

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001608-MR

KINDRED HOSPITALS LIMITED PARTNERSHIP,
D/B/A KINDRED HOSPITAL-LOUISVILLE, KINDRED
HEALTHCARE OPERATING, INC., AND KINDRED
HEALTHCARE, INC.

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR, JUDGE
ACTION NO. 10-CI-000982

SHERAN SMITH, AS EXECUTRIX OF THE
ESTATE OF WILLIAM RHODES, DECEASED,
AND ON BEHALF OF THE WRONGFUL DEATH
BENEFICIARIES OF WILLIAM RHODES

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellants, (“Kindred”) appeal from the Jefferson

Circuit Court’s order denying their motion to dismiss or in the alternative stay the

lawsuit pending an alternative dispute resolution; *i.e.*, arbitration proceeding. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm the trial court's denial of Kindred's motion.

The facts of the case *sub judice* are not in dispute. William Rhodes, an incapacitated person, was a patient of Kindred from February 24, 2009, until July 24, 2009. After his death, his daughter Sheran Smith sued Kindred for negligence, medical negligence, corporate negligence, violations of long-term resident's rights, and wrongful death. Kindred produced a Voluntary Alternative Dispute Resolution Agreement between Patient ("Rhodes") and Hospital ("Kindred") that was signed by Smith the day after Rhodes was admitted to Kindred. Notably, the ADR contained a provision that if signed by the legal representative, then the legal representative was to indicate in what capacity he or she was signed and ADR listed "guardian, dpoa,¹ spouse, son, daughter, etc." as examples. Smith did not indicate in what capacity she signed. After the signature, the ADR contained the following provision:

[I]f signed by a Legal Representative, the representative certifies that the Hospital may reasonably rely upon the validity and authority of the representative's signature based upon actual, implied, or apparent authority to execute this Agreement as granted by the patient.

Based on the ADR, Kindred moved the trial court to dismiss or, in the alternative, stay the lawsuit pending an alternative dispute resolution. The trial

¹ We assume that DPOA stands for durable power of attorney. *See* Durable power of attorney (as it relates to guardianship), 23 Ky. Prac. Ky. Elder Law § 5:12.(2011).

court denied the motion, finding that reliance upon Smith's signature alone coupled with her status as a relative was insufficient to establish an agency relationship for the purposes of the motion to dismiss. The trial court also found Kindred's arguments concerning equitable estoppel to be unpersuasive as there was no evidence in the record that Smith was acting as Rhodes's agent or had a power of attorney, that she did not indicate in what capacity she was signing, and that Kindred could not reasonably rely upon such a signature, especially because by the very terms of the contract it was incomplete. Moreover, the court took issue with Kindred's contract giving inaccurate legal advice to induce someone who has no authority to sign a contract that he or she has the authority to do so. Last, the trial court concluded that the clause included after the signature lines that Kindred may "reasonably rely" upon the putative legal representative's authority to bind the patient violates the policy underpinning KRS 446.060, and the burden of remedying these drafting errors falls to Kindred as the drafter of the document. Thus, the trial court denied Kindred's motion. It is from this denial that Kindred now appeals.

On appeal, Kindred presents six arguments, namely, (1) the law favors enforcement of ADR agreements; (2) the ADR agreement is not ambiguous; (3) the ADR agreement does not constitute "inaccurate legal advice"; (4) Rhodes is bound by the ADR agreement executed by his daughter, Smith, under the principle of apparent authority; (5) Rhodes is estopped by the actions of his agent, Smith; (6) KRS 446.060 does not defeat the ADR agreement.

In response, Smith first argues that the trial court properly found that the ADR was not enforceable against Rhodes as Smith did not have actual or apparent authority and that Rhodes was not estopped to deny the ADR. Secondly, Smith argues that Kindred's presentation within the ADR of legal representative constitutes the unauthorized practice of law. Last, Smith argues that the ADR is unenforceable under the doctrine of impossibility of performance; we decline to address the merits of this argument as we affirm on other grounds.

