2011 WL 9526750 (Ky.) (Appellate Brief)
Supreme Court of Kentucky.

Donna PING, Executrix of the Estate of Alma Calhoun Duncan, Deceased, Appellant,
v.
BEVERLY ENTERPRISES, INC., et al., Appellees.

No. 2010-SC-558-D.
September 8, 2011.

On Discretionary Review from the Kentucky Court of Appeals
Case No. 2009-CA-1361-MR Case No. 2009-CA-1379-MR

Brief on Behalf of Amicus Curiae, Kentucky Justice Association

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***i** *STATEMENT OF POINTS AND AUTHORITIES*

***1** *INTRODUCTION*

The pre-dispute nursing home arbitration (or ADR) agreement at the heart of this case denies personal injury and wrongful death claimants their constitutionally and statutorily protected civil rights. *Amicus Curiae* Kentucky Justice Association submits the agreement is unenforceable, unconscionable, and contrary to public policy.

POLICY AND PURPOSE

Over 5 million seniors suffer **abuse** or neglect each year in the United States. An estimated 84% of those incidents are not reported to authorities. [1] A significant percentage of these occur in nursing homes. While state and federal agencies police nursing home neglect, government oversight alone cannot solve the problem. Residents still suffer and die. The Government

Accountability Office (GAO) found that inspectors miss 15% of the most serious violations. [2] Often these are life threatening violations like failing to provide adequate nutrition and hydration (food and water) to residents. [3]

This problem is particularly acute in Kentucky. The number of inspectors policing over 300 facilities has dramatically decreased since 2005. [4] At the same time, the GAO designated Kentucky as one of 15 states with the worst performing nursing homes. [5] According to the Report, the worst offenders tend to be large "chain-affiliated" for-profit ***2** nursing homes with more beds and residents. [6] The decrease in inspectors, and concomitant increase in serious violations, is a recipe for disaster as Kentucky is expected to see a 91.4% increase in its population over the age of 60 between 2000 and 2030. [7]

The Kentucky Long-Term Care Residents' Rights Act allows victims to hold nursing homes directly accountable. KRS 216.515 states that "Every resident in a long-term-care facility shall have at least the following rights" and lists twenty-six specific rights. Importantly, residents or their guardians have the right to be free from "mental and physical **abuse**." [8] A key component of the Act is the right of victims to seek compensatory and punitive damages for violations "*in any court of competent jurisdiction.*" [9] These rights are an important check on safety in nursing homes, especially where state and federal budgetary constraints leave gaps in meaningful oversight.

Nursing homes, on the other hand, work hard to prevent access to the Courts. The weapon of choice is a boilerplate pre-dispute arbitration (or "ADR") agreement. These are specifically designed to circumvent victims* statutory and constitutional rights. Invariably, such ADR agreements are presented to residents or family members at their most vulnerable - at the time of admission.

Ms. Ping's story, detailed in Appellant's brief, is far from unusual. Individuals or their loved ones appear at nursing homes in a state of great anxiety, most often after a period of acute hospitalization, and after the hospital has already made the arrangements ***3** for transfer. [10] All that remains is a signature on the nursing home admissions documents. [11] Ms. Ping's experience was no different. Upon her and her mother's arrival at the nursing home, Ms. Ping was given a stack of documents to sign which the admissions officer called a "standard application packet." The admissions officer did not explain anything. Instead, he simply pulled back the pages - only partially - and told Ms. Ping to sign as "Power of Attorney' for her mother, Alma Duncan. The whole process took no more than 10 minutes. Buried in the documents was a pre-dispute ADR agreement which waived one of the most fundamental and sacred of constitutional rights: the right to trial by jury. Even if Ms. Ping had the opportunity to read the document, haggling over legal remedies would have been the farthest thing from her mind. Nursing homes understand this and exploit these circumstances. Appellee did so in this case.

