RENDERED: JULY 28, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002003-MR

GGNSC STANFORD, LLC d/b/a GOLDEN LIVINGCENTER – STANDFORD; GGNSC ADMINISTRATIVE SERVICES, LLC d/b/a GOLDEN VENTURES; GGNSC HOLDINGS, LLC d/b/a GOLDEN HORIZONS; GGNSC EQUITY HOLDINGS, LLC; GOLDEN GATE NATIONAL SENIOR CARE, LLC d/b/a GOLDEN LIVING; GOLDEN GATE ANCILLARY, LLC d/b/a GOLDEN INNOVATIONS; GPH STANFORD, LLC — APPELLANTS

v.

APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 11-CI-00360

OLIVIA COFFMAN, AS EXECUTRIX OF THE ESTATE OF FLORA WHITE, DECEASED, & ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF FLORA WHITE, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

CLAYTON, JUDGE: A lawsuit was filed against GGNSC Stanford, LLC d/b/a Golden LivingCenter – Stanford, claiming various theories of liability for the death of a patron who had been staying at GGNSC's nursing home facility. The trial court initially dismissed the case due to an arbitration agreement that had been signed by the patron's power of attorney when she was admitted to the facility. The trial court subsequently vacated its dismissal after *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012) was rendered.[1] GGNSC appeals that order. Because we find *Ping* controls the outcome of this case, we affirm the decision of the trial court.

BACKGROUND INFORMATION

We initially note that pursuant to the parties' motions we have held this case in abeyance twice pending the Kentucky Supreme Court's decision in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), and the United States Supreme Court decision in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. ___, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017). The parties have also filed supplemental briefs regarding *Whisman*. As we do not require additional briefing regarding *Clark*, we have returned the case to the active docket and it is now ripe for review.

[1] GGNSC briefly argues the trial court's use of Kentucky Rules of Civil Procedure (CR) 60.02 to vacate its previous order staying the proceedings was procedurally improper as the order staying the proceedings was not a final order. We hold the argument fails because the Kentucky Supreme Court rejected a similar argument in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 331-332 (Ky. 2015) (reversed and remanded on other grounds by *Kindred Nursing Centers Ltd. Partnership v. Clark*, ___ U.S. ___, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017)).

White became a resident at Golden Living Center-Stanford when her daughter, Olivia Coffman, acting as White's attorney-in-fact, admitted her. The durable power of attorney gave Coffman authority as follows:

> . . . I, FLORA CARSON WHITE, . . . hereby make, constitute and appoint my daughter, OLIVIA COFFMAN, . . . as my true and lawful attorney in fact for me and in my name, place and stead:
>
> To take possession of any and all moneys, goods, chattels and effects belonging to me, wheresoever found; to draw, collect and receive any and all moneys on deposit to take my credit in any bank or wheresoever located; To take charge of my person in case of sickness or disability of any kind, and to remove and place me in such institutions or places as she may deem best for my personal care, comfort, benefit and safety; and for said purposes to use and disburse any or all of said bank deposits, moneys and other personal property; and to endorse any instrument and any contracts on my behalf for my benefit.

Among the documents Coffman executed while admitting her mother was a three page, double-sided document titled, "ALTERNATIVE DISPUTE RESOLUTION AGREEMENT" (hereinafter "ADR agreement"). The ADR agreement set forth that it was not a condition of admission or continued residency at the facility. It provided as follows:

> This agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Facility or the Admissions Agreement between the Parties that would constitute a legally cognizable cause of action in a court of law sitting in the state where Facility is located. Covered Disputes arising from one Party's failure to satisfy a financial obligation to the other Party; . . . negligence, gross negligence, malpractice and any alleged departure from

> any applicable federal, state, or local medical, health care, consumer, or safety standards.

White was a resident at the facility from July 22, 2010, through October 11, 2010, when she passed away. In August of 2011, Coffman brought suit in Lincoln Circuit Court as White's personal representative asserting causes of action for negligence, medical negligence, corporate negligence, wrongful death and violations of Kentucky's Residents' Rights statute, KRS 216.515, *et seq*. The Appellants moved for a dismissal of the claims and for the trial court to enforce the ADR agreement. The trial court then issued an Enforcement Order setting forth that the defendants had met their burden of proof and that the ADR agreement was enforceable.

The Kentucky Supreme Court then issued an opinion in *Ping v. Beverly Enters., Inc.*, *supra*. After the ruling, the trial court vacated its Enforcement Order, and the Appellants initiated this appeal.

STANDARD OF REVIEW

Pursuant to the Kentucky Arbitration Act and the Federal Arbitration Act, a party seeking to compel arbitration under an arbitration agreement has the initial burden of establishing the validity of the agreement. *Id.*; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004). "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." *Ping*, 376 S.W.3d at 590; *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. *Ping*, 376 S.W.3d at 590; *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010).

