

RENDERED: MAY 15, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000589-MR

KINDRED HEALTHCARE, INC.;
KINDRED HOSPITALS LIMITED
PARTNERSHIP, D/B/A KINDRED
HOSPITAL – LOUISVILLE AT JEWISH
HOSPITAL; KINDRED HEALTHCARE
OPERATING, INC; KINDRED HOSPITALS
WEST, LLC; AND KINDRED REHAB
SERVICES, D/B/A PEOPLEFIRST
REHABILITATION

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 13-CI-001627

PERRIE GOODMAN, AS EXECUTOR
OF THE ESTATE OF LINDA BRUCE, DECEASED;
JEWISH HOSPITAL & ST. MARY'S
HEALTHCARE, INC.; CHI KENTUCKY, INC.;
AND CATHOLIC HEALTH
INITIATIVES, INC.

APPELLEES

OPINION
AFFIRMING
AND REMANDING

** ** ** ** **

BEFORE: COMBS, JONES, AND MAZE, JUDGES.

MAZE, JUDGE: Kindred Healthcare, Inc. and affiliated entities (collectively, “Kindred”) appeal from an order of the Jefferson Circuit Court denying its motion to compel arbitration of personal injury and wrongful death claims brought by Perrie Goodman, executor of the Estate of Linda Bruce, Deceased (“the Estate”). The trial court denied Kindred’s motion to compel arbitration based upon the holding of *Ping v. Beverly Enterprises*, 376 S.W.3d 581 (Ky. 2012), concluding that a general power of attorney was insufficient to bind Bruce or her Estate to an optional arbitration agreement. Kindred argues that the trial court erred in finding that Bruce’s power of attorney did not have the authority to execute an arbitration agreement on Bruce’s behalf. In the alternative, Kindred also contends that the restrictive interpretation of an agent’s authority to enter into arbitration contracts violates the Kentucky Uniform Arbitration Act (“KUAA”) and the Federal Arbitration Act (“FAA”). Finding no error on either ground, we affirm.

The underlying facts of this action are not in dispute. On July 22, 2010, Linda Bruce executed a document styled “General Power of Attorney” which provided as follows:

...I, LINDA L. BRUCE, ..., do make, constitute and appoint my daughter, JEANETTA G. PHILLIPS, ..., and my son, PERRIE D. GOODMAN, ..., as my true and

lawful attorneys in fact, for me and in my name, place and stead, with full power and right and authority to take charge of managing and controlling all of my business relating to my personal estate, that is, the right to mortgage, lease, sell, and dispose of any personal (whether tangible or intangible) and/or real property that I may own, or have an interest in, wheresoever situated, and to collect and dispose of the proceeds thereof, to collect any and all debts due me, sign my name to checks on any bank account of mine and execute and deliver any and all papers for me and in my name that I myself could execute relating to my personal business and personal estate. I specifically authorize access to any lock box that I might rent. I specifically authorize the entry of any contract or agreement with an attorney retained to represent me with regard to any claim I may have for compensation, for injuries and damages suffered in a June 28, 2010 car wreck and to represent me with regard to any Medicare/Medicaid/Third Party Insurer issues that may arise as a result of said injuries. They may and can under this power, rent out and lease any real estate for such terms of years and upon such conditions as they may think best for me and my interest and I hereby ratify and confirm whatever my said agents and attorneys may do for me in my name and in the premises and giving and granting unto my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite, necessary and proper to be done in and about the premises as full as to all intents and purposes as I might or could do if personally present (with full power of substitution and revocation), hereby ratifying and confirming all that said attorneys or substitute shall lawfully do, or cause to be done, by virtue thereof.

Bruce was a patient of Kindred from July 28, 2010, to September 23, 2010, and from November 29, 2010, to June 20, 2011. Prior to each admission, Phillips executed documents on her mother's behalf, including documents providing for voluntary alternative dispute resolution between patient and hospital ("the ADR Agreement"). After her second stay at Kindred, Bruce was transferred

to another facility. Bruce died testate on October 1, 2011. Thereafter, the Jefferson District Court appointed Bruce's son, Perrie Goodman, as Executor of Bruce's Estate.

On March 29, 2013, the Estate filed the current action against Kindred, asserting claims for negligence, medical negligence, corporate negligence, violations of the Long-Term Care Resident's Rights Act, KRS¹ 216.510, *et seq.*, medical malpractice and wrongful death. In response, Kindred filed a motion to compel arbitration under the terms of the ADR Agreement signed by Phillips. The trial court denied the motion by written order based upon *Ping*.