The terms of these ADR agreements are also far from balanced. These agreements are invariably one-sided and designed to minimize, if not wholly abolish, residents' rights. For this reason, a Commission composed of the American Arbitration Association, American Bar Association, and American Medical Association found:
"The Commission's unanimous view is that in disputes involving patients and/or plan subscribers, binding arbitration *should be used only where the parties agree to same after a dispute arises.*" [12]

The agreement in this case, like many others, fails to protect patients and ensure a level playing field for dispute resolution. According to the terms of the present ADR ***4** agreement, arbitration *must* be conducted according to the National Arbitration Forum (NAF) Code of Procedure. [13] The NAF Code, in turn, requires arbitration by the NAF and its arbitrators. However, pursuant to a July 24, 2009 Consent Decree, the NAF is *prohibited* from performing consumer arbitrations nationwide, including personal injury and wrongful death claims. [14] The NAF Consent Decree was entered after the Minnesota Attorney General uncovered a disturbing pattern of fraud and deceptive practices by NAF and its arbitrators. NAF arbitrators were found to be far from neutral, and invariably found for businesses over consumers. As explained in a July 19, 2009 letter to the American Arbitration Association:

It is apparent, based on many interviews with consumers, arbitrators and employees of NAF, that arbitrators have a powerful incentive to favor the dominant party in an arbitration; namely, the corporation .... In the case of NAF. arbitrators and employees claimed that arbitrators who issued an award against the corporation, or who failed to award attorney's fees against the consumer, were simply "deselected" and not appointed to future proceedings. [15]

Mandatory arbitration was never intended for these conditions. [16] It was designed to resolve commercial matters and disputes arising from arms-length transactions. [17] The contemporary insertion of arbitration clauses into every kind of case, including personal injury and wrongful death claims, goes beyond legislative intent. Nevertheless, the plain language of state and federal legislation regarding arbitration *cannot* put ADR ***5** agreements beyond the reach of contractual defenses. Under the Federal Arbitration Act (FAA), arbitration clauses are enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract." [18] Kentucky, likewise, permits a party to avoid arbitration "upon such grounds as exist at law for the revocation of any contract." [19]

Simply, if the ADR agreement is unenforceable, the subject claims cannot be submitted to an arbitral forum. Indeed when a court refers claims to arbitration, and the ADR agreement fails to satisfy KRS 417.050, a court acts outside of its subject matter jurisdiction. [20] Subject matter jurisdiction may not be waived or conferred by agreement. [21] Accordingly this Court may consider, not only the reasons relied upon by the Circuit Court in denying arbitration, but any other reason for invalidating the ADR agreement.

Here, the Franklin Circuit Court properly ruled in favor of Ms. Ping and found the ADR agreement unenforceable. Other compelling reasons justify the Circuit Court's ruling as well. For all of these reasons. *Amicus Curiae* asks this Court to reverse the Court of Appeals and remand to the Circuit Court.

ARGUMENT

I. THE ADR AGREEMENT IS UNENFORCEABLE BECAUSE IT REQUIRES ARBITRATION BY THE NATIONAL ARBITRATION FORUM (NAF)

In Kentucky, a contract is unenforceable the where parties' agreement is based on the continued existence of a person or thing, and the person or thing ceases to exist. [22] The rule also applies when a contemplated situation fails to materialize. [23]

***6** The ADR agreement in this case provides that any dispute:

> "*shall be resolved exclusively* by binding arbitration ... in accordance with the National Arbitration Forum [the 'NAF'] Code of Procedure, which is hereby incorporated into this Agreement, and not by any lawsuit or resort to court process." (Emphasis added).

