Supreme Court of Kentucky

Docket No. 2013-SC-426

COURT OF APPEALS CASE NO. 2012-CA-001936-

EXTENDICARE HOMES, INC. d/b/a SHADY LAWN NURSING HOME,
EXTENDICARE, INC.,
EXTENDICARE HEALTH NETWORK, INC.,
EXTENDICARE REIT,
EXTENDICARE, L.P.,
EXTENDICARE HOLDINGS, INC.,
EXTENDICARE HEALTH SERVICES, INC.,
EXTENDICARE HEALTH FACILITY HOLDINGS, INC, AND JOHN DOES 1 THROUGH 5, UNKNOWN DEFENDANTS

MOVANTS/ DEFENDANTS

v.

On Motion for CR 65.07 Relief from
Trigg Circuit Court
Civil Action No. 12-CI-00100

BELINDA WHISMAN AND TONY ADAMS, AS CO-ADMINISTRATORS OF THE ESTATE OF VAN B. ADAMS, DECEASED

RESPONDENTS/ PLAINTIFFS

MOTION FOR RELIEF PURSUANT TO CR 65.09

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Pursuant to CR 65.09, Movants/Defendants[1] move this Court for interlocutory relief from the Court of Appeals' June 25, 2013 Order (the "Order," attached hereto as Exhibit 1), which denied Defendants' request for interlocutory relief under CR 65.07 from the order of the Trigg Circuit Court (the "Circuit Court Order," attached hereto as Exhibit 2) refusing to enforce the parties' arbitration agreement. In support of this motion, Movants state as follows:

INTRODUCTION

The Court of Appeals' Order severely misconstrued this Court's recent opinion in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), and reached a result that the Court of Appeals acknowledged was in direct conflict with the view of the *Ping* decision adopted by the U.S. District Court for the Western District of Kentucky in *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937 (W.D. Ky. May 3, 2013) (attached hereto as Exhibit 3). Indeed, the Court of Appeals' interpretation of the *Ping* decision is squarely in conflict with the Federal Arbitration Act's ("FAA") substantive mandate that arbitration agreements not be held to stricter standards of enforceability than other ordinary contracts. The need to resolve the conflict among state and federal courts concerning the meaning of *Ping*, and this Court's interest in avoiding a clash of Kentucky and federal law, provide extraordinary cause for relief under CR 65.09.

This Court's opinion in *Ping* does ***not*** hold that an agent acting under a durable power of attorney can never bind her principal to an arbitration agreement. Nor does it hold that a power of attorney must explicitly mention "arbitration" in order to empower the agent to enter such an agreement. Such sweeping rules would undoubtedly be

[1] The Movants/Defendants are Extendicare Homes, Inc. d/b/a Shady Lawn Nursing Home; Extendicare, Inc.; Extendicare Health Network, Inc.; Extendicare REIT; Extendicare, L.P.; Extendicare Holdings, Inc.; Extendicare Health Services, Inc.; and Extendicare Health Facility Holdings, Inc.

preempted by the FAA. *Ping* merely held that the language of the specific written power of attorney involved *in that case* did not encompass the authority to enter into arbitration contracts, since the power of attorney related principally to healthcare and financial decisions and did not reference authority to enter contracts or make decisions about litigation rights. That is not the case here. The power of attorney in this case specifically confers the power "to ***make contracts***" and "to draw, make and sign ***any and all*** ... ***contracts***, ... ***agreements, or any other document***...," as well as the power "***to institute or defend suits*** concerning my property or rights."[2] In contrast to the limited grant of healthcare and financial authority in *Ping*, is well established that an express delegation of authority over ***litigation of claims*** in a durable power of attorney necessarily includes the authority to enter into arbitration agreements, just as it would encompass the authority to waive litigation rights in a voluntary settlement agreement.[3]

The Court of Appeals nonetheless concluded this language was still insufficient under *Ping* because it did not explicitly "authorize Ms. Whisman to 'settle claims and disputes' and there is no 'express authorization addressing dispute resolution.'"[4] But that reads *Ping* too narrowly. Such a heightened requirement of specificity for arbitration agreements would run afoul of the FAA. Moreover, it is simply incorrect to say that the power to "institute or defend suits" granted in the Adams POA does not "address[] dispute resolution" or include the power "to settle claims and disputes." Under the Court of Appeals' logic, Ms. Whisman had authority to file a lawsuit, but could never settle it. The Court of Appeals' Order clearly misreads *Ping*, and threatens to bring Kentucky state

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[2] Exhibit 4, V. Adams Durable Power of Attorney ("Adams POA") at 1 (APPX B to Movants' CR 65.07 Motion).

