

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000406-MR

HBR BROWNSVILLE, LLC D/B/A EDMONSON  
CARE AND REHABILITATION CENTER;  
CAROLYN TORRENCE, IN HER CAPACITY AS  
ADMINISTRATOR OF EDMONSON CARE AND  
REHABILITATION CENTER; HARBORSIDE  
ADMINISTRATIVE SERVICES, LLC; HARBORSIDE  
HEALTHCARE MANAGEMENT, LLC; HARBORSIDE  
HEALTHCARE, LLC; HARBORSIDE HOLDINGS 1,  
LLC; HBR KENTUCKY, LLC; KENTUCKY HOLDINGS  
1, LLC; SUN HEALTHCARE GROUP, INC.; AND  
UNBRIDGE HEALTHCARE, LLC

APPELLANTS

v. APPEAL FROM EDMONSON CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 12-CI-00187

JOHNNY CHILDRESS AND WINNIE LOU RAYMER,  
AS CO-ADMINISTRATORS OF THE ESTATE OF  
ELSIE LEE CHILDRESS, DECEASED

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: HBR Brownsville, LLC d/b/a Edmonson Care and Rehabilitation Center, et al., (hereinafter "Appellants") appeal from an Order of the Edmonson Circuit Court overruling their Motion to Stay or Dismiss the wrongful death claim of Johnny Childress and Winnie Lou Raymer, as Co-Administrators of the Estate of Elsie Lee Childress, deceased (hereinafter "Appellees"). The Appellants contend that all claims set out in the Appellees' personal injury and wrongful death action against them are subject to an arbitration agreement signed by the Appellees and Elsie Lee Childress prior to her death, and that the Edmonson Circuit Court erred in concluding that the wrongful death claim is excluded from the agreement. We conclude that *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), disposes of this matter in favor of the Appellees, by virtue of its holding that wrongful death claims belong to statutory wrongful death beneficiaries and not to the decedent's estate. We also decline the Appellants' invitation to advocate *Ping's* reversal by the Kentucky Supreme Court. Accordingly, we AFFIRM the Order on appeal.

Edmonson Care and Rehabilitation Center is a long term health care facility located in Edmonson County, Kentucky. On December 30, 2008, Elsie Lee Childress ("Ms. Childress") was admitted to Edmonson Care, where she resided until her death on December 18, 2011. Ms. Childress was 88 years old at the time of her death.

Prior to her admission at Edmonson Care, Ms. Childress executed a power of attorney naming her sons, Appellee Johnny Childress and Lannie Childress, as her attorneys-in-fact. On the day of her admission, Ms. Childress, along with Johnny and Lannie Childress, signed an Arbitration Agreement which was also signed by a representative of Edmonson Care. Ms. Childress allegedly placed an "X" on the agreement in lieu of a signature. The Agreement provided in relevant part that all claims and controversies arising out of Ms. Childress' residency at Edmonson Care shall be submitted to binding arbitration. It further stated that the Federal Arbitration Act ("FAA") shall apply to the agreement and shall preempt inconsistent state law.

Following the death of Ms. Childress on December 18, 2011, the probate court appointed the Appellees as Co-Administrators of her estate. Approximately 11 months later, the Appellees instituted the instant action against the Appellants in Edmonson Circuit Court. Appellees sought damages based on personal injury, wrongful death and violation of KRS 216.515 (long-term care rights statute).

Thereafter, Appellants moved the circuit court to compel arbitration, and to stay or dismiss the litigation based on the terms of the Arbitration Agreement. The circuit court granted Appellants' Motion on all claims except the wrongful death claim. Based on *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669 (Ky. 1967), however, the court determined that the wrongful death claim was an independent claim and did not arise from the decedent's claims. Accordingly, it

rendered an Order on January 27, 2014, denying the Motion to compel arbitration as to the wrongful death claim, but sustaining the Motion as to all other claims set out in the Complaint. This appeal followed.

