RENDERED: SEPTEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001795-MR

KINDRED HEALTHCARE, INC.;
KINDRED NURSING CENTERS LIMITED
PARTNERSHIP D/B/A KINDRED TRANSITIONAL
CARE AND REHABILITATION-HILLCREST;
KINDRED NURSING CENTERS EAST, LLC;
KINDRED HOSPITALS LIMITED PARTNERSHIP;
KINDRED HEALTHCARE OPERATING, INC.;
KINDRED REHAB SERVICES, INC., D/B/A
PEOPLEFIRST REHABILITATION N/K/A
REHABCARE — APPELLANTS

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOE W. CASTLEN III, JUDGE
ACTION NO. 13-CI-00160

CYNTHIA HORTON, AS EXECUTRIX
OF THE ESTATE OF JAMES E. RICHARDSON,
DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

DIXON, JUDGE: Kindred Healthcare, Inc.; Kindred Nursing Centers Limited Partnership D/B/A Kindred Transitional Care and Rehabilitation-Hillcrest; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare Operating, Inc.; Kindred Rehab Services, Inc., D/B/A Peoplefirst Rehabilitation N/K/A RehabCare (hereinafter collectively "Kindred") appeal from an order of the Daviess Circuit Court denying its motion to compel arbitration of the personal injury and wrongful death claims initiated by Cynthia Horton, as Executrix of the Estate of James E. Richardson, deceased ("Estate"). For the reasons set forth herein, we affirm.

On July 5, 2000, James Richardson executed a Power of Attorney (POA), appointing Cynthia Horton, his daughter, as his attorney-in-fact with respect to all matters including Richardson's real and personal property, financial affairs, legal affairs and healthcare decisions. The POA authority included the following powers:

> 1. To demand, sue for, recover and receive all sums of money . . . and . . . to execute and deliver such receipts, releases or other discharges therefor as My Attorney may deem appropriate.
> . . .
>
> 3. To commence, prosecute, discontinue or defend all actions or other legal proceedings touching my estate or any part thereof, or touching any matter in which I or my estate may be concerned in any way.
> . . .
> 11. For all or any of the purposes of these presents to enter into and sign, seal, execute, acknowledge and deliver any Contracts, . . . other instruments whatsoever . . . .

. . .

17. In general, to do all other acts, deeds, matters and things whatsoever in or about my estate, property and affairs, or to concur with persons jointly interested with myself therein in doing all acts, deeds, matters and things herein, either particularly or generally described, as fully and effectually to all intents and purposes as I could do in my own proper person if personally present.

Thereafter, on October 18, 2010, Richardson was admitted to Kindred Transitional Care and Rehabilitation-Hillcrest, a nursing home located in Owensboro, Kentucky. On that date, Horton, as Richardson's attorney-in-fact, executed an optional Arbitration Agreement on Richardson's behalf during the course of the admission process. The arbitration agreement provided, in pertinent part:

A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the facility including disputes regarding interpretation of this agreement, whether arising out of State or Federal Law, whether existing 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, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted shall be submitted to alternative dispute resolution in the Commonwealth of Kentucky . . . .

B. It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties,

> their successors and assigns, including the agents, employees, servants, officers, directors and any parent or subsidiary of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The term "Resident" includes the resident, his or her Guardian or Attorney in Fact, his or her agent(s) or any person whose claim is derived through or on behalf of the resident.

In addition, the first paragraph of the arbitration agreement stated, "BINDING ARBITRATION MEANS THAT THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL, INCLUDING THEIR RIGHT TO A JURY TRIAL, THEIR RIGHT TO TRIAL BY A JUDGE AND THEIR RIGHT TO APPEAL THE DECISION OF THE ARBITRATOR(S)."

Richardson resided at Hillcrest until August 26, 2012. He died a few days later on August 31, 2012. Thereafter, on February 13, 2013, Horton, as Executrix of the Estate, filed an action in the Daviess 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 Kindred's negligent care. Kindred, in turn, filed a motion to compel arbitration and stay or dismiss the pending lawsuit, arguing that the arbitration agreement Horton signed on behalf of Richardson encompassed the claims asserted by Estate and mandated that the matter be referred to binding arbitration. By order entered August 1, 2013, the trial court denied the motion, stating therein:

> [T]he Court being sufficiently advised finds that Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581 (Ky. 2012) is

controlling, its reasoning applies squarely to the facts of this case:

> "The Estate and the beneficiaries . . . are neither estopped from disavowing the Arbitration Agreement, nor bound to it under third-party beneficiary principles. Finally, the wrongful death claimants would not be bound by their decedent's arbitration agreement, even if one existed, because their statutorily distinct claim does not derive from any claim on behalf of the decedent, and therefore do not succeed to the decedent's dispute resolution agreements."
>
> *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 600 (Ky. 2012) *cert. denied*, 133 S.Ct. 1996, 185 L.Ed.2d 879 (U.S. 2013)

The parties to the Arbitration Agreement did not include the wrongful death claimants, and for the reasons aforesaid, it Ordered that the Defendant's Motion to Compel Arbitration is denied.

