

RENDERED: JULY 18, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000149-MR

HQM OF PIKEVILLE, LLC,
D/B/A PIKEVILLE HEALTH CARE
CENTER; HOME QUALITY
MANAGEMENT, INC.; HEALTHCARE
ACQUISITIONS, INC.; LP PIKEVILLE,
LLC, D/B/A PIKEVILLE HEALTH CARE
CENTER, N/K/A SIGNATURE HEALTHCARE
OF PIKEVILLE; LPMM, INC.; LP MANAGER,
LLC; LP O HOLDINGS, LLC; SIGNATURE
CONSULTING SERVICES, LLC;
SIGNATURE CLINICAL CONSULTING
SERVICES, LLC; AND LINDA DAMRON

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 09-CI-00622

SHERRY COLLINS, AS
ADMINISTRATRIX OF THE
ESTATE OF MYRTIE CHANEY,
DECEASED; AND SHERRY COLLINS,
ON BEHALF OF THE WRONGFUL DEATH
BENEFICIARIES OF MYRTIE CHANEY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: HQM of Pikeville, LLC, d/b/a Pikeville Health Care Center; Home Quality Management, Inc.; Healthcare Acquisitions, Inc.; LP Pikeville, LLC, d/b/a Pikeville Health Care Center, n/k/a Signature Healthcare of Pikeville; LPMM, Inc.; LP Manager, LLC; LP O Holdings, LLC; Signature Consulting Services, LLC; Signature Clinical Consulting Services, LLC; and Linda Damron (collectively referred to as HQM) bring this appeal from an order of the Pike Circuit Court entered January 6, 2012, denying HQM's motion to compel arbitration. For the reasons stated, we affirm.

We begin our discussion by noting this is the second interlocutory appeal of this case to the Court of Appeals on the arbitration issue. By Opinion rendered September 2, 2011, another panel of this Court reversed and remanded the ruling of the Pike Circuit Court entered August 11, 2010, denying HQM's motion to compel arbitration. On remand, our Court in that opinion gave the Pike Circuit Court specific instructions to consider the applicability of the Federal Arbitration Act (FAA) and for the circuit court to make necessary findings of fact and conclusions of law related to that issue. The circuit court had denied HQM's motion to compel arbitration in its August 11, 2010, order in reliance upon *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). If the FAA was applicable,

Ally Cat would not be controlling. Upon remand, the circuit court did not focus its review upon the application of the FAA, but rather, concluded that HQM had failed to prove the existence of a valid enforceable arbitration agreement under applicable state law contract theories. This second appeal now follows.

BACKGROUND

As noted, this is HQM's second appeal from orders of the Pike Circuit Court denying HQM's motion to compel arbitration against Sherry Collins, as administratrix of the estate of Myrtie Chaney, deceased, and on behalf of the wrongful death beneficiaries of Myrtie Chaney (hereinafter collectively referred to as the "Estate").

Myrtie Chaney was admitted to HQM's Pikeville facility on April 24, 2007. She resided at the facility until her death on March 23, 2008. Sherry Collins is the granddaughter of Myrtie Chaney and administratrix of her estate. The Estate commenced this action against the nursing home on May 19, 2009, asserting various claims related to the nursing home's actions towards Myrtie Chaney during her residency at the nursing home. The nursing home moved to compel arbitration under the Kentucky Uniform Arbitration Act (KUAA) and the FAA pursuant to a written agreement executed between the nursing home and Collins on behalf of Chaney. The trial court has now denied the motion to compel arbitration on two different occasions, precipitating the two appeals to this Court. In the January 6, 2012, order, now on appeal, the circuit court concluded that Collins did not have

authority to bind Chaney under the alleged arbitration agreement and thus HQM failed in its burden to prove that a valid and enforceable arbitration agreement existed.