The NAF Code of Procedure, in turn, states that it:

> "*shall be administered only by [the NAF]* or by any entity or individual providing administrative services by agreement with [the NAF]." [24]

And further states:

> "[a]rbitrations will be conducted in accord with the applicable Code of Procedure *in effect at the time the claim is filed,* unless the law of the agreement of the Parties provides otherwise." [25]

The ADR agreement here mandates arbitration according to the NAF Code "exclusively." Only the NAF can administer the NAF Code. However, effective July 24, 2009, the NAF no longer arbitrates injury or wrongful death claims. Given the circumstances, performance under the ADR agreement is now impossible, and the agreement is unenforceable as a matter of basic contract law. Moreover, this is not a situation under where the Court may "appoint an arbitrator or arbitrators" because the agreement does not specify an arbitrator, or because there is a "lapse in the naming of an arbitrator ... or in filling a vacancy." [26] The majority of courts agree that the impossibility of an exclusively-designated arbitral forum is not such a "lapse" under 9 U.S.C. §5.

A Pennsylvania Court recently examined this issue in *Stewart v. GGNSC-Cannonsburg, L.P.* [27] The ADR agreement in *Stewart* is *identical* to the one in this case. Indeed, *Stewart* involved the same chain-affiliated nursing home as the present case. The ***7** Court followed the majority of jurisdictions and invalidated the ADR agreement. The Court found that the agreement failed as to an "essential" term (NAF arbitration), and did not merely "lapse" pursuant to 9 U.S.C. § 5. Other Courts have since adopted *Stewart's* reasoning. [28]

Stewart is consistent with Kentucky contract law. It should be followed here. Nursing homes, like Appellee, deliberately chose the NAF as their "exclusive" arbitrator. They did so despite NAF's corrupt and fraudulent practices which favored nursing homes over the rights and well-being of residents. Now, without the NAF, an essential term of the ADR agreement fails. The Court should not re-write the agreement to benefit Appellee. The agreement is unenforceable.

II. THE ADR AGREEMENT IS UNENFORCEABLE BECAUSE DONNA PING LACKED AUTHORITY TO WAIVE RIGHTS WHICH BELONG TO OTHERS

Donna Ping, as Alma Duncan's attorney-in-fact, had no authority to bind Ms. Duncan to the terms of the ADR agreement. Even if she did. Ping could not bind non-signatory wrongful death beneficiaries who are the real parties in interest in a wrongful death action. It is a fundamental rule of arbitration that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which she has not agreed so to submit. [29] The ADR agreement is unenforceable for this reason as well.

A. An Attorney-in-Fact Does Not Have the Same Authority As a Guardian

Alma Duncan was incapacitated at the time of admission. She had no power to contract for herself. Her daughter. Donna Ping, signed as "POA" or "power of attorney" ***8** on Ms. Duncan's behalf. While a POA may transact business on behalf of her principal, the powers of an attorney-in-fact are not limitless. Specifically, an attorney-in-fact may not waive, compromise, or alter constitutional or statutory civil rights belonging to an incapacitated person. Only a statutorily-appointed guardian may do so.

The statutory basis for a "Power of Attorney" durable or otherwise is found in KRS 386.093 within Chapter 386 titled "Administration; Investments." This section pertains to trusts and **financial** decision-making for others. An attorney-in-fact, appointed pursuant to KRS 386.093, does not have unlimited authority, and does not have the broader powers of a guardian appointed pursuant to Chapter 387.

In *Rice v. Floyd* [30] this Court held that KRS 386.093 was designed to abrogate common law rules regarding attorneys-in-fact. In identifying the different rights and responsibilities of an attorney-in-fact and a statutory guardian, this Court found:

"It was not the purpose of K.R.S. 386.093 to permit an attorney-in-fact to undertake all the obligations of a legally appointed guardian. *The process of appointing a guardian or conservator is the legal means by which the court applies due process to avoid the possible invasion of civil or legal rights in regard to a partial disability* ... the courts have always had the inherent

duty to protect the rights and interests of incompetents ... The position enunciated by the district court that a durable power of attorney can be substituted for a guardianship does not properly recognize the distinctions between the two statutory positions ... An incompetent cannot be sued and an attorney-in-fact cannot defend an action on behalf of an incompetent ... Defense must be completed by a legally appointed guardian or committee. *The legal and personal requirements of a disabled person are not well satisfied by an attorney-in-fact as they might be by a guardian. We do not believe they accomplish the same goals as those expressed in the guardianship statutes.*

