RENDERED: OCTOBER 6, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001048-MR

KINDRED HOSPITALS LIMITED PARTNERSHIP, D/B/A KINDRED HOSPITAL-LOUISVILLE; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED HOSPITALS WEST, LLC; KINDRED SYSTEMS, INC.; KINDRED REHAB SERVICES, INC., D/B/A PEOPLEFIRST REHABILITATION; and MICHAEL RABUKA, in his capacity as administrator/executive director of KINDRED HOSPITALS, LIMITED PARTNERSHIP — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 15-CI-000935

HAROLD WHITE, as administrator of the ESTATE OF SHERREN GAGLE, DECEASED; and PAUL GAGLE — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: The above-captioned appellants seek review of an order of the Jefferson Circuit Court denying their application to enforce an arbitration agreement with respect to various claims asserted against them by the Estate of Sherren Gagle (by and through Harold White, its administrator) and Paul Gagle. Upon review, we reverse and remand for further proceedings not inconsistent with this opinion.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

The Estate of Sherren Gagle, along with Paul Gagle (Sherren's widower), filed various claims in Jefferson Circuit Court against the above-captioned appellants arising out of the care and treatment provided to Sherren while she was a resident at Kindred Hospital-Louisville from March 2, 2014, until the date of her death on April 11, 2014. The appellants, after filing their answer, filed an application to compel arbitration with respect to the claims the Estate had asserted against them as Sherren's successor-in-interest (*i.e.*, claims of "negligence," "medical negligence," "corporate negligence," and violations of the Long Term Care Residents' Rights Act and Kentucky Revised Statutes (KRS) 216.510, *et seq*.).[1] The basis of the appellants' motion was an arbitration

[1] The appellants properly conceded from the inception of this litigation that the remaining claims, which consist of an additional wrongful death claim asserted by the appellees, along with a loss of consortium claim asserted by Paul, could not have been dismissed on the basis of the ADR agreement because these claims did not belong to Sherren or otherwise derive from her rights. *See Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 599 (Ky. 2012) (explaining decedent could not subject a wrongful death claim to arbitration because wrongful death claims do not

agreement ("ADR agreement") Sherren had executed upon her admission to Kindred Hospital. The appellants also moved to stay the appellees' remaining claims until arbitration concluded.

In response, the appellees contended the ADR agreement was invalid for several bases, including: (1) Sherren's purported lack of contractual capacity at the time she executed it;[2] (2) substantive unconscionability; (3) failure of consideration; (4) the "jural rights doctrine;" and (5) public policy.

Ultimately, the circuit court denied the appellants' application to compel arbitration solely because it determined Sherren had lacked the requisite capacity to enter the ADR agreement. The circuit court set forth its reasoning in detail in an order entered June 28, 2016. Because the circuit court's reasoning is dispositive in this matter, it is set forth in relevant part below:

> Sherren Gagle was admitted as a Resident at Kindred Hospital Louisville on March 2, 2014. At the time of her admission, Ms. Gagle alone [sic] and no family members were able to assist her with the admisioon [sic] paperwork.
>
> Prior to her admission, Ms. Gagle had been diagnosed with Stage III lung cancer and had recently undergone a procedure in which she was subjected to the insertion of a metal tracheostomy tube. This tube assisted her with breathing and prevented her from being able to speak.

derive through or on behalf of the decedent, but accrue separately to the wrongful death beneficiaries).

[2] The appellees also asserted the ADR agreement was invalid due to "procedural unconscionability," but explained in their response that this defense was based on "[t]he same reasons which require that the Agreement be invalidated due to lack of contractual capacity." Because we have reversed the circuit court's determination that Sherren lacked contractual capacity when she executed the ADR agreement, we have consequently disposed of this claim and any need to revisit it upon remand.

