COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC- 431

FILED
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CLERK
SUPREME COURT

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION **MOVANTS**

v.

ON REVIEW FROM COURT OF APPEALS CASE NO: 2012-CA-002112-I

BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER **RESPONDENT**

MOTION FOR INTERLOCUTORY RELIEF AND ORAL ARGUMENT PURSUANT TO CR 65.09

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Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation; Kindred Nursing Centers East, LLC; Kindred Hospitals Limited Partnership; Kindred Healthcare, Inc.; and Kindred Healthcare Operating, Inc. (hereinafter collectively "Kindred"), pursuant to CR 65.09, respectfully move this Court for interlocutory relief to vacate the June 25, 2013 Order of the Court of Appeals, attached hereto as Attachment 1. In support of this motion Kindred incorporates and attaches for ready reference their CR 65.07 Motion for Interlocutory Relief in the Court of Appeals, Case No. 2012-CA-002112-I. *See* Attachment 2.[1] The Court of Appeals Order denied Kindred's CR 65.07 Motion for relief from the Clark Circuit Court's Order of November 19, 2012, attached as

[1] For purposes of economy in filing this CR 65.09 Motion, Kindred removed from Attachment 2, copy of CR 65.07 Motion the attached Exhibit 2: copy of Plaintiff's Complaint; and Exhibit 8: this Court's unpublished Order in *Kindred Nursing Centers Ltd. Partnership v. Brenda Miller, et al.*, 2011-CA-000749-I, dated December 15, 2011. Kindred is happy to provide copies of these Exhibits upon request.

Exhibit 1 to Attachment 2. That November 19, 2012 Order vacated the circuit court's previously entered January 9, 2012 Order, *see* Exhibit 5 to Attachment 2, granting the Motion to Compel Arbitration. The circuit court's November 19, 2012 Order denied Kindred's Motion to Compel Arbitration. *See* Exhibit 1 to Attachment 2.

Kindred is being denied the right guaranteed it by all three Kentucky Constitutions – the right to contract for arbitration – and therefore, will suffer immediate and irreparable injury if the Clark Circuit Order is allowed to stand.

I. FACTUAL AND PROCEDURAL HISTORY

The Respondent, Beverly Wellner, filed the underlying personal injury action in the Clark Circuit Court on June 16, 2010, alleging negligence in the care and treatment provided to her husband, Joe Paul Wellner, while he was a resident at Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation, from August 16, 2008 to June 15, 2009. Kindred answered and denied the allegations of negligence and asserted as an affirmative defense that the dispute was governed by an Alternative Dispute Resolution Agreement ("ADR agreement"). Respondent, in her capacity as her husband's legal representative, executed the ADR agreement at issue on August 16, 2008 as Joe P. Wellner's attorney-in-fact, pursuant to the Power of Attorney signed by Mr. Wellner on May 15, 2008. *See* ADR Agreement, Attachment 2, Exhibit 3. *See also*, General Durable Power of Attorney of Joe Paul Wellner, Attachment 2, Exhibit 4.

Kindred filed their motion to compel arbitration on August 20, 2010. After multiple briefs, the Clark Circuit Court finally issued its Order Enforcing the ADR Agreement on January 9, 2012. *See* Exhibit 5 to Attachment 2. Pursuant to this Order, the Clark Circuit Court dismissed the action, and ordered the parties to arbitration.

This dispute proceeded to arbitration, with a date set for the arbitration hearing. However, on September 7, 2012, Respondent sought to have the Clark Circuit Court vacate the order that dismissed the case and sent it to arbitration, citing *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012). The *Ping* case concerned an arbitration agreement in a nursing home context, and the arbitration agreement in question had been executed by an agent of the nursing home resident pursuant to a general power of attorney. The *Ping* court ultimately held that a general medical and financial power of attorney was not specific enough regarding the power to agree to arbitration. *Id.* at 593.[2]

Respondent then sought to vacate the circuit court's order based upon *Ping* and CR 60.02. Kindred objected and filed a response opposing Respondent's motion to vacate the arbitration order. Following oral argument, the Clark Circuit Court entered its Order on November 19, 2012, vacating its 1/9/2012 order compelling arbitration and denying the Movant's Motion to Compel Arbitration, stating that "Beverly Wellner lacked authority to waive Joe Wellner's jury trial rights," under "the principles outlined in [*Ping*]." *See* Attachment 2, Exhibit 1. This decision is clearly erroneous, because the *Ping* power of attorney did not contain the specific grants of the power "to make, execute and deliver deeds, **releases**, conveyances and **contracts of every nature** in relation to both real and personal property," or "to demand, sue for, collect, recover and receive all ... monies" as did Joe Wellner's POA document. *See* Power of

[2] For another day, but important to note, *Ping* incorrectly bifurcated the wrongful death claims from the others. Kentucky is in a distinct minority in that it is a "true" wrongful death state. The beneficiaries do not have that claim. Only the estate does. "Kentucky's wrongful death statute is not a survivor's loss statute." *See Adams v. Miller*, 908 S.W.2d 112, 117 (Ky. 1995)(*overruled on other grounds*)(Leibson, J., dissenting on other grounds). Kentucky courts have squarely held that the wrongful death statute does not create a new cause of action for beneficiaries. *See Louisville Ry. Co. v. Raymond's Adm'r*, 135 Ky. 738, 123 S.W. 281, 284 (1909) (statute manifestly was not to create a right of action in the beneficiaries, but only to protect the recovery for their benefit from the claim of others). *See also, Perry's Adm'r v. Louisville & N.R. Co.*, 199 Ky. 396, 251 S.W. 202 (1923). It is well settled in Kentucky that KRS §411.130 gives the personal representative the same cause of action that the deceased would have if he himself had brought the action. *See Nally v. Blandford*, 291 S.W.2d 832, 834 (Ky. 1956). *See also, Giuliani v. Guiler*, 951 S.W.2d 318, 324-325 (Ky. 1997)(Cooper, J., dissenting.)

