement did not have the authority to do so. *Id.* at 885. The court did not hold that the person who signed the agreement would have had the authority to waive a constitutional right had she simply been named POA. In *Kindred Nursing Centers Ltd Partnership v. Brown*, 2011 WL 1196760 (Ky. App. April 1, 2011) (unpublished), the court explicitly held that the arbitration agreement was unenforceable because the person who signed the agreement had not yet been appointed *guardian*. *Id.* at *9. Kentucky courts have not held that a POA, regardless of the language in the vesting document, may automatically enter a principal into an arbitration agreement and waive her constitutional right to a trial by jury.

Respondents urge that finding the arbitration agreement unenforceable in this case would run afoul of the Supreme Court of the United States' recent holding in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct 1740 (2011), and not "place arbitration

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[4] *Id.*
[5] Brief of Respondents, p. 24
[6] *Id.*

agreements on equal footing as other contracts. *Id.* at 1745.[7] However, if Respondents' argument prevails – that a POA with general language automatically grants the right to waive the principal's right to a trial by jury – arbitration agreements will be placed above all other contracts as the power granted in a POA will go well beyond the plain language of the document.

A. NEITHER THE POA NOR MOVANT'S HISTORY WITH MS. DUNCAN CREATED IMPLIED AUTHORITY.

First, Respondent bases its implied authority argument on a portion of the POA that granted the power to "take possession of any and all monies, goods, chattels, and effects belonging to me, wheresoever found."[8] Respondents provide no support for the contention that this power included the power to arbitrate claims on Ms. Duncan's behalf. The language of the Uniform Power of Attorney Act, which Kentucky has not yet adopted, is instructive here. It allows an attorney-in-fact to compromise/settle disputes and sue/defend on behalf of the principal.[9] The language of the POA quoted by Respondents makes no mention of settlements or disputes and appears to refer only to the personal property of the principal.

Next, Respondent argues that because Movant had helped her mother with questions and decisions in the past, she had implied authority to waive her mother's constitutional right to a trial by jury. The cases cited by Respondents do not support their argument. In *Laurel Creek Health Care v. Bishop*, 2010 Ky. App. Unpub. LEXIS 233 (Ky. App. 2010) (unpublished), the court found an agency relationship where a nursing home resident who had mental capacity to contract specifically asked his wife to come to

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[7] Brief of Respondents, p. 26
[8] *Id.*, p. 27

the nursing home to sign the admission documents. *Id.* at *5-6. Further, the court did not find the arbitration agreement enforceable. Rather, it found that an agency relationship existed and remanded for further proceedings. *Id.* at *8. Respondents' position would allow any family member who had helped a person with "questions and decisions" to waive that person's constitutional rights. There is no support for the logical conclusion of Respondents' argument in Kentucky statutory or case law.

B. THE PLAIN LANGUAGE OF THE POA SHOWS MOVANT DID NOT HAVE APPARENT AUTHORITY.

Respondent is correct that a third party dealing with an attorney-in-fact is only required to look at the language of the POA to determine the extent of the power under that document.[10] In this case, Ms. Duncan's POA is clear that it vests in Movant the power to make decisions relating to Ms. Duncan's property, finances, and medical care. Mr. Brand testified in his deposition that he examined the POA and it was "medically and financially durable." He was right. That was the extent of the powers granted by the POA. His reading of the language of the POA should have alerted him to the fact that Movant did not have the authority to waive her mother's constitutional rights.

Both Mr. Brand and Movant testified in their depositions that Mr. Brand presented the documents to Movant as a "standard application packet." Movant represented herself as having the authority to sign the documents because she did have the authority to sign the documents in a "standard application packet," as those documents involved medical and financial decisions. She did not know, and was not made aware by Mr. Brand or Respondents, that one of the documents would waive Ms.

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[9] See Brief of Movant, p. 31
[10] Brief of Respondents, p. 30

Duncan's constitutional rights, for which she did not have authority, and she could not have represented herself as having the authority to do so.

C. MOVANT IS NOT EQUITABLY ESTOPPED FROM DENYING AUTHORIZATION BECAUSE SHE HELD HERSELF OUT AS HAVING AUTHORITY TO SIGN "STANDARD APPLICATION PACKET."

Because Movant did not hold herself out as having the authority to waive Ms. Duncan's constitutional rights, thereby not creating apparent authority, she also is not equitably estopped from denying authorization.

III. SECTION FIVE OF THE FEDERAL ARBITRATION ACT CANNOT BE USED TO REWRITE THIS AGREEMENT.

Even if Movant did have the authority to enter into the arbitration agreement, the agreement is unenforceable due to the failure of the arbitral forum. Movant acknowledges that a number of federal courts have held that the language in arbitration agreements such as the one in this case can be rewritten by Section 5 of the Federal Arbitration Act. Section 5 of the FAA is implicated because the National Arbitration Forum no longer conducts arbitration due to its record of nearly always ruling in favor of businesses in arbitrations against consumers. However, "the majority of the decisions that have analyzed language similar to" the agreement in this case have refused to rewrite those arbitration agreements and have instead found them unenforceable. *Stewart v. GGNSC-Canonsburg, L.P.*, 2010 PA Super 199, 219 (Pa. Super. Ct. 2010).