> In addition, in the hours prior to her being transported to Kindred for admission, she was administered pain medications including Oxycodone.
>
> On the date of her admission, Ms. Gagle was brought to the hospital via ambulance and during the ride to the hospital, her prescription eye glasses were misplaced. Upon her admission to Kindred, she was presented a number of documents to read and sign including one titled "Voluntary Alternative Dispute Resolution Agreement Between Patient and Hospital" ("The ADR Agreement"). The Defendants are relying on the language of the ADR Agreement as the basis for their Motion to Dismiss that is currently before the Court.
>
> . . .
>
> The Defendants argue that Plaintiff's [sic] claims must be dismissed because upon her admission to Kindred, Ms. Gagle signed an ADR Agreement that is a valid and enforceable agreement requiring Plaintiffs [sic] claims to be resolved through the Arbitration process. Plaintiff's [sic] argue that the ADR Agreement is non-binding on their current claims because Ms. Gagle did not have capacity to voluntarily enter into it. Plaintiff raises a number of additional arguments in support of their objection to the Defendant's [sic] Motion however the Court will focus primarily on the question of capacity.
>
> The Kentucky Court of Appeals addressed the question of when can a trial court determine that an individual did not have the capacity to enter into binding contractual agreements upon their admission to a hospital. *Pikeville Med. Ctr. Inc. v. Bevins 376 S.W.3d 581* [sic].[3] In the

[3] "376 S.W.3d 581" is attributable to *Ping v. Beverly Enterprises, Inc*., 376 S.W.3d 581 (Ky. 2012). The correct citation of *Bevins* is: *Pikeville Med. Ctr. Inc. v. Bevins*, No. 2013-CA-000917-MR, 2014 WL 5420002 (Ky. App. October 24, 2014). As this citation indicates, *Bevins* is an unpublished case; it is not binding precedent; and our reference to *Bevins* should not be taken as our approval of its use as persuasive authority. *See* Kentucky Rule of Civil Procedure (CR) 76.28(4)(c).

With that said, there is nothing controversial about the circuit court's reliance upon *Bevins* to the extent that the circuit court relied upon it to support (as the circuit court stated in its order) "that an individual who was very sick at the time of his admission yet who was deemed capable of providing responses to questions regarding the course of medical treatment, *could*

> *Bevins* case, the Court found that an individual who was very sick at the time of his admission yet who was deemed capable of providing responses to questions regarding the course of medical treatment, could nonetheless be deemed incapable of reviewing and signing a complex contract in which he would be agreeing to waive a number of substanitive [sic] rights. The Court finds the facts in *Bevins* to be analogous to those in the instant case. In addition, the Court finds that the *Bevins* Court's rationale in deeming that the plaintiff lacked capacity to enter into the contractual admissions agreement to be instructive and persuasive in the case before this Court. In the instant action, despite medical records indicating that Ms. Gagle was awake and alert at the time she entered in to [sic] the ADR agreement, the cumulative effect of her illness, her inability to talk, the time of night, her having no family present to assist, etc . . . provide the Court with clear and convincing evidence allowing it to conclude that Ms. Gagle did not have the requisite capacity to enter into the ADR agreement. Accordingly, the Court finds that the Plaintiffs are not bound by the arbitration requirement contained tin [sic] the ADR agreement and will DENY the Defendant's [sic] Motion to Dismiss or Stay Plaintiff's Claims.

After the circuit court entered its order, the appellants then sought interlocutory review with this Court pursuant to KRS 417.220(1)(a).

STANDARD OF REVIEW

> Under KRS 417.060, a person may seek a judicial order to compel arbitration upon a showing that a valid arbitration agreement exists and that the opposing party refuses to arbitrate. If the opposing party challenges the existence of a valid arbitration agreement, the circuit court "shall proceed summarily to the determination of the issue so raised." KRS 417.060(1).

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nonetheless be deemed incapable of reviewing and signing a complex contract in which he would be agreeing to waive a number of substanitive [sic] rights." (Emphasis added.) As discussed below, *if* substantial evidence supports a lack of capacity, a finding of lack of capacity *could* be sustained—notwithstanding the existence of evidence to the contrary.