DISCUSSION

White's power of attorney contained three relevant clauses. First, it permitted the attorney-in-fact to handle financial decisions.[2] Second, it permitted the attorney-in-fact to handle healthcare decisions.[3] And third, it granted the attorney-in-fact broad authority to implement the financial and healthcare decisions.[4] As the power of attorney did not expressly grant the attorney-in-fact authority to sign the ADR agreement, and the ADR agreement was not a condition of White's admission into the healthcare facility, Coffman did not have the authority to bind White to the ADR agreement. We thus affirm the trial court's order denying GGNSC's request to enforce the arbitration agreement. Our conclusion is controlled by *Ping*, *Whisman*, and *Clark*.

[2] "To take possession of any and all moneys, goods, chattels and effects belonging to me, wheresoever found; to draw, collect and receive any and all moneys on deposit to take my credit in any bank or wheresoever located[.]"

[3] "To take charge of my person in case of sickness or disability of any kind, and to remove and place me in such institutions or places as she may deem best for my personal care, comfort, benefit and safety[.]"

[4] "[A]nd for said purposes to use and disburse any or all of said bank deposits, moneys and other personal property; and to endorse any instrument and any contracts on my behalf for my benefit."

In *Ping*, the Kentucky Supreme Court held that an agent's authority under a power of attorney must be construed in relation to the transaction types expressly and impliedly authorized in the power of attorney document and consistent with Section 37 of the Restatement (Second) of Agency, to wit:

> (1) Unless otherwise agreed, general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates.
>
> (2) The specific authorization of particular acts tends to show that a more general authority is not intended.

Ping, 376 S.W.3d at 592.

The power of attorney being interpreted in *Ping* was titled "General Power of Attorney", and it gave the agent "authority 'to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done,'" including "management of [the principal's] property and finances . . . [and] 'medical care . . . .'" *Id*. at 586-87. It also permitted the agent to "'generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf.'" *Id*. at 587. The power of attorney stated its language should "be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire." *Id*. It further noted that, "[t]he enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact." *Id*.

The Court ultimately interpreted the power of attorney as applying only to property and healthcare management, which did not extend to arbitration agreements that were not a condition of admission into a healthcare facility. When it came to arbitration agreements and their "significant legal consequences" that "waive the principal's right to seek redress of grievances in a court of law[,]" the *Ping* Court required lower courts interpreting powers of attorney to look either for express authorization or for strong language from which to infer a grant of authority. "Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id*. at 593. The United States Supreme Court declined to grant a writ of certiorari in *Ping*. *Beverly Enters., Inc. v. Ping*, ___ U.S. ___, 133 S.Ct. 1996, 185 L.Ed.2d 879 (2013).

The *Ping* rule was later applied by the Kentucky Supreme Court in *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (2015). *Whisman* involved three consolidated cases with three differently-worded power of attorney documents. The Court interpreted two of the documents as neither impliedly nor explicitly authorizing the attorney-in-fact to sign arbitration agreements. The third document was broad enough that such authority could be implied. In a divided opinion, though, the Court adopted a clear-statement rule that required powers of attorney to expressly provide that the agent could deprive the principal of an adjudication by judge or jury. This clear-statement rule was narrower than *Ping*'s holding that courts could infer "not . . . lightly" that a power of attorney granted the

agent the authority to deprive the principal of an adjudication by judge or jury. As the Court summarized in *Whisman*, "without a clear and convincing manifestation of the principal's intention to do so, we will not infer the delegation to an agent of the authority to waive a fundamental personal right so constitutionally revered as the 'ancient mode of trial by jury.'" *Id*. at 313.

This clear-statement rule was ultimately rejected by the United States Supreme Court in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. ___, 137 S.Ct. 1421 (2017). There, the United States Supreme Court granted certiorari to review two of the three cases that were consolidated in *Whisman* – one case in which the Kentucky Supreme Court held no authority could be impliedly found in the power of attorney document, and the other case in which the authority had been impliedly found. The United States Supreme Court, having rejected the clear-statement rule, ultimately reversed the case in which the authority had been impliedly found to exist. *Id*. at 1429. It remanded the other case for further consideration of whether the document should be interpreted to impliedly authorize the attorney-in-fact to sign an ADR agreement. *Id*. The United States Supreme Court was concerned the initial interpretation could have been tainted by the clear-statement rule.[5] To fully comprehend *Whisman* and *Clark*, then, we must examine the facts underlying the three cases and the specific results of each.

