RENDERED: DECEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA001220-MR

NEW HERITAGE HALL HEALTH &
REHABILITATION CENTER, LLC, D/B/A
HERITAGE HALL HEALTH AND
REHABILITATION CENTER; SENIOR CARE,
INC.; SENIOR CARE OPERATIONS HOLDINGS, LLC;
SENIOR CARE HOLDINGS, INC.; SENIOR CARE
US HOLDINGS, INC.; RIVERWOOD CAPITAL, LLC;
AND DANA GRAVITT, IN HER CAPACITY AS
ADMINISTRATOR OF NEW HERITAGE HALL
HEALTH AND REHABILITATION CENTER, LLC — APPELLANTS

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 14-CI-00302

DANNY COFFMAN, AS
ADMINISTRATOR OF THE ESTATE
OF CHARLES COFFMAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Heritage Hall Health[1] appeals from the Anderson Circuit Court's July 30, 2014 order denying its motion to compel arbitration and dismiss or stay the pending lawsuit. For the following reasons, we affirm.

This lawsuit was filed by the estate of Charles Coffman, a deceased former resident of Heritage Hall Health and Rehabilitation Center.[2] Prior to being admitted to Heritage Hall, Charles had executed a power of attorney ("POA") naming his brother Kenneth as his attorney-in-fact. The document also provided that if Kenneth was "unable or unwilling" to serve as attorney-in-fact, Danny Coffman, Charles' nephew, was designated as an alternate attorney-in-fact. Danny was granted the authority "to sign on my behalf any contract." The POA also included a broad grant of authority, stating:

> I also give and grant unto my said attorney-in-fact full power and authority to do and perform all and every act and thing whatsoever requisite, necessary and proper to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney-in-fact, or his or her substitute, shall lawfully do or cause to be done by virtue hereof.

[1] The Appellants, referred to collectively as "Heritage Hall Health", are as follows: New Heritage Hall Health & Rehabilitation Center, LLC, d/b/a Heritage Hall Health and Rehabilitation Center, Senior Care, Inc., Senior Care Operations Holdings, LLC, Senior Care Holdings, Inc., Senior Care US Holdings, Inc., Riverwood Capital, LLC, and Dana Gravitt, in her capacity as administrator of New Heritage Health & Rehabilitation Center, LLC.

[2] The original administrator of Charles Coffman's estate, Kenneth Coffman, initiated this lawsuit. Subsequently, Kenneth Coffman passed away, and Danny Coffman was appointed successor administrator of the estate of Charles Coffman by the Anderson District Court. This court has since substituted Danny as the proper party to this appeal.

When Charles was admitted to the Heritage Hall facility, Kenneth asked Danny to handle Charles' admission paperwork because Kenneth could not walk and did not understand much of the paperwork. However, Kenneth was present at Heritage Hall when the admissions forms were signed. Danny completed and signed all of the Heritage Hall admission paperwork on Charles' behalf.

Charles' admission paperwork included an optional arbitration agreement, stating "[t]his Agreement provides for the mediation and arbitration of any disputes that might arise out of or relate in any way to the resident's stay(s) at this Facility." The arbitration agreement also provides:

> Any and all controversies or claims arising out of or relating in any way to the Resident's stay(s) at the Facility or relating to this Agreement, where the amount in controversy exceeds $25,000, shall be submitted to alternative dispute resolution, including but not limited to claims for statutory, compensatory, or punitive damages, and irrespective of the legal theories upon which the claim is asserted whether arising in the future or presently existing.

The agreement further informs that "[b]y agreeing to arbitration, both parties to this Agreement are waiving the right to a trial before a judge or jury." And, the signor acknowledges that by signing the agreement "[e]ach of the parties agrees to waive the right to a trial before a judge or a jury for the resolution of any claims or disputes, whether at law or in equity, which are subject to binding arbitration pursuant to this Agreement." Finally, immediately before the signatures of both parties, the agreement stated:

> **THE UNDERSIGNED HEREBY ACKNOWLEDGE THAT WE HAVE READ THIS ENTIRE AGREEMENT AND VOLUNTARILY CONSENT TO ALL OF THE TERMS OF THE AGREEMENT. WE FURTHER ACKNOWLEDGE THAT WE HAVE WAIVED OUR RIGHTS TO A TRIAL BEFORE A JUDGE OR JURY BY AGREEING TO BINDING ARBITRATION.**

(Emphasis original). Danny signed the arbitration agreement on Charles' behalf.