> Appellate review of an otherwise unappealable interlocutory order arises under KRS 417.220(1)(a). The standard of review by our Court from appeals arising under this statute was discussed in *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001) as follows:
>
> > It may also be well to note that our review of a trial court's ruling in a KRS 417.060 proceeding is according to usual appellate standards. That is, we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court's identification and application of legal principles. . . .

Kindred Nursing Centers Ltd. Partnership v. Sloan, 329 S.W.3d 347, 348 (Ky. App. 2010).

ANALYSIS

The appellants argue no substantial evidence of record supported the circuit court's conclusion that Sherren lacked contractual capacity to enter into the ADR agreement. We agree. While the record includes evidence that Mrs. Gagle was a very ill woman, this alone does not equate to lack of capacity to enter a contract, a burden that her successors had the burden of proving.

To summarize, the circuit court based its conclusion upon the following reasons:

1. Medical records indicating that Ms. Gagle was awake and alert when she executed the ADR agreement do not necessarily support that she had contractual capacity to enter into the ADR agreement at that time;
2. Her prescription eyeglasses had been misplaced;
3. She was alone and had no family members to assist her;
4. In the hours prior to being transported to Kindred, she was administered pain medications including oxycodone;
5. It was late at night;
6. Sherren had been diagnosed with Stage III lung cancer and had recently undergone a procedure in which she was subjected to the insertion of a metal tracheostomy tube; and
7. She was unable to speak.

With respect to its first reason, the circuit court may have been under the impression that the appellants had the burden of demonstrating Sherren had contractual capacity at the time she executed the ADR agreement. If that was indeed the case, the circuit court was mistaken. There is a presumption of contractual capacity, and it was the appellees' obligation to refute it. *Rose v. Rose*, 298 Ky. 404, 182 S.W.2d 977, 978 (1944).

With respect to its second reason, nothing in the record demonstrates Sherren was incapable of reading the ADR agreement without the use of her prescription glasses.[4] More importantly, nothing in the record supports that

[4] In their brief, the appellees also point out that Sherren had a prosthetic left eye. This is likewise irrelevant. Nothing in the record demonstrates Sherren was incapable of reading the ADR

Sherren's eyeglasses were ever misplaced, or that Sherren did not have them with her when she executed the ADR agreement. This was a point the appellees' counsel admitted below during the oral arguments the circuit court held regarding the appellants' application to compel arbitration.

With respect to its third reason, only one record suggests Sherren had no family members to assist her during some part of the process of her admission to Kindred Hospital. That record is a note from "GL McFall RN," a Kindred Hospital admissions nurse. It provides that on "03/02/14" at "00:53," Sherren was "Non-communicative and family not available to provide required admission information."

To the extent that the circuit court determined Sherren lacked capacity based upon this notation, its determination was based upon speculation. Nothing of record indicates Sherren's contractual capacity depended upon the presence of her family. Moreover, Sherren's medical records indicate her husband, Paul, accompanied her to Kindred Hospital; he may have assisted her through other parts of her admission process shortly before or after "00:53;"[5] and the record does not

agreement because she only had one eye.

[5] A record from St. Mary's Elizabeth Hospital (the facility Sherren was residing in prior to her transfer to Kindred Hospital), also produced by the appellees, notes that on "03/01/14" at "2345," Sherren was "TRANSFERRED TO KINDRED VIA AMBULANCE. HUSBAND ACCOMPANYING." Also, the same record from GL McFall RN, which was apparently relied upon by the circuit court, provides that Sherren "Arrived on unit 03/02/14 00:52 . . . Per stretcher – conscious," and was "Accompanied by: escort personnel, *spouse*." (Emphasis added.) It further states that on 03/02/14 00:54, "Hospital/unit information reviewed with patient: reviewed with patient/*significant other*[.]" (Emphasis added).

disclose precisely when, during the admission process, Sherren executed the ADR agreement.