Attorney of Joe Paul Wellner, attached as Exhibit 4 to Attachment 2 (emphasis added). *Compare*, General Power of Attorney of Alma Duncan (the *Ping* POA), attached hereto as Attachment 3.

Kindred sought CR 65.07 relief in the Court of Appeals on December 7, 2012, from the Clark Circuit Court's order of November 19, 2012 vacating its prior January 9, 2012 order to arbitrate and denying Kindred's motion to compel arbitration. Subsequently, the U.S. District Court for the Western District of Kentucky issued its opinion in *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937 (May 3, 2013). In *Oldham*, Judge Russell analyzed a similar case in which a nursing home sought to enforce an arbitration agreement executed by a resident's attorney in fact. *Id.* at *1. In granting the nursing home's motion to compel arbitration under the parties' contract, Judge Russell specifically analyzed, and distinguished, this Court's *Ping* opinion under the facts presented in *Oldham*:

> *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."

Oldham, 2013 WL 1878937 at *5 (emphasis added). Because Mr. Wellner's power of attorney contained a similar grant of power "to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property," Kindred brought the *Oldham* case to the Court of Appeals' attention by filing a citation to supplemental authority. *See* Kindred's Supplemental Citation to Relevant Legal Authority, filed June 12, 2013 and attached hereto as Attachment 4.

On June 25, 2013, the Court of Appeals denied Kindred's request for relief from the trial court's order of November 19, 2012 vacating its original January 9, 2012 order granting the motion to compel arbitration. *See* Attachment 1. Of particular import, the Court of Appeals

acknowledged, but expressly rejected, Judge Russell's reasoning and holding in *Oldham*, as follows:

> While we respect the federal district court's construction of *Ping*, we nevertheless understand *Ping* differently. ....The Kentucky Supreme Court clearly determined that under the power of attorney providing for financial, property, and healthcare decisions, **an arbitration agreement would "create legal consequences that are significant and separate from the transaction specifically directed by the principal."** 376 S.W.3d at 593 (quoting Restatement (Third) of Agency § 2.02 cmt. h).
>
> The power of attorney executed by Mr. Wellner specifically addressed property, financial, and healthcare decisions. The provisions relied on by Kindred pertain to property and financial concerns and there is no express reference to dispute resolution. Given the specificity in the power of attorney accorded to property, financial, and healthcare decisions, we cannot find that Mr. Wellner granted Mrs. Wellner the right to waive his rights to seek redress in a court of law. *See Ping*.

See Attachment 1, pp. 4, 6 (emphasis added). The Court of Appeals rejected Kindred's position that Mr. Wellner's POA's grant of the power to make contracts applied equally to <u>all</u> contracts, and did not exclude, limit or otherwise distinguish contracts "for arbitration." *See, e.g.,* Mr. Wellner's Power of Attorney, Attachment 2 at Exhibit 4. Moreover, the Court of Appeals' refusal to vacate the circuit court's opinion based upon this myopic conclusion runs counter to settled United States Supreme Court precedent directing that, pursuant to the FAA, arbitration is a matter of contract, and courts must place arbitration agreements on an equal footing with all other contracts and enforce them according to their terms. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011). The Clark Circuit Court abused its discretion in failing to recognize and apply this applicable law to the facts of this case. The Court of Appeals clearly erred in its interpretation and application of *Ping* and abused its discretion by refusing to grant Kindred's requested relief and denying Kindred's state constitutional right to contract for arbitration.

Kindred now appeals to this Court for relief pursuant to CR 65.09, to vacate the Court of Appeals Order denying their motion for CR 65.07 relief from the Clark Circuit Court's Order vacating its order of arbitration and remanding this case for trial.

II. ISSUES PRESENTED

This issues presented are whether the Clark Circuit Court and the Court of Appeals abused their discretion in misapplying *Ping v. Beverly Enterprises, Inc.* to the facts presented here and denying Kindred's motion to compel arbitration, and whether the Court of Appeals clearly erred by interpreting *Ping* to exclude an attorney-in-fact's power to contract for arbitration, absent a specific reference in the power of attorney document addressing "arbitration" or "dispute resolution," even where the power of attorney document grants the express power "to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property."