Kindred now appeals from the trial court's order denying its motion to compel arbitration. Ordinarily, such orders are interlocutory and are not immediately appealable. However, an order denying a motion to compel arbitration is immediately appealable. KRS 417.220(1). *See also Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). The enforcement and effect of an arbitration agreement is governed by the KUAA, KRS 417.045, *et seq.*, and the FAA, 9 U.S.C.² §§ 1, *et seq.* "Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor." *Ping*, 376 S.W.3d at 588.

But under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Id.* at 589. That question is controlled by state law rules of contract formation. *Id.* at

¹ Kentucky Revised Statutes.

² United States Code.

590. The FAA does not preempt state law contract principles, including matters concerning the authority of an agent to enter into a contract and which parties may be bound by that contract. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832 (2009). Since this matter is entirely an issue of law, our standard of review is *de novo*. *Conseco*, 47 S.W.3d at 340.

Ping primarily addresses the authority of an agent, such as a power of attorney, to bind the principal to an arbitration agreement. As an initial matter, however, we note that the *Ping* decision did not turn entirely on the particular language of the power of attorney. The Court in *Ping* pointed out that wrongful death claims in Kentucky are afforded a great deal of protection under our Constitution, *Ky. Const.* § 241, and by statute, KRS 411.133. Furthermore, since a wrongful death claim accrues to the benefit of the wrongful death beneficiaries, the Court held that a decedent or her agent cannot bind those beneficiaries to arbitrate their wrongful death claim. *Ping*, 376 S.W.3d at 599. Based upon this holding, the trial court properly denied Kindred's motion to compel enforcement of the ADR Agreement with respect to the Estate's wrongful death claim.

The central question in this case concerns the application of the *Ping* holding to the facts of this case. In most respects, *Ping* is factually similar to this case. As in the current case, the daughter, Donna Ping, served as the attorney-in-fact for her mother, Mrs. Duncan. *Id.* at 586. In that role, Ping entered into an arbitration agreement on behalf of her mother with the nursing home where Mrs. Duncan was a resident. *Id.* When Mrs. Duncan died in the facility, Ping brought a

wrongful death action on behalf of the estate. *Id.* The nursing home sought to compel arbitration of the claim under the terms of an arbitration agreement Ping signed on her mother's behalf upon admission to the facility.

Ultimately, the Kentucky Supreme Court refused to compel arbitration, finding that the power of attorney did not vest Ping with authority to execute the arbitration agreement on behalf of her mother. The power of attorney granted Ping broad authority to manage Mrs. Duncan's property and finances, and authorized Ping “to do and perform, any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present[.]” *Id.* at 586. In addition, the document also authorized Ping to make medical decisions for her mother's care, including

any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me; and [t]o 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.

After examining the scope of authority granted in the power of attorney, the Court concluded that the document only authorized Ping to make financial and health-care decisions for her mother. *Id.* at 591. In addition, the general expressions of authority for Ping to act in these matters were to “‘every act and thing whatsoever requisite and necessary to be done,’ and again to ‘every further act and thing of whatever kind, nature, or type required to be done on my

behalf.”” *Id.* at 592 (emphasis omitted). The Court interpreted this language as limiting Ping’s authority to those acts which were necessary or required to give effect to the financial and health-care authority expressly created. The Court concluded that Ping’s decision to sign the arbitration agreement did not fall within the scope of these powers because it was not a prerequisite for admission to the nursing home, and the other general grants of authority were limited to specific matters. *Id.*

Kindred first argues that *Ping* is factually distinguishable based upon the different language of the power of attorney in this case. Kindred emphasizes the language which authorizes her power of attorney to “execute and deliver any and all papers for me and in my name that I myself could execute to my personal business and personal estate.” Kindred construes this language as granting Phillips the power to execute any contract which Bruce could enter, including the ADR Agreement.

However, *Ping* expressly holds that an agent’s authority under a power of attorney is to be construed with reference to the types of transactions expressly authorized in the document. *Id.* at 591–92. Like the power of attorney at issue in *Ping*, the power of attorney executed by Bruce relates expressly and primarily to the management of her property and financial affairs. Bruce’s power of attorney is specifically limited to management of her business and financial affairs, and in particular the management of her real estate. Similarly, Bruce only authorized her power of attorney to contract with an attorney with regard to a

single matter – claims arising out of a June 28, 2010 automobile accident.³ As in *Ping*, the general expressions of authority did not grant Phillips universal authority beyond the scope of the express provisions. Therefore, we agree with the trial court that Bruce’s power of attorney did not authorize Phillips to execute the ADR Agreement.