[5] "The Kentucky Supreme Court began its opinion by stating that the Wellner power of attorney was insufficiently broad to give Beverly the authority to execute an arbitration agreement for Joe. If that interpretation of the document is wholly independent of the court's clear-statement rule, then nothing we have said disturbs it." *Clark*, 137 S.Ct. at 1429 (citations omitted).

We begin with the *Whisman* case that was not before the United States Supreme Court – the Adams-Whisman POA. In that power of attorney, the agent was granted the authority to "institute or defend suits concerning [my] property rights[,]" and "to draw, make and sign any and all checks, contracts, notes, mortgages, agreements, or any other document including state and Federal tax returns[.]" 478 S.W.3d at 322-24. The Kentucky Supreme Court interpreted those provisions as not giving the attorney-in-fact the authority to enter into arbitration agreements. The first provision in the power of attorney only concerned "institut[ing] or defend[ing] suits[.]" As the arbitration agreement concerned future, hypothetical property rights, the power of attorney language neither expressly nor impliedly granted the agent such authority. Furthermore, "suit" connotes a claim brought in a court of law, not a claim brought in arbitration. Thus, that provision did not grant the agent authority to bind the principal in an arbitration agreement.

The Court likewise rejected that the second provision conferred authority to enter into pre-dispute arbitration agreements. *Id*. at 324. It relied on *Ping* to hold that "powers granted expressly in relation to the management of the principal's property and financial affairs, and to health-care decisions" failed to give the attorney-in-fact "'universal authority beyond those express provisions.'" *Id*. (citing *Ping*, 376 S.W.3d at 592).

The second case consolidated into the *Whisman* decision involved the Wellner POA. *Id*. at 318. That document granted the attorney-in-fact the authority

to handle financial and healthcare decisions. It provided that the attorney-in-fact could "demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)." *Id*. at 319. It also granted the power "to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance." *Id*.

The Court rejected that either of these provisions expressly or impliedly authorized the attorney-in-fact to bind the principal to an ADR agreement. The first provision at best could be viewed as granting the power to "settle" future litigation, but an arbitration agreement is a pre-dispute agreement that "'settles' nothing in relation to present and future claims of the principal." *Id*. at 325. The second provision likewise was deficient because the right contracted away in an arbitration agreement is a constitutional right to a jury trial, not a personal property right. As the provision only permitted contracts regarding personal (and real) property, it did not cover arbitration agreements. *Id*. at 326.

The third case consolidated into the *Whisman* decision involved the Clark POA. *Id*. at 317. That document was broad and granted the attorney-in-fact "full power . . . to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way[, and g]enerally to do and perform for me and in my name all that I might do if present." *Id*. At 318. The Court interpreted this

document as impliedly permitting the attorney-in-fact to enter into pre-dispute arbitration agreements. *Id.* at 327.

In light of the power-of-attorney language in the *Whisman* and *Ping* cases, we find the instant power-of-attorney to be more akin to *Ping* and the Adams-Whisman POA. As in *Ping* and the Adams-Whisman POA, Coffman was granted a durable power of attorney to take care of any health care, property management, and financial issues her mother would encounter should she become incapacitated. As in *Ping* and the Adams-Whisman POA, the durable power of attorney neither expressly gave the agent dispute resolution authority nor did it strongly imply the agent had such authority. And as in *Ping* and the Adams-Whisman POA, the arbitration agreement was not a condition of admission. Under these facts, the *Ping* Court held that Ping was not authorized to bind her mother to the arbitration agreement:

> Our conclusion that Ms. Ping was not authorized to bind her mother to Beverly Enterprises' optional Arbitration Agreement is in accord with the decisions of other courts confronted with the same issue.
>
> On the one hand, where an agreement to arbitrate is presented to the patient as a condition of admission to the nursing home, courts have held that the authority incident to a health-care durable power of attorney includes the authority to enter such an agreement.
>
> On the other hand, where, as here, the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement, courts have held that authority to choose arbitration is not within the purview of a health-care agency, since in that

> circumstance agreeing to arbitrate is not a "health care" decision.

Ping, 376 S.W.3d at 593 (citations omitted, paragraph breaks added). Likewise, the *Whisman* Court found the "contracts" provision in the Adams-Whisman POA did not extend beyond the expressly granted powers over the principal's property, financial affairs, and healthcare decisions. *Whisman*, 478 S.W.3d at 324. Applying both *Whisman* and *Ping* to the instant case, Coffman did not have the authority to bind White to the ADR agreement.

Therefore, we agree with the trial court that the *Ping* decision is controlling, and the ADR agreement is not enforceable. Accordingly, we affirm the decision of the trial court vacating its order enforcing the agreement and REMAND this action for further proceedings.

ALL CONCUR.

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