A review of the legal relationship between Collins and Chaney is relevant to this appeal. In early November 2006, a disability proceeding under Kentucky Revised Statutes (KRS) Chapter 387 was initiated in the Pike District Court against Myrtie Chaney. An emergency order was entered by the district court on November 2, 2006, appointing Collins as an emergency fiduciary for Chaney. The order expressly granted authority to Collins to determine Chaney's living arrangements, handle her financial affairs, and consent to medical procedures. The district court did not grant Collins the authority to enter into contractual relationships on Chaney's behalf under the emergency order.

At the time of Chaney's admission to HQM's nursing home in Pikeville in April of 2007, Collins executed various documents for Chaney, including the arbitration agreement which is the subject matter of this appeal. The Estate argues that Collins had no authority to enter into the agreement under the emergency fiduciary appointment granted in November 2006. On May 18, 2007, the district court entered a disability judgment against Chaney and appointed Collins as her permanent guardian. None of the admission documents including the arbitration agreement were re-signed or ratified by Collins after Chaney's admission in April 2007 and Collins appointment as guardian in May 2007.

THE FIRST APPEAL MANDATE

Before addressing the merits of whether HQM failed to establish the existence of a valid arbitration agreement, HQM raises a legitimate argument regarding the circuit court's failure to follow the mandate of this Court as set out in our Opinion from the first appeal. As noted, in the Opinion rendered September 2, 2011, the circuit court was instructed to address the applicability of the FAA to this proceeding. The circuit court did not address that issue in its order entered June 6, 2012.

A circuit court is bound by and must follow the mandate of an opinion of the Court of Appeals. This duty is not discretionary but rather is mandatory. *Buckley v. Wilson*, 177 S.W.3d 778 (Ky. 2005). This is a fundamental premise of the law-of-the case doctrine which requires obedience to appellate court decisions in all subsequent phases of the litigation. *Id.*

However, after this case was remanded back to the circuit court on the first appeal, and after entry of the second order denying arbitration on January 6, 2012, the Kentucky Supreme Court rendered its decision in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), on August 23, 2012, during the pendency of this appeal. The *Ping* decision addressed in part two issues relevant to this appeal: (1) agreements with nursing homes containing arbitration clauses and their enforceability when executed by persons other than the resident, and (2) wrongful death claims of third parties arising from the death of the resident at the nursing

home. *Id.* On December 5, 2012, this Court ordered supplemental briefing by the parties regarding the applicability of *Ping* to this case.¹

While the failure of the circuit court to follow the Court's earlier mandate would normally control our review, the *Ping* decision alters our approach and review insofar as this Court is also mandated to follow Supreme Court precedent. Supreme Court Rule (SCR) 1.030(8). And, as noted by the Supreme Court in *Ping*, under both the KUAA and FAA, a party seeking to compel arbitration has the burden to establish the existence of a valid agreement to arbitrate. *Ping*, 376 S.W.3d at 590. Thus, for purposes of this appeal and to eliminate any further delay in this case, we will assume the FAA is applicable and address the merits of the circuit court's order holding that a valid arbitration agreement does not exist in this case under applicable Kentucky law.

STANDARD OF REVIEW

We begin our analysis in addressing the appropriate standard of review by this Court. The arbitration agreement provides that it is governed by the FAA as set out in 9 U.S.C. § 1 *et seq.*, and HQM argues in its motion to compel that both the KUAA and the FAA are applicable to this agreement. The KUAA and FAA are substantively identical and both require that a valid arbitration agreement must be established to exist before arbitration can be compelled.

Louisville Peterbilt, Inc. v. Cox, 132 S.W.3d 850 (Ky. 2004).

¹ This case was originally scheduled for oral argument but was continued for the supplemental briefing by the parties. The panel has now concluded that oral argument will not be of any benefit in this case.

The Kentucky Supreme Court in *Ping*, 376 S.W.3d 581, recently addressed the standard of appellate review and the respective burdens of the parties when determining whether a valid arbitration agreement exists. The Court stated:

Under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995); *Louisville Peterbilt, Inc.*, 132 S.W.3d 850. Unless the parties clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, *First Options*, and the existence of the agreement depends on state law rules of contract formation. *Id.*; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009). 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. *North Fork Collieries*, 322 S.W.3d at 102.

