COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2010-SC-000558-D

Donna Ping, Executrix of the Estate of
Alma Calhoun Duncan, Deceased — MOVANT

v.

Beverly Enterprises, Inc.;
Beverly Enterprises-Kentucky, Inc.;
Beverly Health and Rehabilitation Services, Inc.
d/b/a Beverly Health and Rehab. of Frankfort;
GGNSC Administrative Services, LLC d/b/a Golden Ventures;
GGNSC Holdings, LLC d/b/a Golden Horizons;
GGNSC Equity Holdings, LLC;
Golden Gate National Senior Care, LLC d/b/a Golden Living;
Golden Gate Ancillary, LLC d/b/a Golden Innovations;
GGNSC Frankfort, Inc. d/b/a Golden Living Center-Frankfort
f/k/a Beverly Health and Rehab. of Frankfort;
Ann Phillips, in Her Capacity of Administrator of Golden Living
Center-Frankfort f/k/a Beverly Health and Rehab. of Frankfort;
John Does 1 Through 5, Unknown Defendants — RESPONDENTS

ON APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2009-CA-001361-MR
CASE NO. 2009-CA-001379-MR

SUBMITTED BY:
Marcia L. Pearson
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
100 Mallard Creek Road, Suite 400 A
Louisville, KY 40207
502.238.8500
Counsel for Respondents

This is to certify that a true and accurate copy of the foregoing document has been served by mailing same on October 10, 2011, to: The Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, Franklin County Courthouse, 669 Chamberlin Avenue, Frankfort, KY 40601; Hon. Stephen M. O'Brien, III, 271 West Short Street, Suite 510, Lexington, KY 40507; Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and that 10 manually-signed copies were sent via hand-delivery to Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, New Capitol Building, 700 Capital Avenue, Frankfort, KY 40601.

Marcia L. Pearson

INTRODUCTION

Movant, an educated individual with a 40-year career involving frequent, sophisticated business transactions, asks this Court to invalidate an arbitration agreement she signed, but chose not to read, in her capacity as Alma Duncan's daughter and her attorney-in-fact, pursuant to a power of attorney which gave Movant broad authority to act on Ms. Duncan's behalf and provided that its language regarding the grant of power and authority be "liberally construed." Movant's request for this Court to invalidate her agreement is contrary to federal and Kentucky law and public policy favoring arbitration and the Kentucky Court of Appeals correctly rejected Movant's request, finding that she had authority to sign the arbitration agreement, which was not unconscionable, illusory, or subject to any other contractual defense.

STATEMENT CONCERNING ORAL ARGUMENT

Movant has requested oral argument in this case. Respondents welcome the opportunity for argument. Oral argument will not only be helpful to the Court in deciding the issues presented in this appeal, but the decision rendered by the Court in this case will have far-reaching implications on long-standing Kentucky and federal public policy and law favoring arbitration, as recently affirmed by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011).

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Respondents have reviewed Movant's Statement of the Case and it does not provide this Court with all the relevant facts involved in this appeal.

Golden LivingCenter-Frankfort ("the facility") is a long-term care facility in Frankfort, Kentucky. On March 17, 2006, Alma Duncan ("Duncan") was admitted to the facility from the local hospital by her daughter and attorney-in-fact, Donna Ping ("Movant").[1] At the time of Ms. Duncan's admission to the facility, Movant represented herself to facility staff as Ms. Duncan's attorney-in-fact and produced a copy of a General Power of Attorney executed by Ms. Duncan on January 19, 1998 ("the POA").[2] The POA gave Movant broad powers over Ms. Duncan's property, financial affairs and medical care.[3] Moreover, the POA clearly stated Ms. Duncan's intent that "the language of [the POA] be liberally construed with respect to the power and authority hereby granted. . . ."[4]

Pursuant to her authority as Ms. Duncan's POA and "daughter," Movant voluntarily signed the facility admission documents, which included an Arbitration Agreement ("the Agreement"), on Ms. Duncan's behalf.[5] The Agreement, although presented as a component of the admissions packet, was contained on separate pages and was titled in bold font, **"RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)."**[6]

---

[1] TR1 at 89
[2] TR1 at 89 & 99-101; Depo. Transcript of Donna Ping, pp. 48-49 & 51, attached as Tab 3 to the Appendix; POA attached as Tab 1 to the Appendix.
[3] TR1 at 99-100
[4] TR1 at 100
[5] TR1 at 89; Arbitration Agreement attached as Tab 2 to the Appendix.
[6] TR1 at 103-105

The Agreement is governed exclusively by the Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-16 ("FAA").[7] Pursuant to the Agreement, the parties contractually agreed to arbitrate any disputes arising out of Ms. Duncan's stay at the facility, the implications of which were clearly, conspicuously and concisely set out above the signature line:

> **THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES."[8]**

The Agreement gave Movant the "right to seek legal counsel," regarding the terms of the Agreement, reiterated that execution of the Agreement was "not a precondition to admission or to the furnishing of services to the Resident by the Facility," and stated that Movant could rescind the Agreement by providing the facility with written notice within 30 days of the date of signing the Agreement.[9]

The Agreement was presented to Movant by Joshua Brand ("Brand"), who at the time served as the Admissions Coordinator at the facility.[10] Movant is an educated person, having obtained her certification in community development from the University of Louisville, and had a 40-year career involving sophisticated business transactions.[11] Movant has acknowledged that, as Ms. Duncan's POA, she had an obligation to read

---

[7] TR1 at 103-105
[8] TR1 at 104
[9] TR1 at 104
[10] Depo. Transcript of Donna Ping, p. 47; Depo. Transcript of Joshua Brand, pp. 9-10, attached as Tab 4 of the Appendix
[11] Depo. Transcript of Donna Ping, pp. 21-22 & 25

documents before signing them on her mother's behalf.[12] Movant has also admitted that she believes it is a significant event when she signs her name to a document.[13] She further acknowledged that Brand never denied her the opportunity to read the admission documents, including the Agreement.[14] However, Movant testified that she chose not to read the documents before she signed them on her mother's behalf.[15] Brand provided Movant with a copy of all of the admission documents she signed, as well as the Agreement, which Movant took home but admits to reading for the first time after her mother's death.[16] Movant did not rescind or revoke the Agreement by providing written notice of same within thirty (30) days to the facility, as allowed by the Agreement.

B. PROCEDURAL BACKGROUND

In disregard of the Agreement she voluntarily signed on Ms. Duncan's behalf, Movant filed this lawsuit on October 1, 2008, alleging negligence, wrongful death and statutory violations with respect to the care rendered to Ms. Duncan during her residency at the facility and seeking punitive damages.[17] Respondents filed a Motion to Dismiss or, in the Alternative, to Stay the Lawsuit Pending Alternative Dispute Resolution Proceedings.[18] Movant opposed the motion and the Parties subsequently came before the Franklin Circuit Court ("Circuit Court") for hearing on November 10, 2008.[19] In an Order entered November 19, 2008, the Circuit Court ordered the parties to engage in limited discovery regarding the enforceability of the Agreement signed by Movant.[20] Pursuant to

---

[12] Depo. Transcript of Donna Ping, p. 46
[13] Depo. Transcript of Donna Ping, p. 55
[14] Depo. Transcript of Donna Ping, p. 56
[15] Depo. Transcript of Donna Ping, pp. 56-57
[16] Depo. Transcript of Donna Ping, p. 53-54
[17] TR1 at 8-30
[18] TR1 at 58-87 & TR2 233-238
[19] TR2 at 274-300 & TR3 324 & 329-331
[20] TR3 at 332-333

that order, the parties engaged in limited discovery related to the enforceability of the Agreement. Respondents deposed Movant regarding her signing of the Agreement, and Movant deposed Mr. Brand, regarding the admission of Ms. Duncan and the presentation of documents executed by Movant.

On June 25, 2009, the Circuit Court entered its Opinion and Order, denying Respondents' Motion to Enforce the Arbitration Agreement.[21] Contrary to the law of Kentucky, the Circuit Court erroneously ruled as follows:

- Ms. Duncan's POA did not authorize Movant "to arbitrate Ms. Duncan's estate's claims against the Defendants," despite the fact that Ms. Duncan's POA specifically gives Plaintiff the right to make a variety of non-medical decisions and states that the language should "be construed broadly," and "[t]he enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact."[22]

- "The Plaintiff's failure to read [the Agreement] is blameless."[23]

- "The Plaintiff did not have a genuine choice to say 'no,' even assuming she read (and understood) the Arbitration Agreement."[24]

- "[T]he Plaintiff, (whose principal gained nothing), can clearly avoid the Arbitration Agreement for lack of consideration."[25]

Respondents filed their Notice of Appeal from the Circuit Court's Order. The Appeal was fully briefed and came before the Court of Appeals for oral argument. Counsel for Movant extensively argued that the Agreement was illusory, a point he had only cursorily touched on in his brief to that court.[26] The Court of Appeals issued its

---

[21] TR4 at 488-501; *see* Tab 1 of Movant's Appendix
[22] TR4 at 491 & TR1 at 100
[23] TR4 at 498
[24] TR4 at 499
[25] TR4 at 500
[26] Following oral arguments, Respondents moved the Court for leave to file a response to Movant's argument that the Agreement was illusory and tendered a proposed response. Movant opposed Respondents' Motion for leave to submit the response. The Court denied Respondents' Motion for leave to submit a Response.

unanimous Order on July 23, 2010, reversing the Circuit Court's order and remanding the case for further proceedings consistent with the appellate court's Order.[27] The Court of Appeals correctly concluded, among other things, that:

- The Agreement involves interstate commerce.[28]
- The Agreement encompasses the claims brought in Movant's lawsuit.[29]
- The POA held by Movant was a general power of attorney and it granted Movant actual authority to enter into the Agreement." [30]
- Movant possessed apparent authority to enter into the Agreement on behalf of Ms. Duncan.[31]
- The factual circumstances of the presentation of the Agreement do not support the legal conclusion that any type of fraud was present in the execution of the Agreement.[32]
- The Agreement was supported by sufficient consideration.[33]
- The Agreement was not unconscionable.[34]
- The circuit court has subject matter jurisdiction to enforce the Agreement.[35]
- The terms of the Agreement are not illusory.[36]
- Respondents did not breach any fiduciary duty to Ms. Duncan by not fully explaining the terms of the Agreement to Movant.[37]
- "The circuit court gave additional reasons to support its ruling and Appellee raises other arguments as well . . . none of these have merit or warrant discussion."[38]

---

[27] *See* Tab 2 to Movant's Appendix
[28] *Id.*
[29] *Id.*
[30] *Id.* at 9-10.
[31] *Id.* at 10.
[32] *Id.* at 12.
[33] *Id.* at 13.
[34] *Id.* at 15.
[35] *Id.* at 16.
[36] *Id.* at 17.
[37] *Id.*
[38] *Id.* at 16.

