RENDERED: SEPTEMBER 23, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001647-MR

PINE TREE VILLA, LLC, D/B/A/ REGIS WOODS HEALTHCARE AND REHABILITATION CENTER; SUN HEALTHCARE GROUP, INC; HBR KENTUCKY, LLC; HARBORSIDE HEALTHCARE, LLC; SUNBRIDGE HEALTHCARE, LLC; LISA TETRICK, IN HER CAPACITY AS ADMINISTRATOR OF REGIS WOODS CARE AND REHABILITATION CENTER; DEBORAH MARKEY, IN HER CAPACITY AS ADMINISTRATOR OF REGIS WOODS CARE AND REHABILITATION CENTER; AND JOSEPH GARRETT, IN HIS CAPACITY AS ADMINISTRATOR OF REGIS WOODS CARE AND REHABILITATION CENTER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDRICK COWAN, JUDGE
ACTION NO. 12-CI-005889

SARAH JASMINE HARGUS, AS ADMINISTRATRIX OF THE ESTATE OF WALTER HERMAN YOUNG, SR., DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

DIXON, JUDGE: Pine Tree Villa, LLC, D/B/A/ Regis Woods Healthcare and Rehabilitation Center; Sun Healthcare Group, Inc; HBR Kentucky, LLC; Harborside Healthcare, LLC; Sunbridge Healthcare, LLC; Lisa Tetrick, in her capacity as Administrator of Regis Woods Care and Rehabilitation Center; and Joseph Garrett, in his capacity as Administrator of Regis Woods Care and Rehabilitation Center (collectively "Regis Woods") appeal from an order of the Jefferson Circuit Court denying its motion to compel arbitration of the personal injury and wrongful death claims initiated by Jasmine Hargus, as Administratrix of the Estate of Walter Herman Young, Sr., deceased. For the reasons set forth herein, we affirm.

On April 3, 2009, Walter Herman Young executed a durable power of attorney (POA) appointing his son, Walter T. Young (hereinafter "Walter, Jr.") as his attorney-in-fact with respect to all matters including Young's real and personal property, financial affairs and legal affairs. The POA conferred upon Walter, Jr., expansive power and authority including the "full power to act for me and in my name for the following purposes: . . . to sign any legal documents on my behalf; to institute or defend legal actions on my behalf; . . . and to do and perform in my name all that I might individually do."

Thereafter, on April 17, 2009, Young was admitted to Regis Woods. On that date, Walter, Jr., as Young's attorney-in-fact, executed an optional

Arbitration Agreement on Young's behalf during the admissions process. The arbitration agreement provided, in pertinent part:

> B. **AGREEMENT TO ARBITRATE "DISPUTES"**: Any and all claims or controversies arising out of or in *any way* relating to this Agreement, the Admissions Agreement or any of the Resident's stays at this Facility, . . whether or not related to medical malpractice, including but not limited to disputes regarding the making, execution, validity, enforceability, voidability, unconscionability, severability, scope, interpretation, preemption, waiver, or any other defense to enforceability of this Agreement or the Admission Agreement, whether arising out of State or Federal Law, whether existing now or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation except as indicated, any claim based on Residents' Rights or a claim for unpaid facility charges), regardless of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted to binding arbitration.
>
> F. **OTHER PROVISIONS**:
>
> . . .
>
> 6. Binding on Parties and Others: It is the intention of the Resident and the Facility that this Agreement shall inure to the direct benefit of and bind the Facility, its parent, affiliates, and subsidiary companies, . . . that provided any services, supplies or equipment related to the Resident's stay at the Facility, and shall inure to the direct benefit of and bind the Resident (as defined herein), his/her successors, spouses, children, next of kin, guardians, administrators, legal representatives, including the personal representatives or executors of his/her estate, any person whose claim is derived through or on behalf of the Resident or relates in any way to the Resident's stays at this Facility, . . . and any person who executed this Agreement or the Admissions Agreement. The parties agree that all aspects of

> one Party's Dispute with the other shall be included and exclusively resolved through the Arbitration process set forth in this Agreement except as otherwise specified herein. This provision shall apply to all covered affirmative claims a Party may have against another, including cross-claims and counterclaims.