[3] *Candansk., LLC v. Estate of Hicks*, 25 So.3d 580, 584 (Fla. Dist. Ct. App. 2009) ("[T]he power to act with respect to 'claims and litigation' is commonly understood to include the power to submit to arbitration.").

[4] Exhibit 1, Order at 6.

courts into conflict with federal law and with Kentucky federal courts' construction of Kentucky law. The Order should be reversed.

RELEVANT FACTS AND PROCEDURAL HISTORY

This appeal arises from an action filed by Plaintiffs, Belinda Whisman and Tony Adams, as Co-administrators of the Estate of Van B. Adams ("Mr. Adams"), relating to allegations of negligence in the care of Mr. Adams while he was a resident at the Shady Lawn Nursing Home (the "Facility"). Defendants' moved to dismiss the Complaint and Compel Arbitration pursuant to the March 1, 2011 Alternative Dispute Resolution Agreement (the "Arbitration Agreement") entered into by Ms. Whisman, as duly authorized representative of Mr. Adams, upon Mr. Adams' admission to the Facility.[5]

Prior to his admission to the Facility, on February 21, 2011, Mr. Adams executed a Durable Power of Authority (the "Adams POA"), which appointed Ms. Whisman as his "true and lawful attorney-in-fact, with full power for me and in my name and stead" to perform a broad array of acts on Mr. Adams' behalf, including "to ***make contracts***" and "to draw, make and sign ***any and all*** checks, ***contracts***, notes, mortgages, ***agreements, or any other document***...."[6] The Adams POA also specifically authorizes Ms. Whisman to "***institute or defend suits concerning my property or rights***."[7]

Upon Mr. Adams' admission to the Facility, Ms. Whisman executed a number of documents relating to his admission, including the Arbitration Agreement, which is a six-page stand-alone contract. Ms. Whisman signed the Arbitration Agreement as Mr. Adams' legal representative, signing "Belinda Whisman POA."[8]

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[5] Exhibit 5, Arbitration Agreement (APPX C to Movants' CR 65.07 Motion).
[6] Exhibit 4, Adams POA at 1 (APPX B to Movants' CR 65.07 Motion).
[7] *Id.* (emphasis added).
[8] Exhibit 5, Arbitration Agreement at 6 (APPX C to Movants' CR 65.07 Motion).

The Arbitration Agreement provides, in relevant part, that "[t]he Parties voluntarily agree that any disputes covered by this Agreement (herein after referred to as the "Covered Disputes") that may arise between the Parties shall be resolved exclusively by an Alternative Dispute Resolution process that shall be binding arbitration."[9] The Arbitration Agreement defines the scope of "Covered Disputes" subject to arbitration as:

> any and all disputes arising out of or in any way relating to ... the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law ... and shall include, but not be limited to, all claims in law or equity arising from ... a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, health care, consumer or safety standards....[10]

The top of the first page of the Arbitration Agreement states, in all bolded capital letters, "**SIGNING THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR CONTINUED RESIDENCE IN THE CENTER.**"[11] The top of page two, again in bolded capital letters, states: "**THE PARTIES UNDERSTAND, ACKNOWLEDGE AND AGREE THAT BY ENTRING INTO THIS AGREEMENT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES RESULTING FROM THE ALTERNATIVE DISPUTE RESOLUTION PROCESS, EXCEPT AS PROVIDED HEREIN.**"[12]

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[9] *Id.* at 1.
[10] *Id.* at 2.
[11] *Id.* at 1.
[12] *Id.* at 2.

In her affidavit accompanying Plaintiffs' Response, Ms. Whisman acknowledges that she signed the Arbitration Agreement on Mr. Adams' behalf, and that the Facility's nurse representative specifically identified and offered to explain the Arbitration Agreement.[13] Ms. Whisman, however, contends that she did not recall the nurse representative telling her that the agreement was optional, and did not understand that the agreement would prevent her father's estate from asserting claims in court.[14]

On October 17, 2012, following hearing, the Trigg Circuit Court entered an Order denying Defendants' Motion to Compel Arbitration. The Circuit Court initially stated it "believes the Defendants have made a *prima facie* showing sufficient to establish the existence of" an agreement to arbitrate the dispute, since Ms. Whisman "admit[ted] signing such an Agreement."[15] The Circuit Court then concluded that the sole issue was "whether the General Power of Attorney gave Ms. Whisman the authority to bind Van Adams to the terms of the [Arbitration Agreement]," in light of the Kentucky Supreme Court's holding in *Ping*.[16] The Circuit Court acknowledged a difference in the language between the Adams POA and the POA at issue in *Ping*, insofar as the Adams POA granted Ms. Whisman authority "to institute or defend suits concerning my property or rights,"[17] The Circuit Court concluded, however, that "[d]espite the specific language 'to institute or defend suits concerning my property or rights'..., it is difficult for the undersigned to distinguish that from the rationale of the Kentucky Supreme Court [in