III. STANDARD OF REVIEW

Civil Rule 65.09 allows this Court to grant interlocutory relief from an order of the Court of Appeals if the movant demonstrates "extraordinary cause." CR 65.09(1). An abuse of discretion by the lower courts may amount to extraordinary cause and warrant such relief. *See, North Fork Collieries, LLC v. Hall,* 322 S.W.3d 98, 101 (Ky. 2010). *See also, National Collegiate Athletic Assn. v. Lasege,* 53 S.W.3d 77 (Ky. 2001). This Court reviews the trial court's findings of fact for clear error, but its construction of the contract is a purely legal determination reviewed *de novo. Id. See also, Conseco Finance Servicing Corp. v. Wilder,* 47 S.W.3d 335, 340 (Ky.App. 2001).

This Court has held that CR 65.07 and CR 65.09 are appropriate avenues for review of trial court orders denying motions to compel arbitration. *See North Fork,* 322 S.W.3d at 101-

102. Although injunctive relief is said to be in the sound discretion of the trial court, in the context of a motion to compel arbitration that discretion extends no further than the correct application of the law. *Id.* at 102. Therefore, irreparable injury demonstrating "extraordinary cause" in this context arises in the improper denial of a motion to compel arbitration and warrants CR 65.09 relief. *See id.* at 102 (*citing Kodak Mining Company v. Carrs Fork Corporation*, 669 S.W.2d 917 (Ky. 1984)).

The FAA requires that arbitration agreements be enforced no less rigorously than other contract provisions. *See North Fork Collieries*, 322 S.W.3d at 102. The task of the trial court confronted with such a motion is not to weigh the equities of the situation, to assess the merits of the underlying controversy, or to determine whether litigation would or would not "irreparably harm" the movant. Its task generally is simply to decide under ordinary contract law whether the asserted arbitration agreement actually exists between the parties and, if so, whether it applies to the claim raised in the complaint. *Id.; First Options of Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Oakwood Mobile Homes, Inc. v. Sprowls,* 82 S.W.3d 193 (Ky.2002). If an arbitration agreement is applicable, the motion to compel arbitration should be granted.

The Clark Circuit Court and the Court of Appeals abused their discretion, and the Court of Appeals clearly erred, by their holdings refusing to enforce the parties' valid arbitration contract pursuant to a misapplication of *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012). The circuit court's refusal to do so is in direct contravention of federal and state law. Additionally, the Court of Appeals' failure to recognize the trial court's abuse of discretion on this issue necessitates review and direction from this Court. Kentucky state and federal courts radically differ in their interpretation and application of *Ping* to Kentucky litigants' cases, even

with virtually identical facts, reaching varying results. The Supreme Court must provide guidance and rule on this issue. Interestingly, it is likely that if the arbitration agreement involved here arose in another setting, i.e., credit card or cable television dispute, there would be no controversy, thus even more clearly illuminating the error that has occurred here.

IV. ARGUMENT

Kindred is entitled to relief, as the Clark Circuit Court's November 19, 2012 order is a clear abuse of discretion in that it violates the provisions of the Federal Arbitration Act, 9 U.S.C.§ 2 et seq., and *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011), which direct that arbitration contracts must be enforced on equal grounds with all other contracts. In this case, Mr. Wellner's POA granted Beverly Wellner the express grant of authority to make, execute and deliver **releases and contracts of every nature** in relation to both real and personal property. The POA did not limit or otherwise qualify that grant of authority. *See* Exhibit 4 to Attachment 2. The trial court's decision to apply the disanalogous *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) decision to the facts of this case, and its ensuing failure to enforce the parties' lawfully executed arbitration contract, amounts to an abuse of discretion.

Kindred is also entitled to interlocutory relief because the Court of Appeals' interpretation of *Ping* is clearly erroneous and will cause irreparable harm to the public interest, as it confuses and virtually nullifies the right to contract for arbitration under a power of attorney, even when the POA expressly grants to the attorney-in-fact the right to contract, absent express language directed towards "arbitration agreements." This contravenes the FAA and U.S. Supreme Court precedent recognizing that the FAA demands that the "power to contract" necessarily includes the "power to contract for arbitration."[3]

[3] The ability to manage effectively personal injury claims in the Long Term Care setting is crucial. The over-85 population is the fastest growing segment of Kentucky's population. Kentucky's constitution prevents the

A. The Clark Circuit Court's Abused Its Discretion in Denying Kindred's Motion to Compel Arbitration Under the Facts Presented

(1). The Clark Circuit Court singled out the arbitration agreement at issue for disparate treatment.

The Power of Attorney from Mr. Wellner to his wife, Beverly Wellner, explicitly grants the power to "make, execute and deliver deeds, releases, conveyances, and contracts of every nature in relation to both real and personal property." Additionally, the POA provides the power "to 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)." *See* POA, Exhibit 4 to Attachment 2.

The Federal Arbitration Act ("FAA") holds that a written agreement to arbitrate disputes which arises out of a contract involving transactions in interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000) (quoting 9 U.S.C. § 2).