Kindred further argues that these holdings in *Ping* exhibit hostility toward arbitration and for this reason are preempted by the application of the FAA. As an intermediate appellate court, this Court is bound by published decisions of the Kentucky Supreme Court. SCR⁴ 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor Court. *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000). Because *Ping* is neither factually nor legally distinguishable from the current case, we are not at liberty to depart from those holdings.

³ In *Kindred Healthcare, Inc. v. Cherolis*, No. 2012-CA-002074-MR, 2013 WL 5583587 (Ky. App. 2013) (Motion for D.R. held in abeyance pending final disposition of *Kindred Nursing Centers, Ltd. Partnership v. Clark*, No. 2013-SC-000430, *Kindred Nursing Centers Ltd. Partnership v. Wellner*, No. 2013-SC-000431, and *Extendicare Homes, Inc. v. Whisman*, No. 2013-SC-000426), the power of attorney had no limitation on its scope or objectives. Rather, the agent was authorized to perform any act which her principal might do in her own name. Moreover, the power of attorney specifically provided that its recitation of specific powers did not limit the agent’s scope of authority granted by the initial clause. And furthermore, the power of attorney specifically authorized the agent to institute or defend any lawsuits on her principal’s behalf. The power of attorney in the current case is far more similar to the one in *Ping* than in *Cherolis*.

⁴ Kentucky Rules of the Supreme Court.

Nevertheless, Kindred points to the holding of the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), which addresses the application of state law disfavoring arbitration.

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "at law or in equity for the revocation of any contract." *Id.*, at 492, n. 9, 107 S. Ct. 2520 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." *Id.*, at 493, n. 9, 107 S.Ct. 2520.

Id. at 1747.

In *Concepcion*, the Supreme Court considered the application of a state rule holding that an arbitration provision was unconscionable because it disallowed classwide proceedings. Although Section 2 of the FAA permits agreements to be invalidated by generally applicable contract defenses, the Court concluded that the section does not apply to defenses that apply only to arbitration or are fundamentally incompatible with the enforcement of the arbitration contract. *Id.* at 1747-48. Consequently, the Court held that the state law rule prohibiting

arbitration of classwide proceedings was preempted under the terms of the FAA. *Id.* at 1753. *See also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).

In the current case, Kindred argues that the application of the holding in *Ping* implicitly forbids arbitration of any claims for wrongful death. Under *Ping*, neither the principal nor her agent can bind the wrongful death beneficiaries to an arbitration contract. Kindred maintains that this holding is fundamentally inconsistent with the policy favoring enforcement of arbitration provisions, and thus preempted by application of the FAA.

But unlike in *Concepcion* or *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012), the holding in *Ping* does not categorically prohibit arbitration of wrongful death claims based upon contract principles of unconscionability. Rather, *Ping* merely defines the nature of the claim for wrongful death in Kentucky. Under *Ping*, a wrongful death claim exists independently from a personal injury claim, and accrues separately to the wrongful death beneficiaries. *Ping*, 376 S.W.3d at 598-99. The principal or her agent cannot agree to arbitrate a wrongful death claim because that claim can only be asserted by the wrongful death beneficiaries through the personal representative. *Id.* at 599. Although this rule has the effect of precluding arbitration of most wrongful death claims, the rule is based upon generally applicable tort and agency principles and is not related to contract principals which are specific to arbitration.

Therefore, we conclude that the FAA does not preempt this aspect of the holding of *Ping*.

Likewise, we disagree with Kindred that the FAA preempts the holding of *Ping* relating to the authority of a power of attorney to enter into an arbitration agreement. As noted above, the FAA does not preempt state law contract principles, including matters concerning the authority of an agent to enter into a contract and which parties may be bound by that contract. Since the holding of *Ping* is based upon generally applicable agency and contract principals, we conclude that the FAA does not preclude the application of those principles in this case.

Accordingly, the order of the Jefferson Circuit Court denying Kindred's motion to compel arbitration is affirmed, and this matter is remanded for additional proceedings on the merits of the claim.

ALL CONCUR.

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