As also explained in *Rice*, Kentucky has not adopted the Uniform Power of Attorney Act. The Uniform Act gives specific powers to attorney-in-fact to compromise ***9** or settle claims and submit claims for alternative dispute resolution.[31] For example, Tennessee has adopted much of the Uniform Act.[32] Tennessee's "Uniform Durable Power of Attorney Act" contains a specific statutory section which allows an attorney-in-fact to compromise and settle disputes, and sue and defend on behalf of the principal.[33] Kentucky does not. Indeed, there is no indication the General Assembly intended an attorney-in-fact to have such rights - especially since a guardian is the only statutorily-authorized entity allowed "[t]o act with respect to the ward in a manner which limits the deprivation of civil rights"[34] and "prosecute or defend actions, claims or proceedings in any jurisdiction."[35]

KRS 386.093, when read in conjunction with KRS Chapter 387, demonstrates a legislative intent that only statutorily-appointed guardians may alter or affect a ward's civil rights.[36] Since Ping was not Duncan's statutorily appointed guardian, she did not have actual authority to alter or waive those rights.[37] Moreover, since Ping only held herself out to Appellee as "POA" for Duncan, rather than her mother's guardian, there is no issue that Ping held herself out to the nursing home as having some greater authority that she did not possess.

***10 B. The ADR Agreement Cannot Bind Non-Signatory Wrongful Death Beneficiaries**

Ms. Ping also did not have authority to bind non-signatory wrongful death beneficiaries who are the only real parties in interest in a wrongful death action.

KRS 411.130 creates a cause of action for wrongful death. This is a statutory right of action which does not exist prior to the death, and only arises at the time of death. In Kentucky, a wrongful death action is independent and not derivative of any claims the decedent may have had if she survived.[38] The claim belongs only to survivors identified in KRS 411.130. The persons entitled to benefits under KRS 411.130 are to be determined at the time of death of the person wrongfully killed.[39] The recovery is not for the benefit of the estate, but for the next of kin as determined under the statute.[40] States which construe their wrongful death statutes in a similar fashion hold that wrongful death claims are not within the scope of such pre-dispute ADR agreements.[41]

Here, the wrongful death *beneficiaries* are the real parties in interest, not Ms. Duncan or even Ms. Ping in her capacity as Duncan's attorney-in-fact. Accordingly, the ADR agreement cannot bind non-signatory beneficiaries or affect wrongful death claims.

III. THE ADR AGREEMENT IS UNENFORCEABLE BECAUSE IT LACKS CONSIDERATION

"Consideration is an essential element of every contract."[42] A contract is legally enforceable only if the promisor, in exchange for his promise, receives some act or ***11** forbearance from the promisee.[43] The Sixth Circuit case of *Floss v. Ryan's Family Steak Houses, Inc.* involved an arbitration agreement between an employer and its employees. The Court found the agreement to be unenforceable, since the employees received no consideration for the promise to submit their dispute to arbitration.[44]

In this case, neither Alma Duncan nor the wrongful death beneficiaries received consideration when Ms. Ping signed the ADR agreement. The agreement itself states that "execution of this agreement is not a pre-condition to admission to the furnishing of services to the Resident by the facility." Appellee does not dispute this. Accordingly, neither admission to the facility nor the services provided by the facility can be deemed consideration to support the ADR agreement.