After this lawsuit was filed, Heritage Hall Health filed a motion to dismiss and compel arbitration based on Danny's execution of the arbitration agreement on Charles' behalf. On July 30, 2015 the trial court denied the motion, finding that although Danny did have the authority to act as attorney-in-fact since Kenneth was "unable or unwilling" to act as attorney-in-fact, the authority to execute an arbitration agreement on Charles' behalf was not included in the scope of authority granted by the POA. From that order, Heritage Hall Health appeals, arguing that the trial court erred in concluding that the POA did not grant Danny the authority to enter into an arbitration agreement on Charles' behalf.

An order denying a motion to compel arbitration is immediately appealable. KRS[3] 417.220(1). *See also Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). Upon appellate review of a motion to dismiss and compel arbitration, the trial court's factual findings are reviewed for clear error, and its construction of a contract, a legal determination, is reviewed *de novo*. *N. Fork Collieries, L.L.C. v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010); *Am. Gen.*

[3] Kentucky Revised Statutes.

Home Equity, Inc. v. Kestel, 253 S.W.3d 543 (Ky. 2008); *Conseco Fin. Serv.*, 47 S.W.3d 341.

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.[4] § 1 *et seq.* "Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor." *Ping v. Beverly Entrs., Inc.*, 376 S.W.3d 581, 588 (Ky. 2012).

> 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*, although the trial court's factual findings, if any, will be disturbed only if clearly erroneous.

Id. at 590 (internal citations omitted).

The question of whether an attorney-in-fact has the authority to execute an arbitration agreement on behalf of the principal depends on the scope of authority conferred on the agent through the power of attorney. *Id.* Previously, a trial court construed a power of attorney "with reference to the types of transaction expressly authorized in the document. *Id.* at 592. Indeed, the trial court in this case applied *Ping* in finding that Charles' POA, which authorized transactions concerning finances, real estate, and placement in a healthcare facility, did not provide Danny with authority to enter into an optional arbitration agreement since

[4] United States Code.

the agreement was not a precondition to admission to Heritage Hall, and therefore not a healthcare decision. However, the Kentucky Supreme Court recently decided *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2016), and specifically addressed how a trial court should determine whether a power of attorney grants the attorney-in-fact the authority to enter into an arbitration agreement.

Since *Whisman*, a power of attorney must be construed strictly, and the authority to waive the principal's right to a trial by jury will not be inferred "without a clear and convincing manifestation of the principal's intention to do so[.]" *Id.* at 313. The Supreme Court reasoned that "[t]he need for specificity is all the more important when the affected fundamental rights include the right of access to the courts[.]" *Id*. at 328. Waiving an individual's constitutional right to a trial by jury is not to be taken lightly, and accordingly, we will not infer such a waiver absent a clear expression granting the attorney-in-fact the authority to make such a waiver.

Consequently, we agree with the trial court that Charles' POA did not provide Danny with the authority to execute an arbitration agreement. While the POA does include a broad grant of power, in light of *Whisman*, we cannot say that such a grant is specific enough to grant an attorney-in-fact the authority to waive the principal's right to a trial by jury. In fact, in *Whisman*, the Supreme Court addressed a similarly broad grant of authority, namely the power "to make ... contracts of every nature in relation to both real and personal property[,]" and found that such a provision was insufficient to provide the attorney-in-fact the

authority to enter into an arbitration agreement on the principal's behalf. *Id*. at 325-26.

Danny argues that the recent federal district court decision *Preferred Care of Del., Inc. v. Crocker*, 5:15-CV-177, 2016 WL 1181786 (W.D. Ky, Mar. 25, 2016), holding that *Whisman* is preempted by the FAA's policy favoring arbitration, demands that this court disregard *Whisman* in considering whether the POA granted Danny the authority to enter into an arbitration agreement since the arbitration agreement is governed by the FAA. However, we believe the Kentucky Supreme Court adequately addressed this issue in *Whisman* when it found that Kentucky shares the same favorable policy towards arbitration, yet the requirement of a clear and convincing manifestation of intent to waive the constitutional right to a trial by jury is still appropriate. *Whisman*, 478 S.W.3d at 329-31.

> Whatever hostility our rule evinces is not against the federal policy favoring arbitration; indeed, Kentucky shares that same policy, as we have proclaimed on several occasions. Our rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise.

Id. at 331. Since this court is bound to follow the law as stated by the Supreme Court, we cannot find that the decision in *Crocker* demands a different result. *See Kindred Healthcare, Inc. v. Henson*, 481 S.W.3d 825, 828 (Ky. App. 2014) ("As an intermediate appellate court, this Court is bound by published decisions of the

Kentucky Supreme Court. SCR[5] 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court[.]")

The order of the Anderson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Jennifer M. Barbour
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert W. Francis
Little Rock, Arkansas

[5] Rules of the Supreme Court of Kentucky.