Movant filed a Motion for Discretionary Review with this Court, which Respondents opposed. On June 8, 2011, this Court granted Movant's motion and the current briefing ensued.

ARGUMENT

A circuit court's factual findings, if any, are reviewed for clear error, but its construction of a contract, a purely legal determination, is reviewed *de novo*. *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010); *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543 (Ky. 2008); *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 341 (Ky. App. 2001). If a circuit court makes no findings of fact, an appellate court's review is purely *de novo*. *Consultants and Builders, Inc. v. Paducah Federal Credit Union*, 266 S.W.3d 837 (Ky. App. 2008). In this case, the Circuit Court did not prepare formal "Findings of Fact," but rather, issued a general order discussing the validity of the Agreement under Kentucky contract principles. This Court's review of the Circuit Court's erroneous legal conclusions is therefore *de novo*.[39]

A. KENTUCKY AND FEDERAL LAW AND PUBLIC POLICY MANDATE ENFORCEMENT OF THE ARBITRATION AGREEMENT.

The Agreement Movant signed expressly states that it is governed by the FAA. Earlier this year, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011), (hereinafter *Concepcion*), the United States Supreme Court reviewed the enforceability of

[39] Movant contends that the Court of Appeals "impermissibly substituted its judgment" for that of the Circuit Court on evidentiary issues, but it was the Circuit Court's conclusions of law that fatally flawed its Order. For example, the Circuit Court acknowledged the Movant was not deprived of the opportunity to read the Arbitration agreement, that the Plaintiff received the Arbitration agreement, that she had thirty days to read it, that she elected not to read it (*see* Circuit Court Order at pages 10-11), but then applied Kentucky law incorrectly to conclude that her conduct is "blameless." This conclusion is clearly contrary to the holding in *McClure v* Young, 396 S.W.2d 48 (Ky. 1965) and *Mayo Arcade Corp. v. Bonded Floors Co.*, 41 S.W.2d 1104 (Ky. 1931). The circuit court went on to conclude under these facts that there was unconscionability and fraud. These legal conclusions are in error. *See Conseco*, 47 S.W.3d at 341; *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999); *Mayo Arcade*, 41 S.W.2d at 1104.

arbitration agreements governed by the FAA and reiterated the strong federal law and public policy favoring such agreements. The United States Supreme Court held, among other things:

- Section 2 of the FAA reflects a "liberal federal policy favoring arbitration" (*citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).

- "Arbitration is a matter of contract" (*citing Rent–A–Center, West, Inc. v. Jackson,* 130 S. Ct. 2772 (2010)).

- Courts must place arbitration agreements on an equal footing with other contracts (*citing Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006)).

- Courts must enforce arbitration agreements according to their terms (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)).

- The savings clause under Section 2 of the FAA permits agreements to be invalidated by "generally applicable contract defenses," but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue (*citing Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996)).

- When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA (*citing Preston v. Ferrer,* 552 U.S. 346 (2008)).

Concepcion, 131 S. Ct. 1740, 1742 (2011).

This Court has acknowledged in numerous opinions that Kentucky law "favors the settlement of disputes by means of arbitration." *Hathaway v. Eckerle*, 336 S.W.3d 83 (Ky. 2011); *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, (Ky. 2010); *Ally Cat v. Chauvin*, 274 S.W.3d 451 (Ky. 2009); *Louisville Peterbilt, Inc. v. Cox,* 132 S.W.3d 850 (Ky. 2004); *Carrs Fork Corp. v. Kodak Mining Co.*, 809 S.W.2d 699 (Ky. 1991); *Fite v. Warmath Construction Co. Inc.*, 559 S.W.2d 729 (Ky. 1977). Arbitration is also expressly approved by the Kentucky Constitution, which provides "[i]t shall be the duty

of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment." KY CONST. § 250. Although it is not applicable to the Agreement at issue in this case, Kentucky has its own arbitration act, the Kentucky Uniform Arbitration Act ("KUAA"), KRS Chapter 417.010 *et seq.*, which closely resembles the language of the FAA. This Court has acknowledged that both the KUAA and the FAA require that arbitration agreements be enforced no less rigorously than other contract provisions. *Hall*, 322 S.W.3d 98.

The law and public policy favoring arbitration agreements extends to and includes agreements executed during the admission of a resident to a long-term care facility. In *Kindred Healthcare, Inc. et al. v. Peckler*, 2005-SC-0837 (May 18, 2006) (unpublished), this Court acknowledged the public policy in favor of such agreements and recognized that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at *6 (*citing Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-5).[40]

B. THE SIGNED ARBITRATION AGREEMENT ENCOMPASSES THE CLAIMS BROUGHT IN THIS LAWSUIT.

The Agreement, which Movant admittedly voluntarily signed, states that it is "governed by and [shall be] interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16."[41] The FAA was designed to "place arbitration agreements on an equal footing with other contracts." *Concepcion*, 131 S. Ct. at 1745 (citing *Cardegna*, 546 U.S. at 443). The FAA manifests a federal policy strongly favoring arbitration. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24. Courts must resolve any doubts regarding arbitrability in

[40] Pursuant to CR 76.28(4)(c) and CR 76.12(4)(d)(v), all unpublished cases are attached as collective Tab 5 in the Appendix.
[41] TR1 at 103

favor of arbitration. *See Casarotto*, 517 U.S. at 686; *Allied Bruce Terminix Companies, Inc.*, 513 U.S. 265 (1995); *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d 926, 932 (6th Cir. 1988).

The FAA provides that an arbitration clause in "a contract evidencing a transaction involving [interstate] commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Jackson*, 130 S.Ct. at 2772.

1. The Agreement is part of a contract involving interstate commerce.

Movant has not disputed that the FAA governs the Agreement or that it is part of a "contract evidencing a transaction involving interstate commerce." The United States Supreme Court has interpreted the term "involving commerce" as it pertains to the FAA to include all transactions where Congress could permissibly exercise its powers under the Commerce Clause. *Dobson*, 513 U.S. at 274. This includes more than simply those transactions that involve the actual flow of interstate commerce. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Court in *Citizens Bank* explained that "[C]ommerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.'" In fact, even a '*de minimis*' connection to interstate commerce is sufficient to find that the contract involves interstate commerce. *U.S. v. Riddle*, 249 F.3d 529, 537-38 (6th Cir. 2001). This broad application of the FAA is consistent with both federal and Kentucky policy favoring agreements to arbitrate. *See Concepcion*, 131 S.Ct. at 1742; *Cox*, 132 S.W.3d at 854.

Movant admits in her Complaint that Respondents received federal reimbursements for care provided to residents at the facility.[42] The Sixth Circuit has held that a nursing home which housed eighty patients and received Medicaid funding was an industry affecting commerce. *Glen Manor Home for Jewish Aged v. NLRB*, 474 F.2d 1145 (6th Cir. 1973). Based upon the foregoing, the Agreement evidences a transaction involving interstate commerce and is therefore "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2

2. The Arbitration Agreement encompasses all of the claims brought by Movant, including the wrongful death claim.

The Agreement expressly encompasses the claims Movant brings in this lawsuit:

> It is understood and agreed . . . that **any and all claims**, disputes and controversies . . . arising out of or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident **shall** be resolved exclusively by binding arbitration . . . .[43]

Movant now argues for the first time that the wrongful death claim "belongs to the wrongful death beneficiaries of Ms. Duncan's Estate" and that they cannot be bound by the Agreement because they did not sign it. To begin with, this argument was never raised in the lower courts for consideration, which is a prerequisite to appellate review. *See Com., Dept. of Highways v. Taylor County Bank*, 394 S.W.2d 581 (Ky. 1965); *Little v. Whitehouse*, 384 S.W.2d 503 (Ky. 1964); *Scobee v. Donahue*, 164 S.W.2d 947 (Ky. 1942); *Adams v. Commonwealth*, 146 S.W.2d 7 (Ky. 1941).

---

[42] TR1 at 8-30

[43] TR1 at 103 (emphases added).

Movant's argument also mischaracterizes the "binding effect" of the Agreement on the heirs and beneficiaries of Ms. Duncan's Estate with respect to any wrongful death claim. KRS § 411.130 states, "(1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it . . . *The action shall be prosecuted by the personal representative of the deceased.*" KRS 411.130(2) (emphasis added). The statute goes on to provide that "the *amount recovered . . . shall be for the benefit of and go to* the kindred of the deceased . . . ." *Id.* The heirs of a decedent's estate are entitled to *recovery* from a wrongful death claim, which they can recover whether recovery is granted by a court or arbitrator. *Birkenshaw v. Union Light, Heat and Power Co.*, 889 S.W.2d 804, 806 (Ky. 1994). However, Movant, with her mother's POA and as her personal representative, is the only proper person to prosecute the wrongful death claim relating to Ms. Duncan. KRS § 411.130(1); *Everley v. Wright*, 872 S.W.2d 95 (Ky.1993). Of course, Movant agreed to arbitrate that claim by executing the Agreement. Arbitration of the wrongful death claim by Movant does not eliminate, diminish or "give up" anything the heirs of Ms. Duncan's estate are entitled to under statute. The Agreement signed by Movant allows for all the same damages she could seek in court, and is merely a different forum for recovery of those damages.[44] KRS 411.130 does not require Movant to bring such "action" in a judicial forum, or to select trial by jury. The Agreement is a binding contract between Movant and Respondents and Movant is required, as the only person authorized under Kentucky law to bring claims on behalf of Ms. Duncan's Estate, including the

[44] *See* TR1 at 103-105.

wrongful death claim, to arbitrate these claims, regardless of who might receive the proceeds of any recovery at arbitration.[45]

In any event, the heirs of Ms. Duncan's estate are bound by the Agreement. Kentucky recognizes that nonsignatories may be bound to an arbitration agreement if they receive a direct benefit under the agreement. *Olshan Foundation Repair and Waterproofing v.* Otto, 276 S.W.3d 827, 831 (Ky. App. 2009); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990). An intent to benefit the third party may be evidenced by the terms of the agreement. *Sexton v. Taylor County, Kentucky,* 692 S.W.2d 808 (Ky. App. 1985). *Id.* In this case, the Parties' Agreement specifically expresses an intent to benefit Ms. Duncan's heirs:

> [i]t is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties . . . and all persons whose claim is derived through or on behalf of the resident, including . . . executor, legal representative, administrator or heir of the resident.[46]

Thus, the clear and unambiguous language of the Parties' Agreement states that it will be binding on the heirs.