Id. at 590.

In *Ping*, 376 S.W.3d 581, Ms. Ping executed an arbitration agreement on behalf of her mother at the time of her admission into a nursing home in Lawrenceburg, Kentucky. Ms. Ping held a general durable power of attorney for her mother. The Kentucky Supreme Court concluded that the express authority held by Ms. Ping on behalf of her mother under the general durable power of attorney was not sufficient to authorize Ms. Ping to enter into a dispute resolution agreement or to otherwise waive her mother's right to seek redress of grievances in a court of law. The Court further noted that where an arbitration agreement is presented to the patient and is otherwise not a condition for admission to the

nursing home but rather an optional or collateral agreement, as in the case now before this Court, the authority to choose arbitration on behalf of the patient is not within the purview of any “health care” decision. *Id.* at 593.

Ping further held that the wrongful death beneficiaries could not be compelled to arbitrate their independent wrongful death claims as they were not parties to the agreement nor are their claims derived through the decedent. *Ping*, 376 S.W.3d at 599. In other words, a decedent cannot bind his or her beneficiaries to arbitrate the wrongful death claims. *Id.* This ruling by the Supreme Court is also applicable to our review in this case.

ANALYSIS

Unlike the factual premise in *Ping*, 376 S.W.3d 581, where the nursing home resident’s legal representative held a durable power of attorney, this case looks to the legal representative’s status of legal guardian, as set out in KRS 387.500 *et seq.* In review of the complaint as amended in this action, the claims can be categorized as survival claims provided for in KRS 411.140 or wrongful death claims as provided for in KRS 411.130. We will examine each class of claim as concerns the validity and application of the arbitration agreement.

i. Wrongful Death Claims.

As noted by the Kentucky Supreme Court in *Ping*, 376 S.W.3d 581, wrongful death claims are not derivative and thus, independently accrue to the heirs or beneficiaries of the decedent and may be asserted by the personal representative of the decedent's estate. *Id.*; KRS 411.130.

The Kentucky Supreme Court expressly held in *Ping*, 376 S.W.3d 581, that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim. *Id.* Since both a power of attorney and guardianship terminate upon the death of the decedent, we see no practical distinction in their application to a wrongful death claim and must conclude as a matter of law, that a purported arbitration agreement, valid or not, does not encompass a wrongful death claim in Kentucky. Accordingly, the circuit court properly denied the arbitration of the wrongful death claim asserted in this case.

ii. Survival Actions.

The remaining claims set out in the amended complaint include negligence, medical negligence, corporate negligence, and violations of long-term care resident's rights under KRS 216.510 *et seq.* These claims are survival claims as set out in KRS 411.140. These claims arise during the resident's lifetime and, in this case, are essentially personal injury claims that did not lapse upon Chaney's death. Rather, these claims survive death and may be asserted or revived by the personal representative of behalf of the decedent's estate. *See Ping*, 376 S.W.3d 581.

In *Ping*, 376 S.W.3d 581, the Supreme Court concluded that the power of attorney in question did not empower the attorney-in-fact to enter into an arbitration agreement at the time of admission of the resident into the nursing home. Thus, the survival claims asserted were not subject to arbitration. However, we are faced with a different legal question than *Ping*, as HQM argues that Collins was Chaney's appointed fiduciary at the time of admission and thus had authority under common-law agency principles to enter into the arbitration agreement on Chaney's behalf.