With respect to its fourth reason, the circuit court stated that "in the hours prior to being transported to Kindred, [Sherren] was administered pain medications including oxycodone." But, where the record addresses *when* Sherren used oxycodone, it provides a much wider and more ambiguous time frame: The only record addressing this issue is the above-referenced note from GL McFall RN from 03/02/14, and it merely states that "in the last 72 hours" Sherren had been administered "oxycodone immediate release PO tab, 5 mg . . . at an unknown time."

In short, the record indicates Sherren was administered oxycodone, but provides no indication of when Sherren was administered oxycodone and what effect it had upon her mental state at any time including when she executed the ADR agreement. This was insufficient. "[U]nsoundness of mind to avoid a contract must relate to the immediate time when the contract was made." *Hall v. Crouch*, 341 S.W.2d 591, 594 (Ky. 1960) (citation and quotation marks omitted).

With respect to the circuit court's fifth and sixth reasons, it is undisputed that Sherren executed the ADR agreement at some point during her admissions process and that she was admitted to Kindred late at night (*i.e.*, at some point between midnight and 1 a.m.). It is also true that Sherren had been diagnosed with Stage III lung cancer and had recently undergone a procedure in which she was subjected to the insertion of a metal tracheostomy tube. Absent any

indication that Sherren was incapable of understanding the ADR agreement when she executed it, however, these details are irrelevant. When considering a party's capacity to enter into a contract, "courts will look only to the adequacy of the understanding where the validity of an act is questioned, and neither age, sickness, extreme distress, or debility of the body will affect the capacity to make a contract or conveyance, if sufficient intelligence remains to understand the transaction." *Hall*, 341 S.W.2d at 594.

Lastly, with respect to the circuit court's seventh reason, Sherren was unable to speak when she executed the ADR agreement. But, there is no indication from the record that this was at all relevant to Sherren's ability to read and understand the ADR agreement. Moreover, Sherren's medical records, along with her legible signature on the ADR agreement itself, demonstrate that her inability to speak did not render her unable to otherwise communicate.[6]

[6] Examples of Sherren's ability to communicate despite her inability to clearly speak, as set forth in her medical records, include but are not limited to the following:

- According to the record from St. Mary's Elizabeth Hospital from "03/01/14" at "2145," Sherren initially refused to go to Kindred Hospital and either wanted to stay at St. Mary's or go home. But, after the documenting nurse talked to her "at great length regarding the extent of her medical care and husband not equipped to do so, [Sherren] agreed to go to Kindred."
- According to GL McFall RN's notes from 03/02/14, Sherren "ask[ed] appropriate questions" and "verbalize[d]/state[d] full understanding" of a discussion they had regarding "medications, nutrition, oral health, equipment, rehab techniques, pain management, tests/procedures, disease process, safety, discharge planning, [and] infection control precautions."
- On 03/04/14, another nurse at Kindred Hospital noted Sherren was capable of mouthing words with enough proficiency to communicate that "her husband, Paul Gagle, would be able to give needed information and that he was due to visit her in approximately 1 hour."
- On 03/06/14, another nurse at Kindred Hospital observed Sherren "smiling and writing notes."

Despite the foregoing, the appellees argue the circuit court should be affirmed on alternative bases. First, they call attention to several records they have appended to their brief which they believe lend evidentiary support to the circuit court's findings regarding the time frame of when Sherren was administered oxycodone and Sherren's ability to read documents during the time of her admission.[7] However, our review is limited to the appellate record. These documents were not included in the appellate record, were never presented to the circuit court, and therefore shall not be considered or discussed further. *See Carr Creek Community Ctr. v. Home Lumber Co.*, 276 Ky. 840, 125 S.W.2d 777, 781 (1939).