C. THE AGREEMENT IS NOT IMPOSSIBLE TO PERFORM.

Movant complains that because the National Arbitration Forum ("NAF") ceased administering consumer arbitrations, arbitration cannot be conducted according to NAF's Code of Procedure, and therefore the Agreement is now impossible to perform. The Court of Appeals was not persuaded by this argument, holding "[t]he trial court gave

---

[45] Movant has cited cases from Missouri and Washington in support of her position, but these out-of-state cases are easily distinguished. In the Missouri case, the applicable statute permitted the heir of the estate, as well as the personal representative, to directly pursue a wrongful death claim. *See* V.A.M.S. § 537.080. In the Washington case, the resident signed the agreement and, therefore, the personal representative was not a signatory to the agreement. Here, Movant is the only person who can bring a wrongful death action for the benefit of the heirs and she signed the Agreement, and therefore the binding Agreement encompasses all the claims being brought in this lawsuit.

[46] TR1 at 103-105

additional reasons to support its ruling, and Appellee raises other arguments as well. We conclude that none of these have merit or warrant discussion." *See Beverly Enterprises, Inc. v. Ping*, No. 2009-CA-001361-MR, 2010 WL 2867914 (Ky. Ct. App. July 23, 2010). As the Court of Appeals properly concluded, Movant's arguments are unpersuasive for several reasons.

1. The FAA permits the trial court to appoint a neutral arbitrator.

The FAA acknowledges that a particular arbitrator or arbitral forum may subsequently become unavailable and provides for the appointment of an arbitrator by the court in the event the chosen arbitrator cannot or will not act. 9 U.S.C. § 5 (stating that the arbitrator "shall act under the said agreement with the same force and effect as if he or they had been specifically named therein").[47] This provision is consistent with and indicative of the strong federal policy in favor of arbitration where the parties have agreed to arbitrate their claims. In *Jones v. GGNSC Pierre LLC*, 684 F.Supp.2d 1161 (D.S. Dak. 2010), the United States District Court of South Dakota analyzed the enforceability of an arbitration agreement identical to the one at issue here. In *Jones*, the administrator of the estate brought suit against Golden LivingCenter-Pierre and the facility sought to enforce the arbitration agreement signed on the resident's behalf. *Id.* at 1163. Jones argued the agreement was unenforceable because the NAF code was to be utilized by the parties in that matter to select an arbitrator, and the NAF was no longer conducting arbitrations. The Court disagreed, citing to § 5 of the FAA.

[47] The Kentucky Arbitration Act, although not applicable to this particular agreement, also contains a provision that allows the court to appoint neutrals in the event that the neutrals named in the agreement cannot be used. KRS 417.070.

Numerous other federal courts have reached the same conclusion. *See Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1328-29 (9th Cir. 1987) (where arbitration before the contractually-selected arbitrator was "impossible[,]" court properly appointed a neutral arbitrator pursuant to section 5); *In re California Title Insurance Antitrust Litig.*, 2011 WL 2566, slip op. at 16 (N.D. Cal. 2011) ("in the absence of the NAF as an available forum, the Court must designate an appropriate arbitral forum"); *Chambers v. Dollar Financial Group*, 2010 WL 457433, slip op. at 1 (E.D. Cal. 2010) (where the arbitration agreement called for the arbitration "to be conducted in compliance with the NAF's rules and procedures" and NAF was unavailable, the court found the agreement enforceable and held that arbitration "need not be conducted by the NAF"); *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F. Supp. 907, (S.D.N.Y. 1978) (where arbitration forum provided by contract no longer provided arbitration services, court granted motion to arbitrate and agreed to appoint an arbitrator pursuant to its power under 9 U.S.C. § 5). The frequently cited decisions in *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000) and *Adler v. Dell, Inc.*, 2009 WL 4580739 (E.D.Mich.) (unpublished), rejected the specific argument Movant makes to this Court. In *Brown*, the Eleventh Circuit Court of Appeals was faced with an employment agreement which called for arbitration under the NAF's Code of Procedure. The court found Brown's argument that the agreement must fail due to the failure of the "chosen" forum to be without merit. Relying again on section 5 of the FAA, the Court held that there was no evidence that the choice of the NAF Code was an integral part of the agreement to arbitrate. *Brown v. ITT* at 1222. The language of the Agreement leaves no doubt that the Parties intended to arbitrate any claims arising out of Ms. Duncan's

residency and that subsequent acts would not affect or change that intent. The parties "understood and agreed" that any disputes would be "resolved exclusively by binding arbitration . . . and not by a lawsuit or resort to court process." "[I]n the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective." The Parties acknowledged that the Agreement shall "inure to the benefit of and bind the parties, their successors, and assigns, including without limitation . . . executor, legal representative . . . or heir of the Resident" and "survive the lives or existence of the parties hereto."

Despite the clear and unambiguous intent of the Parties to move forward with arbitration, even if subsequent events occurred that could otherwise impair the enforcement of the Agreement, Movant asks this Court to nullify the Agreement because the NAF no longer administers consumer arbitrations. The language indicating the NAF's Code of Procedure would be used by the Parties for the selection of the then unknown arbitrator(s) is an ancillary logistical concern, not an integral material term of the Agreement, overriding the parties' manifested intent to arbitrate any claims. A number of courts that have considered similar arguments have denied that such a term is integral to the agreement. *See Carr v. Gateway, Inc.*, 944 N.E.2d 327, 335 (Ill. 2011) ("the mere fact [that] parties name an arbitral service to handle arbitrations and specify rules to be applied does not, standing alone, make that designation integral to the agreement"); *Owens v. National Health Corp.*, 263 S.W.3d 876, 886 (Tenn. 2007) (finding the arbitration agreement enforceable even in the absence of the specified forums because "there is simply no factual basis for plaintiff's assertion that the specification of the two organizations was so material to the contract that it must fail if they are unavailable");

Reddam v. KPMG LLP, 457 F.3d 1054, 1061 (9th Cir. 2006) (abrogated on other grounds) (concluding that language agreeing to use the rules of a particular organization was not "so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end"); *Clerk v. Cash Central of Utah, LLC*, 2011 WL 3739549, slip op. at 6 (E.D. Pa. 2011) ("[i]f an arbitration clause requires application of the rules of a particular arbitral forum, but does not require that arbitration occur in any particular forum, then the arbitral forum is an ancillary logistical concern, rather than an integral part of the arbitration clause"); *McGuire, Cornwell & Blakey v. Grider*, 771 F. Supp. 319, 320 (D. Colo. 1991) (selection of arbitration forum was "ancillary logistical concern" and not "central to the parties' agreement to arbitrate").[48]

Moreover, in *Jones v. GGNSC Pierre LLC*, 684 F.Supp.2d at 1167-1168, the federal district court found that the "existence of the severance clause in the arbitration agreement is evidence that the parties did not intend for the entire agreement to fail if one portion was invalid or unenforceable." Similarly, the Southern District of Ohio, in *Levy v. Cain, Watters & Associates., P.L.L.C.*, 2010 WL 271300, slip op. at 6 (S.D. Ohio 2010), found that "it [was] far from 'clear that arbitration administered by NAF is as important a consideration as the agreement to arbitrate itself" and that the "parties' intent to arbitrate [was] further evidenced by the severability language that provides that the failure or invalidity of one provision shall have no effect on the remainder of the agreement for arbitration." *Id.* (internal quotation marks omitted).

---

[48] Even if the Court were to find the contract language ambiguous as to the relative importance of the NAF provision, given the public policy in favor of arbitration, such ambiguity should be resolved in favor of enforcing the parties' agreement to arbitrate. *See Adler v. Dell, Inc.*, 2009 WL 4580739, slip op. at 4 (E.D. Mich. 2009) (where court found contractual form selection clause ambiguous as to whether the parties intended arbitration administered by NAF essential to arbitration, court compelled arbitration as "'doubts regarding arbitrability should be resolved in favor of arbitration'" and the "unavailability of NAF to hear the arbitration should not frustrate the overriding intent to arbitrate") (quoting *Morrison v. Circuit City*, 317 F.3d 646, 675 (6th Cir. 2003)).

2. The Arbitration Agreement is not impossible to perform under Kentucky law.

This Court has specifically addressed circumstances surrounding the actions of third parties regarding the impossibility of performance of a contract, and the NAF ceasing to administer arbitrations will not amount to an impossibility that excuses Movant's performance:

> [T]he inability to control the actions of a third person, whose co-operation is needed for the performance of an undertaking, is ordinarily not to be regarded as an impossibility avoiding the obligation. One who engages for the act of a stranger must procure the act to be done, and the refusal of the stranger without the interference of the other party to the contract is no excuse. The performance of an absolute promise is not excused by the fact that a third person refuses or fails to take action essential to performance.

Raisor v. Jackson, 225 S.W.2d 657, 659 (Ky. 1950). Neither Respondents or Movant have done anything to change their position with respect to the Agreement. The NAF, a third party over whom neither Movant nor Respondents has control, ceased administering arbitration agreements. This subsequent, unanticipated decision of the NAF to cease administering pre-dispute arbitration agreements does not amount to an "impossibility" under Kentucky law and should not be used to undermine the clear intent of the Parties to arbitrate their claims.

The out-of-state cases Movant cites can easily be distinguished. In *Grant v. Magnolia Manor- Greenwood, Inc., et al.*, 678 S.E.2d 435 (S.C. 2009), the arbitration agreement, which did not have a severability clause, indicated that any arbitration would be administered by the NHLA, which ceased administering agreements. In contrast, the Agreement in this case does not state that NAF would administer the arbitration, only that its Code, which is publicly available, would guide the selection of yet unnamed

arbitrators affiliated with that organization. Moreover, the Agreement in this case contains a severability clause demonstrating the Parties' intent that any term that might be deemed invalid or otherwise unenforceable be severed and the Agreement remain valid and enforceable.

