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Commonwealth of Kentucky
Supreme Court of Kentucky

CASE NO. 2013 -SC-000431

Kindred Nursing Centers Limited Partnership
d/b/a Winchester Centre for Health and Rehabilitation
n/k/a Fountain Circle Health and Rehabilitation, *et al.*

MOVANTS/
DEFENDANTS

v.

On Appeal from the Kentucky Court of Appeals
2013-CA-002212
Clark County Circuit Court
Civil Action No. 10-CI-00472

Beverly M. Wellner, Individually, an on behalf of the Estate,
of Joe P. Wellner, deceased, and on behalf of the wrongful
death beneficiaries of Joe P. Wellner

RESPONDANTS/
PLAINTIFFS

MEMORANDUM RESPONSE TO MOTION FOR INTERLOCUTORY RELIEF AND ORAL ARGUMENT PURSUANT TO CR 65.09

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served via U.S. Mail, with sufficient postage thereon to ensure delivery, this 15 day of July, 2012, upon the following:

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This Motion for Interlocutory Relief, made pursuant to CR 65, relates to an attempt by movants Kindred Nursing Centers Limited Partnership, *et al.* ("Movants"), to have an order of the Court Appeals vacated. This order of the Court of Appeals, also stemming from a motion for interlocutory relief, effectively affirmed an order of the Circuit Court of Clark County denying a motion to compel arbitration.

The Circuit Court had initially compelled arbitration in the underlying trial case between the parties. The Circuit Court's initial order had been based upon a stand-alone alternative dispute resolution agreement ("Arbitration Agreement") executed by Mr. Wellner's ostensible attorney-in-fact. The Circuit Court later vacated this earlier order, and replaced it with an order denying the trial motion to compel arbitration. The underlying case in question, that of Beverly Wellner (individually and on behalf of the Estate of Joe Wellner and his wrongful death beneficiaries) ("Respondent") against Movants, was still *de facto* and *de jure* in front of the Circuit Court.

The Circuit Court's correction occurred pursuant to the teaching of the recently issued Kentucky Supreme Court case of *Donna Ping v. Beverly Enterprises, Inc.*, 376SW3d 581 (Ky. 2012) (*pet. cert. denied, see Beverly Enterprises, et al. v. Ping, Donna*, 133 S.Ct. 1996 (2013)). The case of *Donna Ping v. Beverly Enterprises* teaches that language in a power-of-attorney does not encompass the power to bind a principal to an alternative dispute resolution (arbitration) agreement—thereby waiving the principal's right to a judicial forum—unless (1) the instrument authorizes such an arbitration agreement, or (2) such power to execute an arbitration agreement would be necessary to the performance of an agency function.

> 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****....*
>
> Mrs. Duncan's power of attorney, properly construed as giving her daughter authority to manage Mrs. Duncan's property and finances and to make health-care decisions on her behalf, did not thereby authorize Ms. Ping to ***waive***, where there was ***no reasonable necessity to do so***, her mother's access to the courts.

Ping at 593-594 (emphasis added).

To highlight this latter point, this Court also stated:

> [W]e have indicated that an agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly authorized in the document....

Ping at 592.

Ping further specified that wrongful death beneficiaries, holding an independent interest and cause of action in wrongful death, must be parties to said alternative dispute resolution agreements before they will be bound by such agreements. "Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another." *Id.* at 600.

The Wellner power-of-attorney at issue here granted the power "***[t]o make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.***" This is the power-of-attorney language upon which Movants rest their right to interlocutory relief. They argue as follows:

1. The Wellner power-of-attorney contains a grant of authority (the quoted power-of-attorney language *supra*) sufficient to execute the subject Arbitration Agreement, *i.e.*, sufficient to satisfy the standards of *Donna Ping v. Beverly Enterprises.*

2. Any conclusion that Mr. Wellner's power-of-attorney (with the quoted power-of-attorney language *supra*) does not encompass sufficient authority would be violative of the Federal Arbitration Act (FAA), and thus any holding supporting such a conclusion, *e.g.*, potentially that of *Donna Ping v. Beverly Enterprises*, is pre-empted under principles of federal law supremacy.

3. Given that the Circuit Court lost jurisdiction upon entering its initial order compelling arbitration, etc... the Circuit Court's subsequent order denying arbitration was substantively and procedurally improper.

4. Arbitration is a Constitutional right in Kentucky, and this right, under these circumstances, mandates the conclusion that Mrs. Wellner's attorney-in-fact had to have had the authority to make the agreement.

Movants now move for Interlocutory Relief in this Court pursuant to CR 65.09, and for oral argument. Respondent herein replies in opposition to interlocutory relief. Respondent believes that oral argument is unnecessary, but takes no other position regarding oral argument.

MEMORANDUM

Movants' motion is ill-founded substantively, and relief must be denied.