At the outset we note that our jurisdiction to consider this otherwise interlocutory appeal is found within KRS 417.220. *See Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001). We review a trial court's findings of fact will "not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. A finding of fact is clearly erroneous when it is not supported by substantial evidence. *Eagle Cliff Resort, LLC v. KHBBJB, LLC*, 295 S.W.3d 850, 853 (Ky.App. 2009). Substantial evidence has been defined as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Secretary, Labor Cabinet v. Boston Gear, Inc.*, 25 S.W.3d 130, 134 (Ky. 2000). Legal issues will be reviewed *de novo*. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002), overruled on other grounds by *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). With these standards in mind, we now address the parties' arguments.

Kindred first argues that the law favors enforcement of ADR agreements. While it is true that Kentucky law generally favors the enforcement of arbitration agreements, the existence of a valid arbitration agreement is a threshold matter which must first be resolved by the court. *Mt. Holly Nursing Center v. Crowds*, 281 S.W.3d 809, 813 (Ky.App. 2008)(internal citations omitted) and *General Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky.App. 2006)(internal citations omitted). Moreover, the burden of establishing the existence of an arbitration agreement that conforms to statutory requirements rests with the party seeking to enforce it. *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 824 (Ky.App. 2008). In the case *sub judice*, we do not agree with Kindred that the trial court erred in denying their motion even though the law generally favors the enforcement of ADR agreements for the reasons set forth, *infra*.

Kindred next argues that the ADR agreement is not ambiguous and that the ADR agreement does not constitute “inaccurate legal advice.” Additionally, Kindred argues that KRS 446.060 does not defeat the ADR agreement. We decline to address these arguments² as they are not dispositive on appeal. We now turn to the dispositive issues on appeal, namely, whether Rhodes was bound by the ADR agreement executed by his daughter, Smith, under the theories of either apparent agency or estoppel.

² We likewise decline to address Kindred’s argument contained within footnote 3 of their brief that Kindred Healthcare Operating, Inc. and Kindred Healthcare, Inc. are not proper parties to the lawsuit as the trial court did not rule on this matter.

Essentially, enforcement of an arbitration agreement is a matter of contract law as “under the arbitration acts a dispute within the scope of an arbitration agreement is subject thereto unless the agreement may be avoided “upon such grounds as exist at law or in equity for the revocation of any contract.”” *Wilder* at 341. Given that Kindred seeks to enforce the ADR agreement against Rhodes, an incapacitated person, and that Smith and not Rhodes signed the ADR, Kindred argues that Smith had apparent authority to sign the ADR on behalf of Rhodes. Thus, we turn to our jurisprudence on agency.

Actual and implied³ authority are both granted to the agent from the principal. A trial court may find actual authority if “there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.” *Terbovitz v. Fiscal Court of Adair County, Ky.*, 825 F.2d 111, 116 (6th Cir.1987) (overruled on other grounds) (internal citation omitted). *See also* Restatement (Third) of Agency § 2.01 (2006) (When an agent acts with actual authority, the agent has the power to bind the principal or to “affect the principal's legal relations with third parties.).

³ We believe it helpful to distinguish between implied and apparent authority for our discussion. We cite *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky.App.,1990), wherein we state:

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. *Estell v. Barrickman*, Ky.App., 571 S.W.2d 650 (1978). Apparent authority on the other hand is not actual authority but is the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely. *Estell v. Barrickman, supra.*

Apparent authority is created when the *principal* holds out to others that the agent possesses certain authority that may or may not have been actually granted to the agent. See *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky.App. 1990) (“It is a matter of appearances on which third parties come to rely.”). Moreover, “[i]t is a rule, universally acknowledged, that the declarations of an agent are inadmissible to prove the fact of agency or that he was acting within the scope of his authority in a particular transaction.” *Galloway Motor Co. v. Huffman's Adm'r*, 281 Ky. 841, 137 S.W.2d 379, 382 (Ky. 1939).