[13] Exhibit 6, B. Whisman Aff. at ¶¶ 8, 11-12 (APPX D to Movants' CR 65.07 Motion).
[14] *Id.* at ¶¶ 15, 20.
[15] Exhibit 2, Circuit Court Order at1.
[16] *Id.* at 2.
[17] *Id.*

Ping] that 'general expressions upon which Beverly relies did not give Ms. Ping a sort of universal authority beyond those expressed provisions.'"[18]

Defendants sought relief in the Court of Appeals pursuant to CR 65.07, which the Court of Appeals denied. Notwithstanding the important differences between the language of the Adams POA and the power of attorney in *Ping*, the Court of Appeals still concluded that the Adams POA's "authorization to make contracts and to 'institute or defend suits' references property or financial matters," not arbitration.[19] The Court of Appeals acknowledged its conclusion was in direct conflict with the recent decision in *Oldham v. Extendicare*, which held that under *Ping*, a grant of authority to make any contracts or agreements included the power to agree to arbitration. However, the Court of Appeals concluded that "[w]hile we respect the federal district court's construction of *Ping*, we nevertheless understand *Ping* differently."[20] Movants now request that this Court accept review under CR 65.09 and correct this unwarranted extension of *Ping*.

GROUNDS FOR INTERLOCUTORY RELIEF

I. Jurisdiction and Standard of Review

Under CR 65.09, this Court may review any decision of the Court of Appeals granting or denying relief under CR 65.07 upon a showing of extraordinary cause. The Court of Appeals here denied relief under CR 65.07 from the Trigg Circuit Court's Order refusing to compel arbitration. It is well established that CR 65.07 and 65.09 are appropriate vehicles for review of orders denying motions to compel arbitration. *North Folk Collieries, LLC v. Hall*, 322 S.W.3d 98, 101 (Ky. 2010). This is particularly true where the underlying arbitration agreement does not specifically require arbitration to

[18] *Id.* at 3 (quoting *Ping*).
[19] Exhibit 1, Order at 6.
[20] *Id.* at 4.

occur in Kentucky, in which case the FAA, rather than the Kentucky Uniform Arbitration Act ("KUAA"), provides the primary grant of jurisdiction to enforce the arbitration clause and the KUAA's alternative procedures for interlocutory appeals do not apply. *North Folk Collieries,* 322 S.W.3d at 101-02 & nn.1-2.

Although denial of a motion to compel arbitration is akin to denial of an injunction, this Court has clearly directed that orders denying arbitration are subject to much more stringent review under CR 65.07 and 65.09 than denial of an injunction. *North Folk Collieries,* 322 S.W.3d at 102-03. Given the FAA's and KUAA's policy that "arbitration agreements be enforced no less rigorously than other contract provisions," the decision whether to compel arbitration does not involve discretionary balancing of equities or consideration of irreparable harm. *Id.* at 102. Thus, "[a]lthough injunctive relief is said to be within the sound discretion of the trial court, in this context that discretion extends no further than the correct application of the law...." *Id.* "[I]rreparable injury arises from an improper denial of a motion to compel arbitration" as a matter of law and "the principal question on review is simply whether the trial court correctly decided the contract issue." *Id.* at 103. The Circuit Court's judgment receives no special deference, and its decision is reviewed as any ordinary appeal from a final judgment: findings of fact are reviewed for clear error and questions of law are reviewed *de novo*. *Id.* at 102.

The present appeal turns on construction of the scope of authority conferred by the Adams POA. The scope of authority conferred by a durable power of attorney is determined by the terms of the document granting the power. *Id.* Construction of the scope of authority granted by a power of attorney is a question of law for the Court. *Ping,*

376 S.W.3d at 590; *Wabner v. Black*, 7 S.W.3d 379, 381 (Ky. 1999). Thus, this Court reviews the Circuit Court's and Court of Appeals' interpretations of the Adams POA *de novo*. *State Farm Mut. Auto. Ins. Co. v. Baldwin*, 373 S.W.3d 424, 428 (Ky. 2012).