Winchester Centre for Health and Rehabilitation n/k/a Fountain Circle Health and Rehabilitation is a nursing home owned, operated, managed, and administered by Movants. Joe P. Wellner was a resident of Winchester Centre for Health and

Rehabilitation n/k/a Fountain Circle Health and Rehabilitation from on or about August 16, 2008 until on or about June 15, 2009. Mr. Wellner died on June 19, 2009. While he was a resident in the Movants' facility, Mr. Wellner sustained numerous injuries, including falls; bruising; abrasions; dehydration; malnutrition; weight loss; pressure sores; infections, including MRSA; improper wound care; poor hygiene; severe pain; and death. Respondent filed suit in Clark County Circuit Court against Movants for these injuries on June 16, 2010, asserting causes of action of negligence, medical negligence, corporate negligence, violations of the Long Term Care Resident's Rights statute, Kentucky Revised Statutes §§ 216.510, *et seq*, loss of spousal consortium, and wrongful death. Movants answered on July 14, 2010.

Movants filed a motion to dismiss or in the alternative to stay the lawsuit pending alternative dispute resolution proceedings on August 20, 2010, to which Respondent opposed. In support of their motion, Movants proffered an alternative dispute resolution agreement ("arbitration agreement") signed on Mr. Wellner's behalf by Mr. Wellner's wife, Beverly Wellner, on August 6, 2008. **(Exhibit D)** In support of Mrs. Wellner's authority to execute such an agreement on her husband's behalf, Movants offered a power-of-attorney instrument from Mr. Wellner to Mrs. Wellner dated May 15, 2008, conferring a power-of-attorney upon Mrs. Wellner. **(Exhibit E)** This power-of-attorney did not authorize the attorney-in-fact to settle claims and disputes, nor did it authorize alternative dispute resolution. The arbitration agreement at issue here is facially optional and thus its execution was not necessary for Mr. Wellner to receive care at Movants' facility.

Nonetheless, on January 9, 2012, the Circuit Court of Clark County entered an order compelling arbitration. **(Exhibit C)** On August 23, 2012, this Court issued its opinion in *Donna Ping v. Beverly Enterprises*, setting aside the opinion of the Court of Appeals in *Beverly Enterprises v. Ping*, 2010 WL 2867914 (Ky.App. July 23, 2011) (*reversed*), effectively reinstating the opinion of the Circuit Court of Franklin County in the *Ping* case. On the basis of the Supreme Court's teaching in *Donna Ping v. Beverly Enterprises*, on September 7, 2012, Respondent moved the Circuit Court of Clark County to vacate its January 9, 2012 order. This, the lower court did, on November 19, 2012. **(Exhibit B)** Movants moved for interlocutory relief pursuant to CR 65.07 on December 7, 2012. Unsurprisingly, Respondent opposed. **(Exhibit F)** The Court of Appeal denied this relief on June 25, 2013. **(Exhibit A)**

During the Court of Appeals litigation, an opinion issued from the U.S. District Court for the Western District of Kentucky, *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937 (W.D.Ky.). In *Oldham*, the federal court stated:

> *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."
>
> * * *
>
> 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.

Movants supplemented their interlocutory appeal in the Court of Appeals with citation to *Oldham*. The Court of Appeals however directly disagreed with the federal courts' interpretation of *Donna Ping v. Beverly Enterprises, Inc.*, 376 SW3d 581 (Ky. 2012). The Court of Appeals stated:

> While we respect the federal district court's construction of *Ping*, we nevertheless understand *Ping* differently. Significantly, in reaching its decision, the Supreme Court analyzed Kentucky law

on agency and found its reasoning consistent with the *Restatement of Agency*:

> Our careful approach to the authority created by a power of attorney is also consistent with the provision in the *Restatement of Agency*... as follows:
>
> > (1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary and incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.
>
> *Restatement (Third) of Agency* § 2.02 (2006). We are not persuaded either that Ms. Ping did understand, or that she reasonably could have understood her authority under the power of attorney to apply to all decisions on her mother's behalf whatsoever, as opposed, rather, to decisions reasonably to maintain her mother's property and finances and to decisions reasonably necessary to provide for her mother's medical care.

(*citing Ping*, 376 SW3d at 592-593)

ARGUMENT

Reiterating the same principles recited in Respondent's lower court briefing, "[a]n interlocutory order is not appealable unless it divests a party of a right in such a manner as to remove from the court the power to return the parties to their original condition." *Druen v. Miller*, 357 SW3d 547, 549 (Ky.App. 2011) (*citing Ratliff v. Fiscal Court*, 617 S.W.2d 36, 39 (Ky.1981)). Because orders denying motions to compel arbitration are structurally equivalent to orders involving injunctions, they can theoretically be appealable pursuant to CR 65. *Kodak Mining Co. v. Carrs Fork Corp.*, 669 SW2d 917 (Ky. 1984) (judicial expansion of the interlocutory appeal provisions of CR 65 to cover appeals of arbitration orders, analogizing these orders to those involving injunctions).

Such an order could constitute an irreversible change in a party's "original condition." In any event, review of orders made pursuant to CR 60.02 are reviewed for an abuse of discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 SW3d 454, 456 (Ky. 2002).