We are not aware of any final, published case in Kentucky to date that addresses the issue of guardians executing arbitration agreements for their wards. We are aware that at least five cases are pending or are awaiting discretionary review in the Supreme Court that may touch on some aspect of this issue. And, we are fully cognizant of a recent opinion rendered April 4, 2014, by another panel of this Court in another appeal from the Pike Circuit Court (hereinafter "LP Pikeville Opinion") that holds a guardian's authority under KRS 387.660 is much broader than a traditional power of attorney and absent some court restriction, the guardian may enter into a binding arbitration agreement on behalf of his ward, upon admission to a nursing home.² However, this case is also pending discretionary review before the Kentucky Supreme Court and thus not final.

² *LP Pikeville, LLC, d/b/a Signature Healthcare of Pikeville, et al., v. Ginger Wright, as Guardian for Mable Damron*, No. 2013-CA-000959-MR, rendered April 4, 2014 (discretionary review pending).

After considerable review and research, including consideration of placing this case in abeyance, we have concluded that the facts of this case are distinguishable from any cases now pending before the Supreme Court, including the recent LP Pikeville Opinion, and thus we are able to address the merits of this case without further delay. As noted, Collins was not appointed as legal guardian for Chaney until May 18, 2007, almost a month after Chaney had been admitted to the nursing home. In fact, the record reflects that the disability trial was not conducted until May 18, 2007. As a matter of law, Collins could not have been Chaney's legal guardian at the time of her admission to the nursing home. Collins was named as Chaney's emergency fiduciary pursuant to a Pike District Court order entered in November 2006. That order was in effect when Chaney was admitted to the nursing home in April 2007. In paragraph 4 of the emergency order entered by the district judge, the court specifically limited Collins' powers and duties to determining living arrangements, consenting to medical procedures and handling financial arrangements. The unchecked boxes in the form order excluded any authority for Collins to enter into contract relationships on behalf of Chaney, dispose of Chaney's property, and execute any instruments for Chaney.³

Under *Ping*, 376 S.W.3d 581, the arbitration agreement is a contract subject to state law rules of contract formation. In this case, Collins did not have authority under state law to execute the agreement or bind Chaney to arbitration. Since no

³ AOC Form – 748 (Rev. 4-05). This form order was signed by the district judge and entered of record on November 2, 2006.

arbitration agreement legally exists, we again must conclude that the trial court properly denied arbitration on the survival claims.

iii. Apparent Authority, Estoppel, and Third Party Beneficiary.

In addition to HQM's arguments that Collins had authority as a fiduciary to execute the arbitration agreement, HQM also alternatively argues that the agreement is enforceable under theories of apparent authority, estoppel and third-party beneficiary. The argument for applying these theories to bind the Estate primarily centers on the various collateral admission documents signed by Collins upon Chaney's admission to the nursing home. The Kentucky Supreme Court addressed these very issues in detail in *Ping*, 376 S.W.3d 581, and essentially concluded they were not valid arguments, especially where the execution of the arbitration agreement was not a condition for admission. Had the nursing home obtained a copy of the emergency fiduciary order from Collins or otherwise verified her authority at the time of admission, it would have known that Collins could not enter into contractual relationships for Chaney. As noted, HQM did not seek ratification of the admission documents, including the arbitration agreement, after Collins became Chaney's legal guardian on May 18, 2007. Had this occurred, the outcome of this case would likely be different. Given we have concluded there exists no valid and enforceable arbitration agreement in this case, and that there are no extraordinary facts in the record that might trigger the application of these alternative legal doctrines argued by HQM, there is no

necessity to address these issues in greater detail, and we simply incorporate the same analysis set forth in *Ping*, 376 S.W.3d 581, 594-96, to dispose of same.

CONCLUSION

For the foregoing reasons, the January 6, 2012, Order of the Pike Circuit Court denying HQM's motion to compel arbitration is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

John David Dyche
Jason Michael Nemes
Louisville, Kentucky

BRIEF FOR APPELLEES:

Richard E. Circco
Lexington, Kentucky

Miller Kent Carter
Michael Lucas
Pikeville, Kentucky

Brian D. Reddick
Brent L. Moss
Little Rock, Arizona

Noah R. Friend
Lexington, Kentucky