The parties entered into a valid arbitration agreement. *See* Attachment 2 at Exhibit 3. The Agreement clearly contains the signatures of both Beverly Wellner, attorney-in-fact for her husband, Joe Wellner, and a representative of Winchester Centre. Beverly Wellner had express authority under Joe's POA "to make, execute and deliver deeds, **releases**, conveyances and **contracts of every nature** in relation to both real and personal property," on her husband's behalf, such as the arbitration agreement at issue. Respondent never alleged that Beverly

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enactment of limits on tort damages. This presents a fertile ground for torts. With the specter of an unlimited judgment looming, providers may be willing to settle for higher amounts to avoid a trial. In 2010, a Kentucky jury awarded nearly $43 million in a nursing home liability case. Of that, $41 million of the judgment were punitive and non-economic damages. These are the type of damages that are typically restricted by tort reform legislation. Such an award can be influential, encouraging plaintiff's attorneys to increase their demands and forcing providers to weigh the stakes of defending a claim. With this backdrop, it is no surprise that liability costs in Kentucky continue to increase. *See* AON Risk Solutions 2012 Long Term Care Study, attached as Exhibit 9 to Attachment 2.

Wellner did not sign the arbitration agreement, and the terms of the agreement are clearly set forth in the document. Further, the arbitration agreement is broad in nature and encompasses all of Respondent's claims. Therefore any claims related to Mr. Wellner's residency at Winchester Centre fall necessarily within the broad scope of the ADR agreement.

As stated above, Judge Russell of the U.S. District Court for the Western District of Kentucky recently granted a motion to compel arbitration in a case with a virtually identical grant of authority "to contract" in a power of attorney document. *See Oldham v. Extendicare Homes, Inc., supra.* There, the plaintiff also contended that *Ping* precluded arbitration absent "an authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution." *Id.* at *4-*5. Analyzing this Court's *Ping* decision to the facts present in *Oldham*, Judge Russell explained the distinction, and why *Ping* did not apply or control that case:

> Among the various grants of authority in the power of attorney, Delores was given the power to "draw, make and sign any and all checks, contracts, or agreements" on Jerald's behalf. [Citation omitted.] The arbitration agreement to participate in alternative dispute resolution for any tort, negligence, or gross negligence is undoubtedly a "contract" or "agreement" that Delores had authority to "make and sign." .....
>
> In an attempt to avoid the Court's conclusion, Jerald argues that the Kentucky Supreme Court's decision in *Ping v. Beverly Enterps., Inc.*, 376 S.W.3d 581 (Ky.2012), counsels against compelling arbitration.....
>
> ***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."** This clause, as contained in Jerald's power of attorney, grants Delores authority to act beyond the categories of healthcare or financial decisions. If such language would have been included in the power of attorney at issue in *Ping,* it is highly likely that the Kentucky Supreme Court would have enforced the arbitration agreement.
>
> *Ping* was correctly decided because the power of attorney did not grant the attorney-in-fact authority to enter into the arbitration agreement. **Unlike *Ping*, the power of attorney in the present action vested Delores with authority to enter into contracts on Jerald's behalf. Such contracts include the arbitration agreement.** Reading the power of attorney according to its explicit terms and in

> light of the strong federal policy favoring arbitration, the Court finds that Delores had authority to execute the arbitration agreement on behalf of Jerald. Jerald's claims for tort, negligence, and gross negligence are included within the terms of the arbitration agreement. In the face of a valid arbitration agreement and Delores's authority to execute it on behalf of Jerald, **the Court is required by the Federal Arbitration Act and the Kentucky Uniform Arbitration Act to grant Shady Lawn's motion to compel arbitration.**

Oldham, 2013 WL 1878937 at *3-*5 (emphasis added).

The facts of *Oldham*, not *Ping*, are analogous this case and render the Clark Circuit Court's and Court of Appeals' application of the disanalogous *Ping* case here clear error – where *Ping* never considered or ruled upon a "power to contract," because none existed in Mrs. Duncan's POA. *See and compare*, Alma Duncan's POA, attached hereto as Attachment 3. Because the arbitration agreement is a contract, and Joe's POA in this matter authorized Beverly to make, execute and deliver "**releases**, conveyances and **contracts of <u>every nature</u>** in relation to both real and personal property," both parties had full legal authority to contract to arbitrate their disputes in the arbitration agreement. The ADR Agreement is legally enforceable and the circuit court abused its discretion in refusing to enforce it. Additionally, the Court of Appeals abused its discretion by failing to grant CR 65.07 relief from the Circuit Court's order of November 19, 2012, denying Kindred's motion to compel arbitration.

<u>(2) Joe Wellner's Power of Attorney satisfies *Ping* in any event.</u>

Even if this Court should decide that *Ping* applies to govern the facts of this case, the circuit court abused its discretion by failing to recognize that Mr. Wellner's power of attorney document actually satisfies *Ping*. Mr. Wellner's POA also authorizes his attorney-in-fact "to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property," and "to 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)." *See* Attachment 2 at Exhibit 4. Granting an agent the power to execute releases of every nature in relation to personal property, as well as the power to institute and defend suits and "legal proceedings" necessarily includes the authority to make decisions concerning the jurisdiction of such actions, and also the authority to arbitrate and settle those actions instituted pursuant to his Power of Attorney. By granting his agent the authority ***to execute releases of every nature*** in relation to both real and personal property, Mr. Wellner expressly granted his agent the exact type of authority contemplated in *Ping* (i.e., the authority to settle claims and disputes).