Moreover, review of orders concerning arbitration must take into account that "Kentucky and national policy have generally favored agreements to arbitrate." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 854 (Ky. 2004). Indeed, "***any doubts*** concerning the scope of arbitrable issues should be ***resolved in favor of arbitration***, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 855 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).[21] Moreover, "the federal policy favoring arbitration is taken into consideration even in applying ordinary state law" concerning contract formation and enforceability. *Kruse v. AFLAC Int'l, Inc.*, 458 F. Supp. 2d 375, 382 (E.D. Ky. 2006). The U.S. Supreme Court has also expressly confirmed that these policies and principles apply with equal force to arbitration agreements relating to nursing home care. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

II. The Court of Appeals erred in holding that the terms of the Adams POA did not include authority to enter into the Arbitration Agreement.

The Court of Appeals' decision was in error. The Adams POA clearly encompassed the authority to enter into the Arbitration Agreement on behalf of Mr. Adams. The Adams POA not only granted Ms. Whisman the broad general authority "to draw, make and sign any and all ... contracts, ... agreements, or any other

[21] *See also AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (observing "our cases place it beyond dispute that the FAA was designed to promote arbitration" and embody a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary") (quotation omitted).

document....,"[22] it also specifically granted the authority to "***institute or defend suits*** concerning my property or rights."[23] ***Either*** of these express grants of authority – to "make and sign any .... contracts" or to "institute and defend suits" – is sufficient by itself to authorize entering into the Arbitration Agreement.

In *Oldham*, the U.S. District Court for the Western District of Kentucky held that a grant of authority in a power of attorney to "draw, make and sign any and all checks, contracts or agreements" encompassed the power to enter arbitration agreements on behalf of the principal. 2013 WL 1878937, at *4. The court discussed the *Ping* decision at length, observing that "*Ping* was correctly decided because the power of attorney did not grant the attorney-in-fact authority to enter into the arbitration agreement." *Id.* at *5. However, the court concluded "*Ping* is distinguishable from the present action for one obvious and significant reason: the power of attorney in *Ping* did not contain an express provision granting the attorney-in-fact authority to 'draw, make and sign any and all checks, contracts, or agreements.'" *Id.* "Reading the power of attorney according to its explicit terms and in light of the strong federal policy favoring arbitration," the court concluded "the power of attorney in the present action vested [the agent] with authority to enter into contracts on [the principal's] behalf. Such contracts include the arbitration agreement." *Id.* Thus, under the reasoning of *Oldham*, the Adams POA's authorization "to draw, make and sign any and all ... contracts, ... agreements, or any other document....," by itself, authorized Ms. Whisman to sign the Arbitration Agreement.

This conclusion is even clearer when one also considers that the Adams POA also includes the power to institute and defend suits. Courts have consistently held that

[22] Exhibit 4, Adams POA at 1 (APPX B to Movants CR 65.07 Motion).
[23] *Id.*

similar grants of authority to control litigation necessarily include the power to enter an arbitration agreement. For example, "the power ***to act with respect to 'claims and litigation'*** [in a power of attorney] is ***commonly understood to include the power to submit to arbitration***." *Candansk., LLC v. Estate of Hicks*, 25 So.3d 580, 584 (Fla. Dist. Ct. App. 2009). Indeed, it is black letter law that "a person acting in a representative or fiduciary capacity ***may submit to arbitration any dispute he or she would have the power to settle by compromise or by litigation***." 4 AM. JUR. 2D ALTERNATIVE DISPUTE RESOLUTION § 77 (emphasis added).[24]

This Court's decision in *Ping* is not to the contrary. *Ping* merely held that the authority to enter arbitration agreements could not be inferred from the particular power of attorney document in that case, which related solely to certain decisions concerning management of finances and healthcare, but contained no reference whatever to litigation decisions. In *Ping*, the Supreme Court emphasized that general expressions of authority in a power of attorney must "be construed with reference to the ***types of transaction expressly authorized*** in the document," and that the subject matter of the specific power of attorney in *Ping* "relate[d] expressly and primarily to the management of her property and financial affairs and to assuring that health-care decisions would be made on her behalf." 376 S.W.3d at 592 (emphasis added).

However, as noted by the *Oldham* Court, the power of attorney in *Ping* did not include the power to make and enter "any contracts or agreements." Nor did the power of attorney in *Ping* include authority over litigation decisions. Indeed, this Court

[24] *See also Jaylene, Inc. v. Moots*, 995 So.2d 566, 568-9 (Fla. Dist. Ct. App. 2008) (grant of authority to "[t]ake any and all legal steps necessary to collect any amount or debt owed to me, or to settle any claim" encompassed power to agree to arbitration, even though "the power to consent to arbitrate the principal's claims was not one of the powers specifically listed").

explicitly premised its holding in *Ping* on the absence of any language concerning the power to "settle claims and disputes" or otherwise "addressing dispute resolution."