We agree with the trial court that there is no evidence that Rhodes did anything to imbue Smith with any authority whatsoever. Further, we must remember that Rhodes was incapacitated. Accordingly, we find it difficult to ascertain how *Rhodes* held out to Kindred that Smith possessed certain authority to sign the ADR agreement given the evidence presented by the parties.⁴ Moreover, Smith did not indicate in what legal capacity she signed⁵ for Rhodes on the ADR agreement. While Kindred contends that by virtue of Smith being Rhodes’s daughter apparent agency is created, we are unaware of any jurisprudence in Kentucky that holds mere familial relationship between adults creates apparent

⁴ We note there was no an allegation that Smith possessed a durable power of attorney, nor that Smith acted under the authority of such a document.

⁵ We likewise fail to see the merits of Kindred’s argument that Rhodes should be bound to the terms of the ADR based on *Olshan Foundation Repair and Waterproofing v. Otto*, 276 S.W.3d 827, 831 (Ky. App. 2009)(“Nonsignatories to a contract containing an arbitration agreement may be bound to the agreement, but only if the nonsignatory receives a direct benefit from the contract.”). The ADR was a voluntary contract entered into post admission. We are unclear what direct benefit Rhodes received.

agency. Therefore, the trial court did not err in finding the absence of authority by Smith to act on the behalf of Rhodes. We now turn to whether Rhodes may be bound by the ADR agreement executed by Smith under the theory of estoppel.

[E]stoppel is a question of fact to be determined by the circumstances of each case.” *Weiland v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 91-92 (Ky. 2000)(internal citations omitted). Under the doctrine of equitable estoppel, certain conduct by a party is viewed as being so offensive that it precludes the party from later asserting a claim or defense that would otherwise be meritorious. *Akers v. Pike County Bd. of Educ.*, 171 S.W.3d 740, 743 (Ky. 2005). In order to prevail on a theory of estoppel, there must be proof not only of an intent to induce action or inaction on the party to be estopped, but also of reasonable reliance by the party claiming the estoppel. *Gailor v. Alsabi*, 990 S.W.2d 597, 604 (Ky. 1999)(internal citations omitted). Indeed in *Weiland, supra*, the Kentucky Supreme Court set out the essential elements of equitable estoppel as:

(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the 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.

Weiland v. Board of Trustees of Kentucky Retirement Systems, 25 S.W.3d 88, 91 (Ky. 2000)(internal citations omitted).

Kindred argues that the “reasonably rely” provision⁶ in the ADR contained after the signatures allowed them to rely on Smith’s signature. Assuming, *arguendo*, that such provision is properly included within the ADR, we disagree and find that the Kindred could not reasonably rely upon Smith’s signature alone without an explanation of her legal authority to bind Rhodes. Given that Rhodes was incapacitated at the time the ADR was signed and that Smith did not purport to be the legal representative⁷ of Rhodes, then the provision by its own language does not support Kindred’s argument. As discussed, *supra*, there is no evidence to establish that Smith was Rhodes agent; thus, Kindred’s theory that Rhodes must be estopped from denying the actions of his agent, Smith, is without merit. Accordingly, the trial court did not err in determining that Rhodes was not estopped to deny the ADR agreement.

Finding no error, we affirm the denial of Kindred’s motion to dismiss or in the alternative to stay the lawsuit pending an alternative dispute resolution by the Jefferson Circuit Court.

⁶ “[I]f signed by a Legal Representative, the representative certifies that the Hospital may reasonably rely upon the validity and authority of the representative’s signature based upon actual, implied, or apparent authority to execute this Agreement as granted by the patient.”

⁷ There was no argument that there was a durable power of attorney that granted Smith authority to bind Rhodes.

ALL CONCUR.

BRIEFS FOR APPELLANTS AND
ORAL ARGUMENT:

Paul A. Dzenitis
Justin N. Rost
Louisville, Kentucky

Donald L. Miller
Louisville, Kentucky

BRIEF FOR APPELLEES AND
ORAL ARGUMENT:

Richard E. Circeo
Deborah Truby Riordan
Lexington, Kentucky

Brian D. Reddick
Little Rock, Arkansas

Brian G. Brooks
Greenbrier, Arkansas