Also, by granting his agent the authority to "demand, sue for, collect, recover and receive all ... demands whatsoever" and "to institute legal proceedings," he is necessarily and implicitly granting the authority to perform those actions which are incidental to instituting suits, usually accompany suits, or are reasonably necessary to accomplish a lawsuit. *See* Restatement (Second) § 35. *See also, Ping*, 376 S.W.3d at 592. This "reasonably necessary or incidental" authority must necessarily include the ability to settle the suits that have been brought pursuant to Joe's intended grant of authority. Moreover, the distinctive language, "legal proceedings" apparently anticipates varying forums for the legal processes.

It would be an absurd result to recognize an agent's power to bring suit pursuant to a power of attorney, and then deny she has the power to settle those very claims. The language present in Mr. Wellner's Power of Attorney both expressly and implicitly grants his agent the right to settle claims and disputes – and therefore meets the challenges of authority required by this Court in *Ping*. Moreover, Ms. Duncan's POA, as analyzed in *Ping*, did not contain any such "institute and defend" language. *See Ping* POA, Attachment 3. Therefore, this fact once again places Mr. Wellner's POA outside of *Ping's* scope. It was clear error for the circuit court and

Court of Appeals to misapply *Ping* to the facts of this case, and they abused their discretion by doing so to deny Kindred's motion to compel.

Kentucky law is clear that "a cause of action for damages for personal injury is nothing more than a chose in action." *Weakley v. Weakley*, 731 S.W. 2d 243, 246 (Ky. 1987) (J. Leibson, *dissenting*)(citing Black's Law Dictionary, 5th Edition). "It is a valuable right which may be reduced to money damages, and as such it is a form of property acquired at the date of the injury. 'Choses in action are personal property.'" *Id.* (emphasis added) (quoting *Button v. Drake*, 302 Ky. 517, 195 S.W. 2d 66, 69 (1946). Mr. Wellner's POA explicitly grants his attorney-in-fact the right "to make, execute and deliver deeds, **releases**, conveyances and **contracts of every nature** in relation to both real and personal property." *See* Attachment 2 at Exhibit 4. This necessarily includes a release of any cause of action allegedly possessed by Mr. Wellner against Winchester Centre.

While the Power of Attorney examined in *Ping* lacked the specificity required to waive a right to trial by jury according to this Court, the Power of Attorney signed by Mr. Wellner in this matter specifically articulated the requisite standards set by the Court in *Ping*. The ADR Agreement executed herein is enforceable, and accordingly, the circuit court abused its discretion in denying Kindred's motion to compel arbitration.

B. The Court of Appeals' Incorrect Interpretation and Application of *Ping* Resulted in the Court's Failure to Grant CR 65.07 Relief as an Abuse of Discretion.

If the Court of Appeals' characterization and application of *Ping* is accurate, then this Court has judicially created a state law that singles out arbitration contracts for disfavored treatment, explicitly analyzing and placing them in a more restrictive light than other contracts. In essence, the Court of Appeals' interpretation of *Ping* creates a distinction between the attorney-in-fact's ability to execute contracts, generally, and the attorney-in-fact's ability to

execute an ***arbitration*** contract. The FAA preempts any law, whether legislatively or judicially enacted, that reaches this result. *See AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

Mr. Wellner's POA specifically grants to his attorney-in-fact, Beverly Wellner, the power to execute "releases ... and contracts **of every nature** in relation to both real and personal property" generally; it places no limitation or other qualification on the power to contract in its text. *See* Attachment 2 at Exhibit 4. Under the FAA, that power to execute contracts must also necessarily include the power to execute ***arbitration*** contracts. The FAA **preempts** state laws that are hostile to the purpose of the FAA, and the FAA governs all aspects of arbitration procedure to which the act applies. *Stout v. J.D. Byrider*, 228 F.3d 709, 716 (6th Cir. 2000). In determining whether the parties have made a valid arbitration agreement, state law may be applied *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally, although the **FAA preempts state laws applicable only to arbitration provisions**. *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1014 (6th Cir. 2003)(citing *Great Earth Cos. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996))(emphasis added).

The U.S. Supreme Court explicitly and definitively held that the FAA preempts state laws, including a state court's application of general contract defenses, that run counter to its purposes and that pertain only to arbitration agreements. *See Concepcion*, 131 S.Ct. 1740. Following *Concepcion*, non-enforcement of arbitration agreements under the FAA is highly disfavored and must be closely scrutinized. *Concepcion* reiterated the Court's frustration with state court bias against enforcement of arbitration agreements ("the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and

formulas' declaring arbitration against public policy." (Citation omitted)). *See Id.* at 1747. The Court expressed the focus and concern of its review as follows:

> [W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." [Citation omitted]. 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 (2008), 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. 2529 .... 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 to court to effect what ... the state legislature cannot." *Id.* at 493, n.9.

Concepcion, 131 S.Ct. at 1747 (emphasis added).

"The 'principal purpose' of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 1748 (*citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 498 U.S. 468, 478 (1989)). While the § 2 savings clause preserves applicable common law contract defenses, the *Concepcion* Court warned that the grounds available under § 2 must not be construed to include a state's policy preference for procedures incompatible with arbitration:

> Although § 2's savings clause preserves generally applicable contract defenses, **nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives**. [citations omitted]... As we have said, a federal statute's saving clause... "'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. (emphasis added).