> 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 (emphasis added).

Unlike the power of attorney in *Ping*, the Adams POA ***does*** contain an "express authorization addressing dispute resolution." It specifically grants the power to "institute and defend suits." Decisions concerning Mr. Adams' litigation rights clearly are among the "types of transaction expressly authorized in the document." *Ping* at 592. One can hardly doubt that a court would find this language sufficient to encompass a range of litigation-related decisions, including the decision to file suit in the first instance, the choice of whether to file in state or federal court, litigation strategy decisions including selection of what claims to assert and whether to seek a bench or jury trial, the decision to mediate, and the decision to settle or compromise claims. The decision to arbitrate claims is certainly within this class of contemplated decisions. There is no rational basis for concluding, as the Court of Appeals apparently did, that the Adams POA intended to authorize Ms. Whisman to make all decisions concerning litigation, except for arbitration.

In contrast to the situation in *Ping*, the Adams POA expressly confers authority to make any contracts and control decisions regarding the prosecution and defense of claims in litigation. That necessarily includes the power to submit those claims to arbitration. The Court of Appeals' construction of the Adams POA was incorrect as a matter of law, and must be reversed.

III. Any requirement for more specific reference to arbitration would run afoul of the FAA and be preempted by federal law.

While the *Ping* decision itself, properly construed, is a valid application of the general law of agency, if the Court of Appeals' interpretation were allowed to stand, its interpretation of the rule in *Ping* would clearly run afoul of the FAA. The Court of Appeals Order necessarily assumes that greater specificity is required in a power of attorney to authorize entering into arbitration agreements than is needed to enter ordinary contracts or to make other types of standard litigation decisions. That type of heightened specificity requirement would run contrary to the FAA and be preempted by federal law.

It is well-established that the FAA preempts state laws that disfavor or discriminate against arbitration agreements, including purportedly neutral state laws that are applied in a manner that disproportionately disfavors arbitration. *See AT&T Mobility, LLC*, 131 S. Ct. at 1747 (FAA preempts state law when "a doctrine normally thought to be generally applicable ... is alleged to have been applied in a fashion that disfavors arbitration"); *Perry v. Thomas*, 482 U.S. 483 (1987). Thus, where a state law requires a heightened showing of intent or specificity to find a valid agreement to arbitrate, that law is preempted. *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2nd Cir. 1993). In *Progressive*, for example, the Second Circuit held the FAA preempted a line of New York state judicial decisions requiring proof of an "express, unequivocal agreement" to arbitrate, holding that those decisions discriminated against arbitration agreements because "New York law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence." *Id.* at 46.

Thus, to hold – as the Court of Appeals seemingly did – that *Ping* requires a more explicit, unequivocal reference to arbitration in a power of attorney than would be

required to confer authority over other types of comparable contracts would single out arbitration for less favorable treatment, and cause a conflict between state and federal law. In this case, the Adams POA granted Ms. Whisman the authority to "***institute or defend suits*** concerning my property or rights." Any reasonable construction of the power to "institute or defend suits" would include a variety of decisions involving Mr. Adams' litigation rights and remedies, such as the decision whether or not to initiate litigation at all, the choice of judicial forum, the decision to settle, etc. To hold that this delegation of authority over the subject matter of litigation decisions is insufficiently specific to include the authority to enter an arbitration agreement would be to impose a more rigorous standard in finding authority to arbitrate than other comparable contracts. Such a rule would run afoul of the strong federal policy, codified in the FAA, that "arbitration agreements be enforced no less rigorously than other contract provisions." *North Folk Collieries,* 322 S.W.3d at 102.

Notably, that is not what *Ping* holds. *Ping* merely concluded that the power of attorney in that case did not delegate authority to make any decisions concerning the overall subject matter of litigation rights, and therefore did not include the authority to make the specific decision to enter into an agreement to arbitrate. The same cannot be said here. If *Ping's* rationale were extended to bar enforcement of the arbitration agreement in this case, such a rule surely would single out arbitration agreements for less favorable treatment than other types of contracts. The FAA does not allow that result.

CONCLUSION

For all the foregoing reasons, Movants/Defendants' Motion for Interlocutory Relief under CR 65.09 should be **GRANTED**. This Court should **VACATE** the Court of

Appeals Order and Circuit Court Order and **REMAND** with instructions that arbitration be compelled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of July, 2013, a true and correct copy of the foregoing has been delivered via U.S. Mail, postage prepaid, on the following:

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