In *Beverly Health & Rehabilitation Services, Inc., et at. v. Smith*, an **elderly** patient's family was asked to sign an arbitration agreement when the patient was admitted to a nursing home. [45] The patient died while in the care of the nursing home, and the patient's estate later filed a wrongful death lawsuit. The trial court denied the nursing home's motion to compel arbitration. In upholding the denial, the Court of Appeals held that "the arbitration agreement plainly states that the execution of the agreement was not a precondition to the admission of the patient or services rendered to the patient." [46] The Kentucky Court of Appeals found that the patient had derived no benefit from entering into the arbitration agreement. Thus, the arbitration agreement was unenforceable, due (in part) to lack of consideration.

***12** Just like the *Floss* and *Smith* cases, the arbitration agreement in this case is unenforceable, due to lack of consideration. According to Appellee's interpretation of the agreement, Duncan and the wrongful death beneficiaries, through Ping, waived one of the most fundamental constitutional rights that they have as American citizens: the right to trial by jury. In exchange. Appellee gave up nothing. Indeed, given the NAF practices that have come to light, Appellee only stood to gain through "stacked deck" arbitration. For this reason, the fact that Appellee agreed to NAF arbitration is not sufficient consideration to support the agreement.

IV. THE ADR AGREEMENT, AS APPLIED TO THE INJURY AND WRONGFUL DEATH CLAIMS, IS UNCONSCIONABLE AND CONTRARY TO PUBLIC POLICY

The ADR agreement is also unconscionable and contrary to public policy.

There are two components of an unconscionability analysis: procedural and substantive. Procedural or "unfair surprise," unconscionability pertains to the process by which an agreement is reached and the form of an agreement. [47] Substantive unconscionability, on the other hand, "refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent." [48]

Here, during one of the most stressful moments in her life, Ms. Ping was handed a packet of documents and told where to sign. The admissions officer did not explain the documents. The admissions officer simply folded the pages over - only partially - and told Ms. Ping where to sign. Ms. Ping had no idea that she was purportedly waiving all of her mother's civil rights. Unknown to Ms. Ping, the ADR agreement required arbitration by the NAF - an arbitral forum forced to discontinue arbitration due to its corrupt and ***13** fraudulent practices. Thus, according to the literal terms of the ADR agreement, Ms. Ping, on behalf of her mother, "agreed" to give up valuable constitutional and statutory rights in exchange for illusory remedies to be meted out in a non-existent forum. Whether classified as "procedural" or "substantive," the ADR agreement is unconscionable and unenforceable. [49]

In the past, our Courts have looked to West Virginia law which holds that "an arbitration clause that contains a 'substantial waiver of a parties' rights' is unenforceable.' " [50] More recently, the West Virginia Supreme Court of Appeals in *Brown v. Genesis Healthcare Corp.* invalidated three separate pre-dispute ADR agreements nearly identical to the one in this case on unconscionability and public policy grounds. [51]

In *Brown*, the Court considered the general public policy favoring arbitration in context of the Federal Arbitration Act; the one-sided nature of pre-dispute nursing home ADR agreements; and the many concerns affecting nursing home residents and

their families. The Court also examined the law regarding procedural and substantive unconscionability, which is the same in Kentucky. The Court then found that:

> "The line of cases that we think is most analogous to nursing home arbitration clauses involves pre-injury contracts immunizing one party from liability for negligence toward another party."

West Virginia, like Kentucky, enforces pre-injury agreements unless they violate public policy or a duty imposed by a safety statute. The Court in *Brown* considered its own Residents' Rights Act which, like Kentucky, allows residents a private cause of action in court for violations of the Act. Because a pre-injury exculpatory agreement ***14** would violate public policy if signed by a nursing home resident, the Court found that pre-dispute ADR agreements should not be treated differently. Indeed, because the Federal Arbitration Act only elevates arbitration agreements to the same level as other contracts, the FAA *cannot* require states to enforce agreements that otherwise violate public policy just because the agreements invoke the words "ADR" or "arbitration." As stated by the Court:

> Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act. We therefore hold that, as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.