Young resided at Regis Woods for approximately three years until his death on March 19, 2012. Thereafter, on November 7, 2012, Hargus, as Administratrix of the Estate, filed an action in the Jefferson Circuit Court seeking damages for personal injury, violations of the long-term care resident's rights statute, KRS 216.515, and for wrongful death allegedly caused by Regis Wood's negligent care. Regis Woods, in turn, filed a motion to compel arbitration and stay or dismiss the pending lawsuit, arguing that the arbitration agreement Walter, Jr. signed on behalf of Young encompassed the claims asserted by Estate and mandated that the matter be referred to binding arbitration. By order entered August 26, 2013, the trial court denied the motion, stating therein:

> While the parties have presented several arguments for and against the enforcement of the arbitration agreement, the Court believes the decisive argument is based on two powers granted [Walter, Jr.] in the POA. One is the power to "sign legal documents" and the other is "to institute and defend legal actions." Defendants argue the power to institute and defend lawsuits necessarily implies a grant of the power to settle them, and a grant of the power to settle a lawsuit amounts to a grant of authority to enter into an arbitration agreement under *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012).
>
> In *Ping*, the Supreme Court said, "absent authorization in the power of attorney to settle claims and disputes, or some such express authorization addressing dispute

> resolution," a waiver of the right to a jury trial "is not to be lightly inferred." *Id.* at 593. The Court disagrees with the defendants' interpretation of the quoted language in *Ping* and the POA when both are read in light of *Ping's* apparent reluctance to imply a waiver of jural rights. Lawsuits are traditionally instituted and defended in a court of law, and there is no indication in the POA at issue here that Young, Sr. had any other venue in mind when he granted his son the power to institute and defend lawsuits on his behalf. *See Ping* at 593. (Quotation omitted).

Regis Woods thereafter appealed to this Court as a matter of right.

An order denying a motion to compel arbitration is immediately appealable. KRS 417.220(1). *Conseco Financial Service Corporation v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). The enforcement and effect of an arbitration agreement is governed by the Kentucky Uniform Arbitration Act ("KUAA"), KRS 417.045 et seq., and the Federal Arbitration Act ("FAA"), 9 U.S.C.3 § 1 et seq. "Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor." *Ping*, 376 S.W.3d at 588. Under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. Unless the parties clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, and the existence of the agreement depends on state law rules of contract formation. An appellate court reviews the trial court's application of those rules *de novo*. However, the trial court's factual findings, if any, will be disturbed only if clearly erroneous. *Id.* at 590 (internal citations omitted).

Regis Woods argues in this Court that the trial court erred in finding that Young's POA did not authorize Walter, Jr. to execute the arbitration agreement on his father's behalf. Regis Woods contends that the POA specifically granted Walter, Jr. the power to execute "any legal documents," and to "institute or defend any legal actions," which necessarily included the power to sign a binding arbitration agreement. Further, Regis Woods points out that the POA granted Walter, Jr. the unlimited power "to do or perform in [Young's] name all that [he] might individually do." We conclude, however, that based upon our Supreme Court's recent decision in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), the POA at issue herein did not confer upon Walter, Jr. the authority to waive Young's right to a jury trial so as to compel arbitration of the Estate's claims for personal injuries and statutory violations.

There is no dispute that an arbitration agreement, if valid and enforceable, covers an estate's negligence and personal injury claims, as well as violations of statutory and regulatory provisions. Whether the arbitration provision is enforceable, however, first depends upon the authority of a decedent's attorney-in-fact to bind any claims that she or her estate may have against the healthcare provider. In *Ping*, the Court noted:

> The scope of that authority [granted to the attorney-in-fact] is thus left to the principal to declare, and generally that declaration must be express... [E]ven a "comprehensive" durable power would not be understood as implicitly authorizing all the decisions a guardian might make on behalf of a ward. Rather, we have indicated that an agent's authority under a power of

> attorney is to be construed with reference to the types of transaction expressly authorized in the document and subject always to the agent's duty to act with the "utmost good faith."