Respondent argues that the integral part of the arbitration agreement is the intent to arbitrate any claims.[11] That argument has been rejected by several federal courts. The courts in *Stewart* and *Ranzy v. Tijerina*, 2010 U.S. App. LEXIS 17872 (5th Cir. Tex. 2010) (unpublished), among others, have held that the integral portions of the agreement

are that the law governing the arbitration proceeding would be the NAF code and that the arbitrators would be members of the NAF or those designated by the NAF. *Stewart*, 2010 PA Super at 220. Since the NAF can no longer conduct arbitrations, the NAF code can no longer be enforced. *Id.* Therefore, Respondents urge this Court to delete the provisions of the agreement that mandate who will arbitrate this dispute and what rules will govern that arbitration and completely rewrite the agreement. That is precisely what the *Stewart* court refused to do:

> "This Court will not rewrite an arbitration agreement and insert additional terms to replace an unenforceable provision that was integral to the agreement. Sanctioning this type of action would run contrary to the clear intent of the parties as expressed by the plain language of the Agreement itself."
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> *Id.*

Further, the Stewart court also rejected Respondents' argument that the severability clause of the arbitration agreement saves it even though the agreement is otherwise unenforceable. The court found that to hold otherwise would violate cardinal contract principles because it would ignore the plain language of the agreement. In the case on which Respondents rely, *Jones v. CGNSC Pierre LLC*, 684 F.Supp.2d 1161 (D.S. Dak. 2010), the court failed to analyze whether the portions of the agreement related to the NAF were integral to the contract before deciding that the otherwise unenforceable agreement could be saved by a severability clause. Because those portions are integral to the contract, the arbitration agreement cannot have its terms completely rewritten with the use of a severability clause.

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[11] Brief of Respondents, p. 15

This Court should find that Section 5 of the FAA does not apply to the arbitration agreement in this case and that the agreement is unenforceable, regardless of the severability clause, due to the fact that integral portions of the contract cannot be performed.

IV. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION BECAUSE THE CIRCUIT COURT'S FINDING OF FRAUD AND UNCONSCIONABILTY PLACE THE AGREEMENT WITHIN AN EXCEPTION TO THE FAA.

Respondents are correct that *Ally Cat v. Chauvin*, 274 S.W.3d 451 (Ky. 2009) does not apply to arbitration agreements governed by the FAA.[12] However, Section 2 of the FAA provides that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 USCS § 2. The Circuit Court's findings of fraud in *factum* and unconscionability place the agreement within an exception to the FAA. Therefore, *Ally Cat* applies.

Respondents are incorrect that the arbitration agreement in this case satisfies the requirements of *Ally Cat*.[13] *Ally Cat* requires that the arbitration agreement "comply with the literal provisions of KRS 417.200." 274 S.W.3d at 455-456. *Ally Cat* is distinguishable from *Hathaway v. Eckerle*, 336 S.W.3d 83 (Ky. 2011), on which Respondents rely, because the arbitration agreement in *Hathaway* solely provided for arbitration in Kentucky. *Id.* at 86. The agreement provided that "[s]uch arbitration shall be conducted in the County in which the dealership is located." *Id.* There was no other provision for the location of the arbitration. That agreement did comply with the literal provisions of KRS 417.200, as *Ally Cat* requires.

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[12] *Id.*, p. 19

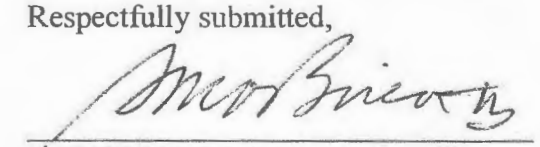
[13] Brief of Respondents, p. 21

In this case, 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...." While the second part of this provision is similar to the agreement in *Hathaway*, the first part of the provision allows for the arbitration to take place somewhere other than Kentucky, which does not comply with the literal provisions of KRS 417.200. Therefore, the arbitration agreement in this case does not meet the requirements of *Ally Cat* and this Court does not have subject matter jurisdiction to enforce the agreement.

CONCLUSION

This Court reviews the trial court's finding of facts, which it relied on its Opinion and Order, under the clearly erroneous standard. Complete *de novo* review is inappropriate. Further, Movant did not have the requisite authority to waive Ms. Duncan's constitutional right to a trial by jury. Moreover, because Section 5 of the Federal Arbitration Act does not apply, the arbitration agreement in this case is unenforceable due to the failure of the arbitral forum and cannot be rewritten. Lastly, because the arbitration agreement in this case is within an exception to the FAA due to contract defenses, this Court does not have subject matter jurisdiction to enforce the agreement. For the foregoing reasons, and those raised in the Brief of Movant, Movant respectfully requests that this Court reverse the decision of the Court of Appeals and reinstate the Circuit Court's order denying Respondents' motion to dismiss this lawsuit.

Respectfully submitted,



STEPHEN M. O'BRIEN, III
Counsel for Movant