The reasoning in *Brown* is comprehensive, compelling, and consistent with Kentucky law. In the health care context. 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.[52] More generally, Kentucky prohibits any party from contracting away liability and damages for personal injury or death caused by the violation of a safety statute.[53] Here, the applicable safety statute, KRS 216.515, is designed to protect residents and give residents a private cause of action in Court for violations caused by the nursing home.

Given Kentucky law on pre-injury agreements, it would be unreasonable to allow negligent defendants to accomplish with the words "ADR" or "arbitration" what they ***15** cannot accomplish with any other pre-injury agreement. The ADR agreement here eliminates plaintiff's access to the courts yet provides no viable alternative. It is the functional equivalent of an exculpatory agreement. Neither the Kentucky nor Federal Arbitration Acts elevate such an agreement above other pre-injury agreements. As such, the agreement is unenforceable on public policy grounds as well.

CONCLUSION

WHEREFORE, *Amicus Curiae* Kentucky Justice Association respectfully requests that this Court reverse the Court of Appeals and find that the pre-dispute ADR agreement in this case is unenforceable, unconscionable, and contrary to public policy.

Footnotes

1 Kentucky Attorney General's Guide, "How to Protect Nursing Home Residents" (2008) available at http://www.ag.ky.gov/NR/rdonlyres/EBFBC5C7-1DAC-42F4-96C0-133037D31521/0/protectnursinghomeresidents.pdf

2 GAO Report 10-70 (Nov. 2009) available at http:// www.gao.gov/new.items/d1070.pdf

3 *Id.*

4 Lexington Herald-Leader, "Number of Nursing Home Inspectors Declines" (June 1, 2010) available at http://www.kentucky.com/2010/06/01/1287865/number-of-nursing-home-inspectors.html

5 GAO Report 09-689 (Aug. 2009) available at: *http:// www.gao.gov/new.items/d09689.pdf*

6 *Id.*

7 Kentucky State Plan on Aging Fiscal Years 2009-2012, p. 10 (2009), available at http://chfs.ky.gov/NR/rdonlyres/585CBA10-9F0C-4E8B-80EB-AB06611D3D7B/0/KentuckyStatePlanonAging20092012.pdf

8 KRS 216.515(6).

9 KRS 216.515(26)(Emphasis added).

10 Marshall B. Kapp, "The 'Voluntary' Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications," 24 New Eng. J. on Crim. & Civ. Confinement 1, 2 (1998) (stating that an older person's move to a nursing home often follows a period of acute hospitalization when she and/or her family cannot manage the demands of home care); see also discussion by the West Virginia Supreme Court of Appeals in *Brown v. Genesis Healthcare Corp.*, -- S.E.2d --, 2011 WL 2611327 (W.Va. June 29, 2011).

11 *Id.*

12 American Arbitration Association, American Bar Association, American Medical Association, Commission on Health Care Dispute Resolution, Final Report, p. 10 (1998)(emphasis added) available at: http://www.adr.org/sp.asp? id=28633.

13 A link to the NAF Code of Procedure is included in the ADR Agreement and available at www.adrforum.com

14 Letter of the Minnesota Attorney General and NAF Consent Decree available at http://www.publicjustice.net/Repository/FilesWAFMinn_Letter_ 071909.pdf

15 *Id.*

16 See, e.g., Sternlight, Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637 (1996);. Note, Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facia Unconscionable. 23 Rev. Litig. 463 (2004); Gallagher, Mandatory Arbitration Agreements in Nursing Home Admission Agreements: the Rights of **Elders**, 3 NAELA Journal 187(2007).

17 *Id*

18 9 U.S.C.§ 2; see also *Volt Information Sciences, Inc. v. Board of Trustees*, 488 U.S. 468 (1989).

19 KRS 417.050.

20 *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009).

21 *Duncan v. O'Nan.* 451 S.W.2d 626 (Ky., 1970).

