

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001663-MR

KINDRED HOSPITALS LIMITED PARTNERSHIP,
D/B/A KINDRED HOSPITAL-LOUISVILLE;
AND KINDRED NURSING CENTERS LIMITED
PARTNERSHIP, D/B/A KINDRED HOSPITAL-
LOUISVILLE

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 10-CI-000781

JULIE CLARK, ADMINISTRATRIX, OF THE
ESTATE OF DOROTHY HAROLD, DECEASED

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This appeal concerns the enforceability of an arbitration agreement entered into between Kindred Hospitals Limited Partnership, d/b/a Kindred Hospital-Louisville and Kindred Nursing Centers Limited Partnership,

d/b/a Kindred Hospital-Louisville (collectively Kindred), and Julie Clark, administratrix, of the estate of Dorothy Harold, deceased.

Clark took an active role in securing medical care for Harold. On four separate occasions, February 6, 2009, May 7, 2009, July 20, 2009, and August 7, 2009, Clark completed admissions paperwork for Kindred facilities on behalf of Harold. Each time, Clark completed the paperwork outside the presence of Harold and without consulting her. Each set of admissions paperwork contained a voluntary alternative dispute resolution (ADR) agreement between Harold and Kindred that Clark signed. The ADR agreements did not have to be signed in order for Harold to be admitted to the Kindred facilities.

While Clark did not have power of attorney, she was authorized under a medical surrogate form to make health care decisions for Harold when Harold no longer had decisional capacity. The record is unclear as to whether Harold had decisional capacity on the relevant dates.

Shortly after her final admission to a Kindred skilled nursing home, Harold died. Subsequently, Clark filed an action against Kindred for gross negligence and recklessness, and Kindred moved to dismiss on the basis of the arbitration agreements. We affirm the circuit court's denial of Kindred's motion to dismiss.

Kindred argues that Clark had actual or apparent authority to enter into the ADR agreements on behalf of Harold, or should be estopped from challenging the ADR agreements because she is benefiting from other portions of the agreements

she signed on Harold's behalf. Kindred seeks enforcement of the ADR agreements, either through an order of dismissal or a stay pending arbitration.

We have jurisdiction to review this interlocutory order as the denial of a motion to compel arbitration under Kentucky Revised Statutes (KRS) 417.220(1)(a). *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459-461 (Ky.App. 2004).

Kindred had the initial burden to establish the existence of valid ADR agreements. *Ping v. Beverly Enterprises*, 376 S.W.3d 581, 590 (Ky. 2012). We review the circuit court's application of these agreements *de novo*, but will only disturb the circuit court's factual findings if they are clearly erroneous. *Id.*

We agree with the circuit court that under the authority of *Ping*, the ADR agreements cannot be enforced against the estate because Clark lacked the authority to enter into the ADR agreements on behalf of Harold. In *Ping*, the Kentucky Supreme Court concluded that a daughter, who was acting under the authorization of a general durable power of attorney agreement, did not have the actual authority to waive her mother's right to a jury trial by signing an ADR agreement on her behalf. *Id.* at 588-600. Under the medical surrogate form authorization, Clark had even less actual authority to voluntarily waive Harold's right to pursue a court action than the daughter in *Ping*. The only authority Clark had was to make health care decisions if Harold was incapacitated. Waiving Harold's right to redress in court cannot be considered an authorized health care decision. Even if the ADR agreements were not executed, Harold would not have

been prevented from receiving care from the Kindred facilities. Accordingly, Clark had no actual authority to enter into the ADR agreements.

The circuit court's finding that Clark lacked apparent authority to enter into the ADR agreements is supported by substantial evidence and in accordance with *Ping*. Harold engaged in no actions to suggest that Clark had the authority to act on her behalf in regard to optional ADR agreements. *Id.* at 594.

Additionally, estoppel cannot form the basis for the enforcement of the agreement unless Harold misrepresented Clark's authority and Kindred detrimentally relied on such a misrepresentation. *Id.* at 595. There is no evidence to support any kind of an affirmative misrepresentation by Harold or reliance by Kindred. Therefore, estoppel cannot be a basis for the enforcement of the ADR agreements.

Accordingly, we affirm the Jefferson Circuit Court's denial of Kindred's motion to dismiss.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Donald L. Miller, II
Kristen M. Lomond
Louisville, KY

BRIEF FOR APPELLEE:

Chandrika Srinivasan
Louisville, KY