Concepcion, 131 S. Ct. 1740, 1748 (citations omitted) (emphasis added). Justice Thomas agreed in his concurring opinion:

> If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to "any contract." *Id.* at 1753.

Even prior to *Concepcion*, other courts have similarly found that the FAA preempts state laws that make enforcement of arbitration agreements more difficult but do not apply generally to state contract law. *See e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996)(finding special notice requirements as precondition to enforceability of arbitration agreements under Montana statute were preempted by FAA); *Southland Corp. v. Keating*, 465 U.S. 1 (1984)(invalidating state law that had prevented enforcement of arbitration agreement that was otherwise enforceable under FAA); *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140 (10th Cir. 2007)(invalidating state law exception in Kansas' UAA to enforcing arbitration provisions in employment agreements); *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2nd Cir. 1988), certiorari denied 119 S.Ct. 867, 525 U.S. 1103, 142 L.Ed.2d 769 (finding FAA preemption of New Jersey law that invalidates out of state forum designations in arbitration agreements); *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 449 (2nd Cir. 1991) certiorari dismissed 112 S.Ct. 17, 501 U.S. 1267, 115 L.Ed.2d 1094 (finding FAA preempted Vermont statute that provided more stringent signatory requirements to arbitration agreement); *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 108 A.L.R. Fed. 159 (4th Cir. 1990), *rehearing denied, certiorari denied*, 111 S.Ct. 516, 498 U.S. 983, 112 L.Ed.2d 527 (finding FAA preempted Virginia law that required stricter standard for enforceability of arbitration agreements than what was required for contracts generally); *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), *certiorari denied,* 110 S.Ct. 2559, 495 U.S. 956, 109 L.Ed.2d 742 (finding FAA preempted Massachusetts' law that made enforcement of arbitration provisions in broker-dealer agreements more difficult than enforcement of contracts generally); and *Flint Warm Air Supply Co., Inc. v. York Intern. Corp.*, 115 F.Supp.2d 820 (E.D. Mich.,

2000) (finding FAA preemption of Michigan law that invalidated all arbitration clauses that required arbitration to occur outside of Michigan).

Following *Concepcion*, state law may be applied to determine whether the parties have made a valid arbitration agreement if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. However, *Concepcion* expressly holds that the FAA preempts any state law or policy, whether legislatively enacted **or judicially made**, that applies only, or exhibits any bias applicable, to arbitration provisions. *Concepcion*, 131 S.Ct.1740; *see also, Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1014 (6th Cir. 2003) (citing *Great Earth Cos. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996)). Kentucky laws, like the Court of Appeals' interpretation and misapplication of *Ping* to the disanalogous facts presented in this case, that run counter to the purposes of the FAA and are hostile only to arbitration agreements but not contracts generally, are definitively preempted by the FAA and must be strictly scrutinized by this Court. *See id.*

Furthermore, in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the U.S. Supreme Court summarily reversed the West Virginia Supreme Court of Appeals' declaration that all pre-dispute arbitration agreements that apply to personal-injury or wrongful-death claims against nursing homes are invalid *per se* under West Virginia state law. In doing so, the Court relied heavily on the rationale set forth in *Concepcion* and Section 2 of the FAA's clear pronouncement that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of **any** contract. 9 U.S.C. § 2." (Emphasis added).

The *Marmet* Court reiterated the FAA's "emphatic federal policy in favor of arbitral dispute resolution." *Id.* And it reaffirmed that the FAA's "text includes no exception for personal-injury or wrongful-death claims." *Id.* Because the West Virginia court's *per se* public policy rule "prohibiting arbitration of a particular type of claim," that rule was prohibited by the FAA. *Id.* at 1204. The Supreme Court has more recently confirmed this analysis and support for the use of arbitration in *Nitro-Lift Technologies v. Howard*, 568 U.S. -- (2012) at *5 ("Where a specific statute, for example, conflicts with a general constitutional provision, the latter governs. And the same is true where a specific state statute conflicts with a general federal statute. There is no general-specific exception to the Supremacy Clause")(*citing Concepcion* and *Marmet*).

Further, the law is clear that any doubts regarding arbitration should be resolved in favor of arbitration. *Fazio v. Lehman Brothers, Inc.*, 340F.3d 386, 392 (6th Cir. 2003)(citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765(1983)). State contract law is used to determine whether the arbitration clause itself was validly obtained, provided the contract law applied is ***general*** and not specific to arbitration clauses. *Id.* at 393; *Baquie v. Eastern Energy Corp.*, 2010 WL 1416557, *2 (W.D.Ky. 2010). *See also, Holifield v. Beverly Health and Rehabilitation Services, Inc.*, 2008 WL 2548104 (W.D.Ky. 2008) (pre-dispute arbitration agreements in the nursing home admission context are enforceable under both Kentucky and Federal law). The Court of Appeals misinterpretation of *Ping* to the facts present in this case is clear error, and its failure to grant the requested relief because of that error constitutes an abuse of discretion.