In *Rivera v. American General Financial Services, Inc.*, 259 P.3d 803 (N.M. 2011), the New Mexico Supreme Court considered the enforceability of an arbitration clause contained in a form car title loan contract. The agreement made several specific references to the NAF being the exclusive forum for arbitration under the agreement. That court correctly determined that the analysis of whether the term designating the NAF as the arbitral forum was integral to the agreement would depend on the parties intent, as expressed in their agreement:

> We agree with the jurisdictions that have focused on the parties' intent, as expressed in the contract, to determine whether § 5 of the FAA permits a court to substitute a different arbitration provider . . . is consistent with New Mexico's general principles of contract law in requiring courts to 'give effect to the intent of the parties' . . . [t]his approach also best complies with the admonition of the United States Supreme Court that a fundamental purpose of the FAA is to require that courts enforce arbitration agreements 'according to their terms.'

Id. at 812.

Despite adopting this approach, however, the *Rivera* court then ignored the intent and directive of the parties that "[i]f any term of the Arbitration Provision is unenforceable, the remaining terms are severable and enforceable to the fullest extent permitted by law," and instead concluded that it must wholly invalidate the agreement. The *Rivera* Court acknowledged that its holding was based on the fact that the agreement referred to the NAF or its rules in "multiple places" within the agreement and that

numerous other unrelated provisions in the agreement were unfairly one-sided and substantively unconscionable, requiring a "substantial re-writing." However, in this case, the parties refer only once to the NAF Code of Procedure and the other terms of the Agreement are conspicuous, reciprocal and mutual. Thus, the *Rivera* Court improperly ignored the intent of the parties and is factually distinguishable.

The intent of the Parties here was to arbitrate any claims they may have against the other party regardless of changing circumstances that might occur after execution of the Agreement. Movant's argument that the Agreement is now impossible to perform ignores this intent of the parties, the terms of the Agreement, Kentucky and federal law and public policy in favor of arbitration. It must be rejected.[49]

D. THIS COURT HAS SUBJECT MATTER JURISDICTION TO ENFORCE THE ARBITRATION AGREEMENT AT ISSUE.

Movant mistakenly asserts that this Court lacks subject matter jurisdiction to enforce the Agreement she signed because it "does not provide for arbitration in this state[,]" under *Ally Cat v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). In *Ally Cat,* this Court analyzed the enforceability of an arbitration provision in a home owner's limited warranty document after a claim was made for water and mold damage that occurred to a condominium unit after it was purchased. The limited warranty document, which was never signed by the purchaser, included an arbitration provision that incorporated the KUAA, and not the FAA, and was silent as to the location of such arbitration. *Id.* At 453.

[49] It is important to note that Movant entered into the Agreement on March 17, 2006. It is well-settled that included in the terms of contracts are the laws subsisting at the time and place of the making of the contract. *Corbin Deposit Bank v. King,* 384 S.W.2d 302, 304 (Ky. 1964) (citing *City of Covington v. Sanitation Dist. No. 1,* 301 S.W.2d 885, 888 (Ky. 1957). More importantly, however, Movant filed the underlying lawsuit on October 1, 2008. The NAF was administering arbitration agreements like the one at issue in this case until July 23, 2009, more than nine months after Movant filed this lawsuit. To the extent that this Court would find that the Agreement is now impossible to perform and, therefore, unenforceable, Movant is responsible for that failure. She has wrongfully refused to honor the Agreement she made and equity should not allow her to avoid a contract because of her own unreasonable and unlawful delay.

The KUAA provides that "[t]he making of an [arbitration] agreement described in KRS §417.050 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement . . . ." KRS §417.200. This Court interpreted that language to require arbitration agreements to provide for arbitration in Kentucky to be enforceable under the KUAA. *Ally Cat*, 274 S.W.3d at 455-56.

This Court would later expressly clarify that its holding in *Ally Cat* did not apply to arbitration agreements governed by the FAA. *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 686 fn. 8, (Ky. 2010) ("*Ally Cat* has no applicability to an arbitration agreement governed exclusively by the Federal Arbitration Act"); *Hathaway v. Eckerle*, 336 S.W.3d 83, 87-88 (Ky. 2011) (reiterating that *Ally Cat* was inapplicable to arbitration agreements governed solely by the FAA and the FAA provides a state court subject matter jurisdiction to decide the enforceability of such an agreement). Here, the parties agreed that the Agreement is governed solely by the FAA.[50] As such, the holding in *Ally Cat* is inapplicable. Under numerous United States Supreme Court precedents, including *Concepcion*, any state provision conflicting with the FAA is preempted. *See Southland Corp. v. Keating*, 465 U.S. 1, 5, 10 (1984) (California Franchise Investment Law claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 621, 621 fn.8, 623 n.10 (Puerto Rico antitrust and unfair competition); *Perry v. Thomas*, 482 U.S. 483, 491-93 (1987) (California statute declaring claims to collect wages nonarbitrable); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56, 58 (1995) (New York prohibition against arbitration of punitive-damages claims); *Preston v. Ferrer*, 552 U.S. 346, 353, 356, 359 (2008) (California statute governing Talent Agents Act claims);

[50] TR1 at 103.

Concepcion, 131 S. Ct. at 1742 ("[w]hen state law prohibits outright the arbitration of a particular type of claim," the state law "is displaced by the FAA").

Of course, even if *Ally Cat* did apply to the Agreement, the language of the Agreement easily satisfies the requirements of that decision. The Agreement provides that "any and all claims . . . 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. . . ." Movant admits in her Complaint that "the Facility" is located in Frankfort, Kentucky. In *Hathaway v. Eckerle*, 336 S.W.3d at 87-88, an automobile purchaser was seeking a writ of prohibition from this Court relating to a circuit court's ruling that she arbitrate her claims against the Kentucky dealership. After concluding that the arbitration agreement in that case was governed solely by the FAA and, therefore, the *Ally Cat* case was inapplicable, this Court went on to conclude that even if that case *were* applicable, the language stating that any arbitration would occur in the "COUNTY IN WHICH [THE DEALERSHIP] IS LOCATED," satisfied the prerequisite imposed by KRS 417.200 of "providing for arbitration in this state." *Id.* at 88. Like the arbitration agreement in *Eckerle*, the Agreement here requires arbitration to occur at the Facility unless the parties agree to a different location. The facility is admittedly in Kentucky. Thus, even if the *Ally Cat* case were applicable, the Agreement Movant signed satisfies the prerequisites articulated in that case.

Movant's argument that this Court lacks subject matter jurisdiction to consider the enforceability of the executed Agreement should be rejected.

E. MOVANT HAD AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT ON BEHALF OF MS. DUNCAN.

Despite representing herself to the facility as the appropriate person to sign documents for her mother, Movant now argues that she did not have authority to sign the Agreement or "waive Ms. Duncan's constitutional right to a jury trial." Movant argues that there should be heightened scrutiny of the Agreement because it waives "important constitutional" rights of Ms. Duncan. There is no legal basis for this argument as constitutional rights, including the right to a jury trial, can be waived. *See, e.g., Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461, 464 (6th Cir. 1988). It is well-settled in Kentucky that a person can waive the right to a jury trial as easily as not asking for one. *See* CR 38.04. More importantly, Movant's position ignores the very purpose of the FAA—to place arbitration agreements on "equal footing with all other contracts." *Concepcion*, 131 S. Ct. 1742, 1745 (2011) (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006)).

Although she has not directly raised the argument to this Court, Movant argued in the lower courts that her execution of the Agreement was not "knowing and voluntary." Movant's signature on the Agreement, which contains the conspicuous and unambiguous title and warning **"RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION - READ CAREFULLY)[,]"** demonstrates that Movant knowingly and voluntarily waived Ms. Duncan's rights to a jury trial. *Burden v. Check Into Case,* 267 F.3d 483 (6th Cir. 2001) "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate") (internal quotation marks omitted). Nonetheless, Movant argues that this Court should consider *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005), a case in

which Tennessee law was applied to evaluate whether an arbitration agreement entered into as part of the employment relationship was enforceable. *Walker* held that a Tennessee court must examine the following factors to determine whether an individual knowingly and voluntarily waived his or her "constitutional right to a jury trial" by signing an arbitration agreement: (1) applicant's experience, background, and education; (2) amount of time that applicant had to consider whether to sign waiver, including whether employee had opportunity to consult with lawyer; (3) clarity of waiver; (4) consideration for waiver; as well as (5) totality of circumstances. Even if this Court should decide to consider these factors, they support a finding that Movant's execution of the Agreement was "knowing and voluntary." The record demonstrates Movant is well-educated.[51] Movant has held jobs that required her to be experienced in the making of contracts and reviewing detailed documents. She knows it is a significant event when she signs her name to a document. [52] Plaintiff admits she could have read the Agreement but chose not to read it before she signed it. She admits she took a copy of it home with her following the admission.[53] The Agreement expressly gave Movant the right to revoke the Agreement within 30 days of signing it. Movant never revoked the Agreement. The implications of the Agreement were clear, concise and conspicuous. There was sufficient consideration for the Agreement as there was a mutuality of obligation between the Parties. *See Pace v. Burke*, 150 S.W.3d 62, 65 (Ky. App. 2004).

---

[51] Depo. Transcript of Donna Ping, pp. 21-22 & 2]
[52] *Id.* at pp. 21-22, 25, 46, 55
[53] *Id.* at p. 53-54, 56-57

1. Movant had actual authority to execute the Arbitration Agreement.

It is undisputed that Ms. Duncan executed a POA making Movant her attorney-in-fact. It is well-settled that a POA is a form of agency. *Moore v. Scott,* 759 S.W.2d 827, 828 (Ky. App. 1988). Kentucky law recognizes the authority of an agent with a POA to act for and enter into contracts on behalf of a principal, even when those contracts implicate constitutional rights. *See Claibourne v. U.S.*, 648 F.2d 448 (6th Cir. 1981) (POA authorized son to enter agreement with railroad company to sell mother's property, even in the face of language requiring his mother's approval).[54] Indeed, a number of Kentucky courts have expressly or impliedly 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. *See Stanford Health & Rehabilitation Center v. Brock*, 334 S.W.3d 883 (Ky. App. 2010); *Mt. Holly Nursing Center v. Crowdus*, 281 S.W.3d 809 (Ky. App. 2008); *Kindred Nursing Centers Ltd Partnership v. Brown*, 2011 WL 1196760 (Ky. App. April 1, 2011) (unpublished); *Laurel Creek Health Care Center v. Bishop*, 2010 WL 985299 (Ky. App. March 19, 2010) (unpublished); *Holifield v. Beverly Health and Rehabilitation Services, Inc.*, 2008 WL 2548104 (W.D.Ky., June 20, 2008) (unpublished).