Second, the appellees note that during the proceedings below, they filed of record the affidavit of Daniel M. Lively, M.D., an expert they had retained for purposes of disputing Sherren's capacity to enter the ADR agreement. The relevant substance of his affidavit provides:

> 1. My name is Dr. Daniel M. Lively. I have agreed to serve as a medical expert in this matter on behalf of the above-referenced Plaintiffs.
>
> 2. I am a board certified internist in geriatric medicine, and a Curriculum Vitae outlining my qualifications was attached to my previously tendered Affidavit in this matter.
>
> 3. I have completed my assessment of Sherren Gagel's physical and mental condition leading up to and at the time of her March 2, 2014 admission to Kindred Hospital-Louisville. This Affidavit is based upon my

[7] The appellees reference these documents as "SGag-MR00431," "SGag-MR00436," "SGag-MR00444," "SGag-MR02422," "SGag-MR02423," and "SGag-MR02424."

personal knowledge following review of medical records pertaining to Ms. Gagel from Jewish Hospital and St. Mary's Healthcare, Kindred Hospital-Louisville, Rockford Health and Rehab, as well as her Death Certificate.[8]

4. It is my opinion to a reasonable degree of medical certainty that Sherren Gagel lacked the capacity to review, understand, and ask questions concerning the "Voluntary Alternative Dispute Resolution Agreement Between Patient and Hospital."

5. Ms. Gagel's lack of capacity stemmed from a number of underlying acute physical and mental conditions, including, but not limited to: Chronic obstructive pulmonary disease, profound anemia, hypoxemia, hypotension, lung cancer (ongoing chemotherapy), and medical induced delirium which had not resolved since February 22, 2014 admission to St. Mary & Elizabeth Hospital.

6. In addition to these acute physical and mental conditions, Ms. Gagel's lack of capacity was further exacerbated by the particular circumstances of her admission which included, but were not limited to: ongoing pain management (including recent administration of opioids and benzodiazepines at St. Mary & Elizabeth Hospital), sleep deprivation (admission at or near 01:30), significant vision impairment, lack of lower dentures and recent tracheostomy with retained 6mm tracheostomy tube (prior to conducting of speech therapy).

7. Given her weakened physical and mental state as set forth above, it is apparent that Ms. Gagel was presented the "Voluntary Alternative Dispute Resolution Agreement Between Patient and Hospital" under an effective state of duress.

Regarding this affidavit, the appellees acknowledge the appellants moved to strike it as conclusory or vague. They further acknowledge that the

[8] Sherren's death certificate, which the appellees filed with the record, merely provides that Sherren died of natural causes due to lung cancer caused in part by tobacco use.

circuit court did not rely upon Dr. Lively's affidavit in its order, or otherwise make any ruling upon the admissibility of Dr. Lively's expert opinion as set forth in his affidavit. Notwithstanding, the appellees assert that because this affidavit was placed in the record, it qualifies as evidence capable of sustaining the circuit court's judgment.

We disagree. The subject of Sherren's contractual capacity was submitted to the circuit court for final adjudication. The circuit court's final adjudication in the context of these proceedings was subject to CR 52.01, which required the circuit court to support any finding that Sherren lacked contractual capacity with evidence of record. *Sloan*, 329 S.W.3d at 348. The evidence necessary to authorize setting aside a contract must be "clear and convincing." *Pierce v. Pierce*, 309 Ky. 77, 216 S.W.2d 408, 409 (1948). And, "clear and convincing evidence" is evidence that need not be uncontradicted, but "is not vague, ambiguous or contradictory, and comes from a credible source." *Glass v. Bryant*, 302 Ky. 236, 194 S.W.2d 390, 393 (1946).

Dr. Lively's opinion does not qualify as clear and convincing evidence capable of sustaining the circuit court's determination that Sherren lacked contractual capacity. To begin, his affidavit takes, as fact, certain details that the record does not support. As discussed previously, the record does not support that Sherren had "recent[ly]" been administered "opioids and benzodiazepines" prior to her execution of the ADR agreement. Despite the late hour of her transfer, the record does not support that Sherren suffered from "sleep deprivation" at that time.