C. The Court of Appeals Abused Its Discretion by Failing to Recognize the Clark Circuit Court had Lost Jurisdiction of the Matter[4]

Initially, it must be recognized that when it entered the January 9, 2012 order, the Clark Circuit Court **dismissed** the underlying case and referred the matter to binding arbitration. Pursuant to Kentucky law, ten days after it entered the order dismissing the action, the circuit court lost jurisdiction over the dispute. *Pavkovich v. Shenouda*, 280 S.W. 3d 584, 587 (Ky. App. 2009). Consequently, the circuit court initially erred in hearing the Respondent's Motion to Vacate, as "[o]nce lost, jurisdiction must be invoked anew, independently of the previous action that has achieved finality." *Id.* at 588. The Court of Appeals rejected this argument, stating that CR 65.07 relief was not available for Kindred because CR 60.02 relief is generally not final and appealable. *See* Attachment 1, p. 2. It abused its discretion in doing so.

When the matter was referred to arbitration, jurisdiction vested therein, and the Clark Circuit Court had no authority to revive its jurisdiction or enter the subsequent Order. Until the Clark Circuit Court's Order of November 19, 2012, incorrectly re-assuming jurisdiction, vacating its prior Order and denying Kindred's Motion to Compel Arbitration and effectively remanding the case to the Clark Circuit Court for trial on the merits, Kindred was for ten (10) months relying upon the circuit court's January 9, 2012 Order dismissing the case and referring it to arbitration for resolution. That Order stated:

> IT IS HEREBY ORDERED and ADUJUDGED that **this action is hereby dismissed** and the parties are ordered to **resolve this dispute in accordance with the terms of the arbitration agreement** executed by and between the parties. (Emphasis added).

In summary, the Clark Circuit Court's January 9, 2012 Order dismissed this action. The Order did not have any "prospective application" because, in the words of Kentucky's highest

[4] Kindred briefed this issue extensively before the Court of Appeals in their CR 65.07 Motion. *See* Attachment 2, pp. 6-13. In the interest of economy, Kindred incorporates this argument and relies upon it by reference as if fully restated herein.

court, it did not regulate any "future situations" between the parties. *See, e.g., National Electric Service Corp v. District 50, United Mine Workers of America*, 279 SW 2d 808, 812 (Ky. 1955). Rather, on January 9, 2012, the Clark Circuit Court dismissed the Plaintiff's case against Kindred and ordered the parties to proceed with their claims in an arbitration venue. Ten months later, it reopened the case after having lost jurisdiction ten months ago, and ordered the parties to proceed to trial. The error is clear: the Court of Appeals abused its discretion in failing to recognize that the circuit court lost jurisdiction when it dismissed the case. Instead, it cited *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007) for the position that CR 65.07 relief was not available here because "the vacated judgment here was less than a year old and the respondent's CR 60.02 motion was vested in the broad discretion of the trial court." *See* Attachment 1, pp. 2-3. By allowing the trial court to act without jurisdiction, and by failing to rectify that situation by granting CR 65.07 relief as requested, the Court of Appeals abused its discretion.

D. The Court of Appeals' Order Will Cause Irreparable Harm to Kindred As Well As to the Public Interest

Kentucky is in a minority believing the right to contract for arbitration is worthy of being a state constitutional right, no different than any other constitutional right – including that to a jury trial. *See* § 250 of the Kentucky Constitution. *See also* KRS Chapter 417, codifying same. Indeed, Kentucky's Second, Third and Fourth Constitutions preserved and provided for the right to contract for arbitration. Section 250 of the Kentucky Constitution states, "[i]t shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences of arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment." *See also,* Article VI, Section 10 of Kentucky's Second Constitution adopted in 1799 and Article 8, Section 10 of Kentucky's Third Constitution adopted

in 1850. The Court of Appeals' order eviscerates that right and effectively rejects the proposition that the right to contract for arbitration is protected equally by Kentucky's courts as against other constitutional guarantees.

The Clark Circuit Court's and Court of Appeals' interpretation of *Ping* to this matter holds ramifications far beyond this case. The lower courts' holdings, if allowed to stand, will continue to generate disparate results, create uncertainly, irreparable harm and confusion within the realm of general public interest: individuals and businesses alike will be unable to rely upon their Constitutional right in Kentucky to contract for arbitration in both commercial and private contexts. Contracts previously made in good faith under prevailing laws will be subject to immediate invalidation. Kindred is aware of multiple cases on appeal in Kentucky concerning the interpretation and enforcement of contracts under powers of attorney sufficient to enter binding arbitration. These cases concern all walks of business, private and commercial, and are not limited solely to the nursing home context.

Further, Kindred here will forever lose its right to arbitration in this matter and that right, once lost, can never be recovered or made whole. *See Bridgestone/Firestone Industrial Products Co. v. McQueen*, 3 S.W.3d 366, 367 (Ky. App. 1999) ("the relevance of arbitration and the right to invoke it would be rendered essentially meaningless or moot if a party were required to go first through the time and expense of litigation); *see also, Board of Regents of Western Kentucky University v. Clark*, 276 S.W.3d 819, 822 (Ky. 2009) (arbitration rights would be rendered meaningless without opportunity for relief).