Movant's authority here was based on a POA that specifically provided her with broad authority to conduct Ms. Duncan's affairs, including the right to make decisions relating to Ms. Duncan's property, finances and medical care:

---

[54] *See also Keyes v. Hogg,* 2010 WL 2788247 (Ky. App. 2010) (unpublished) (POA authorized son to file lawsuit on behalf of his mother over contract made involving her land); *Darling v. Plummer,* 2007 WL 2069799 (Ky. App. 2007) (unpublished) (POA authorized transfer of principal's real property to the attorney-in-fact's corporation); *Mullins v. Com.*, 200 S.W. 9 (Ky. 1918) (POA authorized agent to sign surety on bail bond even though no set monetary amount was included in the grant of authority); *Irvin v. Thompson,* 1816 WL 728 (Ky. 1816) (unpublished) (POA authorized principal to contract for the purchase of 400 acres, even though the principal alleged POA exceeded his authority).

> I, Alma Duncan . . . appoint Donna Ping. . . my true and lawful attorney in fact, giving and granting to her full and complete power and authority to do and perform any, all and every act and thing . . . to and for all intents and purposes, as I might do if personally present, including but not limited to. . . to take possession of any and all monies, goods, chattels, and effects belonging to me, wheresoever found . . . draw, collect and receive any and all monies on deposit to my credit in any banks . . . and all other financial institutions . . . receive, deposit, invest and spend funds on my behalf . . . take charge of any real estate which I may own in my name or together with others . . . to mortgage, convey or sell said real estate . . . make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me (emphasis added).[55]

The construction of a POA is a question of law for the court, and this Court has held that the clear and unambiguous language in a POA should be honored. *Webner v. Black*, 7 S.W.3d 379, 382 (Ky. 1999). There is no requirement that a POA specifically delineate each and every transaction the attorney-in-fact is authorized to perform. *Ingram v. Cates*, 74 S.W. 3d 783 (Ky. App. 2002). In *Ingram*, the court analyzed whether an attorney-in-fact pursuant to a POA breached any fiduciary duties when he paid his personal debts with his principal's money. That Court held that, even though it was admitted that the POA did not specifically bestow upon the agent the power to make a gift to himself or to another, the language of the POA granted general power to "convey any personal property that [the principal] now or hereafter own[ed] . . . ." The court held that the broad language in the POA authorized the transfers from agent to principal. *Id.* at 787. In this case, Ms. Duncan's POA delegated very broad powers to Movant and should

[55] TR1 at 99

be liberally construed with respect to the power and authority granted . . .".[56] The language is clear and unambiguous and reflects the intention to give Movant the same power to act on her behalf as Ms. Duncan would herself have.[57]

Movant's argument that a POA is "ineffective" to waive constitutional rights of a principal and that "only a guardian" appointed under Kentucky's guardianship statute (KRS § 387), has that authority, is contrary to well-settled precedent and would lead to absurd results.[58] Respondents have directed this Court to a number of cases finding that a POA authorized an individual to act on behalf of and enter into contracts that implicated and affected the constitutional rights of the principal. *See supra* at 24-25; fn 55. To single out arbitration contracts and hold that a POA cannot authorize an individual to enter into an arbitration agreement on behalf of their principal would impermissibly not "place arbitration agreements on an equal footing as other contracts." *Concepcion*, 131 S. Ct. 1742, 1745 (*citing Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006)).

Movant's reliance on *Rice v. Floyd,* 768 S.W.2d 57 (Ky. 1989) is also misplaced. In *Rice*, this Court reviewed a district court's denial of a daughter's guardianship petition filed on behalf of her mother on the grounds that her mother's POA (held by another

---

[56] TR1 at 100

[57] Despite this language of the POA Movant asserts now that the language of the POA should be interpreted narrowly. Movant block quotes language from *Southard v. Steele*, 19 Ky. 435 (Ky. 1826), which states that a "general agent" cannot bind his principal to arbitration. However, the language she quotes is not that of the court, but rather, language from the petition for rehearing filed by a party in that case. In any event, this 185-year-old case was decided well before the enactment of the FAA, which was enacted to "overrule the judiciary's longstanding refusal to enforce arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219-20 (1985). As such, this case is not instructive to this Court.

[58] Kentucky's Guardianship statute offering a mechanism for an individual to be appointed by a court to act on behalf of a minor (KRS 387.010-387.280) or disabled individual (KRS 387.500-387.770). Movant's position that a guardianship is required to make decisions that implicate a constitutional right on behalf of another individual would leave an otherwise competent adult with no one to act on his or her behalf in a number of fairly common scenarios. For example, Movant's position would prevent an individual serving in our armed forces who is deployed from authorizing another person to sell or lease property she owns. It would prevent individuals living abroad to authorize another individual to collect a debt, file a collection action or enter into a lease on their behalf.

individual) already provided for the management of her personal and financial affairs. Although the mother had developed a subsequent disability, the district court held that the POA was not affected by the subsequent disability pursuant to KRS § 386.093. This Court held that the existence of a durable POA unaffected by disability pursuant to KRS § 386.093 was not intended to prevent or supplant guardianship proceedings. This Court noted the differences between POA and guardianship, but nowhere in that opinion did this Court indicate that an agent holding a POA cannot enter into contracts implicating a principal's constitutional rights. The POA in this case establishes that Movant had broad powers under that document and was authorized to enter into the Agreement on Ms. Duncan's behalf.

2. Movant also had implied authority to bind Ms. Duncan to the Arbitration Agreement.

The record also establishes that Movant had implied authority to enter into the Agreement on behalf of Ms. Duncan. Implied authority 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 actually delegated." *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. App. 1990). Implied authority can be deduced from the surrounding facts of a case. *See CSX Transportation, Inc. v. First National Bank of Grayson*, 14 S.W.3d 563, 567 (Ky. App. 1999). Ms. Duncan gave Movant broad authority to manage her financial and business affairs through her POA. Specifically, Ms. Duncan directed in her POA to Movant to "take possession of any and all monies, goods, chattels, and effects belonging to me, wheresoever found."[59] Implicit in this specific grant of authority would be the power to

[59] TR1 at 99-100

arbitrate any claims Ms. Duncan or her Estate may have against Respondents and collect any proceeds from that action.

Even without the POA, Movant had implied authority to sign the Agreement on behalf of Ms. Duncan. Movant admitted that she moved in with her mother in March 2005 because her mother's health was deteriorating.[60] Movant acknowledged that she helped her mother "with decisions and questions" well before March 2005 and even prior to her mother's POA.[61] Kentucky courts have held that family members who have a history of acting on behalf of a resident being admitted to a long-term care facility, are authorized to sign arbitration agreements on the resident's behalf, even in the absence of a POA or guardianship. *Laurel Creek Health Care v. Bishop*, No. 2009-CA-001055-MR (Ky. App. 2010) (unpublished); *Walkup v. Beverly Health & Rehabilitation Services, Inc. d/b/a Mount Holly Nursing Center*, 3:08CV-432-R (W.D. Ky., August 24, 2009) (unpublished).[62]

Movant also mistakenly relies on the nearly century-old decision in *Harding v. Kentucky River Hardware Co. Buskirk*, 265 S.W. 429 (Ky. 1924), for the proposition that "any [POA] which delegates authority to perform specific acts that also contains general words, is limited to the particular acts authorized." However, Ms. Duncan expressly directed that "[t]he enumeration of specific items, rights, or acts or powers [in her POA]

---

[60] Depo. Transcript of Donna Ping, p. 30-31

[61] *Id.* at p. 44-46

[62] The facts of the *Walkup* case are particularly instructive. In *Walkup*, the daughter of the resident signed an arbitration agreement on her mother's behalf. The resident's son held a POA for his mother and argued that his sister lacked authority to sign the agreement. However, the court found that, while it could point to no specific act where the incompetent resident had affirmatively held her daughter out as possessing authority to sign documents on her behalf, the daughter lived with her mother and had a two-year history of acting on her mother's behalf. This course of action created circumstantial evidence that the resident had consented to and intended for the daughter to act on her behalf. Like the daughter in *Walkup*, Movant's relationship with her mother and her pattern of conduct on her behalf demonstrate that she held implied, actual authority to sign Ms. Duncan into the facility and to enter into the Agreement, even absent the POA.

is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact." In contrast, *Harding* dealt with a POA that was signed for a specific, limited purpose, whereas Movant's POA granted her broad authority.[63]

3. Movant also had apparent authority to bind Ms. Duncan to the Arbitration Agreement.

Movant also had apparent authority to enter into the Agreement on behalf of Ms. Duncan. Under Kentucky law, "[a]pparent 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 persons dealt with are deceived, and on which they rely." *Estell v. Barrickman*, 571 S.W.2d 650, 652 (Ky. App. 1978).

By designating Plaintiff as her POA, Ms. Duncan created the appearance that Movant was authorized to act on her behalf. It was reasonable for Respondents to assume that Movant had authority to enter into the Agreement on behalf of Ms. Duncan. Not only did Ms. Duncan give Movant a POA outlining broad powers to act on her behalf, but Movant affirmatively represented to the facility that she was the appropriate person to sign the documents.[64] Thus, to representatives of the facility, Movant possessed authority

---

[63] Movant cites to the Circuit Court's Order in support of her position that the POA did not vest her with implied authority to sign the Agreement. But, the Circuit Court only examined one sentence in the POA:[63]

> Thus, the question to be ascertained is whether from the language in the POA . . . "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 authority to submit pre-dispute claims to arbitration.

Order at page 6.

It is unclear why the circuit court limited its analysis of the language of the POA to one particular sentence in the three-page document but, nonetheless, the legal conclusion it reached is contrary to this Court's holdings in *Ingram v. Cates* and *Webner v. Black, supra*, which require that the clear and unambiguous language of a POA be honored.

[64] Depo. Transcript of Donna Ping, pp. 48-49 & 51

to execute the Agreement on behalf of Ms. Duncan and they proceeded to enter into the Agreement based on this appearance.