The sole issue for our consideration is Appellants' contention that the Edmonson Circuit Court erred in failing to compel arbitration on the wrongful death claim. The Appellants direct our attention to *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), which they contend stands for the proposition that all state and federal courts must enforce the FAA with respect to arbitration agreements covered by the Act. Specifically, and at the heart of the Appellants' argument, is *Marmet's* recognition that the FAA "includes no exception for personal-injury or wrongful-death claims." *Marmet*, 132 S.Ct. at 1203. Finally, the Appellants point to *Marmet's* recognition that "a state court may not contradict or fail to implement the rule so established." *Id.* The Appellants argue that, 1) the FAA applies to the Arbitration Agreement entered into by the Childresses and Edmonson Care, 2) the FAA makes no exception for wrongful death claims, and 3) the Edmonson Circuit Court erred in failing to so rule.

The Appellants also acknowledge the application of *Ping, supra*, to the matter before us. In *Ping*, the Kentucky Supreme Court held in relevant part that wrongful death claims belong to wrongful death beneficiaries and are therefore not subsumed by the decedent's estate. As applied herein, and as acknowledged by the Edmonson Circuit Court, the wrongful death claim of Ms. Childress' beneficiaries is not part of her estate and is therefore not governed by the

Arbitration Agreement. The Appellants now argue that *Ping* did not address the issue of whether this rule would so significantly impair the enforcement of arbitration agreements as to run afoul of the FAA and the Supremacy Clause, and they maintain that we may now properly resolve this question as a matter of first impression.

After having closely examined the record and the law, and having heard the well-reasoned oral arguments of counsel, we find no error in the Edmonson Circuit Court's Order overruling the Appellants' Motion to Stay or Dismiss the wrongful death claim in favor of arbitration.

In *Ping*, an Executrix of a nursing home resident's estate brought suit against the owners and operators of the nursing home, alleging that negligence by the home's staff and the breach by its management of statutes regulating the provision of nursing home services resulted in injuries to the resident and in her wrongful death. The defendants filed a Motion to Dismiss the Complaint or to stay it pending arbitration. The Franklin Circuit Court denied that motion, and the nursing home appealed. A panel of this Court reversed the circuit court's ruling, and held that the wrongful death claim was subject to arbitration. On appeal, the Kentucky Supreme Court held in relevant part that the wrongful death beneficiaries were not bound by the arbitration agreement. It based this conclusion largely on the constitutional and statutory status of wrongful death claims in Kentucky, which it found were a strong indication that wrongful death claims were independent and not derivative of any underlying personal injury action. *Ping* at 599.

Because under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, we agree with the Courts cited above which have held that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim. This then is another reason, at least with respect to the wrongful death portion of the complaint, to uphold the trial court's denial of Beverly's motion to compel arbitration.

*Id.*

As the parties are well aware, as an intermediate appellate court we are bound to apply decisions of the Kentucky Supreme Court. "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court[.]" SCR 1.030(8)(a). We are without authority to overturn a decision of the Kentucky Supreme Court even if we are inclined to do so. *Fields v. Lexington-Fayette Urban County Gov't*, 91 S.W.3d 110, 112 (Ky. App. 2001); *Buckler v. Mathis*, 353 S.W.3d 625, 631 (Ky. App. 2011).

*Ping* disposes of the issue before us. The Edmonson Circuit Court properly concluded that the Appellees' wrongful death claim was not subject to arbitration.

The Appellants urge us to examine whether *Ping* runs afoul of the FAA and the Supremacy Clause by improperly undermining the practical application of the FAA as to state wrongful death claims. Additionally, they ask us to set forth the reasons why, in our judgment, *Ping* should be overturned. For the reasons articulated above, and as we are bound by the SCR and the case law to follow applicable precedents established in the opinions of the Kentucky

Supreme Court, we decline the opportunity to criticize *Ping* or to advocate its demise. We are bound to apply *Ping* to the matter before us. Any reconsideration of the principles espoused in *Ping* should come, if at all, by the Kentucky Supreme Court.

For the foregoing reasons, we AFFIRM the Order of the Edmonson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Donald L. Miller, II  
Jan G. Ahrens  
Kristin M. Lomond  
Louisville, Kentucky

ORAL ARGUMENT FOR  
APPELLANTS:

Donald L. Miller, II  
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT  
FOR APPELLEES:

Matthew C. Minner  
Lexington, Kentucky