As an initial aside, in a footnote, Movants assert: "The ability to manage effectively personal injury claims in the Long Term Care setting is crucial. The over-85 population is the fastest growing of Kentucky's population. Kentucky's constitution prevents enactment of limits on tort damages. This presents a fertile ground for torts." (Movants' Brief at p. 8 n. 3)

This is an odd point to make. Perhaps Movants meant to state that 'this is a fertile ground for tort ***claims***.' Respondent would agree that the increase of numbers in a particularly vulnerable sector of the population does make an increase in the number of torts committed against the members of this sector a distinct possibility. Respondent's position is that this is no reason to relax the safeguards protecting that sector; rather, the judiciary should be ever more vigilant in their regard. To the extent that Movants are concerned regarding the scale of impending litigation, the easiest solution for them is this: Stop committing the torts, and the tort claims and their damages will dry up.

The underlying litigation here seeks to redress some of the harms done to Mr. Wellner. It is improper for Movants to suggest that the judiciary of Kentucky act to place a finger on the scale regarding a public policy determination that should be left to either the General Assembly or the sovereign people in their role as Constitutional law-giver. The role of the judiciary is to apply the law, not to make it. *City of Louisville v. Melton Food Marts, Inc.*, 564 SW2d 849, 851 (Ky.App. 1978) (*citing Chapman v. Chapman*, 498

SW2d 134, 137 (Ky. 1973)). Powers-of-attorney are instruments of ancient lineage. Their language should be interpreted solely with an eye toward the principles of the Common Law applicable to powers-of-attorney, the English language, and common sense.

In the same vein, Movants' expression that "doubts regarding arbitration should be resolved in favor of arbitration" (Movants' Brief at p. 18) misapplies the case law cited and evinces a lack of understanding regarding it. The suggestion that courts should resolve doubts as to ***whether an agreement exists***, *ab initio*, is inaccurate. The burden to prove the existence and efficacy of the Arbitration Agreement was a threshold issue placed upon Movants, and they had the same burden of proof and persuasion as with any other contract. *See Bd. of Trs. of the City of Delray Beach Police & Firefighters Retirement Sys. v. Citigroup Global Mkts., Inc.*, 622 F3d 1335, 1342 (11th Cir. 2010) ("[W]e resolve this issue without a thumb on the scale in favor of arbitration because the 'federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.'") (*citing Fleetwood Enters., Inc. v. Gaskamp*, 280 F3d 1069, 1073 (5th Cir. 2002)). While Kentucky law favours the enforcement of arbitration agreements, any policy favouring arbitration comes into play ***only after*** it is determined that a valid agreement to arbitrate exists. *See Mt. Holly Nursing Center v. Crowdus,* 281 S.W.3d 809, 813 (Ky.App. 2008). The burden of proving that a valid, enforceable arbitration agreement exists rests upon the party seeking to compel arbitration. *See* KRS § 417.060; *see also Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 824 (Ky.App. 2008); 9 U.S.C. § 4 (the trial court shall order arbitration only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue").

I. Pursuant to the teaching of *Donna Ping v. Beverly Enterprises*, Mr. Wellner's power-of-attorney did not constitute sufficient authority for the signor's execution of the arbitration agreement.

The Circuit Court of Clark County grounded its well-reasoned Order fully on *Donna Ping v. Beverly Enterprises, Inc.*, 376 SW3d 581 (Ky. 2012):

> Based on the motion, response, arguments of counsel, and the circumstances as a whole, the Court finds that, under the principles outlined in *Donna Ping v. Beverly Enterprises, Inc.*, --- SW3d - - -- (Ky. 2012), Beverly Wellner lacked authority to waive Joe Wellner's jury trial rights.

(Exhibit B)

In reviewing the full import of this Court's decision in *Ping*, it is very useful to recall the *Ping* case when it was pending in front of the Kentucky Court of Appeals, as it is this latter court's decision and logic which the Supreme Court implicitly found unpersuasive, and nullified by reversing. In the Court of Appeals *Ping* decision, *Beverly Enterprises v. Ping*, 2010 WL 2867914 (Ky.App. July 23, 2011) (*reversed*), the Court of Appeals attempted to distinguish an older case cited by the plaintiff Donna Ping, *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429, 431 (1924). The *Ping* plaintiff had cited *Harding* for the proposition that ***powers in a power-of-attorney must be strictly construed.*** "[A]ny power of attorney ***which delegates authority to perform specific acts*** that also contains general words, is ***limited to the particular acts authorized.***" *Harding*, 265 S.W. at 431. The Court of Appeals in *Beverly Enterprises* attempted to address *Harding* by stating, "[t]he case in *Harding*... dealt with a power of attorney that was given for a specific limited purpose."