A third party dealing with an attorney-in-fact is only required to look to the language of the POA to determine the extent of the power under that document. *Parton v. Robinson*, 574 S.W.2d 679 (Ky. App. 1978). Mr. Brand testified that he did examine the language of the POA and noted that it allowed Movant to make medical and financial decisions on Ms. Duncan's behalf.[65] As such, it was reasonable for him to conclude that the POA vested Movant with authority to sign the Agreement, especially in light of the directive of Ms. Duncan that the language of the document be "liberally construed."[66]

4. Movant is equitably estopped from denying that she was authorized to sign the Arbitration Agreement.

When Movant signed the admission documents, including the Agreement, she represented that she was authorized to sign the documents, but now argues that she was not authorized to sign the Agreement. The doctrine of "equitable estoppel" is applied to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced. *Hicks v. Combs*, 223 S.W.2d 379 (Ky. 1949). For the party claiming equitable estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Weiand v. Board of Trustees of Kentucky Retirement Systems,* 25 S.W.3d 88, 91 (Ky.

[65] Depo. Transcript of Joshua Brand, p. 35.
[66] TR1 at 99-100

2000); *Electric and Water Plant Board of Frankfort v. Suburban Acres Development, Inc.*, 513 S.W.2d 489, 491 (Ky. 1974).

Movant now denies she was authorized to sign the Agreement on behalf of Ms. Duncan. However, she withheld that information from the facility representative and affirmatively represented to the facility that she was authorized to sign the documents presented to her, including the Agreement. In so doing, it was Movant's expectation that the facility would act on her representations and allow her to sign the Agreement as Ms. Duncan's POA. Had the facility known that Movant would subsequently deny that she had authority to sign the Agreement pursuant to her POA, it is axiomatic that the facility could have, and would have, assisted Movant in obtaining any additional information or authority she believed was necessary for her to consider or sign the Agreement.

F. THE ARBITRATION AGREEMENT IS NOT ILLUSORY

Movant argues that the Agreement is illusory because it is "fatally indefinite," with respect to the procedures governing the arbitration.[67] An illusory agreement is one in which a promisor has made no legally enforceable commitment. *David Roth's Sons, Inc. v. Wright and Taylor, Inc.*, 343 S.W.2d 389, 390 (Ky. 1961). In this case, both Parties have made a legally enforceable promise to arbitrate their claims against each other. As such, while the the Agreement is not "fatally indefinite" and does not give any party or forum "unfettered discretion . . . ."[68] In *Kruse v. AFLAC Intern., Inc.*, 458 F. Supp. 2d 375 (E.D. Ky. 2006), the arbitration agreement at issue did not identify where the arbitration was to take place, the responsible party for paying for the arbitrators, the

[67] Movant argues that the Court of Appeals "failed to address the issue of the illusory nature of the Agreement." This is factually inaccurate. The Court of Appeals specifically addressed and rejected this argument on page 17 of its Opinion, "[w]e also reject Appellee's arguments that the terms of the Agreement are illusory . . ."

[68] Movant's Brief at 17.

amount of arbitration costs and legal fees, what procedure the arbitrators or participants were supposed to follow, or what law applied to the arbitrable issues. Relying on *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 92 (2000), the *Kruse* court held that, even though all of the specific procedures governing arbitration were not spelled out in the agreement, the agreement provided that arbitration "shall be pursuant to the terms of the Federal Arbitration Act" and, therefore, the agreement was not "uncertain or indefinite." *Id.* at 385. Beyond expressly selecting a governing code of procedure, the Agreement at issue in this case provides additional bilateral requirements, including that an arbitrator may award any damages that are legally allowable.[69]

Floss v. Ryan's Family Steak House, Inc., 211 F. 3d 306 (6th Cir. 2000), which Movant cites in its brief, is inapposite. The arbitration agreement at issue in *Floss* was between an employee Floss, and an arbitration services provider Employment Dispute Services, Inc. ("EDSI"), which was hired and paid by the employer Ryan's Steakhouse. The agreement between EDSI and Floss gave EDSI complete discretion over the rules and procedures of arbitration and the right to modify the rules without Floss' consent. The *Floss* Court held that the arbitration agreement was unenforceable because the only consideration exchanged by EDSI was to provide an arbitral forum and ESDI, a party to the arbitration agreement, retained unfettered discretion in choosing the nature of the arbitral forum and could unilaterally change the rules and procedures of the arbitration, thereby making the agreement illusory. Respondents here have no analogous power, whether based in contract or not, unilaterally to alter the parties' Agreement or Movant's

[69] *See* TR1 at 103-105 ("damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action").

substantive rights under the Agreement.[70] Respondents have no control over NAF or its procedural rules, and therefore Respondents have not retained the right to "choose the nature of their performance." *Floss*, therefore, is inapplicable to the issues in this case.

Indeed, a number of courts have refused to follow *Floss* because of its limited factual circumstances and narrow holding, including the 6th Circuit, the same court that decided *Floss*. *See Seawright v. American General Financial Services, Inc.*, 507 F.3d 967 (6th Cir. 2007) (finding *Floss* distinguishable because even though employer retained right to terminate the agreement, they had to give 90-days notice of termination, and the obligation to be bound for at least 90 days was sufficient consideration); *Fazio v. Lehman Brothers, Inc.*, 340 F. 3d 386 (6th Cir. 2003) (holding that provision in the arbitration agreement that allowed defendants to seize the bank accounts of plaintiffs, which arguably would mean that defendants never had to engage in arbitration to settle their claims, was not enough to demonstrate lack of mutuality); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (holding that arbitration agreement was supported by sufficient consideration even though employer was not bound by the arbitration agreement).

G. THERE WAS ADEQUATE CONSIDERATION EXCHANGED AND MUTUALITY IN THE EXECUTION OF THE ARBITRATION AGREEMENT.

For a contract to be deemed valid and enforceable under Kentucky law, there must be a mutuality of obligation between the contracting parties. *Pace v. Burke*, 150 S.W.3d 62, 65 (Ky. App. 2004). However, it is not necessary that both parties to the

[70] Both parties made a mutual and reciprocal obligation to be bound by the NAF rules, and any changes to those rules affect both Parties. More importantly, however, the intent of the Parties, as demonstrated by the language in their Agreement, is that the selected arbitrator be authorized to grant any relief that is legally allowable, undercutting Movant's assertion that either Respondents or the NAF had "unfettered discretion" to "choose the nature of the forum."

agreement have reciprocal rights or obligations of the same kind or nature. *David Roth's Sons, Inc. v. Wright and Taylor, Inc.*, 343 S.W.2d 389 (Ky. 1961). If both parties to a contract are bound by mutual obligations for even a brief period of time, the contract cannot be voided on the grounds of lack of mutuality. *Hathaway v. Eckerle*, 336 S.W.3d 83, 87-88 (Ky. 2011). Mutual promises are a valid form of consideration, as long as there is some benefit to the promisor or detriment to the promisee. *More v. Carnes,* 214 S.W.2d 984, 991 (Ky. 1948).

In this case, the rights and obligations incurred by both Movant and the Respondents under the Agreement are the same. The Agreement requires that any claims stemming from Ms. Duncan's residency are to be submitted to arbitration.[71] This is not limited to only those claims held by Ms. Duncan or her representative, but includes any claims that Respondents had against Ms. Duncan or her Estate.[72] "An arbitration clause requiring both parties to submit equally to arbitration constitutes adequate consideration." *Kruse v. AFLAC Intern., Inc.*, 458 F.Supp.2d 375, 385 (E.D. Ky. 2006). Thus, Kentucky law recognizes that Respondents' reciprocal obligation to forego a jury trial against Movant or Ms. Duncan is sufficient consideration for the Agreement.

The unpublished decision in *Beverly Health & Rehabilitation Services, Inc. et al. v. Smith,* 2008-CA-000604-MR (Ky. App., April 10, 2009), is inapplicable. In *Smith*, nursing home appellants conceded that the signatory was not an agent of the resident, but sought to enforce the agreement solely on a third-party beneficiary contract theory. In evaluating whether the agreement was enforceable under a third-party beneficiary argument, the *Smith* Court pointed out that the resident was not bound by the agreement

---

[71] TR1 at 103
[72] *Id.*

because neither he nor his agent signed it and, therefore, he had not made a mutual agreement to arbitrate his claims. That court rejected an argument that the resident received (and the facility gave) consideration to support the agreement to arbitrate by being admitted to the facility. Here, the consideration given by both parties is the mutual obligation to arbitrate their claims and waiver of right to bring judicial action. As such, *Smith* does not support the position of Movant and the circuit court.

Movant's unsubstantiated argument that Respondents gave up nothing because they "selected the NAF as the sole arbitral forum" and "virtually guaranteed their own success in that process" is equally wrong. An arbitration agreement will not be held unenforceable based on a perceived lack of mutuality:

> The [parties'] contention that their arbitration clause is unfairly one-sided rests similarly on a presumption that arbitration will not afford them an adequate opportunity to vindicate their substantive claims. Under both the FAA and Kentucky's UAA, such a presumption is not a proper basis for refusing enforcement of an arbitration clause. If arbitration will afford the [parties] essentially the same opportunity to present their . . . CPA, and other claims as would litigation, there is no reason to believe that the agreement limiting them to arbitration is unfair.

Conseco, 47 S.W.3d at 344. Under the express terms of the Agreement, Movant is able to pursue her claims against Respondents on Ms. Duncan's behalf, including her claim for punitive damages, with the additional benefit of confidential arbitration proceedings. As such, Movant's *ex post* contention that there was a lack of mutuality of obligation or unfairness with the Agreement, is not legally sufficient to avoid the Agreement she made.

H. MOVANT HAS NOT CARRIED HER BURDEN TO PROVE THAT SHE HAS ANY VALID BASIS FOR REVOCATION OF THE ARBITRATION AGREEMENT.

The evidence establishes that a valid arbitration agreement existed between Respondents and Movant. The FAA requires enforcement of contractual arbitration agreements "unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law of in equity for the revocation of any contract.'" *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting 9 U.S.C. § 2). 9 U.S.C. § 2. While "the party seeking to enforce an agreement [to arbitrate] has the burden of establishing its existence," "once prima facie evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement," and this is a heavy burden. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004). The Record does not support any ground for the revocation of the agreement.