Id. at 592 (citation omitted). The *Ping* Court further recognized the general rule that "[a]bsent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.* at 593. Thus, the issue herein is whether Walter, Jr., possessed the authority under the POA to execute the arbitration agreement on Young's behalf.

In *Whisman*, our Supreme Court examined three different power-of-attorney instruments and held that only one of the three contained broad enough language to empower the attorney-in-fact to execute an arbitration agreement. 478 S.W.3d 306. The Court explicitly held that neither of the following provisions in a POA granted the agent the authority to enter into a pre-dispute arbitration agreement: a grant of the power "to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns"; and a grant of the power "to make ... contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance[.]" *Id.* at 324–26. In so ruling, the Court noted,

> [i]nfusing the authority to enter into 'any contract or agreement' with the authority to waive fundamental constitutional rights eviscerates our long line of carefully crafted jurisprudence dictating that the principal's explicit grant of authority delineated in the power-of-attorney

> document is the controlling factor in assessing the scope of the powers of the attorney-in-fact.

Id. at 329. Based on *Whisman*, Regis Woods' argument that Walter Jr.'s authority to execute "any documents" necessarily included the arbitration agreement must fail.

Similarly, the *Whisman* Court concluded that the power to "'institute or defend suits' . . . and 'institute legal proceedings' . . . cannot be construed as supporting the authority for the attorney-in-fact to sign a predispute arbitration agreement binding his principal and his estate to arbitrate future personal injury claims." *Id.* 326-27.

> First, at the most elementary level, even if we agreed that the conduct of initiating an arbitration proceeding for personal injury claims was functionally equivalent to instituting a suit concerning Adams's property rights, the act that required authorization was not the act of initiating an arbitration proceeding. Obviously, Whisman never initiated an arbitration proceeding. The action under review is the signing of the pre-dispute arbitration agreement when no personal injury or property rights were in dispute.
> . . .
>
> Secondly, the current edition of Black's Law Dictionary defines "suit" as "[a]ny proceeding by a party or parties against another in a court of law." SUIT, Black's Law Dictionary (10th ed. 2014) (emphasis added). By way of comparison, an earlier edition of Black's Law Dictionary defines "suit" as "any proceeding by one person or persons against another or others in a court of justice in which a plaintiff pursues, in such court, the remedy the law affords him for the redress of an injury or the enforcement of a right[.]" Black's Law Dictionary, 1603 (4th ed. 1968) (emphasis added). There is no doubt that in the language of the law, a "suit" occurs in a court of

> law; arbitration by its very purpose and design is intended to avoid suits in a court of law; it is the antithesis of a suit in a court of law.
> . . .
>
> Kindred acknowledges that this provision of the Wellner POA granting the power to "demand, sue for, collect, recover and receive all ... demands whatsoever" and "to institute legal proceedings" did not expressly authorize Beverly to sign the pre-dispute arbitration agreement. Instead, Kindred argues that such authorization must be implied because arbitration is "reasonably necessary or incidental," as Kindred puts it, to "the ability to settle suits that have been brought pursuant to Joe's intended grant of authority." Kindred argues, "it would be an absurd result to recognize an agent's power to bring suit ... and then deny that she has the power to settle those very claims." We do not disagree; but "arbitrating" is not "settling."
>
> An agent charged with the responsibility of managing a claim in litigation would ordinarily need the ability to settle the claim. But, as we said above in reference to the Whisman case, initiating an arbitration proceeding—or more precisely, entering into a pre-dispute arbitration agreement, is a far cry from "settling" a claim.

Id. at 323-25.