This Court nullified the distinction made in the Court of Appeals and effectively reminded the Kentucky judiciary of the *Harding* principle, a principle essentially relied upon by the Circuit Court of Franklin County in *Ping*, that all powers-of-attorney are to be strictly construed. The *Ping* Circuit Court had stated:

> Express authority arises from direct, intentional granting of specific authority from a principal to an agent, *Mills Street Church of Christ v Hogan*, 785 S.W.2d 263 (Ky. Ct. App. 1990). For these reasons, (and contrary to the Defendants' characterization of the law during the hearing of their motion), powers of attorney must be strictly construed and closely examined in order to ascertain the intent of the principal.

This principle had old Common Law precedent:

> Generally, a power of attorney must be strictly construed. The instrument will be held to grant only those powers which are specified, and the act done must be legally identical with that authorized to be done. A court ***cannot imply authority*** of an attorney-in-fact that ***the power of attorney itself does not express.***

AM.JUR. *Agency* § 28 (emphasis added).

The Wellner power-of-attorney has no such express language covering arbitration, nor does it speak to physical torts. As relied upon by Movants, it speaks to "releases" and "contracts," but with regard to "real and personal property, including stocks, bonds, and insurance." It does not refer to issues involving the principal's physical person, such as personal injury torts. Again, nor does the subject power-of-attorney state that the attorney-in-fact may settle or arbitrate any claim. So the power-of-attorney neither covers the subject matter involved here—physical torts—nor does it expressly provide for arbitration or settlements going thereto.

Movants argue the following: The Wellner power-of-attorney provides for the power to contract to execute releases in matters involving "real and personal property."

Additionally, the instrument's language, to "institute legal proceedings," intrinsically involves the power to settle, and by extension, arbitrate claims. The phrase, "institute legal proceedings" provides the power to agree to enter an arbitral forum (thereby waiving the judicial forum) and arbitrate personal injury claims.

A. Subject matter of the authority in the instrument

The errors in this logic are legion. In addition to neglecting the principles of *Harding v. Kentucky River Hardwood, supra*, Movants neglect to consider *Ping*'s quotation from the Restatement that states:

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

Ping at 592 (*quoting* the Restatement (Second) of Agency).

This means that a double-layered filter exists for power-of-attorney interpretation in Kentucky. If general grants of power are contained in the instrument, these only go to the areas of concern listed in the instrument. If specific acts are listed, there is no general grant of authority at all. The ability to contract and to execute releases is stated in the context of "real and personal property, ***including stocks, bonds, and insurance.***" The subject matter here is not stocks, bonds, or insurance. Nor real and personal property. The subject matter is personal injury in the context of a nursing home residence and medical care.

Movants also point to the contract-making power in the Wellner power-of-attorney, and point to the U.S. District Court in *Oldham v. Extendicare Homes*. With due respect to the federal court in *Oldham*, the *Ping* decision is not distinguishable based upon the absence of the power to contract in the *Ping* power-of-attorney. The *Ping* power-of-attorney facially encompassed the power to contract. The *Ping* power-of-attorney provided the attorney-in-fact with the power to sell and mortgage real estate, and to sell bonds and securities. Intrinsic to a sale, by definition, is the power to contract. Does the Wellner power-of-attorney provide a greater power to contract? No. Similar to that in *Ping*, it provides contract-making power only with respect to "real and personal property, including stocks, bonds, and insurance." This is virtually indistinguishable from the contract-making power inherent in the *Ping* power-of-attorney.

Undaunted, Movants additionally argue that since the Wellner attorney-in-fact had authority over Joe Wellner's personal property, and since a personal injury action is nothing more than a chose in action, *i.e.*, a type of personal property, the attorney-in-fact had authority to enter into this arbitration agreement. But a chose in action cannot be handled in the manner the power-of-attorney specifies. The power-of-attorney provides that, regarding personal property, the attorney-in-fact may "receive, take receipt for, and hold in possession, manage and control [Joe Wellner's] property... with full power to sell, mortgage or pledge, assign, transfer, invest and reinvest the same...." A chose in action cannot be handled in this way, and thus cannot be read into this list.

> Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void.

KRS § 372.060. Thus, it stands to reason that because a personal injury action could not be sold, mortgaged, or assigned, it is not a personal property included in the list provided in the power-of-attorney.

To group personal injury tort litigation with the other matters in the power-of-attorney is entirely unfounded. Tort litigation is not a niche area of law that an instrument might understandably overlook. If the principal here intended a general grant of authority over tort litigation, he would have said so.

B. Instrument power going to arbitration and the ability to waive jural right

Ping conditionally requires an explicit authorization for arbitration:

> 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***.

Ping at 593.

Otherwise, the power to arbitrate must be necessary to carry out the other functions of the subject matter falling under the power-of-attorney:

> Mrs. Duncan's power of attorney, properly construed as giving her daughter authority to manage Mrs. Duncan's property and finances and to make health-care decisions on her behalf, did not thereby authorize Ms. Ping to ***waive***, where there was ***no reasonable necessity to do so***, her mother's ***access to the courts***.

Id. at 594 (emphasis added). And, on its face, the arbitration agreement was optional, *i.e.*, unnecessary to Mr. Wellner's care.