22 *Juett v. Cinicnnati N.O. & T.P.R. Co.*, 245 Ky. 379, 53 S.W.2d 551, 552-53 (1932).

23 *Senters v. Elkhorn & Jellico Coal Co.*, 284 Ky. 667, 145 S.W.2d 848 (Ky. 1940)

24 NAF Code of Procedure, p. 1 (emphasis added) available at: www.adrforum.com

25 *Id.* (emphasis added).

26 9 U.S.C. §5.

27 9 A.3d 215 (Pa. Super 2010).

28 *See GGNSC Tylertown v. Dillon*, -- So.3d --, 201] WL 3065415 (Miss.App. July 26, 2011); *Rivera v. American General* ***Financial*** *Services, Inc.*, N.M. Supreme Court Docket No. 32,340 (N.M. July 27, 2011).

29 *Howsam v. Dean Witter Reynolds. Inc.*, 537 U.S. 79, 83 (2002).

30 768 S.W.2d 57, 59-60 (Ky. 1989).

31 See Uniform Power of Attorney Act. Section 212 (2006) available at: http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm

32 TCA 34-6-101 *et seq.*

33 TCA 34-6-109(17).

34 KRS 387.660(4),

35 KRS 387.700(1); see also KRS 387.500(2).

36 The General Assembly amended KRS 386.093 following *Rice* to allow an attorney-in-fact to exercise authority even after a guardian or conservator is appointed by a court. However, nothing in the amended version of KRS 386.093 gave attorneys-in-fact the same rights and responsibilities as guardians. This is important because, presumably, the General Assembly was aware of *Rice*, yet chose not to vest attorneys-in-fact with the same rights and responsibilities as guardians.

37 *Beverly Enterprises, Inc. v. Stivers*, 2009 WL 723002 (Ky. App. 2009) (nursing home arbitration agreement not binding where signatory did not have authority to bind resident).

38 *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967).

39 *Id., citing Sharp's Adm'r v. Sharp's Adm'r*, 284 S.W.2d 673 (Ky. 1955).

40 *Emmerke's Adm'r v. Denunzio*, 302 Ky. 832. 196 S.W.2d 599 (1946).

41 *See, e.g.*, *Peters v. Columbus Steel Casting Co.*, 873 N.E.2d 1258 (Ohio 2007); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Woodall v. Avalon care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010).

42 *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315 (6th Cir. 2000), citing *Cuppy v. General Accident Fire & Life Assurance Corp.*, 378 S.W.2d 629, 632 (Ky. 1964).

43 *Id.*

44 *Id*, p. 316.

45 *Beverly Health & Rehabilitation Services, Inc., et al. v. Smith*, No. 2008-CA-000604-MR (Ky, App. 2009). Unpublished opinion, cited pursuant to CR 76.28(4)(c).

46 *Id.* at 6.

47 *Conseco* ***Finance*** *Servicing Corp. v. Wilder*. 47 S.W.3d 335, 342-343, n. 22 (Ky. App. 2001).

48 *Id.*

49 *Valued Services of KY, LLC v. Watkins*, 309 S.W.3d 256 (Ky. App. 2010) (finding the arbitration agreement in that unconscionable despite the FAA and general policy favoring arbitration).

50 *See Mortgage Electronic Registration Systems, Inc. v. Abner*. 260 S.W.3d 351, 354 (Ky.App.2008). (citing *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854, 861-862 (1998)).

51 -- S.E.2d --, 2011 WL 2611327 (W.Va. June 29, 2011).

52 *See Meiman v. Rehabilitation Center, Inc.*, 444 S.W.2d 78, 80 (Ky. 1969)("The general rule is that persons may not contract against the effect of their own negligence and that agreements which attempt to do so are invalid.").

53 See *Hargis v. Baize*, 168 S.W.3d 36, 48 (Ky. 2005)("A party cannot contract away liability for damages caused by that party's failure to comply with a duty imposed by a safety statute.").

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