1. The evidence does not establish that the Arbitration Agreement is unconscionable.

As acknowledged by this Court, the seminal Kentucky case on unconscionability in arbitration agreements is *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335 (Ky. App. 2001). *Schnuerle v. Insight Communications Co., L.P.*, 2010 WL 5129850 (Ky. 2010) (unpublished). In *Conseco*, the Court of Appeals analyzed whether an arbitration agreement between a mobile home purchaser and a lender was unconscionable. The contract at issue was a three-page, preprinted, fill-in-the-blank form. The *Conseco* plaintiffs' signatures appeared at the end of the form in the middle of the third page. Immediately above their signatures appeared a warning to the buyers in large, bold type to read the agreement before signing it. The plaintiffs in the *Conseco* case did not allege that they were denied an opportunity to read the form.

The *Conseco* Court held that the arbitration agreement at issue was not unconscionable. The court reasoned that "[a]n unconscionable contract has been characterized as one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." *Id.* at 342 (internal quotation marks omitted). The court found that inclusion of the arbitration clause was not abusive or unfair and reasoned that, "[t]he clause was not concealed or disguised within the form; its provisions are clearly stated such that purchasers of ordinary experience and education are likely to be able to understand it, at least in its general import; and, its effect is not such as to alter the principal bargain in an extreme or surprising way." *Id.* at 343. Like the arbitration agreement at issue in *Conseco*, the Agreement Movant signed was conspicuous and its implications clear.

a. The Arbitration Agreement is not substantively unconscionable.

The Agreement in this case is not a clause buried in the fine print of a long document. Rather, it is on separate sheets of paper, separately titled in bold print, and presented as a component of the admissions package during the admissions process. The Agreement is conspicuously entitled **"RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION - READ CAREFULLY)."**[73] Although the Agreement is part of the admissions process, acceptance of the Agreement is not required for admission to the facility, as plainly stated in the title of the document.[74] The Agreement defines in bold font its implications above the signature line and in clear terms states **"BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL**

[73] TR1 at 103
[74] TR1 at 103-104

RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND JURY."[75] The Agreement expressly states that the parties have a right to seek legal counsel concerning the Agreement and gives the parties the right to revoke the Agreement within thirty days of signing it.[76] The Agreement does not limit Movant's right to recovery, even recovery of punitive damages. Moreover, the obligations in the Agreement are reciprocal and mutual, Movant and Respondents have agreed to arbitrate any claims they may have. Under *Conseco*, the Agreement is not substantively unconscionable.

b. There is no evidence that the execution of the Arbitration Agreement was procedurally unconscionable.

Contrary to Movant's allegations and the legal conclusions reached by the Circuit Court, there is no evidence that the Agreement was presented to Movant in an unconscionable way. Movant testified at her deposition that she had an opportunity to read the Agreement, but chose not to read it before she signed it.[77] She also acknowledged that facility representative Brand gave her copies of the documents she signed to take home with her.[78] Movant never revoked the Agreement. To permit a party, when sued on a written contract, to admit that she signed it, but deny that it expresses the agreement she made, would "absolutely destroy the value of all contracts." *Morgan v. Mengel Co.*, 242 S.W. 860 (Ky. 1922).

---

[75] TR1 at 104
[76] TR1 at 104
[77] Depo. Transcript of Donna Ping, pp. 56-57
[78] *Id.* at p. 53

Brand's deposition testimony is not to the contrary. Brand testified that he "did not specifically remember" presenting the admission documents to [Movant,][79] but that he would have presented the Agreement to Movant in the same way he always presented the Agreement to residents and/or their families.[80] It was Brand's usual practice to allow a person to read and review any agreement before they signed it and to remind the individual signing an agreement that he or she could take the contract to an attorney for review:

> I don't want to call it a spiel, but my scenario would be to have them look over their stuff at home when everything is cleared up, because it's a very hectic time in someone's life. And I would ask them, you know, 'go back and look over it. Come back. . . . look over this, take it to someone, have someone else look over it if you need to. If you have any questions, you want to change anything, come back.' That was something – you know, like I said, my job didn't depend on whether she signed [the agreement]."[81]

There is no evidence to support Movant's contention that there was procedural or substantive unconscionability involved in reaching the Agreement at issue. The terms of the Agreement are clear and reciprocal, Movant was given the right to consult with legal counsel and revoke the Agreement and the Agreement conspicuously explained its implications. It is the settled law in Kentucky that one who signs a contract is presumed to know its contents and, if he has an opportunity to read the contract which he signs, he is bound by its provisions unless he is misled as to the nature of the writing or his signature has been obtained by fraud. *Hathaway v. Eckerle*, 336 S.W.3d 83, 87-88 (Ky. 2011) (*citing Clark v. Brewer*, 329 S.W.2d 384, 387 (Ky. 1959). Since Movant presents no evidence that anyone at the facility attempted to conceal the Agreement or deceive her

---

[79] Depo. Transcript of Joshua Brand, p. 17
[80] *Id.*
[81] *Id.* at pp. 18-19

into signing it, she cannot establish as a matter of law that the presentation of the Agreement was procedurally unconscionable.

c. The Arbitration Agreement is not *per se* unconscionable.

Although not directly raised by Movant, *Amicus Curiae* Kentucky Justice Association ("KJA"), asserts that arbitration agreements entered into in connection with admission to a nursing home are *per se* unconscionable and void as against public policy. The KJA cites to the West Virginia case, *Brown v. Genesis, Healthcare Corp.*, 2011 WL 2611327, slip op. at 6 (W.Va. 2011) (hereinafter "*Brown*") (*petition for cert.* filed June 2, 2010),[82] involved a West Virginia residents rights statute that provided that "[a]ny waiver by a resident or his or her representative of the right to commence an action under this section . . . shall be null and void as contrary to public policy." (quoting W. Va. Code § 16-5C-15(c)). Following *Concepcion*, the West Virginia Supreme Court admitted that the state statute "singles out for nullification written arbitration agreements with nursing home residents, and does not apply to any other type of contractual agreements." *Id.* at 24. For that reason, the West Virginia Court held that the FAA preempts Section 15(c) from nullifying an existing, written, arms-length agreement reflecting a transaction in interstate commerce between a nursing home and a resident to arbitrate any dispute." *Id.* The *Brown* Court's other holdings—that Congress "did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits" (*id.* at 35) and that the FAA does not preempt the just-created state-law rule of public policy that per se invalidates any "arbitration clause in a nursing home agreement adopted prior to an

[82] Petition for a Writ of Certiorari attached as Tab 6 of the Appendix.

occurrence of negligence that results in a personal injury or wrongful death" (*id.*)—are without legal support and directly contrary to *Concepcion.*

The erroneous conclusions reached by the court in *Brown*, and urged by the KJA here, are squarely at odds with the FAA and the United States Supreme Court's decision in *Concepcion.* They are also in direct contravention of well-settled Kentucky case law.[83] The *Brown* Court cites to no statute or precedent to support this novel subject-matter limitation on arbitration. The United States Supreme Court has rejected similar arguments that "Congress 'thought that arbitration would be used primarily where merchants . . . possessed roughly equivalent bargaining power'" (*id.* at 755 fn. 5) or that a narrow construction of the FAA was required to protect consumers asked to sign adhesive contracts (*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-81 (1995)). On the contrary, the FAA "seeks broadly to overcome judicial hostility to arbitration agreements . . . in both federal and state courts" and its scope "coincide[es] with that of the Commerce Clause." *Id.* at 272-73, 274-75.

---

[83] For example, the *Brown* Court held if a party voluntarily signs an agreement without knowledge of its contents, a court should inquire whether the terms of the agreement are fair when deciding the enforceability of such agreement. *See Brown* at pages 53-54. In contrast, well-settled Kentucky law holds that absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms. *Conseco*, 47 S.W.3d at 335; *see also Mayo*, 41 S.W.2d at 1009 (holding if a party does not exercise reasonable diligence to know the contents of an agreement, party's "negligence will estop him from claiming the instrument is not binding"). Additionally, the *Brown* Court held "the doctrine of substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party" and holds there should be a "sliding scale" approach for determining whether a contract term is unconscionable. However, this contradicts the directives of the *Conseco* Court, adopted as authoritative by this Court, including its holding that a perception an arbitration agreement is unfairly one-sided and/or will not afford an adequate opportunity to vindicate claims, is insufficient grounds for invalidating an arbitration agreement. *Conseco*, 47 S.W.3d at 344. Moreover, the holding in *Brown* directly contradicts the recent case *Abell v. Bardstown Medical Investors, LTD* , 2011 WL 2471210 (W.D. Ky. 2011) (unpublished). In *Abell*, plaintiff was suing a nursing home for injuries she allegedly sustained under the care of that facility. She opposed efforts to enforce an arbitration agreement she signed on the grounds that she was "in a compromised physical and mental condition," and "that the process requiring her to review, initial and sign so many documents prior to her admission," was unfair. *Id.* at 2. The *Abell* Court rejected plaintiff's arguments, acknowledged that Kentucky law favors the enforcement of arbitration agreements, held that enforcement of the agreement was not substantively unconscionable even though there was evidence in the record that that plaintiff suffered from a "a major mental disorder."

The *Brown* Court acknowledged that "[n]o jurisdiction has concluded that arbitration clauses executed during admission to a health care facility are unenforceable *per se.*" In fact, numerous jurisdictions have explicitly applied the FAA to contracts in the nursing home context. *See, e.g., Carter v. SSC Odin Operating Co.*, 927 N.3.2d 1207, 1212, 1214 (Ill. 2010) (FAA preempts Illinois law prohibiting nursing home residents from waiving right to a jury trial); *Estate of Ruszala ex rel. Mizerak v. Broookdale Living Cmtys., Inc.*, 1 A.3d 806, 818, 822 (N.J. Super. Ct. App. Div. 2010) (FAA preempts state efforts to make wrongful death claims nonarbitrable); *Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 679 S.E.2d 785, 789-90 (Ga. Ct. App. 2009) (state statute precluding enforcement of pre-dispute agreements to arbitrate medical malpractice claims brought by, *inter alia*, nursing home residents preempted by FAA); *Miller v. Public Storage Mgmt, Inc.*, 121 F.3d 215, 219 (5th Cir. 1997) (rejecting argument that claims were nonarbitrable "because Texas law does not favor arbitration for personal injury . . . claims"); *Cleveland v. Mann*, 942 So. 2d 108, 113 (Miss. 2006) (en banc) (compelling arbitration of medical malpractice claim pursuant to the FAA); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 n.4 (Tex. 2005) (orig. proceeding) (person injury claims arbitrable under the FAA); *ATP Flight Sch., LLC v. Sax*, 44 So. 3d 248, 250 (Fla. Dist. Ct. App. 2010 (compelling arbitration of wrongful death claim under the FAA); *J.B. Hunt Transp., Inc. v. Hartman*, 307 S.W.3d 804, 809-10 & n.4 (Tex. Ct. App. 2010) (orig. proceeding) (same).