Likewise, the power to agree to binding arbitration (and waive the judicial forum) as incidental to the power to "institute legal proceedings" is nonsense. The power to institute legal proceedings is not itself a subject matter of the instrument, not a general expression of authorization. It is a specific act listed. Instituting legal proceeding is a power recited with respect to "debts, monies, interest and demands." This too obviously alludes to matters akin to accounts receivable, not personal injury claims. Additionally, this arbitration agreement is not just an institution of a legal proceeding; it is intrinsically a ***waiver*** of the right to proceed in a court of law. Aside from the fact that expressing "institute legal proceedings" signals in the common understanding going to court or in front of an administrative agency—thus ***an expressed preference*** for the judicial forum over an arbitral forum—jural waiver is certainly not a specific act not listed in any event.

Simply put, the Supreme Court in *Ping* re-emphasized this principle of the Common Law, explaining its rationale in the context of foreseeability: "[N]othing in Mrs. Duncan's power of attorney suggests ***her intent*** that Ms. Ping make such ***waivers*** on her behalf." *Id.* at 593 (emphasis added). Likewise, nothing whatsoever in the Wellner power-of-attorney suggests that Joe Wellner intended his agent to have the power to execute pre-dispute agreements to arbitrate and thereby waive his right to sue for torts upon his physical person. The requirement of strict construction and limitation to specific instructions is decisive here.

C. Pre-dispute agreements

Moreover, even a power ***to agree to arbitrate personal injury claims*** would not encompass this particular arbitration agreement. Pre-injury and post-injury arbitration agreements are different species of contract. Even the U.S. Congress has taken note of this. *See* 12 USC § 5518 (In the context of financial consumer protection, while the Bureau of Consumer Financial Protection may not prohibit arbitration agreements entered into after the dispute has arisen, it does have the power to prohibit pre-dispute arbitration agreements.).

For this reason, Movants' beloved settlement analogy—that the ability to institute legal proceedings must encompass the ability to settle, *e.g.*, arbitrate them—must fail. Did Mr. Wellner's attorney-in-fact have the power to agree to a settlement ***before*** Movants injured Mr. Wellner? Movants may believe that their arbitration agreements are akin to a liquidated damages clause (*i.e.*, a pre-dispute settlement) for personal injury, but this cannot possibly be read into the powers granted to the attorney-in-fact. There is nothing in the instrument that shows any such radical intent. Therefore, even if the power-of-attorney had included a power to arbitrate (which it does not), it would not solely thereby include the power to agree on behalf of the principal vis-à-vis a third party, to arbitrate any dispute in perpetuity that might arise in the future, but is not existent at present.

This Court in *Ping* ultimately reasoned (again relying on the Restatement) that there are three categories of particular acts that "will impose on the principal" such dire "consequences" that the authority to engage in those acts will not be inferred. *Ping* at 593. (*quoting* Restatement Third of Agency § 2.02 comment h. (2006)). The first category is crimes and torts. The second category consists of acts that "create no prospect of economic advantage for the principal." The third category is acts that are otherwise lawful but "create legal consequences" that are "significant and separate" from the primary transactions authorized and are "fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment." *Id.* Arbitration agreements are in this third category of acts.

In re-emphasizing the principle from the Common Law that powers-of-attorney are to be strictly construed, the Supreme Court in *Ping* explained its rationale in the context of foreseeability: "[N]othing in Mrs. Duncan's power of attorney suggests ***her intent*** that Ms. Ping make such ***waivers*** on her behalf." *Id.* (emphasis added).

The substantive law from *Ping*, upon which the Circuit Court ground its Order, is fully applicable here to deny Movants' underlying motion to compel arbitration. The next questions then are: Could the Supreme Court do what it did in *Donna Ping v. Beverly Enterprises*? Could the Circuit Court properly issue its Order to Vacate? The answers to both questions are unequivocally "YES."

II. The FAA is not offended in any way by a State court construing the powers of a power-of-attorney instrument.

Movants argue that the lower court's decision "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.'" (Movants' Brief at p. 8) Movants provide no citation for this bold proposition. Because there is none. Because it isn't true.

The FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or ***an agreement*** in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and ***enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USC § 2 (emphasis added). "[A]n agreement." Recognizing the mechanism whereby an agreement may be seen to arise does not fall under the FAA. Only in the event that

the agreement does exist is the FAA triggered to mandate complete and strict enforcement of its terms, notwithstanding State law and public policy to the contrary.

For a Kentucky court to construe the empowering verbiage of a power-of-attorney does not run afoul of the FAA. The focus in *Ping* was on the power-of-attorney language, not the agreement involved. *Ping* merely re-emphasized strict construction of an agency instrument, and happened to do so in the context of resolving an appeal involving arbitration. These principles apply equally to the case at bar.