The record does not support that Sherren's vision or recent tracheostomy impaired her ability to read and understand the ADR agreement, or that she even lacked her lower dentures at the time.[9] Furthermore, while the appellees assert that one of Sherren's medical records (*i.e.*, a February 22, 2014 medical record from St. Mary & Elizabeth Hospital) could support that Sherren suffered from what Dr. Lively described as "medical induced delirium," the very same record indicates that any altered mental status Sherren may have been suffering from had *resolved* as of February 22, 2014,[10] and does not support that any such altered mental status

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[9] In a somewhat related vein, the appellees assert that Sherren's ability to communicate or otherwise effectively understand the ADR agreement was hindered by the "loss" of her lower denture plate. In support, they point to the following statement within a medical record from "UD Boehnert Speech Pathologist," dated "03/11/14," which provides: "Per SLP pt *now* missing lower denture plate and only had upper plate available *today*." (Emphasis added.) From this, the appellees reason that Sherren must have been missing her lower denture plate at all times *prior* to March 11, 2014, including on March 2, 2014, when she executed the ADR agreement.

We disagree. The appellees offer no evidence indicating Sherren was incapable of understanding the ADR agreement without both of her denture plates. More importantly, the record contradicts the appellees' speculation on this point: An earlier medical record from "UD Boehnert Speech Pathologist," dated "03/06/14" (appearing immediately above the later 03/11/14 note) provides in relevant part: "[Sherren] was not complaining of pain. *Dentures placed*." (Emphasis added).

[10] The February 22, 2014 medical record is a consultation report from Sajjad Jameel, M.D., a physician from St. Mary & Elizabeth Hospital. In relevant part, it provides:

> The patient is a 69-year-old caucasian female who is known to us from 2 previous admissions. The first was in July 2013 when she was admitted with emesis secondary to nausea from her chemotherapy and radiation for non-small-cell lung cancer. At that time, her troponins were elevated and she did not complete a cardiac catheterization due to all the other events that were happening at that time. She was admitted again 02/02/2014 and her troponins were elevated again. This time, she was admitted due to some respiratory failure. She ended up being diagnosed with a paratracheal mass and underwent a tracheostomy. She actually was just discharged on February 19 to a nursing home. At the nursing home, she had some altered mental status and lethargy and was brought back in 3 days later on the 22nd. She does note that she feels as though her head was fuzzy. She is not able to recollect all the events that brought her back into the hospital this time. She does seem more clear today and is back to her baseline from when we saw during her previous admission.

carried forward to March 2, 2014.

Moreover, Dr. Lively's opinion provides no indication that it is the product of reliable principles and methods, or that Dr. Lively applied the principles and methods reliably to the facts of the case—threshold requirements for reliance upon, much less the admissibility of, any expert opinion. *See* Kentucky Rule of Evidence (KRE) 702;[11] *see also* CR 56.05 (explaining in part that "affidavits . . . shall set forth such facts as would be *admissible* in evidence[.]" (Emphasis added). Specifically, it provides no discussion or analysis of *how* chronic obstructive pulmonary disease, profound anemia, hypoxemia, hypotension, lung cancer, and ongoing chemotherapy caused Sherren (or would have caused anyone else) to lack the capacity to understand the ADR agreement specifically at issue in this matter under the circumstances.

CONCLUSION

The record does not support the Jefferson Circuit Court's determination that Sherren lacked contractual capacity when she executed the ADR agreement. Therefore, the presumption of her capacity applied, and we REVERSE. Because the circuit court grounded its order upon Sherren's lack of

[11] KRE 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
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> (2) The testimony is the product of reliable principles and methods; and
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> (3) The witness has applied the principles and methods reliably to the facts of the case.

capacity, a decision not supported by the evidence, it did not address the other bases the appellees offered for avoiding the ADR agreement. Moreover, none of those additional bases have been briefed before this Court. For that reason, we REMAND this matter to the circuit court for further consideration of those unaddressed bases.

ALL CONCUR.

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