It is inconceivable to believe that this Court meant to remove an entire class of entities (attorneys-in-fact) from the ability to execute valid arbitration agreements in this Commonwealth, where the POA already grants the power to make contracts generally but does

not contain a specific grant of a "power to contract for arbitration." This distinction runs counter to the FAA and all U.S. Supreme Court precedent interpreting same. It singles out arbitration for disparate treatment when the party executing the contract is an agent acting pursuant to a legal power of attorney. Surely, these individuals and businesses must have the same right to contract for arbitration as all other contracts. However, the Court of Appeals' opinion severely limits the rights of attorneys-in-fact to contract for **arbitration**. Numerous contracts will be rendered meaningless in the process. Such a result would cause disruption and chaos in Kentucky commercial and private sectors alike. The Court of Appeals Order interpreting *Ping* according to the facts existing in this case is clearly erroneous and preempted by the FAA. It should not be allowed to stand as the law of Kentucky, and Kentucky courts must cease their overtly prejudicial treatment of arbitration contracts in this setting.

IV. CONCLUSION

For all of the reasons stated herein, Kindred prays that this Court vacate the Court of Appeals Order denying relief from the Clark Circuit Court's November 19, 2012 order vacating its January 9, 2012 order for arbitration, and denying Kindred's motion to compel arbitration in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served, this 1st day of July 2013, via regular U.S. Mail, postage prepaid, upon the following:

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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013- SC- _____

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a WINCHESTER CENTRE FOR HEALTH AND REHABILITATION n/k/a FOUNTAIN CIRCLE HEALTH AND REHABILITATION; KINDRED NURSING CENTERS EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; KINDRED HEALTHCARE OPERATING, INC.; KINDRED REHAB SERVICES, INC. d/b/a PEOPLEFIRST REHABILITATION **KINDRED**

v.

ON REVIEW FROM
COURT OF APPEALS
CASE NO: 2012-CA-002212-I

BEVERLY WELLNER, Individually and on behalf of the Estate of JOE P. WELLNER, deceased, and on behalf of the wrongful death beneficiaries of JOE P. WELLNER **RESPONDENT**

MOTION FOR ORAL ARGUMENT

Kindred Nursing Centers Limited Partnership d/b/a Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation, Kindred Nursing Centers East, LLC, Kindred Hospitals Limited Partnership, Kindred Healthcare, Inc., Kindred Healthcare Operating, Inc., Kindred Rehab Services, Inc. d/b/a PeopleFirst Rehabilitation, (collectively "Kindred") moves the Court for oral argument on its Motion to Vacate or Modify the June 25, 2013 Order of the Court of Appeals. As grounds for this motion, Kindred states that the issues raised by this case are of importance not only to this litigant, but to the public, the courts and all other litigants and businesses who believe they can turn to arbitration as a viable alternative to litigation.

Having previously granted Kindred's motion to compel arbitration in this case in January 2102, after this Court's *Ping v. Beverly Enterprises, Inc.* decision the Clark Circuit Court entertained, and granted, Plaintiff's motion to vacate the arbitration order in November 2012

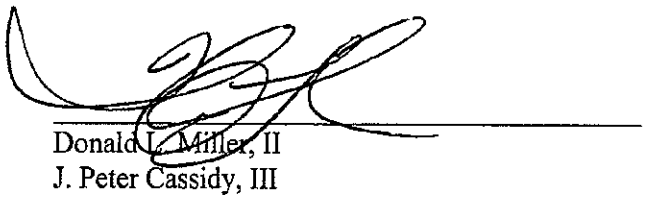
based upon the *Ping* decision. This is despite the parties' written agreement to arbitrate and Mr. Wellner's Power of Attorney document granting his attorney-in-fact the power "to make, execute and deliver...releases ... and contracts of every nature in relation to both real and personal property," a grant of power nonexistent – and therefore neither considered nor analyzed -- in the *Ping* case.

The Court of Appeals denied Kindred's Motion for Interlocutory Relief per CR 65.07. In doing so, the Court expressly rejected the U.S. District Court, Western District of Kentucky's decision and reasoning in *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937 (W.D.Ky. May 3, 2013), holding that the express grant of the "power to contract" in a power of attorney document provided the attorney-in-fact authority to act "beyond the categories of healthcare or financial decisions," as the *Ping* court found itself so limited. The Court of Appeals stated they "nevertheless understand *Ping* differently." Quoting from the *Ping* decision, the Court of Appeals held the "the most relevant" language of *Ping* was that "an arbitration agreement would 'create legal consequences for the principal that are significant and separate from the transaction specifically directed by the principal.'" (*Citing Ping* 376 S.W.3d at 593 and Restatement (Third) Agency § 2.02 cmt. h.). If correct, the Court of Appeals interpretation of *Ping* violates the FAA and holds widespread ramifications for all parties, not simply nursing homes, who rely upon their Constitutional right to contract for arbitration in Kentucky.

As demonstrated in the Motion to Vacate filed herewith, "extraordinary cause" exists under CR 65.09 to merit this Court's review and those same factors also support oral argument and full consideration of this case.

Respectfully submitted,

QUINTAIROS, PRIETO, WOOD & BOYER, P.A



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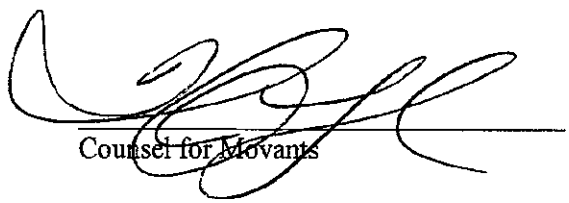

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