State law governs the interpretation of a power-of-attorney, the authority therein contained. As the U.S. District for Louisiana once stated, regarding a federal bail bond:

> Even though there seems to be a split of authority as to whether state or federal law governs federal bail bonds, we can find no authority which holds that federal law governs the interpretation or effect of a power of attorney which purports to authorize a person to sign a bail bond on behalf of another. We conclude that the issuance and use of a power of attorney authorizing a person to sign, on behalf of another, a bail bond is governed entirely by state law.

See U.S. v. Bussey, 452 FSupp 891, 895 (D.C.La. 1978). Analogous to the federal bail bond circumstance, while there is no question that federal preemption applies to construe and enforce a FAA contract, State law governs the authority contained in a power-of-attorney going to the question of whether said instrument encompasses the authority to execute the FAA contract.

No one disputes that electing binding arbitration intrinsically also means waiver of the right to pursue dispute resolution in a judicial forum. This equivalence is of the essence, for arbitration. And there is no dispute that there is neither anything wrong with electing arbitration, nor is there anything wrong with waiving the right to a judicial forum. Certainly the Kentucky and federal legislatures have both recognized the right for contracts for binding arbitration to be enforced.

A criminal defendant has a right to plead guilty, and to waive trial. It is not encumbering this right to plead guilty to require that an agent pleading guilty on a client's behalf have explicit authority so to do. *See U.S. v. Garcia*, 59 MJ 447, 452 (C.A.A.F. 2004) ("[D]efense counsel had the responsibility of explaining these options [pleading guilty or not guilty] to his client and obtaining the client's fully informed consent as to which path to follow.") Requiring explicitness of authority encumbers nothing.

As *Ping* reaffirms on its face, there is neither prohibition nor encumbrance placed upon a properly-empowered agent contracting for arbitration on behalf of his principal. However, Kentucky has always required more expressions of empowerment, for attorneys-in-fact to take certain actions on a principal's behalf. For instance, when an attorney-in-fact makes a gift to himself, the intention of the principal permitting such must be unambiguously set out on the face of the power-of-attorney instrument. KRS 386.093(6). And while obviously a principal may always confess judgment on his own behalf, in many instances powers-of-attorney are circumscribed from confessing judgment. *See e.g.*, KRS 190.100(c), KRS 286.4 -580, KRS 380.040; *see also* Restatement (Third) of Agency § 2.02, comment h. (*quoted in Ping* at 592). In contrast, regarding any subject matter of arbitration whatsoever, an attorney-in-fact may agree to arbitrate, so long as this power to agree for arbitration is expressly stated in the instrument. The FAA does not purport to trigger the creation of an arbitration agreement. As Movants aptly state: "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*.**" (Movants' Brief at p. 14 (emphasis altered)).

On the other hand, when Movants claim that the FAA preempts this Court's law which "creates a distinction between the attorney-in-fact's ability to execute contracts, generally, and that attorney-in-fact's ability to execute an arbitration contract" (Movants' Brief at pp. 13-14 (emphasis removed)), this is overreach. Very importantly, this question need not be reached, inasmuch as Kentucky law requiring strict construction applies indiscriminately to contracting via power-of-attorney, whether the contract involves arbitration, or, say, marriage.[1] Nonetheless, the implication of Movants' theory here is that the U.S. Congress would have the Constitutional power to simply suspend the States' judicial systems generally, and direct that all State law causes-of-action affecting interstate commerce go to arbitration. Suffice it to say, the FAA evinces no such radical assumption of power on the part of the U.S. Congress.

While presumably no State can use artifice to claim that it would enforce arbitration agreements, but make it practically impossible to make such an agreement, this is not the case at bar. In the final analysis, the question is this: ***Would the reasonable man read Mr. Wellner's power-of-attorney and believe that, by virtue of the language of the instrument, its ambit included entering into an optional, pre-dispute, arbitration agreement for personal injury torts?***

Movants rely upon a litany of U.S. Supreme Court cases that are facially incongruous with the case at bar. In *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), cited by Movants at length, the U.S. Supreme Court struck down a California

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[1] One laughs at the comparison, but marriage by proxy, via power-of-attorney, is experiencing a resurgence. *See Tshiani v. Tshiani*, 56 A.3d 311 (Md.App. 2012) (recognizing marriage by proxy under Maryland law). However, strict construction of power-of-attorney in Kentucky would likely mean that even the most broadly-worded general power-of-attorney would not have the power to marry off the principal, without that power being specifically expressed in the instrument.

judicial rule categorically prohibiting class arbitration waiver provisions in a contract. Movants' quotation of Justice Clarence Thomas in *Concepcion* is illustrative of why this case is inapplicable to Ping:

> 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***."

(Movants' Brief at p. 15 (*citing Concepcion* at 1753) (emphasis added))

The California rule applied to prevent contracts containing a term prohibiting class action, on unconscionability grounds. The U.S. Supreme Court simply said that the FAA would trump the State's class action contract clause prohibition. In contrast, the *Ping* "policy" does not apply to contracts at all; it applies to what is required of language in a power-of-attorney to confer agency authority over arbitration. According to Movants' theory, inasmuch as the Second Amendment prohibition of laws against fire arms ownership applies equally to the States, *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020 (2010), apparently a State court could not specify power-of-attorney language in fire arms transactions, for possible fear that it would interfere with gun ownership. Such a theory is untenable.