The *Brown* decision also depends on a newly-created subject matter exception to the enforcement of arbitration contracts that is not found in the exclusive limits of Section 2 of the FAA. 9 U.S.C. § 2; *see Perry*, 482 U.S. at 489. In essence, the West Virginia

Supreme Court found that a statutory prohibition expressly founded in public policy (W. Va. Code § 15-5C-15(c)) would be preempted by the FAA, but articulated a nearly identical judge-made prohibition also expressly founded in public policy, and declared that prohibition not preempted by the FAA. This judicially-created categorical public policy ban on arbitration is equally preempted by the FAA. *See Perry*, 482 U.S. at 492 n.9 (a "state-law principle[,]" "whether of legislative or judicial origin," "does not comport with [the] requirement of § 2" if it "takes its meaning precisely from the fact that a contract to arbitrate is at issue"); *Concepcion*, 131 S. Ct. 1740, 1756-57 (2011),

Brown's unsubstantiated reliance on law relating to the enforceability of "pre-injury contracts immunizing one party from liability for negligence toward another party[,]" was also misplaced. Agreements to arbitrate do not have the same effect as an exculpatory agreement on a claim for personal injury. The latter is an outright prohibition on pursuing particular claims, while the former is merely a change of forum for pursuing claims. The KJA cites to *Meiman v. Rehabilitation Center, Inc.*, 444 S.W.2d 78 (Ky. 1969) for the proposition that "Kentucky has a strong public policy against enforcement of pre-dispute agreements which limit or eliminate the plaintiff's right to seek redress for injury in court." But, in *Meiman*, this Court was considering the validity of an exculpatory clause, signed by the patient upon admission to the facility that stated, "I will not assert any claim against the Center, its employees, or its volunteers that results from unintentional acts or conduct on their part." *Id.* at 80. This Court held that "persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid." This Court's holding has nothing to do with the validity of arbitration agreements or "seeking redress in court." It is instead entirely premised on the

fact that the law will not support enforcement of a pre-injury agreement in which a party is precluded entirely from bringing a claim for personal injury. The Agreement at issue here does not preclude Movant's claims against Respondents for alleged injuries to Ms. Duncan and expressly allows her to bring the claims and to seek punitive damages relating to any injury. As such, the rationale behind the *Brown* court's stand-alone holding cannot be supported under Kentucky law.

Although Movant did not brief the issue to this Court, she erroneously contends that arbitration violates the supposed guarantee of a jury trial given to a long-term care resident in KRS §215.515(26) and is, therefore, not enforceable.[84] Even if this Court were to accept this argument, the FAA would preempt this portion of the statute, as it would amount to a prohibition on arbitration for claims arising under this statute. *Concepcion*, 131 S. Ct. 1740, 1742 (2011) (*citing Preston v. Ferrer,* 552 U.S. 346 (2008)). The *Brown* Court rejected a similar argument made in that case on these grounds. As such, any arguments that the Agreement in this case is *per se* invalid or otherwise unenforceable based on public policy must be rejected, especially in light of well-settled Kentucky law and public policy favoring arbitration.

2. The Record does not establish fraudulent inducement.

In order to show fraud in the inducement, a plaintiff must show through clear and convincing evidence that there was a (1) material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon (5) acted in reliance thereon and; (6) injury. *Rickert*, 996 S.W.2d at 468. However, it is well-settled that "the negligence of one party, such as signing a contract without reading it,

[84] KRS §215.515 (26) states, "[A]ny resident whose rights . . . are deprived or infringed upon shall have a cause of action against any facility . . . [t]he action may be brought in any court of competent jurisdiction."

bars a suit for fraud against another." *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764, 767 (Ky. App. 1985); *see also Mayo,* 41 S.W.2d at 1009 (holding that if a party does not exercise reasonable diligence to know the contents of an agreement, that party's "negligence will estop him from claiming that the instrument is not binding"). Movant admits she signed the Agreement and received a copy of the Agreement to take home. Movant further admitted that she was aware that she had a responsibility as Ms. Duncan's POA to read the admission documents, but she chose not to read the Agreement prior to signing it.[85] Under Kentucky law, Movant's claimed failure to actually read the Agreement will not invalidate her signature on that document. *See Conseco*, 47 S.W.3d 341 (holding that a fundamental rule of contract law provides that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms.) As such, fraud is not available to Movant as a ground for revocation of the Agreement.

Even if fraud was an available defense to Movant, there is no evidence, much less clear and convincing evidence, that anyone at the facility intentionally or recklessly made any false statement to Movant to induce her to sign the Agreement. The only statement Movant attributes to Brand during the process of admission was that he was presenting to her the "standard admissions packet," and he was. Movant lists a number of things Brand did not tell her during the admission process apparently in an attempt to create an inference that he is guilty of "failing to disclose the truth." However, it appears the information she believes he should have told her was information about the legal process, legal definitions and legal implications of arbitration, which he did not know, as demonstrated in his deposition. It is unclear how Movant can arrive at the argument that

[85] Depo. Transcript of Donna Ping, p. 46

Brand willfully failed to disclose information to her when he did not know the information himself. Moreover, it does not matter what Brand did or did not know about the Agreement because Movant did not ask him any questions before signing. As such, the Agreement cannot be revoked on grounds of fraud.

I. KENTUCKY LAW DOES NOT RECOGNIZE A FIDUCIARY DUTY UNDER THE FACTS OF THIS CASE.

Movant asserts that Respondents "had a duty to place Ms. Duncan's interests above their own and not entice her or her family to waive her constitutional rights in order to receive medical care." This unsupported conclusion is a blatant misrepresentation of the facts of this case and Kentucky law. As an initial matter, even if a breach of fiduciary duty did occur, this is not a valid defense for the revocation of the Agreement. The FAA provides the only way a court can deny enforcement of an arbitration agreement is if the party arguing against enforcement can establish a defense *for the revocation of any contract.* 9 U.S.C. § 2 (emphasis added). The only potential grounds for revocation of a contract under Kentucky law are inapplicable to the circumstances of this case and have been previously discussed. *See Louisville Peterbilt, Inc. v. Cox*, 132 S.W. 3d 850 (Ky. 2004) (holding that contract may be revoked where there is fraud in the inducement); *Conseco,* 47 S.W.3d at 341 (holding that a contract may be revoked for either procedural or substantive unconscionability); *Berry v. Walton*, 366 S.W.2d 173 (Ky. 1963) (holding that lack of mutuality is a valid ground for the revocation of a contract).

Moreover, no fiduciary duty existed with respect to the presentation of the Agreement to Movant. Under Kentucky law, a "fiduciary relationship" is one founded on trust or confidence reposed by one party in the integrity and fidelity of another, and

which also necessarily involves an undertaking in which duty is created in one person to act primarily for another's benefit in matters connected with such undertaking. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 485 (Ky. 1991). The Restatement (Second) of Torts § 874 cmt. a (1979) defines a fiduciary relationship as existing between two persons "when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation."

Kentucky law does not recognize a fiduciary duty between a nursing home and a person admitting a resident with respect to the presentation of an arbitration agreement:

> [Plaintiff] directs the Court's attention to cases where other state's courts have recognized a special relationship between two parties such a doctor-patient, sea captain-crew, common carriers-passengers. By extension, she argues that the relationship between a nursing home and the person admitting a patient imposes an "affirmative duty to disclose and explain [the Arbitration Agreement] before it could have been validly signed." However, no Kentucky court has imposed a duty to further explain a clearly marked separate document. This is not surprising, as such a ruling would amount to a significant departure from current Kentucky law. Consequently, this Court is unwilling to find such a failure a basis for rescission here.

Holifield, 2008 WL 2548104, slip op. at 4.

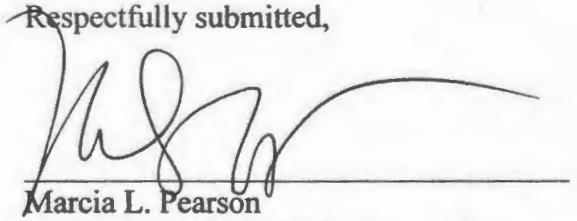
At the time Movant signed the Agreement on behalf of Ms. Duncan, no fiduciary relationship had been formed between Ms. Duncan or her family and Respondents. The execution of the Agreement occurred as part of the formation of the relationship between the parties, not after the relationship was formed. Kentucky law, even in the commercial setting, recognizes the existence of a fiduciary relationship only after a relationship is established. *See generally Steelvest,* 807 S.W. 2d 476 (discussing the existence of duties in an already existing business relationship). The formation of a fiduciary duty must have clear and reasonable boundaries. Respondents did not have any "duty to act for or to give

advice for the benefit" of Movant or Ms. Duncan until, if at all, she had been admitted to the facility and, even then, it would not have extended to include a duty to explain an arbitration agreement. To hold that a fiduciary relationship had been formed between the Parties before the admission documents had been executed would be extending such a duty beyond reasonable bounds.[86]

CONCLUSION

Movant voluntarily signed the Agreement pursuant to her powers under the POA given to her by her mother, Ms. Duncan, after having the opportunity to read it. The Agreement encompasses the claims she brings in this lawsuit. Movant has no grounds for revocation of the Agreement under Kentucky law. In light of the federal and Kentucky public policies favoring arbitration, Respondents respectfully request that this Court affirm the decision of the Court of Appeals and remand the case back to the circuit court for entry of an Order dismissing the lawsuit or, in the alternative, staying the lawsuit pending alternative dispute resolution proceedings.

Respectfully submitted,



Marcia L. Pearson
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER, LLP
100 Mallard Creek Road, Suite 400 A
Louisville, KY 40207
502.238.8500

Counsel for Respondents

[86] Moreover, even if there was a duty, it was not breached. The express language of the Agreement shows that Respondents did not gain any benefit from Movant, Duncan or any other member of Duncan's family by virtue of the Agreement. The Agreement does not limit Movant's right to ask for punitive damages and the obligations in the Agreement are reciprocal.