Finally, the *Whisman* court examined a POA provision similar to that herein authorizing Walter, Jr. "to do and to perform in my name all that I might individually do[,]" and concluded that the broad delegation of power necessarily encompassed entering into an arbitration agreement:

> A literal comprehension of the extraordinarily broad grant of authority expressed by these provisions—"to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way" and "to do and perform for me in my name all that I might if present"—requires no inference about what the scope of authority

> encompassed within the expressed power. One might entertain considerable doubt about whether Olive consciously intended to forfeit her right of access to the courts and to a jury trial, but the language of her POA encompasses that result regardless of Olive's actual intent. Given this extremely broad, universal delegation of authority, it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered.

Id. at 327.

Nevertheless, the Court then considered the extent to which an attorney-in-fact's power to waive the decedent/estate's fundamental constitutional rights could be inferred from a "less-than-explicit grant of authority":

> There are limits to what we will infer from even the broadest grants of authority that might be stated in a power-of-attorney instrument. Lest there be any doubt concerning the propriety of drawing a line that limits the tolerable range of inferences we would allow from such a universally broad grant as that contained in the Clark POA, it is worth considering how we would react when other fundamental rights are at stake.
>
> It would be strange, indeed, if we were to infer, for example, that an attorney-in-fact with the authority "to do and perform for me in my name all that I might if present to make any contracts or agreements that I might make if present" could enter into an agreement to waive the principal's civil rights; or the principal's right to worship freely; or enter into an agreement to terminate the principal's parental rights; put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude. It would, of course, be absurd to infer such audacious powers from a non-specific, general, even universal, grant of authority. So too, it would be absurd to infer from a non-specific, universal grant, the principal's assent to surrender of other fundamental, even sacred, liberties.
> . . .

> Without any doubt, one may expressly grant to his attorney-in-fact the authority to bargain away his rights to access the courts and to trial by jury by entering into a pre-dispute arbitration agreement. No one challenges that; we accept such authorized waivers often in the context of criminal cases. We will not, however, infer from the principal's silence or from a vague and general delegation of authority to "do whatever I might do," that an attorney-in-fact is authorized to bargain away his principal's rights of access to the courts and to a jury trial in future matters as yet not anticipated or even contemplated. A durable power-of-attorney document often exists long before a relationship with a nursing home is anticipated. It bears emphasis that the drafters of our Constitution deemed the right to a jury trial to be inviolate, a right that cannot be taken away; and, indeed, a right that is sacred, thus denoting that right and that right alone as a divine God-given right.
>
> It is argued that the power-of-attorney documents we see in this case would endow the attorneys-in-fact with the authority to waive any and all constitutional rights of his principal as he may deem proper, at least insofar as the waiver can be effectuated by a "contract" or an "agreement." However, as illustrated by our decision in *Ping*, it is fundamental that we will not read provisions into a contract that were not put there by the principal.

Id. at 328-29. Thus, the Court concluded that "without a clear and convincing manifestation of the principal's intention to do so, we will not infer the delegation to an agent of the authority to waive a fundamental personal right so constitutionally revered as the 'ancient mode of trial by jury.'" *Id.* at 313.

> [T]he power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document in order for that authority to be vested in the attorney-in-fact. The need for specificity is all the more important when the affected fundamental rights include the right of access to the courts (Ky. Const. §

> 14), the right of appeal to a higher court (Ky. Const. § 115), and the right of trial by jury, which incidentally, is the only thing that our Constitution commands us to "hold sacred." See Ky. Const. § 7.

Id. at 328 (internal footnotes omitted).

We must conclude, as did the *Whisman* Court, that the POA at issue herein did not contain a clear manifestation of Young's intent to waive his constitutional rights to access the courts and to trial by jury. Therefore, Walter, Jr. was without the power to enter into an arbitration agreement that waived those rights on behalf of the decedent/Estate. Accordingly, the trial court properly denied Regis Woods' motion to compel arbitration.

The order of the Jefferson Circuit Court is affirmed

ALL CONCUR.

BRIEF FOR APPELLANT:

Jan G. Ahrens
Kristin M. Lomond
Donald L. Miller II
Louisville, Kentucky

BRIEF FOR APPELLEE:

Brian Michael Jasper
Roscoe Frank Mann II
Robert Earl Salyer
Lexington, Kentucky