The case of *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012), also cited by Movants, is even more clearly inapplicable to *Ping*. In *Marmet* the U.S. Supreme Court reversed a West Virginia Supreme Court decision that held that that the FAA did not apply to personal injury or wrongful death claims and that arbitration agreements pertaining to those claims would not be enforced. This ran afoul of the FAA, which exempts out no category of action from its ambit. In contrast, in *Ping* the Kentucky Supreme Court did not remove anything from the ambit of potential subject matter for arbitration agreements. The *Ping* Court merely specified language required in a power-of-attorney and refused to enforce an agreement against persons who were not party to the contract (the wrongful death beneficiaries).

In a footnote (Movants' Brief at p. 3 n. 2), Movants contend that the *Ping* decision incorrectly bifurcated the wrongful death claims from the others. Movants go on to claim that a litany of previous Kentucky case establish that wrongful death is not an independent cause-of-action for the benefit of statutory beneficiaries, but just another claim of the estate. This is incorrect, and Movants' reading of the cited case law is misleading. Kentucky cases have have fixed that wrongful death is not a personal loss claim, *i.e.*, not a claim akin to loss of consortium for the statutory beneficiaries or hedonic damages. Rather it is a claim going to the beneficiaries' monetary losses. Quick perusal of the black letter of the statute, KRS § 411.130, and the associated case law yields the inescapable conclusion that this is an independent claim, not to be bound by the deceased or his agent.

> KRS 411.130 creates a cause of action for wrongful death. This is a statutory right of action which did not exist prior to the wrongful death but arises by reason thereof. It has been pointed out that the wrongful death action is not derivative. It is brought to compensate survivors for loss occasioned by the death and not to recover for injuries to the decedent. ***The cause is distinct from any that the deceased may have had if he had survived.*** The damage caused by the wrongful death begins with, and flows from, the death.

Moore v. Citizens Bank of Pikeville, 420 SW2d 669, 672 (Ky. 1967) (emphasis added).

Certainly one ground to find an agreement invalid and unenforceable is absence of authority. Another ground exists where the parties did not execute it. Thus *Ping* stated:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract.

Ping at 599.

The federal preference for arbitration does not preempt a State court from construing the language requirements of a power-of-attorney purportedly covering arbitration. The common sense Common Law principle that a person has to be party to a contract to be bound under it is likewise not preempted by the FAA.

III. The Circuit Court had the power to enter the Order.[2]

Movants' argument that the Circuit Court lost jurisdiction over Respondent's cause-of-action, and thus could not even entertain a motion made pursuant to CR 60.02 also lacks all merit whatsoever. There is no ouster of jurisdiction under the FAA.

Defendants moved to enforce the arbitration agreement pursuant to the Kentucky Uniform Arbitration Act (KUAA), KRS Chapter 17, and the FAA, 9 USC §§ 1-16. Yet, they effectively acknowledged in their tendered order of November 28, 2011 that:

> The arbitration agreement fails to provide that the arbitration hearing will occur in Kentucky and this Court therefore does not have jurisdiction to enforce the agreement under the Kentucky Uniform Arbitration Act, KRS Chapter 417, in accordance with the Kentucky Supreme Court decision of *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009).

(**Exhibit G**)

This is true. The agreement does not definitively provide for arbitration in Kentucky and thus does not confer jurisdiction in any Kentucky court under the KUAA.

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[2] Similar to Movants (*see* Movants' Brief at p. 19 n. 4), Respondent briefed this issue extensively before the Court of Appeals. (*See* **Exhibit F**) Respondent incorporates these responsive arguments herein.

See Ally Cat, LLC v. Chauvin, 274 S.W.3d 451 (Ky. 2009). If the subject arbitration agreement were to be enforceable at all, it had to be under the FAA, and Movants so conceded. (*See* **Exhibit G, ¶** 2.) *See Hathaway v. Eckerle*, 363 SW3d 83, 87-88 (Ky. 2011) (choice-of-law provision in arbitration clauses permit enforcement option under the FAA).

The U.S. Supreme Court has explicitly denied that the FAA effects to strip jurisdiction from the courts upon a successful application for arbitration. *The Anaconda v. American Sugar Refining Co.*, 322 US 42, 44 (1944) (no "ouster" of jurisdiction). Citing to *Anaconda v. American Sugar*, as a U.S. Court of Appeals explained in *DiMercurio v. Sphere Drake Ins., PLC*, 202 F3d 71 (1st Cir. 2000): "The act was passed not to oust the jurisdiction of the courts but to provide for ***maintaining their jurisdiction*** while at the same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement." *Id.* at 75-76 (*quoting American Sugar Refining Co. v. The Anaconda*, 138 F.2d 765, 766-767 (5th Cir.1943) (emphasis added)). The FAA has generated a body of federal substantive law on arbitration that is equally binding on State and federal courts. *See Southland Corp. v. Keating*, 465 US 1, 12 (1984); *see also Ernst & Young, LLP v. Clark*, 323 SW3d 682, 692 (Ky. 2010) ("We recognize that when a lawsuit is submitted to arbitration, the trial court technically retains jurisdiction over the proceeding while the issues are arbitrated."). Further, contracts enforced under the FAA are not construed any differently than contracts enforced under the Kentucky Uniform Arbitration Act. "[W]e have interpreted the KUAA consistent with the FAA...." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky.2004).