Kindred thereafter filed a motion to alter, amend or vacate arguing that *Ping* did not mandate that the wrongful death beneficiaries consent to arbitrate personal injury, medical negligence, corporate negligence and statutory violation claims. The trial court summarily denied the order and this appeal ensued.

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).

Kindred argues that the trial court misinterpreted *Ping* when it refused to enforce the arbitration agreement for all of the Estate's claims solely because the wrongful death claimants were not a party to the agreement. To the contrary, Kindred contends that *Ping* specifically recognized that an estate's survival claims can be bound by an arbitration agreement even when the wrongful death claims could not be. *Ping* at 597 -98. Kindred further argues that Horton's authority granted in the POA to execute any contract on Richardson's behalf, and to commence, prosecute, discontinue or defend all legal actions or proceedings necessarily included the power to sign a binding arbitration agreement. Although we agree with Kindred that the trial court's interpretation of *Ping* was erroneous, we nevertheless conclude 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 Horton the authority to waive Richardson's right

to a jury trial so as to compel arbitration of the Estate's claims for personal injuries and statutory violations.

In *Ping*, the Kentucky Supreme Court addressed the question of whether a decedent, by her own action or through the action of her attorney-in-fact, could enter into contracts of any kind that would bind the rights of the beneficiaries of wrongful death claims made in connection with her own death. The *Ping* Court determined that a wrongful death claim does not "derive from any claim on behalf of the decedent, and [the wrongful death beneficiaries] do not succeed to the decedent's dispute resolution agreements." *Id.* at 600. Recently, in *Whisman*, the Court reaffirmed said principle:

> Under Kentucky law, a wrongful death claim is a distinct interest in a property right that belongs only to the statutorily-designated beneficiaries. Decedents, having no cognizable legal rights in the wrongful death claims arising upon their demise, have no authority to make contracts disposing of, encumbering, settling, or otherwise affecting claims that belong to others. The rightful owners of a wrongful death claim, the beneficiaries identified in KRS 411.130(2), cannot be bound to the contractual arrangements purportedly made by the decedent with respect to those claims. A decedent has no more authority to bind the wrongful death beneficiaries to an arbitration agreement than he has to bind them to a settlement agreement fixing or limiting the damages to be recovered from the wrongful death action, limiting the persons against whom a claim could be pursued, or an agreement on how and to whom to allocate the damages recovered in a wrongful death claim. Our analysis in *Ping* was thorough, complete, correct, and unanimous. We reaffirmed it in [*Pete v. Anderson*, 413 S.W.3d 291, 299 (Ky. 2013)] and we have no reason to retreat from it now. (Footnotes omitted).

> In contrast with the wrongful death claims, the personal injury and statutory claims arising under KRS 216.510 et seq. belong to the decedents; and the respective estates succeeded to those claims, at least to the extent that such claims survive the decedent's death pursuant to KRS 411.1408 and 216.515(26).

478 S.W.3d at 314. Based upon the reasoning set forth in *Ping* and *Whisman*, we must conclude that the trial court herein erred in ruling that the failure to include the wrongful death beneficiaries as parties to the arbitration agreement rendered the agreement wholly unenforceable.

While a decedent cannot bind the wrongful death beneficiaries to an arbitration agreement, there is no dispute that such 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 Horton possessed the authority under the POA to execute the arbitration agreement on Richardson'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 "[t]o 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*, Kindred's argument that Horton's authority to execute "any contracts" necessarily included the arbitration agreement must fail.

We would note that the *Whisman* court also examined a POA provision similar to number 17 herein that authorized Horton "to do all other acts . . . as I could do in my own proper person if personally present," 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 Richardson's intent to waive his constitutional rights to access the courts and to trial by jury. Therefore, Horton 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 Kindred's motion to compel arbitration.

The order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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