Clearly the Circuit Court has to act to enforce an arbitral decision after arbitration, and it must either have, or assume, jurisdiction over the cause of action in order to do so. Movants cannot possibly be suggesting that the parties must first go through arbitration, then have the Circuit Court reassume jurisdiction, and then correct its January 9, 2012 order. The Circuit Court retained jurisdiction to vacate its own order.

The Circuit Court could thus revisit it. It is well within the authority of any trial court to review its own non-final orders. *See Kentucky Board of Medical Licensure v. Ryan*, 151 SW3d 778, 781 (Ky. 2004) ("It was well within the authority of the trial court to review its own orders." (Lambert, J., *dissenting*)); *see also U.S. v. Todd*, 920 F2d 399, 403 (6th Cir. 1990) (evidentiary ruling made in a first trial not binding in a second because courts have the inherent power to revisit their own prior decisions); *Kurtsinger*, 90 SW3d at 456 (trial courts have authority under CR 60.02 to vacating previous orders founded on error).

Kentucky courts have explicitly stated that where a trial court has made an error in enforcing an arbitration agreement, this was subject to correction via direct appeal. This is so because the lower court has explicitly stated that an order granting an application ***to compel*** arbitration is interlocutory, *Fayette County Farm Bureau Federation v. Martin*, 758 SW2d 713 (Ky.App. 1988), and commensurately, the arbitration's opponent can find that the error be corrected on direct appeal. *See Com. ex. rel. Stumbo v. Philip Morris, USA*, 244 SWW3d 116, 121 (Ky.App. 2007) ("[I]t is not irrevocably deprived of anything by submission to arbitration. Instead it is protected by the right to appeal any final Circuit Court judgment resulting from arbitration."). Thus a motion to compel arbitration is non-jurisdictional.

Movants' own motion is styled "Motion for Interlocutory Relief," suggesting that Movants know that Circuit Court orders regarding arbitration are interlocutory (*i.e.*, non-jurisdictional). If the Circuit Court's first, interlocutory order compelling arbitration was premised upon a mistake, and if the Court of Appeals could correct this mistake upon direct appeal; then certainly the Circuit Court was not obliged to sit upon its first order but may correct the offending order itself.

To bolster their position in this regard, Movants argue that the January 9, 2012 Order "did not have any 'prospective application' because in the words of Kentucky's highest 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 SW2d 808, 812 (Ky. 1955)." (Movants' Brief at pp. 19-20) Well, arbitration awards don't enforce themselves. Rather, the Circuit Court is obliged to enter an order enforcing the award. It would be completely incongruous for a circuit court to enter an order enforcing an arbitration award made pursuant to compelled arbitration via an invalid *ab inito* contract.

Most importantly and self-evidently, *Ping* merely restated what was always the law: "[P]ower[s] of attorney must be strictly construed." AM.JUR. *Agency* § 28, *supra*; *see Harding supra*. That is, *Ping* not only did not alter contractual rights; it did not even change the law. Indeed, the Court of Appeals decision in *Beverly Enterprises v. Ping* effected to change the law. The oft-used precatory language that a decision should be given retrospective or merely prospective application is entirely missing from the Supreme Court's opinion in *Ping*, implying that this Court did not consider its decision to have altered anything. The fact is, this Court considered the lower court's interpretation of Ms. Ping's power under the power-of-attorney instrument language in that case to have been incorrect, and the Franklin County Circuit Court's interpretation to have been correct.

In the same vein, Movants' expressions of misery for their reliance for ten months on the Circuit Court's erroneous order are expressions misplaced. (Movants' Brief at p. 19) What prejudice is there? The parties would have had to prepare their cases and conduct discovery in any event. They paid an arbitrator? Yes, but they would have paid an arbitrator even more if arbitration had continued, only to be set aside on appeal. The fact is, this prejudice must pale in comparison to the prejudice that Respondent would suffer should this arbitration have continued without a valid underlying arbitration agreement. Movants are in reality in no different position than any party having gone through litigation successfully only to have the case sent back after appeal due to a trial court error. Movants' argument in this regard, as is true of all their arguments, lacks merit.

CONCLUSION

Based upon the foregoing, Movants' *Motion for Interlocutory Relief* must be denied. Respondent does not believe that oral argument is necessary, but holds no other position regarding Movants' motion for oral argument.

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